SHORT FORM ORDER

E-FILE

INDEX No. 14-64162
CAL. No. 16-00374MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

***PRESENT:***

Hon. DANIEL MARTIN

MOTION DATE 8-16-16
ADJ. DATE 9-6-16
Mot. Seq. # 001 - MD

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RICK EISEMAN and JACQUELINE EISEMAN,

Plaintiffs,

- against -

PAULA DENOYA, M.D., ELLEN LI, M.D., TIMOTHY CONNOLLY, M.D., JASON CHIU, M.D., ELDHOSE ABRAHAMS, M.D., ROBERTO BERGAMASCHI, M.D., STONY BROOK SURGICAL ASSOCIATES, UNIVERSITY FACULTY PRACTICE CORPORATION and STONY BROOK INTERNISTS, UNIVERSITY FACULTY PRACTICE CORPORATION,

Defendants.

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Upon the following papers numbered 1 to 81 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1- 75 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 76- 80 ; Replying Affidavits and supporting papers 81 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion of defendants Dr. Timothy Connolly and Dr. Jason Chiu for summary judgment dismissing the complaint against them is denied.

Plaintiff Rick Eiseman commenced this action against defendants to recover damages for injuries allegedly sustained as a result of negligent care and treatment and lack of informed consent. Plaintiff's wife, Jacqueline Eiseman, brought a derivative claim for loss of services and companionship.

Defendants Dr. Timothy Connolly and Dr. Jason Chiu now move for summary judgment dismissing the claims against them on the ground that their treatment of plaintiff did not depart from accepted medical practice, and was not a proximate cause of his injuries. The moving defendants further argue that they cannot be liable for plaintiff's injuries, as they were residents during the time of his treatment and were acting under the supervision of an attending physician. In support of the motion, the movants submit copies of the pleadings, the bill of particulars, an expert affirmation, and the transcripts of the parties' deposition testimony.

Plaintiff testified that he was diagnosed with Crohn's disease in 2000, and that he treated with Dr. Leeboth and Dr. Dresnick. He testified that he suffered from abdominal pain and chronic diarrhea, and that he developed a fistula. Plaintiff testified that in 2001, he began receiving Remicade infusions, and that after the second treatment, the fistula closed, and that the symptoms of diarrhea and abdominal pain became manageable. He testified that in 2010, his abdominal pain returned, and that he suffered on a daily basis, especially after he ate. Plaintiff testified that he received a CAT scan in 2013, and an upper gastrointestinal x-ray examination which revealed the presence of a fistula, so Dr. Dresnick referred him to Dr. Ellen Li. He testified that he presented to Dr. Li, and that she informed him that he had one or two fistulas which required surgery, and that the Remicade was no longer working. Plaintiff testified that Dr. Li referred him to a surgeon, Dr. Denoya, and that he presented to her office for a consultation. He testified that Dr. Denoya reviewed his medical records, and that she concurred with Dr. Li about the presence of a fistula. He testified that Dr. Denoya told him she would be performing laparoscopic surgery to do a resection, that he would need an ostomy, and that he would be in the hospital for approximately a week. Plaintiff testified that Dr. Denoya explained the risks of the surgery, and he signed a consent form.

According to his deposition testimony, plaintiff presented at Stony Brook University Hospital on a Thursday in November 2013 to undergo the surgery. After the surgery, he had trouble breathing and experienced abdominal pain. Plaintiff testified that he complained to Dr. Timothy Connolly, who told him that "nothing was done," and that he ordered an x-ray examination which revealed he had pneumonia. He testified that his wife told him that Dr. Denoya did not observe a fistula nor did she find any evidence of Crohn's disease. Plaintiff testified that he had a fever from Friday through Sunday, but the nurses explained that they were not concerned unless his temperature was 101 degrees. He testified that he still suffered from abdominal pain when he was discharged from the hospital, and that he was prescribed pain medication and Ciprofloxacin. Plaintiff testified that his abdominal pain prevented him from sleeping on Sunday night, but the following day he decided to try to "out muscle this thing." He testified that he took a shower, dressed himself, and went to the park to walk around the track, but he only made it half way around the track, as he had trouble breathing. Plaintiff testified that he went home and called Dr. Dresnick, who told him to go to the emergency department at St. Charles Hospital. He testified that his wife drove him to the hospital, and that he was placed in the Intensive Care Unit, as his oxygen was low. He testified that he was given medication for the abdominal pain at St. Charles, and

that a nurse told him he had pneumonia. He testified that the following day, Dr. Theodorus, a pulmonologist, removed fluids from his lungs and drained his stomach. He testified that he remained at St. Charles for six days, and that it was subsequently determined that the left portion of his diaphragm was paralyzed. Plaintiff testified that in February 2014 he resumed the Remicade infusions for the Crohn's disease, and that he has had approximately ten flare ups since February 2014.

Dr. Paula Denoya testified that she is a board certified colorectal surgeon, and that she is an attending physician at Stony Brook University Hospital. She testified that plaintiff was referred to her by Dr. Li and that he presented to her office with complaints of severe diarrhea and a medical history of Crohn's disease. She testified that she reviewed the magnetic resonance imaging (MRI) images which revealed the possibility of two small fistulas. Dr. Denoya testified that she recommended to plaintiff that he have laparoscopic surgery to evaluate the small bowel, resect the ileocolic region, and possibly do a resection of the sigmoid colon. She testified that she explained the risks associated with the laparoscopic surgery, and that plaintiff signed a consent form. Dr. Denoya testified that when she performed the surgery, she did not observe any fistulas, so she performed a colonoscopy, which revealed mild inflammation in the cecum and mild inflammation in the rectum. She testified that she informed plaintiff's wife and Dr. Li that she found no evidence of Crohn's disease and did not observe any fistulas, and that it was unnecessary to perform a resection. Dr. Denoya testified that she examined plaintiff the following day, and that he was tachycardic, but that she was unaware of any breathing problems. She testified that plaintiff was discharged from the hospital on Sunday, November 17, 2013, by Dr. Roberto Bergamaschi, as she was not at the hospital on the weekend. She testified that Dr. Timothy Connolly is a junior resident who was involved in plaintiff's postoperative care, and that Dr. Jason Chiu is a surgery resident. Dr. Denoya testified she did not know whether Dr. Chiu worked at the hospital that weekend.

At his deposition, Dr. Jason Chiu testified that he works at Stony Brook University Hospital as a chief surgical resident. He testified that on November 16, 2013 he was working a 24-hour shift which began at 8:00 a.m. He testified that Dr. Bergamaschi was the attending physician for colorectal service, and that he was part of his team. Dr. Chiu testified that he was notified that plaintiff was febrile and tachycardic on November 16, 2013, and that he ordered blood work which indicated plaintiff had an elevated white blood cell count which he attributed to postoperative inflammation. He testified that he also ordered cultures, but the results were not obtained until after plaintiff was discharged. Dr. Chiu testified that plaintiff was taking Tylenol to reduce his fever, and that he attributed his fever to a possible urinary tract infection, for which he prescribed Ciprofloxacin. He testified that he ordered a chest x-ray examination and a CT angiography to rule out a pulmonary embolism, and that the results indicated plaintiff had scattered subcutaneous gas locules and Atelectasis which he believed were caused by postoperative pain. He testified that plaintiff's chart indicated that Dr. Connolly discharged him on November 17, 2013.

Dr. Roberto Bergamaschi testified that he is a board certified colorectal and general surgeon and the division chief of colorectal surgery at Stony Brook University Hospital. He testified that he was the on call attending physician that weekend and in charge of the team that treated plaintiff from November 16, 2013 until November 17, 2013. Dr. Bergamaschi testified that Dr. Connolly was a junior resident

who was on the colorectal team, and that he conducted rounds with him on Saturday morning. He testified that both Dr. Connolly and Dr. Chiu worked under his supervision and direction. He testified that he examined plaintiff on November 16, 2013, that he was alert with no signs of distress, but his white blood count was elevated, and he had a fever, so he ordered a chest x-ray examination, and Dr. Chiu ordered a sputum culture, urine culture, and a urinalysis. Dr. Bergamaschi testified that the x-ray images indicated that there was a left lower lobe atelectasis, which may be indicative of his diaphragm being pushed by the distension of the colon. According to Dr. Bergamaschi, plaintiff did not have pneumonia and, while a differential diagnosis was made and that included pneumonia, urinary tract infection, peritonitis, ulcerative colitis or a wound infection, the results of the uranalysis indicated plaintiff had a urinary tract infection. He testified when he examined plaintiff on Sunday, November 17, 2013, plaintiff's respiration was unlabored, but he had substantial atelectasis and an elevated white blood count. He testified that plaintiff did not have a fever, his pain was under control, and that plaintiff was taking pain medication and Ciprofloxacin. Dr. Bergaschi testified that he discussed plaintiff's discharge plan with Dr. Connolly, that Dr. Connolly prepared the discharge summary, and that plaintiff was discharged that same day. He testified that the results of the urinary culture and sputum culture were obtained on November 18, 2013, one day after plaintiff was discharged, and that the urinary culture indicated that plaintiff did not have a urinary tract infection. With respect to the sputum culture, a bacteria known as haemophilus influenza was present, indicating an infection of the lung.

Dr. Timothy Connolly testified that he is a second year surgical resident at Stony Brook University Hospital, and that he worked on Dr. Denoya's surgical team on November 14, 2013, and on Dr. Bergamaschi's team on November 16 2013 and November 17 2013. His testimony comports with the testimony of the other parties.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]. The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, 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 [2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

To impose liability upon a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries (***Senatore v Epstein***, 128 AD3d 794, 9 NYS3d 362 [2d Dept 2015]; ***Poter v Adams***, 104 AD3d 925, 961 NYS2d 556 [2d Dept 2013]; ***Gillespie v New York Hosp. Queens***, 96 AD3d 901, 947 NYS2d 148 [2d Dept 2012]). To establish a prima facie showing of

entitlement to summary judgment, a defendant physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in his or her treatment of the patient, or that any departure was not a proximate cause of plaintiff's injuries (*see* ***Lau v Wan***, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; ***Castro v New York City Health & Hosps. Corp.***, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2002]). Furthermore, to satisfy his or her burden on a motion for summary judgment, a defendant must address and rebut the specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see* ***Wall v Flushing Hosp. Med. Ctr.***, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; ***Grant v Hudson Val. Hosp. Ctr.***, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]; ***Terranova v Finklea***, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]).

"A resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene" (***Leavy v Merriam***, 133 AD3d 636, 638, 20 NYS3d 117, 120 [2d Dept 2015], quoting ***Soto v Andaz***, 8 AD3d 470, 779 NYS2d 104 [2d Dept 2004]). Specifically, where "the doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders" ***Doria v Benisch,*** 130 AD3d 777, 14 NYS3d 95 [2d Dept 2015], quoting ***Toth v Community Hosp. at Glen Cove***, 22 NY2d 255, 292 NYS2d 440 [1968]).

Here, the moving defendants submit the affirmation of Dr. Thomas Gouge, a board certified surgeon and a professor of surgery at New York University School of Medicine. Dr. Gouge states that he reviewed plaintiff's hospital records, the pleadings, the bill of particulars, the supplemental bill of particulars, and the transcripts of deposition testimony by the parties. Dr. Gouge opines, with a reasonable degree of medical certainty, that the care and treatment provided to plaintiff by Dr. Connolly and Dr. Chiu did not depart from accepted medical practice and was not a cause of plaintiff's alleged injury. He states that Dr. Connolly was a second-year surgical resident working under the direction and supervision of Dr. Denoya on November 15, 2013 and under the direction and supervision of Dr. Bergamaschi on November 16, 2013 and November 17, 2013. He further states that Dr. Chiu was working under the direction and supervision of Dr. Bergamaschi on November 16, 2013. He explains that the typical practice in teaching hospitals, such as Stony Brook University Hospital, is for the resident to physically examine the patient, complete a medical history, present the case to the attending physician, and then develop a treatment plan. He explains that the attending physician performs an independent evaluation of the patient and confirms the treatment plan, "as it is the attending physician who is ultimately responsible for the patient's evaluation and plan of care." Further, he states that it is "always the attending whose diagnosis controls the situation." Dr. Gouge states that the aforementioned process is the standard practice for training residents at teaching hospitals in the New York Metropolitan region. Dr. Gouge recounts the examinations and findings made on each day plaintiff was in the hospital, and recites the treatment plan and medications given to plaintiff. He opines, with a reasonable degree of medical certainty, that Dr. Bergamaschi did not deviate from normal practice by discharging plaintiff on November 17, 2013. He states that there was no definitive proof that plaintiff had active pneumonia when he was discharged from the hospital based on the results of the multiple tests and the "trending figures of his vital signs and lab values," and that he could have developed it after he left Stony Brook University Hospital.

The testimony of the parties and the affirmation of Dr. Gouge establishes, prima facie, that the conduct of Dr. Connolly and Dr. Chiu was in accord with acceptable medical practice and was not a proximate cause of plaintiff's injuries. It also establishes that the movants were working under the direction and supervision of attending physicians whose conduct did not so greatly deviate from normal practice (***Soto v Andaz***, 8 AD3d 470, 779 NYS2d 104). Having established their entitlement to summary judgment, the movants shifted the burden to plaintiff to raise a triable issue of fact. In opposition to the motion, plaintiff submits the affirmation of Dr. David Mayer, a board certified general surgeon and a professor of surgery at New York Medical College. Dr. Mayer states that he has treated hundreds of patients with Crohn's disease with and without fistulization. He states that he reviewed plaintiff's hospital records, the pleadings, the bill of particulars, the transcripts of deposition testimony by the parties, and the affirmation of Dr. Thomas Gouge. Dr. Mayer opines, with a reasonable degree of medical certainty, that it was a "gross deviation from standard of care" for plaintiff to be discharged from the hospital with an infection from an unknown source, and a departure from acceptable medical practice to discharge plaintiff from the hospital without obtaining the results of the cultures. Dr. Mayer opines that the movants' differential diagnosis should have included the more obvious diagnosis of atelectatic pneumonia, and that it was a departure from acceptable practice to fail to provide a broader antibiotic coverage. He opines that the oral Ciprofloxacin given to plaintiff was "woefully inadequate," and that he should have been given intravenous antibiotics such as Zosyn, Levaquin and Vancomycin. He opines that plaintiff's symptoms on November 17, 2013 of hypoxemia, substantial bilateral lower lobe atelectasis, elevated white blood cell count, and fever are incompatible with a urinary infection. Dr. Mayer opines that if the movants had started the broad spectrum antibiotic coverage on November 16, 2013, plaintiff's pneumonia would not have progressed to "life-threatening respiratory compromise necessitating his readmission to St. Charles Hospital on November 18, 2013." In Dr. Mayer's opinion, the instruction from their supervising attending to send Mr. Eiseman home while suffering from "serious untreated pneumonia" before his "critical urine and sputum cultures" were even reported "was so clearly contraindicated by normal practice that ordinary prudence required Drs. Connolly and Chiu make inquiry into its correctness." Dr. Mayer opines that the plaintiff was discharged from the hospital prematurely, and such decision by the attending physicians "so greatly deviated from normal practice."

The expert affirmation of Dr. Mayer raises triable issues of fact. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (***Feinberg v Feit***, 23 AD3d 517, 519, 806 NYS2d 661 [2d Dept 2005]). It is evident that the conflicting affirmations of Dr. Mayer and Dr. Gouge raise credibility issues properly determined by a trier of fact (***Leavy v Merriam***, 133 AD3d 636, 20 NYS3d 117 [2d Dept 2015]; ***Kunic v Jivotovski***, 121 AD3d 1054, 995 NYS2d 587 [2d Dept 2014]; ***Loaiza* v *Lam***, 107 AD3d 951, 968 NYS2d 548 [2d Dept 2013]). Accordingly, the motion of defendants Dr. Connolly and Dr. Chiu for summary judgment in their favor is denied.

Dated: May 18, 2017

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION