

<b>Szarfharc v Beaton</b>
2019 NY Slip Op 30826(U)
March 20, 2019
Supreme Court, Kings County
Docket Number: 519622/2016
Judge: Bernard J. Graham
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

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AVROHOM SZARFHARC,

Plaintiff,

-against-

HOWARD BEATON, M.D. and  
NYP-LOWER MANHATTAN HOSPITAL,

Defendants.  
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Index No.: 519622/2016

**DECISION/ORDER**

Hon. Bernard J. Graham  
Supreme Court Justice

**Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: award summary judgment to the defendant, pursuant to CPLR sec. 3212.**

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	___ 1-2, 3-4 ___
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits.....	___ 5 ___
Replying Affidavits.....	___ 6 ___
Exhibits.....	_____
Other: .....(memo).....	_____

2019 MAR 26 AM 9:38  
KINGS COUNTY CLERK  
FILED

**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

Defendant, Howard Beaton, M.D., (“Dr. Beaton”), has moved, pursuant to CPLR § 3212, for summary judgment and a dismissal of plaintiff’s Avrohom Szarfharc (“Mr. Szarfharc”) complaint, upon the grounds that he did not depart from accepted medical practice in the care and treatment rendered to the plaintiff and that any alleged departure was not the proximate cause of plaintiff’s alleged injuries. In addition, Dr. Beaton has moved to dismiss plaintiff’s cause of action based on lack of informed consent, upon the grounds that the doctor fully explained the procedures, obtained plaintiff’s written consent prior to surgery and a reasonably prudent person would have undergone the procedure based upon the circumstances that existed at the time. Defendant, New York Presbyterian-Lower Manhattan Hospital, (“NY Presbyterian”) has moved, pursuant to CPLR § 3212, for summary judgment and a dismissal of plaintiff’s complaint, upon the

grounds that they did not depart from accepted medical, hospital as well as nursing practice in the care and treatment rendered to the plaintiff and that any alleged departure was not the proximate cause of plaintiff's alleged injuries. In opposition to the defendants' motions, the plaintiff asserts that summary judgment is not warranted as there are triable issues of fact as to whether these defendants departed from accepted medical, hospital and nursing practice in the care and treatment that was rendered to Mr. Szarfharc following hernia surgery on June 6, 2014, which allegedly caused severe and permanent injuries.

Background:

The within action was commenced by the filing of a summons and complaint on behalf of the plaintiff on or about November 6, 2016. A Certificate of Merit was also filed by counsel for the plaintiff on or about November 6, 2016. Issue was joined, on or about November 23, 2016, by the service of defendant, N.Y. Presbyterian's verified answer, and on or about December 21, 2016, by the service of defendant, Dr. Beaton's verified answer. At the time that the defendants served their answer, discovery demands, as well as a Demand for a Bill of Particulars were made of the plaintiff. On or about December 27, 2016, the plaintiff served a Bill of Particulars.

Depositions were conducted of the plaintiff, Mr. Szarfharc, the defendant Dr. Beaton, as well as physician assistants, Dora Colasuardo and Jillian Fromkin, who were former employees of NY Presbyterian at the time plaintiff was treated in June 2014.

Facts:

The plaintiff, a 39 year old male, first presented to Dr. Beaton when he was seen for an initial consultation and examination at the doctor's office on May 20, 2014. At the time of the medical consultation, the plaintiff had a very large right inguinal hernia which he admittedly had for a considerable period of time<sup>1</sup> (see Mr. Szarfharc EBT p.17). Upon

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<sup>1</sup> The plaintiff admittedly had not sought medical care for this condition for a period of years until just prior to consulting Dr. Beaton.

examining the plaintiff, Dr. Beaton noted that this basketball sized hernia in the right groin was not reducible, but there were no gastrointestinal or genitourinary symptoms (see Dr. Beaton EBT p. 14-15). After Dr. Beaton discussed the possibility of surgery with the plaintiff, which surgery was elective, the plaintiff agreed to undergo the procedure to repair the hernia.

Hernia surgery was performed on June 6, 2014 at NY Presbyterian. During the surgery, the doctor encountered massive adhesions of the bowel within the hernia sac which were unexpected. These adhesions situated in the small bowel and small bowel mesentery were characterized as being extraordinarily dense and vascular in nature (see Dr. Beaton EBT p.17-18).

Following the patient's discharge in the afternoon of the day that surgery was performed, the plaintiff contacted the doctor's office shortly after arriving home to advise that he was not feeling well and was nauseous. Dr. Beaton recommended to the plaintiff that he should put himself on a clear liquid diet and discontinue the use of oxycodone (see Dr. Beaton EBT p. 25-26). The plaintiff alleges that he also contacted Dr. Beaton<sup>2</sup> on Saturday (the following day) to advise him that he was still not feeling well. On June 8, 2014, the plaintiff once again contacted the doctor by telephone to advise the doctor that he had vomited in the late morning/early afternoon. At that point, Dr. Beaton advised the plaintiff to go to the emergency room at NY Presbyterian to be further evaluated.

When the plaintiff was initially seen in the emergency room at NY Presbyterian on June 8, 2014 at 3:00 P.M., he was complaining of abdominal distention and nausea which he had continually experienced since the hernia surgery on June 6, 2014. He further stated that he had not passed flatus and had vomited in the late morning/early afternoon of that day. The plaintiff was evaluated by the hospital staff, which included Jillian Fromkin, a physician assistant (PA), who performed a physical exam of the plaintiff, and had also been present at the time of plaintiff's initial surgery on June 6, 2014. Her

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<sup>2</sup> It is not disputed that the plaintiff could either telephone the doctors' office or the doctor's cellphone which number was provided to the plaintiff by the doctor.

findings were that the patient's abdomen was distended and not soft. She was unable to hear any bowel sounds (see Fromkin EBT p. 24-25). PA Fromkin's impression was that there was an ileus and Mr. Szarfharc needed to be admitted to the hospital (see Dr. Beaton EBT p. 40-41).

At 8:30 P.M., Nurse Heather Wiesen's examination of the plaintiff's abdomen revealed that it was now distended, firm and tender which contrasted with the findings of P.A. Fromkin ninety minutes earlier. A CT scan was then taken of the plaintiff at 9:38 P.M. The radiological diagnosis of the scan by Dr. Lily Belfi was that the "bowel obstruction is thought to be secondary to a twisted loop of small bowel within the right lower quadrant (RLQ) which may be on the basis of volvulus or internal hernia."

At 11:00 P.M., a nasogastric tube was inserted into the plaintiff by PA Colasuardo. The next recorded note by a nurse or PA in the hospital records was by a nurse at approximately 3:00 A.M., when the plaintiff upon exam was observed to have become tachypneic<sup>3</sup> with a respiratory rate of 30, the respirations were "shallow and labored", and the pulse oxygenation had decreased to 88%. Due to the change in the patient's clinical condition, emergency surgery was scheduled for later that morning (June 9, 2018) (see Beaton EBT p. 51).

Following surgery, the plaintiff was initially placed in the Intensive Care Unit for a few days and then remained a patient in the hospital until June 22, 2014. In the ensuing months following his discharge from NY Presbyterian, the plaintiff continued to be monitored by Dr. Beaton as an out-patient. During this period of time Dr. Beaton allegedly observed that the plaintiff's incision was healing, his scrotal swelling had decreased, there was no further edema in his feet nor was there evidence of an abdominal wall or incisional hernia. The plaintiff allegedly reported that he was feeling better, had regular bowel movements, had returned to work in September 2014 and resumed his regular duties as a teacher.

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<sup>3</sup> Breathing at a rapid rate.

Approximately, twenty-two months later, on June 23, 2016, the plaintiff underwent surgery to repair an incisional hernia at Maimonides Medical Center.

Discussion:

On a motion for summary judgment seeking a dismissal of a medical malpractice cause of action, a defendant must make a prima facie showing either that there was no departure from good and accepted medical practice, or, if there was a departure, that the departure was not the proximate cause of plaintiff's alleged injuries (Williams v. Bayley Seton Hosp., 112 AD3d 917, 918, 977 NYS2d 395 [2<sup>nd</sup> Dept. 2013]; Giacinto v. Shapiro, 151 AD3d 1029, 1030, 59 NYS3d 42 [2<sup>nd</sup> Dept. 2017]; Brinkley v. Nassau Health Care Corp., 120 AD3d 1287, 993 NYS2d 73 [2<sup>nd</sup> Dept. 2014]). Thus, on a motion for summary judgment, the defendant has the initial burden of establishing the absence of any departure from good and accepted practice or that the plaintiff was not injured by any departure (see Terranova v. Finklea, 45 AD3d 572, 845 NYS2d 389 [2<sup>nd</sup> Dept. 2007]). "In order to sustain this burden, the defendant is only required to address and rebut the specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars" (Bhim v. Dourmashkin, 123 AD3d 862, 864, 999 NYS2d 471 [2<sup>nd</sup> Dept. 2014]).

Once the defendant has made such a showing, the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut the prima facie showing made by the defendant, so as to demonstrate the existence of a triable issue of fact (see Fritz v. Burman, 107 AD3d 936, 94, 968 NYS2d 167 [2<sup>nd</sup> Dept. 2013]; Brinkley v. Nassau Health Care Corp., 120 AD3d at 1287). The plaintiff must "lay bare her proof and produce evidence, in admissible form, sufficient to raise a triable issue of fact as to the essential elements of a medical malpractice claim, to wit, (1) a deviation or departure from accepted medical practice, [and/or] (2) evidence that such departure was a proximate cause of injury" (Sheridan v. Bieniewicz, 7 AD3d 508, 5089 [2<sup>nd</sup> Dept. 2004]; Gargiulo v. Geiss, 40 AD3d 811, 911-812 [2<sup>nd</sup> Dept. 2007]). In order to prevail on a claim for medical malpractice, "expert testimony is necessary to prove a deviation from

accepted standards of medical care and to establish proximate cause” (Nicholas v. Stammer, 49 AD3d 832, 833 [2008]).

In addressing the issue of proximate cause, the Court notes that “in a medical malpractice action, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant” (Johnson v. Jamaica Hosp. Med. Ctr., 21 AD3d 881, 883 [2<sup>nd</sup> Dept. 2005], quoting Holton v. Sprain Brook Manor Nursing Home, 253 AD2d 852 [2<sup>nd</sup> Dept. 1998]). “A plaintiff’s evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant’s act or omission decreased the plaintiff’s chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may infer that the defendant’s conduct diminished the plaintiff’s chance of a better outcome or increased the injury” (Semel v. Guzman, 84 AD3d 1054, 1055-1056 [2<sup>nd</sup> Dept. 2011], quoting Goldberg v. Horowitz, 73 AD3d 691, 694 [2<sup>nd</sup> Dept. 2010], quoting Alicea v. Liguori, 54 AD3d 784, 786 [2<sup>nd</sup> Dept. 2008]).

Here, this Court is presented with the issue as to whether defendants, Dr. Beaton, and NY Presbyterian deviated or departed from accepted medical, hospital and nursing practice while caring for Mr. Szarfharc, and if so, whether their departure from accepted medical, hospital and nursing practice were the proximate cause of the injuries that allegedly occurred. The plaintiff has withdrawn any claim with respect to the decision to perform the June 6, 2014 procedure or the manner in which it was performed as plaintiff does not contend that the surgery on that date was improperly performed, or that it was unnecessary.

Defendant (Dr. Beaton):

In support of his motion for summary judgment, this defendant offers the affirmation of Dr. James McGinty, board certified in surgery, who opined that Dr. Beaton did not depart from accepted medical practice in the care and treatment rendered to the plaintiff, did not fail to diagnose and evaluate the condition of the plaintiff and that the

lab work and testing that he directed to be performed upon the plaintiff in the emergency room on June 7-8, 2014 was satisfactory and within the standards of care.

In support of the motion, Dr. McGinty opined that the plaintiff's post-surgical complications were not in any way proximately caused by the breach of any accepted medical standards of care. The presence of a closed loop bowel obstruction is not indicative of improper surgical or medical practice, but rather is attributable to the presence of the large sized hernia and the extensive amount of dissection that was needed. The surgical return of the contents to their normal position during the procedure placed pressure on the sutures that had held the prior surgical incision closed. The twisting of the bowel was the result of the length of time that the hernia was outside of the abdominal cavity. The number of adhesions found during the course of the surgery was a complication to which the surgeon could not be held accountable. The condition that resulted is a known and unavoidable risk considering the complexity of the procedure that was performed and that risk is increased where there is an emergency situation, and poor nutrition and obesity on the part of the plaintiff are other contributing factors.

The expert opined that the follow up care and treatment that was provided to the plaintiff following the first surgery was proper. The response of Dr. Beaton on June 8, 2014 to the plaintiff having been in the emergency room of NY Presbyterian and needing emergency surgery was timely and appropriate. The patient was promptly and properly evaluated by personnel in the emergency department and his vital signs were regularly monitored. Dr. Beaton had ordered certain testing to be performed, as well as a CT scan, and he was informed and updated as to the plaintiff's condition. Any alleged delay prior to the commencement of surgery was due to the time needed to perform proper clinical laboratory and radiological work that is required to determine the presence of the small bowel obstruction or some other complication. Time was also needed to properly assess whether the plaintiff's condition could be treated without surgical intervention.

Additionally, the expert opined that Dr. Beaton did not need to consult another surgeon before proceeding with the second operation, but rather based upon his

qualifications and experience he was able to make his own determination. There was no evidence that there was a breach of duty on the part of Dr. Beaton with respect to having to perform this second surgery. The fact that the plaintiff was tachycardic is not an indication of any wrongdoing, but rather that condition could be caused by several factors including dehydration.

As to the aftercare following the second procedure, upon the plaintiff being discharged from the hospital on June 22, 2014, the plaintiff had regular office visits with Dr. Beaton to monitor his progress. Over a three-month period, the plaintiff's condition appeared to have improved incrementally to the point that the plaintiff was able to return to work and resume his daily activities. There had been no signs that the plaintiff had either an abdominal wall hernia or an incisional hernia.

Finally, the defendant asserts that the subsequent incisional hernia is not indicative of any improper medical practice on the part of Dr. Beaton. The expert explained that the repositioning of the bowel into the abdomen from the scrotum generates pressure on the abdominal wall that previously had not existed and that the pressure that occurred could result in the formation of an incisional hernia in the abdomen.

In addressing the plaintiff's cause of action based upon lack of informed consent, at the office visit on May 20, 2014, Dr. Beaton allegedly discussed with the plaintiff his condition, the possibility of having to undergo elective surgery and he obtained the plaintiff consent. As for the surgery performed on June 9, 2014, Dr. Beaton obtained plaintiff's consent before performing the surgery, and a reasonably prudent person would have undergone the procedure based upon the circumstances.

Dr. Beaton, in moving for summary judgment and a dismissal of the plaintiff's causes of action as against said defendant, maintains that he has met his burden of establishing both the absence of any departure and that any alleged departure was not the proximate cause of plaintiff's alleged injuries.

This Court finds that the defendant has set forth his prima facie burden of establishing that Dr. Beaton had neither departed from good and accepted medical

practice or that the plaintiff had not been injured as a result of any alleged departure, and the burden shifted to the plaintiff to establish the existence of a triable issue of fact.

In opposing the motion for summary judgment by this defendant, in which the plaintiff claims there are triable issues of fact, the plaintiff offers the opinion of a medical expert, board certified in general surgery, who asserted that there were several departures from good and accepted standards of medical care on the part of Dr. Beaton.<sup>4</sup>

The plaintiff asserts that even though a closed loop obstruction may be a known complication of hernia surgery, Dr. Beaton did not adequately and expeditiously address the deteriorating and life-threatening situation that Mr. Szarfarc endured. A closed loop obstruction left untreated could cause an intestinal perforation and gangrene.

Plaintiff maintains that after arriving home following his discharge from the hospital following hernia surgery on June 6, 2014, he advised the doctor that he was nauseous and not feeling well and that feeling did not change over the next nearly forty-eight hours until Dr. Beaton decided that he needed to be assessed at the emergency room.

The plaintiff asserts that when Nurse Wiesen, following an exam of the plaintiff, at approximately 8:30 P.M, found his abdomen it to be “extremely distended, firm and tender”, that was in contrast to his abdominal condition at 7:05 P.M., and should have been a strong indicator that plaintiff’s physical condition was showing signs of decompensation. It was further asserted that even though the radiology report following the CT scan, which revealed both a bowel obstruction and a twisted loop of a small bowel within the right lower quadrant, was available prior to midnight and confirmed plaintiff’s deteriorating condition, Dr. Beaton did not arrive at the hospital until approximately 5:00 A.M. when surgery was to be performed. At that point the plaintiff had already

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<sup>4</sup> Plaintiff’s claim of a departure on the part of the defendants is confined to the period following the June 6, 2014 procedure, as there is no contention that the surgery of June 6, 2014 was unnecessary or improperly performed. Plaintiff concedes that the closed loop obstruction was a known and medically unavoidable risk. However, since it was a known complication, the delay in Dr. Beaton coming to the hospital and addressing plaintiff’s declining situation sooner than he had, is the alleged deviation and departure.

experienced systematic decompensation and exhibited signs of sepsis and peritonitis due to the intestine allegedly having been perforated and the gangrene that resulted. While there are conflicting assertions that Dr. Beaton may have arrived as early as two hours prior to surgery, and had allegedly personally monitored the plaintiff, there are no progress notes or records which would confirm the doctor's work activities at an earlier time.

Dr. Beaton acknowledged that while performing the June 9, 2014 operation that a one-inch gangrenous portion of the bowel perforated. Contrary to the contention of the defendant, the perforation was not minor in nature as the plaintiff underwent a serious post-operative period which included extended time in intensive care during which time the plaintiff experienced adult respiratory distress syndrome (ARDS) and other complications.

Plaintiff further asserts that based upon the care and treatment that was rendered by Dr. Beaton in June 2014 following his initial surgery, the plaintiff would experience more pain and discomfort over the ensuing two-year period, developed a large incisional hernia, and he underwent surgery in June 2016 at Maimonides hospital to repair that hernia.

This Court finds that plaintiff has raised triable issues of fact with the submission of an expert affirmation which offered detailed opinions as to the treatment rendered to Mr. Szarfhar, which conflicts with defendants' expert opinions, sufficient to warrant denial of summary judgment and a dismissal of the causes of action pertaining to claims of malpractice as to Dr. Beaton (see Contreras v. Adeyemi, 102 AD3d 720, 721, 958 NYS2d 430 [2<sup>nd</sup> Dept. 2013]); Shahid v. NYC Health & Hosps. Corp., 47 AD3d 798, 850 NYS2d 521 [2<sup>nd</sup> Dept. 2008]).

In reaching this determination, the Court considered the arguments of both parties. Initially, the Court considered the argument on behalf of Dr. Beaton that he was dealing with an individual who had neglected and not sought medical treatment for a hernia which had grown to basketball size and who was not in the best physical condition due in part to his obesity. Despite a finding of adhesions which resulted in a much longer

surgery on June 6 than anticipated, the procedure was completed without any known complication. This Court also considered the defendant's assertion that prior to Sunday, June 8, the plaintiff appeared to have tolerated a liquid diet and not until the plaintiff had vomited was it necessary for the plaintiff to be further evaluated at the emergency room.

This Court further considered the argument that Dr. Beaton carefully monitored the progress of the plaintiff; ordered appropriate testing and that the emergency operation performed in the early morning of June 9<sup>th</sup> was timely; that the presence of a closed loop bowel obstruction is not indicative of improper surgical practice but rather was attributable to the large sized hernia and the extensive amount of dissection that was needed; and the fact that the plaintiff became tachycardic could have been caused by several factors and not by any wrongdoing.

These contentions were addressed by plaintiff who rejected these defenses and has offered arguments that create triable issues of fact. The plaintiff asserted that since Mr. Szarfharc advised Dr. Beaton the very same day of the operation (June 6), that he was feeling nauseous and not himself, he should have been evaluated much earlier than the afternoon of June 8, 2014. Further, at the hospital when Nurse Wiesen, upon examination, found the plaintiff's abdomen to be extremely distended that was indicative of a major change in plaintiff's condition as he showed signs of decompensation. This argument was further buttressed by the deposition testimony of PA Fromkin who stated that firm distention points more in the direction of a clinical issue such as an ileus or obstruction and that small air fluid levels is suggestive of a small bowel obstruction (see Fromkin EBT p. 26).

There were conflicting opinions offered as to whether the distention after the initial surgery was expected since Dr. Beaton had reduced several feet of small bowel into the plaintiff's abdomen which had not been situated in its proper place for a period of time or that the distention was the result of the twisted loop in the small bowel that was not anticipated.

There were also contradictory theories offered as to whether Dr. Beaton should have performed an emergency procedure when the radiologist confirmed that the plaintiff

not only had a bowel obstruction but a twisted loop of the small bowel, and that waiting an additional six or seven hours placed plaintiff's life in peril and having to undergo a complicated post-operative period may have resulted in the plaintiff developing an incisional hernia. There is conflicting testimony adduced as to when Dr. Beaton was made aware of the results of the CT scan. PA Colasuardo testified that she was regularly informing Dr. Beaton as to plaintiff's condition and the results of the CT scan during the evening. Dr. Beaton testified that he did not learn of the results of the CT scan until he arrived at the hospital in the wee hours of the morning on June 9, 2018 (see Beaton EBT p. 43-44, 48).

This Court further considered the fact that the notes and records of Dr. Beaton do not include some of the exams and progress notes that allegedly occurred on June 8 and June 9, 2014, and there is no explanation for their absence. There is no documentation in the record that Dr. Beaton monitored and examined the plaintiff in the hospital for a period of up to two hours prior to the plaintiff being sent to the operating room at approximately 5:00 A.M. on June 9, 2014. The first record of Dr. Beaton's presence in the hospital was when he electronically signed the admission note at 5:21 A.M. on June 9, 2014.

There are also conflicting opinions as to whether the plaintiff sustained a perforation as a result of the aftercare following the first hernia procedure or did it occur as Dr. Beaton states during the second procedure of June 9, 2014.

It is well settled that where parties to a medical malpractice action offer conflicting expert opinions on the issue of malpractice and causation, issues of credibility require resolution by the factfinder (see Loaiza v. Lam, 107 AD3d 951, 953 [2013]; Omane v. Sambaziotis, 150 AD3d 1126, 1129 [2<sup>nd</sup> Dept. 2017]; Dandrea v. Hertz, 23 AD3d 332,333 [2005]). Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical opinions (see Elmes v. Yelon, 140 AD3d 1009, 1011 [2<sup>nd</sup> Dept. 2016], (Feinberg v. Feit, 23 AD3d 517, 519 [2<sup>nd</sup> Dept. 2005]; Shields v. Baktidy, 11 AD3d 671, 672 [2<sup>nd</sup> Dept. 2014]). With regard to proximate cause, where causation is often a difficult issue, a plaintiff need do no more

than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not the injury was caused by the defendant (see Johnson v. Jamaica Hosp. Med. Ctr., 21 AD3d 881, 883[2005]) quoting Holton v. Sprain Brook Manor Nursing Home, 253 AD2d 852 [1998], lv. denied 92 NY2d 818 [1999]). The plaintiff opposing a defendant physicians' motion for summary judgment must only submit evidentiary facts or materials to rebut the defendant's prima facie showing (see Stukas v. Streiter, 83 AD3d 18, 24-26 [2<sup>nd</sup> Dept. 2011]).

Lack of informed consent:

In addressing the portion of defendant, Dr. Beaton's motion to dismiss the plaintiff's cause of action for malpractice based upon lack of informed consent, a plaintiff must prove (1) the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances; (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed; and (3) that the lack of informed consent is a proximate cause of the injury (see Zapata v. Buitriago, 107 AD3d 977, 979, 969 NYS2d 79 [2<sup>nd</sup> Dept. 2013]); Spano v. Bertocci, 299 AD2d 335, 749 NYS2d 275 [2<sup>nd</sup> Dept. 2002]).

The defendant in a malpractice action can establish "prima facie entitlement to summary judgment by demonstrating that the plaintiff signed a consent form after being informed of the risks, benefits and alternatives of the procedure". (Bengston v. Wang, 41 AD3d 625, 626 [2<sup>nd</sup> Dept. 2007], citing Ericson v. Palleschi, 23 AD3d 608, 610 [2005]).

In support of this portion of the motion to dismiss, Dr. Beaton maintains that he provided details as the first procedure that was performed and obtained plaintiff's consent as to both procedures.

This Court finds that Dr. Beaton established his prima facie entitlement to a judgment as a matter of law to dismiss the cause of action based upon the alleged lack of informed consent by submitting deposition testimony, and a medical expert's opinion that

he properly informed the plaintiff as to the procedures, as well as the reasonably foreseeable risks and benefits. In opposition, plaintiff's counsel addressed the issue of informed consent with respect to the first surgery and counsel concedes that not only was the repair of the hernia necessary, but there were known risks. Mrs. Szarfharc further testified that it was her belief that consent forms had been signed by her husband (the plaintiff) prior to the first surgery (see Fraydel Szarfharc EBT p. 29). As for the second surgery, a reasonable person in plaintiff's position would not have refused to undergo the June 9<sup>th</sup> procedure after the plaintiff's condition had rapidly declined<sup>5</sup> (see Guctas v. Pessolano, 132 AD3d 632, 634, 17 NYS23d 749 [2<sup>nd</sup> Dept. 2015]); Johnson v. Staten Is. Med. Group, 82 AD3d 708, 709, 918 NYS2d 132 [2011]). Further, any lack of informed consent did not proximately cause any injury (see Johnson v. State Is. Med. Group, 82 AD3d at 709; Trabal v. Queens Surgi-Center, 8 AD3d 555, 557, 779 NYS2d 504 [2004]).

Thus, based upon the above analysis, and the fact that the plaintiff failed to raise a triable issue of fact on the issue of lack of informed consent, (see Johnson v. Staten Is. Med. Group, 82 AD3d at 709-710) that portion of the motion by Dr. Beaton to dismiss is granted.

Defendant (NY Presbyterian):

Counsel for NY Presbyterian, in moving for summary judgment and a dismissal of plaintiff's cause of action as against said defendant, offered the expert affirmation of Dan Reiner, M.D., who is board certified in both General Surgery and in Surgical Critical Care.

Dr. Reiner opined that the services rendered by hospital personnel which included those performed by physician assistants and nurses, from the time the patient was seen in the emergency room on June 8, 2014 until the time of the operation on June 9, 2014, conformed to good and accepted hospital and nursing practice. In the emergency room, hospital personnel undertook the proper procedures after the plaintiff advised them that

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<sup>5</sup> Consent for the second procedure was given at 4:17 A.M on June 9, 2014 by the plaintiff.

following his surgery on June 6, 2014, he had not felt well, had been nauseous, and vomited earlier that day. The plaintiff was initially examined by hospital employees and then x-rays were taken, the results of which was an indication of a distended abdomen with the possibility of a small bowel obstruction.

Dr. Reiner further opined that hospital personnel followed the orders of Dr. Beaton, (the patient was a private patient of Dr. Beaton) who made his own evaluation of the plaintiff's condition and the treatment that should be afforded. It is alleged that Dr. Beaton, who after having a phone conversation with PA Fromkin, ordered hospital personnel to take a CT scan of the plaintiff. Defendant maintains that hospital personnel continuously monitored the plaintiff's vital signs while in the emergency room and it is alleged that there had been no change in his heart rate from when the patient was initially seen on June 8, 2014 until June 9, 2014 at 3:00 A.M., when the plaintiff's condition began to decline. It is further alleged that PA Colasuardo had informed Dr. Beaton of the plaintiff's worsening condition, whereby the patient was placed on telemetry, with the plan to prepare for an impending emergency operation that morning.

In addition, it is alleged that Dr. Beaton was fully aware of the CT scan results hours prior to surgery and was also aware of the entries made by hospital personnel into the hospital record with respect to the plaintiff's condition. Dr. Beaton allegedly made the determination that prior to performing an operation he would observe the condition of the patient for a short period of time since small bowel obstructions sometimes resolve themselves on their own and do not require surgical intervention. (see Dr. Beaton EBT p. 51). In fact, it is alleged that Dr. Beaton observed the patient for a period of time prior to performing the emergency procedure and that he made all decisions as to how to care for and treat this patient.

Counsel for NY Presbyterian maintains that they have met their burden of establishing both the absence of any departure and that any alleged departure was not the proximate cause of plaintiff's alleged injuries.

This Court finds that the defendant has set forth their prima facie burden of establishing that NY Presbyterian had neither departed from good and accepted medical

and nursing practice and that the plaintiff had not been injured as a result of any alleged departure for the period covering when the plaintiff entered the emergency room on June 8<sup>th</sup> until he was brought to the operating room on June 9<sup>th</sup>, and the burden shifted to the plaintiff to establish the existence of a triable issue of fact.

In opposing the motion for summary judgment by this defendant, the plaintiff offered the opinion of a medical expert, board certified in general surgery, who asserted that there were several departures from good and accepted standards of medical care on the part of NY Presbyterian.<sup>6</sup>

The plaintiff asserted that the staff at NY Presbyterian, following the plaintiff being admitted at the emergency room should have performed a more extensive abdominal examination (serial abdominal exams). Further, the records and reports maintained by the hospital staff do not provide all of the alleged examinations and testing that were performed and there is a substantial period of time in which there is no record of plaintiff's vital signs. In support of this contention, the plaintiff refers to the deposition testimony of PA Colasuardo who testified that while she may have checked the plaintiff's abdomen that evening, there were no progress notes recorded as to her findings. Considering the fact that the hospital staff was aware that plaintiff's condition was decomposing during the evening of June 8<sup>th</sup>, should have resulted in closer scrutiny of the plaintiff. In fact, it was not until 3:00 A.M. when plaintiff's heart rate and oxygen level had declined is there a record of plaintiff's vital signs.

The plaintiff asserts that the failure on the part of the hospital staff to perform proper exams and testing and to properly monitor and record the progress notes and plaintiff's vital signs is a departure from accepted hospital and nursing practice in the care and treatment that was rendered to the plaintiff.

Further, the opinions expressed by both of defendants' experts that Dr. Beaton had monitored and examined the plaintiff as much as two hours prior to him being

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<sup>6</sup>. The plaintiff in its cause of action as against NY Presbyterian is seeking a determination that the hospital is responsible for the negligent acts of its employees as its staff departed from accepted medical, hospital and nursing practice. The plaintiff is not seeking a determination that the hospital is vicariously liable for the alleged negligent actions of Dr. Beaton.

transported to the operating room are not supported by any records or documentation. The first indication that Dr. Beaton was in the hospital was at 5:21 A.M. on June 9, 2016 when he electronically signed the admission note for the plaintiff. Further, Mrs. Szarfharc testified that she saw Dr. Beaton for the first time that day when the plaintiff was being taken to the surgery area for prep. The doctor was wearing a suit and the doctor allegedly stated that "I guess we're going back to surgery. I'll go scrub up" (see Fraydel Szarfharc EBT p. 34).

This Court finds that plaintiff has raised triable issues of fact with the submission of an expert affirmation which offered detailed opinions as to the treatment rendered to Mr. Szarfharc, which conflicts with defendants' expert opinions, thereby precluding summary judgment and a dismissal of the causes of action pertaining to NY Presbyterian for the period of time in which the plaintiff was a patient in the emergency room between June 8 and June 9, 2014.

In determining this motion, this Court considered the fact that the defendant has failed to adequately explain why both the reports and progress notes are incomplete and do not detail the various exams, as well as the record of plaintiff's vital signs that were taken while he was a patient in the emergency room. The fact that these records are incomplete may have been indicative of the treatment, or the lack thereof, that was provided to the plaintiff.

In addition, the Court finds the affirmation of defendant's medical expert Dr. Reiner, to be for the most part conclusory and lacking both in substance and detail. The affirmation is based in large part on the assumption that Dr. Beaton was present in the hospital as early as two hours prior to the surgery on June 9, 2014, and at that point in time he was fully familiar and knowledgeable of all reports. However, Dr. Reiner offers his opinion without any supporting documentation, and perhaps based solely upon the assumption that the deposition testimony of Dr. Beaton provided accurate and complete details. A reading of Dr. Beaton's deposition appears to indicate that there was a lack of certainty or at the very least clarity as to the chronology and timing of events that took place in the time period prior to 5:00 A.M on June 9<sup>th</sup>. While it could be contended that

the time of Dr. Beaton's arrival may not be significant and did not have an effect upon the plaintiff's ultimate condition, at the very least, issues pertaining to what transpired in the hours prior to surgery have been raised in this matter.

The submissions by the plaintiff raise triable issues of fact as to whether NY Presbyterian, through its staff departed from the accepted standard of care by failing to properly communicate plaintiff's condition to Dr. Beaton, resulting in a lack of coordination and care and ultimately a failure to timely and properly treat Mr. Szarfharc.

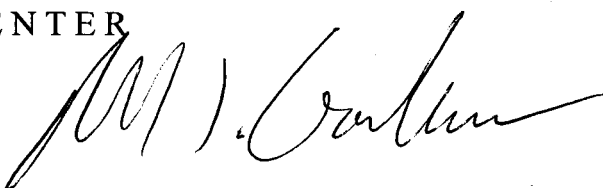
Conclusion:

The motion by defendant Dr. Beaton for summary judgment, pursuant to CPLR § 3212 and a dismissal of the causes of action as against this defendant is granted only to the extent of dismissing the cause of action pertaining to lack of informed consent. In all other respects, the motion by Dr. Beaton is denied. The motion by defendant NY Presbyterian Hospital for summary judgment, pursuant to CPLR § 3212, and a dismissal of the causes of action as against said defendant is denied.

This shall constitute the decision and order of this Court.

Dated: March 20, 2019  
Brooklyn, New York

ENTER



Hon. Bernard J. Graham, Justice  
Supreme Court, Kings County

HON. BERNARD J. GRAHAM

2019 MAR 26 AM 01:01  
KINGS COUNTY CLERK  
FILED

