

Kitts v Strizik
2018 NY Slip Op 31502(U)
June 29, 2018
Supreme Court, Suffolk County
Docket Number: 12-15161
Judge: David T. Reilly
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SHORT FORM ORDER

COPY

INDEX No. 12-15161
 CAL. No. 17-00869MM

SUPREME COURT - STATE OF NEW YORK
 I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
 Justice Supreme Court

MOTION DATE 10-24-17
 ADJ. DATE 12-12-17
 Mot. Seq. # 005 - MD

-----X
 KATHLEEN KITTS,

Plaintiff,

- against -

BRIAN STRIZIK, M.D., NORTH SHORE -
 LONG ISLAND JEWISH HEALTH SYSTEM,
 INC., and NORTH SHORE
 CARDIOPULMONARY ASSOCIATES, P.C.,

Defendants.
 -----X

KRAMER, DILLOF, LIVINGSTON & MOORE
 Attorney for Plaintiff
 217 Broadway
 New York, New York 10007

BARTLETT, McDONOUGH & MONAGHAN
 Attorney for Defendants Strizik and North Shore
 Cardiopulmonary Associates, P.C.
 170 Old Country Road, 4th Road
 Mineola, New York 11501

FUREY, FUREY, LEVERAGE, MANZIONE,
 WILLIAMS & DARLINGTON, P.C.
 Attorney for Defendant North Shore - Long Island
 Jewish Health System, Inc.
 600 Front Street
 Hempstead, New York 11550

Upon the following papers numbered 1 to 56 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-40; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 41-54; Replying Affidavits and supporting papers 55-56; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion of defendant Huntington Hospital for summary judgment dismissing the complaint against it, pursuant to Civil Practice Law and Rules 3212, is denied.

Plaintiff 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. By her verified bill of particulars, plaintiff alleges that defendant Huntington Hospital, s/h/a North Shore Long Island Jewish Health System, Inc., was negligent in hiring and supervising its medical staff, and failed to provide

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medical staff who possessed sufficient skill and knowledge to treat her. Plaintiff further alleges that Huntington Hospital is vicariously liable for the conduct of its staff including defendant Dr. Brian Strizik, Cammy Ficarola, and Meghan Conigliaro. The complaint, as pertinent to the instant motion, alleges that the medical staff at Huntington Hospital failed to properly perform and provide post-catheterization care during the period of December 20 through December 25, 2009 following an angiogram that was conducted when plaintiff presented to its emergency department on December 20, 2009.

Huntington Hospital now moves for summary judgment dismissing the complaint against it on the ground that the treatment and care rendered by its staff, particularly Nurse Cammy Ficarola and Nurse Meghan Conigliaro, did not depart from accepted medical practice and was not a cause of plaintiff's injuries. In support of the motion, the hospital submits copies of the pleadings, the verified bill of particulars, the transcripts of deposition testimony by the parties and non-party nurses, the affidavit of Dr. John Fox, and plaintiff's hospital records.

Plaintiff testified that on the morning of December 20, 2009, she was transported by ambulance to the emergency department at Huntington Hospital with complaints of shortness of breath after shoveling snow. She testified that her blood was taken, and that the hospital staff informed her that she had suffered a heart attack. She testified that a cardiac catheterization was performed by Dr. Strizik, and that she was not given any information about the procedure but she signed several forms. Plaintiff testified that at the end of the catheterization procedure, she experienced a tugging sensation, and that Dr. Strizik told her he was "plugging it up." She testified that she felt severe pain after the tugging sensation, which she described it as a constant stabbing pain and continues to experience. She testified that she was brought to the coronary care unit after the procedure, and that she told the nurse that she was experiencing severe pain. She testified further that the bandage over her groin was saturated with blood so she called for a nurse, and that two nurses performed manual compression at the incision site for thirty minutes and then placed a sandbag on top the area for two hours. Plaintiff testified that following morning she saw Dr. Romano, a cardiologist. According to plaintiff, Dr. Romano looked at the incision and told her that Dr. Strizik "[messed] her up bad," and that it was not common practice to utilize two arterial closure devices. She testified that she did not wish to be treated by Dr. Strizik and retained Dr. Romano as her cardiologist.

Plaintiff testified that after she was discharged from the hospital, the bruise on the groin area gradually became larger and reached her knee, and that it took three months to heal. She testified that she sought treatment from a neurologist, Dr. Shareef, who ordered an MRI of the pelvis, but did not inform her as to the origin of her pain. She testified that Dr. Shareef referred her to a pain management doctor, and that she underwent physical therapy. Plaintiff testified that she did not treat with Dr. Shareef for sixteen months before returning at the request of Dr. Romano. She testified that she also treated with Dr. Bressler who told her that she had femoral neuropathy, and that she received treatment from a chiropractor and an acupuncturist for the pain.

Dr. Brian Strizik testified that he has been a licensed physician since 1994, and that he is an internist, cardiologist and interventional cardiologist. He testified that he was the attending physician on the date that plaintiff was admitted to Huntington Hospital, and that he performed a cardiac

catheterization on plaintiff, as she presented to the hospital with complaints of chest pain and shortness of breath, and an electrocardiogram showed abnormalities indicative of myocardial infarction. He testified that plaintiff's blood was taken for laboratory tests, but that the results would not be ready until 3:15 p.m., and that he started the procedure at 2:39 p.m. He testified that he obtained access to the aorta through the right femoral artery after he put lidocaine on the area, that he inserted a catheter in the artery, injected dye into it and performed an angiogram. He testified that when the angiogram was completed, he removed the catheter and used a Perclose device to close the femoral artery. He testified to the procedure utilized for the Perclose device and explained that it has a two percent chance of failing. Dr. Strizik testified that he could not obtain hemostasis and determined that the Perclose device failed, so he used Angio-Seal, a device that utilizes a collagen plug to seal the femoral artery and obtain hemostasis. He testified that after he obtained hemostasis plaintiff was brought to the cardiac care unit. He testified that it is not uncommon for oozing or small amounts of bleeding to occur after the procedure, that before the procedure he informed plaintiff of the risks and benefits of the procedure, and that she signed a consent form.

Dr. Strizik testified that after the procedure a nurse informed him that plaintiff was bleeding at the incision site, that he ordered the nurse to apply manual pressure to the site, and that the nurse noted the bleeding stopped. He testified that at 9:15 p.m. he was notified that plaintiff's blood pressure had dropped 20 points, and that she had complained of feeling lightheaded, so he instructed the nurse to apply manual pressure to the groin area. Dr. Strizik testified that he ordered medications typically used for patients who had heart attacks and also prescribed Xanax and Ambien for plaintiff. He testified that the following morning, December 21, 2009, he performed an examination on plaintiff, and that Dr. Romano took over her care, as he was plaintiff's regular cardiologist.

Meghan Conigliaro, a registered nurse, testified that she works at Huntington Hospital as a staff nurse and was assigned to the cardiac care unit at the time plaintiff was admitted to the hospital. She testified that on December 20, 2009 she worked from 7:00 a.m. until 7:30 p.m., and that she received plaintiff at 4:00 p.m. She testified that plaintiff was bleeding at the catheter insertion site, and that she applied manual pressure to the area. She testified that after the bleeding stopped and plaintiff was stable, she applied new dressing and Tegaderm to the site. Nurse Conigliaro testified that at 6:05 p.m., plaintiff complained of lightheadedness and her blood pressure dropped, but that it went up on its own. She testified that she checked on plaintiff frequently, and that her notes contained in plaintiff's chart indicate that the groin site was clear and dry. She testified that plaintiff's chart indicates that she saw her at 10:00 a.m. on December 23, 2009, and that at 5:00 p.m. plaintiff's right groin was "intact." She testified that she saw plaintiff again at 10:30 a.m. on December 24, 2009, and that nothing is documented regarding the groin area. She testified that plaintiff was transferred to a step down unit, cardiac intermediate care unit, at 2:30 p.m., and that she did not see plaintiff again.

Cammy Ficarola, a registered nurse, testified that she has been employed by Huntington Hospital since 2004, and worked from 7:00 p.m. on December 20 to 7:00 a.m. on December 21, 2009. She testified that she received plaintiff when Nurse Conigliaro's shift ended, and that she regularly monitored plaintiff. She testified that she followed Dr. Strizik's order to apply manual pressure to the incision site, but she does not recall if plaintiff was bleeding. She testified that in the early evening hours plaintiff's blood pressure dropped, and that she contacted Dr. Strizik, who told her to apply

manual pressure to the incision site and ordered an IV with saline. She testified that at 9:15 p.m., plaintiff complained of pain in her groin area, and that she had a small ecchymosis at the incision site. Nurse Ficarola denies having used a sandbag at anytime to apply pressure to the incision site. She testified that she followed nursing protocol and evaluated plaintiff at midnight and at 4:00 a.m.

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 Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]).

A hospital owes a duty of reasonable care to its patients in hiring and supervising its employees and generally complies with such duty where there is evidence that it conformed to the acceptable standard of care customarily used by general hospitals (see *Salvia v St. Catherine of Sienna Med. Ctr.*, 84 AD3d 1053, 923 NYS2d 856 [2d Dept 2011]). The elements of medical malpractice are a deviation or departure from accepted medical practice, and evidence that such departure was the proximate cause of injury (see *Ortiz v Wyckoff Hgts. Med. Ctr.* 149 AD3d 1093, 53 NYS3d 189 [2d Dept 2017]; *Paone v Lattarulo*, 123 AD3d 683, 683, 997 NYS2d 694 [2d Dept 2014]). To establish medical malpractice by a hospital through its employees, expert medical testimony must be offered to demonstrate that its personnel did not depart from accepted medical practice in their treatment of plaintiff (see *Bailey v Brookdale Univ. Hosp. & Med. Ctr.*, 98 AD3d 545, 949 NYS 2d 714 [2d Dept 2012]). Namely, expert medical testimony must be offered to demonstrate that a "resident, intern, nurse or technician violated some accepted standard of good professional practice and injured the patient" (*De Falco v Long Island College Hospital*, 393 NYS2d 859, 171, 90 Misc 2d 164 [Sup Ct 1977], *aff'd* 62 AD2d 1180, 403 NYS2d 608 [2d Dept 1978]).

Hospitals are vicariously liable for the acts of their employees and may be vicariously liable for the malpractice of a physician, nurse, or other health care professional that it employs under the doctrine of respondeat superior (see *Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904 [1986]; *Bing v Thunig*, 2 NY2d 656, 163 NYS2d 3 [1957]; *Seiden v Sonstein*, 127 AD3d 1158, 7 NYS3d 565 [2d Dept 2015]). Generally, a hospital is not vicariously liable for the malpractice of a physician who is not employed by the hospital. Liability may also be imposed upon a hospital for its own negligence in failing to properly review an independent physician's qualifications before according him or her use of the hospital's facilities (*Boone v North Shore Univ. Hosp. at Forest Hills*, 12 AD3d 338, 784 NYS2d 151 [2d Dept 2004]; *Megrelishvili v Our Lady of Mercy Med. Ctr.*, 291 AD2d 18, 739 NYS2d 2 [1st Dept 2002]; *Sledziewski v Cioffi*, 137 AD2d 186, 528 NYS2d 913 [3d Dept 1988]).

To establish a prima facie showing of entitlement to summary judgment, a defendant hospital must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in the defendant's treatment of the patient or that any departure was not a proximate cause of plaintiff's injuries (*Tsitrin v New York Community Hosp.*, 154 AD3d 994, 62 NYS3d 506 [2d Dept 2017]; *Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2002]).

Here, the hospital submits an affidavit by Dr. John T. Fox, who states that he is a board certified cardiologist and practices interventional cardiology and cardiovascular medicine. He states that he has reviewed plaintiff's medical records, the bill of particulars and the transcripts of deposition testimony, and opines, with a reasonable degree of medical certainty, that the hospital's treatment and care of plaintiff did not depart from accepted medical practice. Dr. Fox states that the catheterization procedure was performed at the right femoral artery at 2:56 p.m., it was completed at 3:08 p.m., the sheaths were removed at 3:10 p.m., and a Perclose device was deployed at 3:10 p.m. He states that hemostasis was not achieved with the Perclose device so Dr. Strizik used Angio Seal and such device closed the catheter access site. He states that plaintiff was stable for the entire procedure, that no complications were noted, and that standard post-catheterization orders were signed when plaintiff was transferred to the cardiac care unit at 3:14 p.m. He states that the post-procedure bleeding was minimal as evidenced by plaintiff's hemoglobin levels, which did not drop significantly. Dr. Fox states that the hospital records do not show any documentation of a major vascular complication and on discharge, "no mention of any problem with the access site." He states further that plaintiff's chart does not indicate there was a significant hematoma, but only indicates ecchymosis. He states further that plaintiff's dizziness was caused by a missing lens in her eyeglasses. He states that the access site was soft and the bleeding that occurred on December 20, 2009 at 4:50 p.m. was controlled with manual pressure. Dr. Fox states that when plaintiff stood up for the first time at 6:05 p.m. to use the bathroom, it made her feel lightheaded and diaphoretic with a drop in blood pressure but she felt "better, back to normal."

The hospital's submissions are insufficient to establish its prima facie entitlement to summary judgment. The affidavit of Dr. Fox is conclusory and fails to address all of the allegations in the bill of particulars. To satisfy its 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]). Dr. Fox does not discuss the closure devices utilized by Dr. Strizik and whether Dr. Strizik properly utilized the devices, among other things. Nor does Dr. Fox address whether a sand bag was utilized to stop bleeding at the incision site and whether such use would have been within acceptable medical practice. Several other allegations in the bill of particulars against the hospital have not been addressed.

Additionally, triable issues of fact have not been eliminated regarding the condition of the incision site, as the nurses testified that they did not remove the dressing to observe the site and much of their testimony is in conflict with plaintiff's testimony. Plaintiff testified that a sand bag was placed at the incision site and the nurses testified that they only used manual pressure with their fingers. Additionally,

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Nurse Ficarola testified that she applied manual pressure to the incision site at the direction of Dr. Strizik, but she does not recall if plaintiff was bleeding and did not include the incident in plaintiff's chart.

Furthermore, defendant's submissions are insufficient to establish that plaintiff's cause of action for lack of informed consent should be dismissed. "The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law" (*Schussheim v Barazani*, 136 AD3d 787, 789, 24 NYS3d 756 [2d Dept 2016]). In order to demonstrate the sufficiency of the consent forms, the expert must aver that "the consent form complied with the prevailing standard for such disclosures applicable to reasonable practitioners performing the same kind of surgery" (*Whitnum v Plastic & Reconstructive Surgery, P.C.*, 142 AD3d 495, 498, 36 NYS3d 470 [2d Dept 2016], quoting *Walker v Saint Vincent Catholic Med. Ctrs.*, 114 AD3d 669, 979 NYS2d 697 [2d Dept 2014]). Here, Dr. Fox merely states that plaintiff signed a consent form.

"The court's function on a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility but merely to determine whether such issues exist." (*Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004], quoting *Roth v Barreto*, 289 AD2d 557, 558, 735 NYS2d 197 [2001]). As defendant failed to establish its prima facie burden on the motion, it is unnecessary to consider the sufficiency of plaintiff's papers in opposition (see *Campbell v New York City Tr. Auth.*, 109 AD3d 455, 970 NYS 2d 284 [2d Dept 2013]). Defendant's motion for summary judgment, therefore, is denied.

Dated: June 29, 2018


 J.S.C.
HON. DAVID T. REILLY

____ FINAL DISPOSITION X NON-FINAL DISPOSITION