[* 1]

SHORT FORM ORDER

INDEX No. 09-8856
CAL. No. 13-01518MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 1-7-14 (002)
MOTION DATE 1-14-14 (003)
MOTION DATE 1-31-14 (004)
ADJ. DATE 3-4-14
Mot. Seq. # 002 - MG
003 - MotD
004 - MG

PHILLIP KORDULA and DIANE KORDULA,

Plaintiffs,

- against -

PAUL BRODSKY, M.D., WEST CARVER MEDICAL ASSOCIATES, P.C., DAVID BENISCH, M.D., and HUNTINGTON HOSPITAL,

Defendants.

GALLO, VITUCCI, KLAR & PINTER
Attorney for Plaintiffs
90 Broad Street, 3rd Floor
New York, New York 10004

CHESNEY & NICHOLAS, LLP
Attorney for Defendants Brodsky and West Carver Medical Associates
2305 Grand Avenue
Baldwin, New York 11510

GERSPACH SIKOSCOW, LLP
Attorney for Defendant Benisch
40 Fulton Street, 14th Floor, Suite 1402
New York, New York 10038

FUREY, FUREY, LEVERAGE, MANZIONE, WILLIAMS & DARLINGTON, P.C.
Attorney for Defendant Huntington Hospital
600 Front Street, P.O. Box 750
Hempstead, New York 11550

Upon the following papers numbered 1 to 59 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; 21 - 38; 39 - 46 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 47 - 49; 50 - 55 ; Replying Affidavits and supporting papers 56 - 59 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#002) by defendant Huntington Hospital for summary judgment, the motion (#003) by defendants Paul Brodsky, M.D., and West Carver Medical Associates, P.C. for summary judgment, and the motion (#004) by defendant Paul Brodsky, M.D., for an order permitting him to serve expert disclosure and to compel plaintiffs to accept such disclosure are consolidated for the

purposes of this determination; and it is

ORDERED that the motion (#002) by defendant Huntington Hospital for summary judgment dismissing the complaint against it is granted; and it is further

ORDERED that the motion (#003) by Paul Brodsky, M.D., and West Carver Medical Associates, P.C., for summary judgment dismissing the complaint against them is granted as to the cause of action for lack of informed consent and is otherwise denied; and it is further

ORDERED that the motion (#004) by defendant Paul Brodsky, M.D., for an order pursuant to CPLR 2001, 2004, and 2005 permitting him to serve expert disclosure and to compel the plaintiffs' attorney to accept said expert disclosure is granted.

On February 11, 2008, plaintiff underwent an upper endoscopy and colonoscopy procedure performed by defendant Paul Brodsky, M.D., who is employed by defendant West Carver Medical Associates, P.C. During the colonoscopy, plaintiff's bowel was perforated, and he was transported to defendant Huntington Hospital via ambulance. Dr. Brodsky called defendant Dr. David Benisch to evaluate plaintiff's condition, and plaintiff was admitted to Huntington Hospital under the care of Dr. Benisch. The complaint alleges that defendants were negligent and careless in performing the procedures on plaintiff, resulting in injuries to him. It also alleges that defendants failed to obtain informed consent prior to rendering treatment or performing procedures on plaintiff. Plaintiff's wife, Diane Kordula, brought a derivative cause of action for loss of services.

Huntington Hospital now moves for summary judgment dismissing the complaint against it, arguing that it cannot be held vicariously liable for the alleged malpractice committed by Dr. Brodsky and Dr. Benisch. In support of its motion, Huntington Hospital submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, copies of plaintiff's medical records, and an expert affirmation of Dr. William Miller. No papers were submitted in opposition to this motion.

Dr. Brodsky and West Carver Medical Associates move for summary judgment dismissing the complaint against them, arguing that they did not depart from accepted standards of medical practice in treating plaintiff and that their conduct was not the proximate cause of plaintiff's injury. In support of their motion, they submit, among other things, a copy of the pleadings, transcripts of the parties' deposition testimony, plaintiff's medical records, and expert affirmations of Dr. William Miller and Dr. Perry Gould. Plaintiffs oppose this motion, arguing that the affirmation of their expert, Dr. Jason Green, raises a triable issue of fact as to whether Dr. Brodsky and West Carver Medical Associates were negligent in the care of plaintiff.

In addition, Dr. Brodsky moves for an order pursuant to CPLR §§2001, 2004, and 2005 permitting him to serve expert disclosure pursuant to CPLR §3101(d), and compelling plaintiffs to accept it. Plaintiffs oppose this motion, arguing that they are prejudiced by the delay in the disclosure of Dr. Brodsky's expert.

In his affirmation, Dr. Miller states that based on his review of the medical records, plaintiff's bowel was perforated while he was undergoing a colonoscopy performed at West Carver Medical

Associates by Dr. Brodsky. He states Dr. Brodsky requested that Dr. Benisch meet his patient in the emergency room of Huntington Hospital, as it was believed that plaintiff's colon may have been perforated. He states that after plaintiff was examined by Dr. Shin in the emergency department, an x-ray was ordered and a CAT scan was performed. Plaintiff was admitted under the care of Dr. Benisch at 12:30 p.m. to perform a colectomy with possibility of colostomy. A colostomy was performed. Plaintiff was discharged from the hospital on February 19, 2008, and returned to the hospital to undergo a laparotomy to reverse the colostomy on June 4, 2008. Dr. Miller states that during the laparotomy, Dr. Benisch noted inflammation and poor healing of the rectal segment and the colostomy was unable to be reversed. Dr. Miller opines within a reasonable degree of medical certainty that no employee of Huntington Hospital departed from good and accepted practices of medicine during plaintiff's admission.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The requisite elements of proof in an action to recover damages for medical malpractice are a deviation or departure from accepted practice, and evidence that such departure was a proximate cause of injury or damage (***Feinberg v Feit***, 23 AD3d 517, 806 NYS2d 661 [2d Dept 2005]; ***Lyons v McCauley***, 252 AD2d 516, 675 NYS2d 375 [2d Dept 1998], *lv denied* 92 NY2d 814 [1998]). On a motion for summary judgment dismissing the complaint, a defendant hospital or physician has the burden of establishing through medical records and competent expert affidavits the absence of any departure from good and accepted practice, or, if there was a departure, that the plaintiff was not injured thereby (*see* ***Luu v Paskowski***, 57 AD3d 856, 871 NYS2d 227 [2d Dept 2008]; ***Mendez v City of New York***, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). In opposition, "a plaintiff must submit evidentiary facts or materials to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact" (***Deutsch v Chaglassian***, 71 AD3d 718, 719, 896 NYS2d 431 [2d Dept 2010]). Further, the plaintiff "need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing" (***Stukas v Streiter***, 83 AD3d 18, 24, 918 NYS2d 176 [2d Dept 2011]).

"A hospital may not be held vicariously liable for the malpractice of a private attending physician who is not an employee and may not be held concurrently liable unless its employees committed independent acts of negligence or the attending physician's orders were contraindicated by normal practice such that ordinary prudence required inquiry into the correctness of the same" (***Toth v Bloshinsky***, 39 AD3d 848, 850, 835 NYS2d 301 [2d Dept 2007]; *see* ***Sela v Katz***, 78 AD3d 681, 911 NYS2d 112 [2d Dept 2010]; ***Cerny v Williams***, 32 AD3d 881, 882 NYS2d 548 [2d Dept 2006]). However, "an exception to the general rule exists where a patient comes to the emergency room seeking

treatment from the hospital and not from a particular physician of the patient's choosing" (***Schultz v Shreedhar***, 66 AD3d 666, 666, 886 NYS2d 484 [2d Dept 2009] *quoting* ***Salvatore v Winthrop Univ. Med. Ctr.*** 36 AD3d 887, 888, 829 NYS2d 183 [2d Dept 2007]; *see* ***Sampson v Contillo***, 55 AD3d 588, 865 NYS2d 634 [2d Dept 2008]). In addition, vicarious liability for the medical malpractice of an independent, private attending physician may be imposed under a theory of apparent or ostensible agency by estoppel (***Sullivan v Sirop***, 74 AD3d 1326, 1328, 905 NYS2d 240 [2d Dept 2010], *quoting* ***Dragotta v Southampton Hosp.***, 39 AD3d 697, 698, 833 NYS2d 638 [2d Dept 2007]). In the context of a medical malpractice action, the plaintiff must have reasonably believed that the physician treating him or her was provided by the hospital or acted on the hospital's behalf (*see* ***Dragotta v Southampton Hosp.***, *supra*; ***Sampson v Contillo***, *supra*), and must have accepted the physician's services in reliance upon the doctor's relationship with the hospital as opposed to the doctor's particular skill (*see* ***Brink v Muller***, 86 AD3d 894, 927 NYS2d 719 [3d Dept 2011]; ***Keitel v Kurtz***, 54 AD3d 387, 866 NYS2d 195 [2d Dept 2008]).

Huntington Hospital has established its prima facie entitlement to judgment as a matter of law by submitting evidence establishing that neither Dr. Brodsky and Dr. Benisch were employees of the hospital, but rather attending physicians (*see* ***Giambona v Hines***, 104 AD3d 807, 961 NYS2d 519 [2d Dept 2013]; ***Schultz v Shreedhar***, *supra*; ***Bevelacqua v Yonkers Gen. Hosp.***, 10 AD3d 668, 781 NYS2d 747 [2d Dept 2004]; ***Orgovan v Bloom***, 7 AD3d 770, 776 NYS2d 879 [2d Dept 2004]). Here, the evidence demonstrates that the perforation of plaintiff's colon occurred while Dr. Brodsky was performing a colonoscopy at offices owned by West Carver Medical Associates. Moreover, while plaintiff arrived at the emergency room of Huntington Hospital seeking treatment, the emergency room exception is inapplicable as plaintiff was referred to Dr. Benisch's care at Huntington Hospital by Dr. Brodsky (*see* ***Giambona v Hines***, *supra*; ***Corletta v Fischer***, 101 AD3d 929, 956 NYS2d 163 [2d Dept 2012]). Furthermore, Dr. Miller states in his expert affirmation that the hospital staff did not depart from good and accepted practices of medicine in the care of plaintiff. No papers were submitted in opposition to Huntington Hospital's motion for summary judgment. Accordingly, the motion by Huntington Hospital for summary judgment dismissing the complaint against it is granted.

With regard to the motion by Dr. Brodsky and West Carver Medical Associates, the Court notes that while defendants failed to provide expert disclosure prior to the filing of the note of issue, precluding an expert's affidavit in the context of a summary judgment motion based solely on this reason "does not necessarily advance the court's role of determining the existence of a triable issue of fact," particularly in a medical malpractice action, where a party must generally submit an affidavit or affirmation from an expert medical provider to meet its prima facie burden (***Rivers v Birnbaum***, 102 AD3d 26, 29, 953 N.Y.S.2d 232 [2d Dept 2012]). Although CPLR 3101(d)(1)(i) requires a party, upon request, to identify the expert witnesses the party expects to call at trial, it "does not require a party to respond to a demand for expert witness information at any specific time'" (***Aversa v Taubes***, 194 AD2d 580, 582, 598 N.Y.S.2d 801 [2d Dept 1993], *quoting* ***Lillis v D'Souza***, 174 AD2d 976, 976, 572 N.Y.S.2d 136 [4th Dept 1991]; *see* ***Rivers v Birnbaum***, *supra*). Thus, the expert affirmation of Dr. Gould was considered in the determination of this motion.

Here, Dr. Brodsky and West Carver Medical Associates established a prima facie case that they did not deviate or depart from accepted medical practice through the submission of plaintiff's medical records, the transcripts of the parties' deposition testimony, and the expert affirmation of Dr. Gould (*see*

Sandmann v Shapiro, 53 AD3d 537, 861 NYS2d 760 [2d Dept 2008]; ***Bengston v Wang***, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]; ***Jonassen v Staten Island Univ. Hosp.***, 22 AD3d 805, 803 NYS2d 700 [2d Dept 2005]). In his affirmation, Dr. Gould, who is a board certified internist and gastroenterologist, states that in his opinion, with a reasonable degree of medical certainty, Dr. Brodsky did not deviate from the accepted standards of care in his treatment of plaintiff. He states that perforation is a known and accepted risk of colonoscopies, and that the location of the perforation, the sigmoid junction, is a common site of colonic perforation. He explains that this is due to the tortuous shape of the colon in this location, and the greater mobility of the sigmoid colon compared to the rectum. Dr. Gould states that perforations of the colon during a colonoscopy may not always be caused by the tip of the colonscope, but can also be caused by the bowing of the shaft. He further states that "paradoxical motion" of the colonscope can occur through no fault of the gastroenterologist.

Dr. Gould further opines that Dr. Brodsky did not delay unreasonably in making arrangements to send plaintiff to the hospital, as diagnosis of the perforation took place during the colonoscopy. He states that diagnosis of a perforation during a colonoscopy cannot always be made immediately, and that Dr. Brodsky's withdrawal of a colonoscope when he assessed that there might be a problem was appropriate. He states that it was appropriate to ensure that plaintiff, who had been sedated, was stabilized before transporting him to the hospital. He also states that it was appropriate for Dr. Brodsky to ask plaintiff to attempt to pass gas as a colonoscope inserts gas during the procedure, and this gas pressure can be relieved by having the patient expel the gas. Dr. Gould states that the alleged delay in treating the perforation did not contribute to plaintiff's injuries, as the colonoscopy procedure ended at 10:35 a.m, and plaintiff arrived at the hospital at 11:42 a.m. and was admitted under the care of a surgeon at 12:30 p.m.

Thus, the burden shifted to plaintiff to come forth with admissible evidence refuting the prima facie showing by Dr. Brodsky and West Carver Medical Associates (***Holbrook v United Hosp. Med. Ctr.***, 248 AD2d 358, 669 NYS2d 631 [2d Dept 1998]; ***Pierson v Good Samaritan Hosp.***, 208 AD2d 513, 616 NYS2d 815 [2d Dept 1994]). Plaintiff's expert, Dr. Green, who is a board certified colon and rectal surgeon, states in an affirmation that Dr. Brodsky deviated from accepted standards of care in his treatment of plaintiff. He states that during plaintiff's colonoscopy, the tip of the colonoscope perforated the colonic wall posteriorly at the rectosigmoid junction, where there is an acute bend. He explains the rectosigmoid junction is the site where the sigmoid colon becomes the rectum. Dr. Green asserts that while perforation of the colon is a known risk of a colonoscopy, perforation of the wall of the colon with the tip of the colonoscope is a deviation from accepted standards of care when the colon is normal, which was the case here. He explains that the camera and light give direct vision of the colon, and it would require forceful advancing without seeing the colon for a surgeon to perforate the colon with the tip of the colonoscope.

Dr. Green also states that there was a delay in diagnosing plaintiff's perforation as it occurred at approximately 9:35 a.m., and that plaintiff should have been in an operating room two hours later, but did not arrive at Huntington Hospital until 11:42 a.m. He states that Dr. Brodsky's request to plaintiff to attempt to pass gas was medically unnecessary, as the perforation was diagnosed at the time of the colonoscopy. He further states that Dr. Brodsky's recommendation that plaintiff undergo a CT scan was medically unnecessary, because such procedure does not alter the treatment of a perforated colon. Dr. Green opines that in asking plaintiff to attempt to pass gas, and in undergoing a CT scan, Dr. Brodsky

delayed plaintiff's treatment which contributed to his injuries.

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions...Such credibility issues can only be resolved by a jury" (***Feinberg v Feit***, *supra* at 519; *see* ***Hayden v Gordon***, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; ***Graham v Mitchell***, 37 AD3d 408, 829 NYS2d 628 [2d Dept 2007]; ***Shields v Baktidy***, 11 AD3d 671, 783 NYS2d 652 [2d Dept 2004]). Here, plaintiffs raised a triable issue of fact by submitting the affirmation of Dr. Green which contradicts the expert of defendants Dr. Brodsky and West Carver Medical Associates by opining that Dr. Brodsky deviated from accepted standards of care in his treatment of plaintiff (*see* ***Magel v John T. Mather Mem. Hosp.***, 95 AD3d 1081, 945 NYS2d 113 [2d Dept 2012]; ***Bengston v Wang***, *supra*). Specifically, Dr. Green states that Dr. Brodsky's perforation of the colon wall with the tip of the colonoscope, during plaintiff's colonoscopy, is a deviation from accepted standards of care as plaintiff's colon was normal, and it would require forceful advancing without seeing the colon for a surgeon to perforate the colon. Accordingly, the application by defendants Dr. Brodsky and West Carver Medical Associates for summary judgment dismissing the cause of action for medical malpractice is denied.

As to the application by Dr. Brodsky and West Carver Medical Associates for summary judgment on the issue of lack of informed consent, they have established their prima facie entitlement to summary judgment (*see* ***Lynn G. v Hugo***, 96 NY2d 306, 728 NYS2d 121 [2001]; ***Luu v Paskowski***, 57 AD3d 856, 871 NYS2d 227 [2d Dept 2008]). To succeed on a cause of action based on lack of informed consent, a plaintiff must establish that the doctor failed to disclose the reasonably foreseeable risks, benefits, and alternatives to the surgery that a doctor in a similar circumstance would have disclosed; that a reasonably prudent person in the plaintiff's position would not have undergone the surgery if he or she had been fully informed of the reasonable foreseeable risks, benefits, and alternatives to the surgery; and that the lack of informed consent is a proximate cause of the injury sustained (*see* Public Health Law § 2805-d; ***Orphan v Pilnik***, 15 NY3d 907, 914 NYS2d 729 [2010]; ***James v Greenberg***, 57 AD3d 849, 870 NYS2d 100 [2d Dept 2008]; ***Innucci v Bauersachs***, 201 AD2d 460, 607 NYS2d 130 [2d Dept 1994]). Here, defendants offered the consent form signed by plaintiff authorizing Dr. Brodsky to perform the colonoscopy (*see generally* ***Spano v Bertocci***, 299 AD2d 335, 749 NYS2d [2d 2002]). Plaintiffs failed to present any evidence in opposition to the branch of the defendants' motion seeking summary dismissal of such claim (*see* ***Thompson v Orner***, 36 AD3d 791, 828 NYS2d 509 [2d Dept 2007]).

Turning to Dr. Brodsky's motion permitting him to serve expert disclosure, specifically, expert disclosure with respect to Dr. Gould, whose affirmation was submitted in support of Dr. Brodsky and West Carver Medical Associates' motion for summary judgment, Dr. Brodsky's attorney states that he did not realize that expert disclosure with respect to Dr. Gould was not sent to plaintiffs' attorney until plaintiffs' attorney brought it to his attention when requesting an adjourned date of the motion for summary judgment. Dr. Brodsky's attorney states that the expert disclosure was not sent to the plaintiff's attorney as a result of law office failure as it had been prepared two months earlier but was inadvertently never sent out. The Court notes that it considered Dr. Gould's affirmation in determining the aforementioned motion for summary judgment and hereby grants the requested relief to serve expert disclosure and to compel plaintiff's attorney to accept same since "precluding an expert's affidavit in the context of a summary judgment motion based solely on the failure to provide expert disclosure prior to

the filing of the note of issue does not necessarily advance the court's role of determining the existence of a triable issue of fact . . . . [and] is not consistent with the purpose and procedural posture of a motion for summary judgment" (***Begley v City of New York***, 111 AD3d 5, 15, 972 NYS2d 48, 72 [2d Dept 2013] [internal citations and quotation marks omitted]). Furthermore, there is no evidence that Dr. Brodsky's attorney deliberately delayed in responding to the plaintiff's expert witness demand or that any delay in disclosing Dr. Gould's identity hampered the plaintiffs' ability to respond to the motion (*see id.*).

Thus, the motion for summary judgment by defendants Dr. Brodsky and West Carver Medical Associates dismissing the complaint is granted as to the cause of action for lack of informed consent and is otherwise denied. With regard to the motion by Dr. Brodsky for an order permitting him to serve the expert disclosure, it is granted.

Dated: July 30, 2014

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION