At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of May, 2020.

PRESENT:

HON. BERNARD J. GRAHAM,
Justice

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ARILEYDA PAEZ DE DURAN AND JOEL DURAN,

Plaintiffs,

-against-

Index No. 504767/16

Motion Sequence 6

FOREST HILLS HOSPITAL, NORTH SHORE-LIJ HEALTH SYSTEMS, DANIELA TATOMIR MARIA, RN, BENJAMIN KORMAN, RN, AND RACHEL E. MORRIS, M.D. A/K/A RACHEL E. BRUCE, M.D.

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc. Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	65-83, 85-88
Opposing Affidavits (Affirmations)	89-91
Reply Affidavits (Affirmations)	92-93

Upon the foregoing papers, in this medical malpractice action by plaintiffs Arileyda Paez De Duran (plaintiff) and Joel Duran (collectively, plaintiffs) against defendants Forest Hills Hospital, Northwell Healthcare Inc., sued herein as North Shore-LIJ Health Systems (North Shore-LIJ), Maria Daniela Tatomir, R.N., sued herein as Daniela Tatomir Maria, RN (Nurse Maria), Benjamin Korman, RN (Nurse Korman), and Rachel E. Morris, M.D. a/k/a Rachel E. Bruce, M.D. (Dr. Bruce), defendants move, under motion sequence (mot. seq.) number six, for an order, pursuant to CPLR 3212, granting them

summary judgment dismissing plaintiff's complaint as against them in its entirety.[1]

Background Facts and Procedural Background

This case essentially concerns plaintiff's allegations of failing to be properly diagnosed and treated for appendicitis when she appeared at the Forest Hills Hospital Emergency Room (ER) on June 30, 2014 complaining about nausea, pain and vomiting since the prior day. Nurse Maria noted plaintiff's pain as 7/10 on the pain scale at 1:54 p.m., that she was not feverish and that her blood pressure was 116/74. Nurse Korman, among other notations, reported plaintiff's abdomen as soft, non-tender, non-distended and that she had no loss of appetite. Dr. Bruce, the ER attending physician, took a history from plaintiff at approximately 2:12 p.m. and learned that she had been experiencing abdominal pain since June29, that the pain was worse with food and that she had vomited once on June 30th. She physically examined plaintiff by viewing, palpating and listening to her abdomen with a stethoscope and placed plaintiff's pain in the upper abdomen. Dr. Bruce's several possible diagnoses did not include appendicitis.

Plaintiff's white blood cell count was found slightly elevated, her urinalysis was normal and a hepatic and pancreatic ultrasound was negative. She received 4 mg of morphine via IV at 5:17 p.m., and Dr. Bruce found her asymptomatic and her abdomen no longer tender after repeating an abdominal examination at 7:26 p.m. Plaintiff was cleared for discharge with a principal diagnosis of "abdominal pain" and given a Spanish language information sheet which, among other instructions, told her to seek medical

[1] Plaintiffs, in their opposition papers, do not oppose dismissal as against North Shore-LIJ (*see* NYSCEF Doc. No. 89, November 19, 2019 affirmation of plaintiffs' counsel at 2, ¶2 which recognizes that "it is merely the parent of defendant Forest Hills Hospital and rendered no treatment or patient care").

attention if she felt pain in only one abdomen area. More specifically, the form advised that pain in the right zone could indicate appendicitis. Plaintiff also received a prescription for Omeprazole, a stomach medication. Her pain increased after discharge from Forest Hills Hospital on June 30, 2014, but plaintiff did not return until July 3, 2014 when it was discovered that she had suffered a perforated appendix and had a right lower quadrant abscess.

Plaintiff filed the instant action against all defendants except Dr. Bruce on March 30, 2016 and filed a separate action against Dr. Bruce on December 16, 2016. A September 8, 2017 order of Justice Gloria M. Dabiri consolidated both actions under the index number herein. All defendants answered and discovery ensued including disclosing medical records and conducting plaintiff's deposition. Plaintiff filed a note of issue on June 20, 2018, and thereafter Nurse Korman's, Dr. Bruce's and Nurse Maria's depositions occurred. A November 1, 2018 order of JHO Martin Schneier extended the time for dispositive motions to April 30, 2019, and all defendants have made the instant, timely summary judgment motion.

Discussion

The Requisite Showing

"The essential elements of a cause of action to recover damages for medical malpractice are a deviation or departure from accepted medical practice and evidence that such departure was a proximate cause of injury" (*Harris v St. Joseph's Med. Ctr.*, 128 AD3d 1010, 1012 [2d Dept 2015]; *see also Poter v Adams*, 104 AD3d 925, 926 [2d Dept 2013]; *Hayden v Gordon*, 91 AD3d 819, 820 [2d Dept 2012]; *Guzzi v Gewirtz*, 82 AD3d 838, 838 [2d Dept 2011]). "'In an action sounding in medical malpractice, a defendant

moving for summary judgment must make a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the patient's injuries'" (*Stucchio v Bikvan*, 155 AD3d 666, 667 [2d Dept 2017], quoting *Matos v Khan*, 119 AD3d 909, 910 [2d Dept 2014]; *see also Guctas v Pessolano*, 132 AD3d 632, 633 [2d Dept 2015]; *Harris*, 128 AD3d at 1012; *Poter*, 104 AD3d at 926). "Once a defendant has made such a showing, the burden shifts to the plaintiff to 'submit evidentiary facts or materials to rebut the prima facie showing by the defendant'" (*Harris*, 128 AD3d at 1012, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Defendants' Motion

Defendants advocate granting summary judgment to North Shore-LIJ, as plaintiff acknowledges it has rendered no medical care to her (*see* n 1 *supra*). They further submit that no basis equally exists for holding the remaining defendants liable as shown in the supporting affirmation of their expert, Dr. Gregory Mazarin (Dr. Mazarin) , a physician duly licensed to practice medicine in the State of New York, who is board certified in emergency medicine. Defendants note that plaintiff's expert, unlike Dr. Mazarin, failed to affirm familiarity with the nursing standard of care. Defendants in fact highlight that Dr. Mazarin affirmed familiarity with an Emergency Department's nursing standard of care for both triage nurses like Nurse Maria (*see* NYSCEF Doc. No. 67, Dr. Mazarin's affirmation at 2, ¶3 and at 5, ¶16) and for nurses like Nurse Korman who handle patients admitted to the Emergency Department (*id.* at 2, ¶3 and at 6, first ¶18).

Nurse Korman and Nurse Maria stress that no factual basis supports their alleged departures and, in any event, such departures could not have caused any harm. They assert that material factual misstatements in the affirmation of plaintiff's expert

undermines its value and warrants disregarding it. For example, they note that plaintiff's expert claims plaintiff received IV morphine, a powerful narcotic *after* 6:00 PM, not far from discharge *with severe pain at 9 over 10*" (*see* NYSCEF Doc. No. 90, affirmation of plaintiff's expert at 5, ¶ 16 [emphasis added]). However, the nurses cite the hospital record which shows that the morphine was administered at "17:48, " i.e., 5:48 p.m. (*see* NYSCEF Doc. No. 82, exh P at 50, annexed to reply affirmation) and that "Pt [plaintiff] resting comfortably, now asymptomatic. Abdomen no longer tender" (*id*. at 16 "Progress Note Details"). Defendants further cite plaintiff's deposition acknowledgment regarding her pain at discharge: ". . . when you left, what was your pain like, what number?" Plaintiff responded "I didn't feel pain. I didn't feel pain" (*see* NYSCEF Doc. No. 76, plaintiff's dep tr at 42, line 24 through 43, line 3, exh L, annexed to reply affirmation).

Also, both nurses challenge the claim of plaintiff's expert that they "failed to take proper and complete vital signs and history" concerning plaintiff (*see* NYSCEF Doc. No. 90, affirmation of plaintiff's expert at 2, ¶ 4). They both regard that allegation as impermissibly vague and conclusory. Nurse Maria additionally challenges the accompanying claim of plaintiff's expert that she inaccurately noted both that plaintiff reported "no decreased eating/drinking" and that plaintiff's symptoms had begun the day she went to the hospital rather than at least the day before (*id*. at 4, ¶ 14). Nurse Maria asserts that the chart entries as to plaintiff's eating or appetite and the onset of her symptoms are both accurate and/or consistent with deposition testimony. She initially mentions that the hospital record notation of "no decreased eating or drinking" is not attributed to her in the hospital records. More importantly, she considers the notation correct given the absence of contradictory evidence and plaintiff's deposition testimony

that (a) she had eaten breakfast before coming to the hospital and that (b) the reduced eating or drinking concerned the period after she left the Emergency Department (*see* NYSCEF Doc. No. 76, plaintiff's dep tr at 48, line 10 through 49, line 15, and at 45, lines 5 through 11, exh L, annexed to reply affirmation).

Nurse Maria separately cites the hospital records as showing that, contrary to the claim of plaintiff's expert, she made a chart entry that plaintiff's symptoms began the day before plaintiff went to the hospital. Her triage note in this regard in the hospital record specifically reads "Chief Complaint Quote: abd [abdominal] pain with nausea and vomiting *since yesterday"* (*see* NYSCEF Doc. No. 82, exh P at 1, annexed to reply affirmation [emphasis added]). Likewise, Nurse Maria cites her own consistent deposition testimony where she was asked: " . . . And does it say when the pain started? Is there any indication, from what you took, that indicates when this particular pain started?" She responded: "I documented 'since yesterday,' so apparently the day before it started" (NYSCEF Doc. No. 81, exh O at 36, lines 16-21, annexed to reply affirmation). Dr. Mazarin, upon having reviewed the records herein, opines that "the information recorded by Nurse Maria was consistent with the standard of care for triage assessment" (*see* NYSCEF Doc. No. 67, at 5, ¶ 16).

Defendants submit that plaintiff improperly raises claims about her vital signs and following vital signs protocols for the first time in opposing defendants' motion and that those claims are unsupported. They argue in this latter regard that plaintiff has never seen or requested such protocols, overlooks that Nurse Korman was not assigned to plaintiff during her entire time at the hospital (*see id*. at 6, first ¶ 18 ["Nurse Korman was not present in the Hospital when Ms. Paez De Duran was discharged"]) and that plaintiff's symptoms never included fever. Hence, they contend that plaintiff's expert speculates about whether her vital signs changed, whether that information would have affected the medical outcome and whether the nurses' alleged departures altered the outcome or caused injury herein.

More broadly, defendant nurses emphasize that making a diagnosis falls outside the scope of a nurse's practice. Dr. Mazarin supports this view and elaborates (*id*. at 6 ¶ 17) that:

> "Nurse Maria was not responsible for: diagnosing or treating appendicitis; performing a physical exam; performing a rectal/pelvic examination; ordering or performing any diagnostic tests, including CT scans, ultrasounds, or other imaging studies; ordering or performing laboratory tests, including a complete blood count; interpreting any diagnostic tests or lab results; ruling out appendicitis or a ruptured appendix; or referring Ms. Paez De Duran to any medical professional other than the ED attending. Any claim to the contrary represents a profound ignorance of the practice of medicine and nursing in an ED."

Dr. Mazarin makes the same statement regarding Nurse Korman (*see id*. at second ¶ 18) and

also explains (*id*. at first ¶ 18) that:

> "As a nurse in the ED, the standard of care required Nurse Korman to observe and document changes in the patient's

condition, notify a physician of changes in the condition, and to carry out physician orders. The records establish that Nurse Korman appropriately documented Ms. Paez De Duran's condition during his shift and that the information was made available to attending physicians in the ED."

The nurses therefore conclude that plaintiff can neither pursue a malpractice claim against them for not having diagnosed plaintiff with appendicitis nor claim that they prevented the appropriate diagnosis from being made. Dr. Mazarin concurs: "Clearly, the claims regarding the care and treatment rendered to Ms. Paez by Nurse Maria and Nurse Korman have no basis" (*id*. at ¶ 19). They thus urge granting summary judgment dismissing the complaint as against them.

Dr. Bruce likewise asserts that plaintiff's expert simply makes speculative and conclusory allegations that fail to negate summary judgment. More specifically, she mentions that plaintiff was unable to document the location of her pain when shown a diagram of the abdomen (*see* NYSCEF Doc. 76, plaintiff's deposition tr at 28, line 18 through 30, line 3; and NYSCEF Doc. 93, exhibit accompanying reply affirmation of plaintiff's counsel). Dr. Bruce also cites the acknowledgment of plaintiff's expert that appendicitis involves abdominal pain radiating into the right lower quadrant, but then distinguishes that plaintiff's pain was bilateral in the upper abdomen *without radiation* as determined by palpating plaintiff's abdomen. She repeated this palpating, which plaintiff apparently does not remember, before discharging her. The palpating again, as earlier, showed no tenderness in the right lower quadrant, and hence, no radiation (*see* NYSCEF Doc. 80, Dr. Bruce's deposition tr at 72, line 25 through 74, line 24).

Dr. Bruce regards plaintiff's deposition testimony as coinciding with the information in the hospital record and references plaintiff's acknowledgment that she both knew to return to the hospital if her pain returned or worsened but instead remained at home and did not return until two days later when her pain did return (*see* NYSCEF Doc. 76, plaintiff's deposition tr at 44, line 15 through 24; at 49, line 21 through 50, line

6, at 51, line 22 through 52, line 3). Consequently, Dr. Bruce asserts that she complied with accepted standards of medical practice in examining, diagnosing and treating plaintiff and that any claimed injury cannot be proximately attributed to a departure in care.

Plaintiff, in opposition, relies upon her board-certified emergency medicine expert, a physician duly licensed to practice medicine in the State of New York.[2] Plaintiff's expert, upon also having reviewed the materials herein, opines in the affirmation presented herein that Dr. Bruce:

> "failed to diagnose appendicitis, failed to take a complete and appropriate medical history and failed to appreciate its clinical significance . . . failed to perform a complete and appropriate exam and appreciate its clinical significance, failed to obtain appropriate ancillary testing, namely lab and imaging, and failed to appreciate their clinical significance and failed to timely initiate appropriate management, and diagnostics which in this case would have been to timely have a surgeon see her and get a CAT scan of the abdomen with contrast to rule out appendicitis—highly accurate in such circumstances" (NYSCEF Doc. No. 90 at 2, ¶¶ 5 and 6).

Appendicitis, the expert explains, can occur anywhere in the lower or upper abdomen, the lower back or rear end, and a practitioner thus must consider its possibility even when the pain has not traveled or is not found in the lower right quadrant, especially as here, when a patient's symptoms include nausea and vomiting. Plaintiff's expert faults the failure: to determine if the nausea and vomiting occurred after the onset of the abdominal pain as such sequence more likely characterizes appendicitis rather than if

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[2] Plaintiff has redacted the name and signature of her expert from the copy of the affirmation (NYSCEF Doc. No. 90, attached to her opposition papers, NYSCEF Doc. Nos. 88-91), but has submitted an unredacted copy of the affirmation for in camera inspection by the court under governing case law (*see Stucchio,* 155 AD3d at 667-668 [2d Dept 2017]; *Turi v Birk,* 118 AD3d 979, 980 [2d Dept 2014] and NYSCEF Doc. No. 89, at 3, ¶ 8 + NYSCEF Doc. No. 91).

those symptoms preceded the pain; to determine if the pain worsened when plaintiff walked, another appendicitis indicator; to have a chart notation indicating whether any bowel sound change occurred, as comparatively reduced bowel sounds on the right side also accompany appendicitis; and to have a rectal examination performed by Dr. Bruce to assist in diagnosing or excluding appendicitis. Additionally, the expert opines that Dr. Bruce's reference to plaintiff's effort to still try to eat as a basis for ruling out appendicitis underappreciated that plaintiff also noted that she "didn't eat well the night before," a condition akin to loss of appetite, another appendicitis symptom.

Most importantly, the expert faults Dr. Bruce for only ordering an ultrasound of the upper quadrants of the abdomen and not including the appendix. The expert reasons that an abdominal contrast CAT scan was far more indicated to visualize the appendix and surrounding area considering that lab tests showed both an elevated white cell count and a "left shift," i.e. an increased neutrophil granulocytes population (81.9%), a finding consistent with a possible bacterial infection or appendicitis. Plaintiff's expert faults Dr. Bruce for not appreciating these results, as she testified that she had ruled out appendicitis before receiving these results and did not reconsider after getting them.

Discharging plaintiff at 19:44 (i.e. 7:44 p.m.) about 1 to 1.5 hours after she received morphine at 18:13 (6:44 p.m.) also is a basis for faulting Dr. Bruce, the expert opines, given the appendicitis indicators and that the proximate receipt of the morphine could account for plaintiff's claim of being pain free then. The discharge instructions' failure to require a 12 to 24 hour reevaluation of plaintiff by a primary physician or the emergency department to ensure that symptoms had resolved or to provide any time frame for conducting a follow up represents another departure in the expert's opinion.

Plaintiff's expert concluded that the departures were independent substantial factors causing the deterioration of plaintiff's condition and her return to the emergency department on July 3, 2014 with continuous pain and the ensuing discovery, by an abdominal CAT scan, of her perforated appendix with peritonitis and abscess. These departures, plaintiff's expert opines, also led to subsequent serious complications and a more involved procedure than would have been needed with an initial appendicitis diagnosis.

Plaintiff's expert, as previously reviewed, also faulted both defendant nurses in several respects including failing to take vital signs every four hours and before discharge as the hospital chart shows plaintiff's hospital stay having lasted six hours and no vital signs having been taken post-triage. In addition, plaintiff's expert faults only orally checking plaintiffs temperature, as a rectally-taken temperature may have been different.

Plaintiff, as earlier noted, does not oppose granting summary judgment to North Shore-LIJ, as she acknowledges it has rendered no medical care to her (*see* n 1 *supra*) Therefore, summary judgment dismissing the complaint as to North Shore LIJ is warranted (*see* CPLR 3212 [b]).

The remaining defendants have established their prima facie entitlement to summary judgment by their initial motion papers, the exhibits attached thereto, and the submission of the opinion of its board-certified emergency medicine expert, Dr. Marazrin. Thus, the burden shifted to plaintiff to raise a triable issue of fact.

In opposition, plaintiff has submitted the redacted affirmation of her emergency medicine expert, who is duly licensed to practice medicine in the State of New York and is also board-certified in emergency medicine. Plaintiff's expert has raised several triable

factual issues as to Dr. Bruce's care and treatment of plaintiff including whether before ruling out appendicitis she should have more thoroughly evaluated when nausea and vomiting started in relation to the pain and the pain upon walking; whether plaintiff's complaint about not eating well the night before going to the hospital should have been given more weight; whether sand especially whether Dr. Bruce should have considered or reconsidered ordering an abdominal contrast CAT scan to visualize the appendix and surrounding area given that lab tests showed both an elevated white cell count and an increased neutrophil granulocytes population (81.9%), a finding consistent with a possible bacterial infection or appendicitis. In addition, plaintiff's expert raises a triable factual issue whether the discharge should have occurred since the administered morphine, only an hour to an hour and a half before discharge, may masked plaintiff's pain and underlying condition. The expert further raises the related triable factual issue whether the discharge instructions should have included some specific time frame for requiring plaintiff to go to her primary care physician or the hospital's emergency department for reevaluation as the cause for the plaintiff's pain remained unresolved.

"'Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions'" (*Elmes v Yelon*, 140 AD3d 1009, 1011 [2d Dept 2016], quoting *Feinberg v Feit*, 23 AD3d 517, 519 [2d Dept 2005]; *see also Nisanov v Khulpateea*, 137 AD3d 1091, 1094 [2d Dept 2016]; *Guctas*, 132 AD3d at 633; *Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 1089 [2d Dept 2014]). Here, the opinion of plaintiff's expert opinions conflicts with the opinion of defendants' expert. "Such credibility issues can only be resolved by a jury" (*Feinberg*, 23 AD3d at 519). Thus summary judgment dismissing plaintiff's medical malpractice claim as against Dr.

Bruce must be denied

However, plaintiff's expert fails to raise a triable factual issue as to defendant nurses. Both nurses cite hospital records in several instances supporting their refutation of the claims by plaintiff's expert that they inaccurately recorded information on plaintiff's chart. In addition, defendant nurses correctly assert that the allegation by plaintiff's expert that they failed to take proper and complete vital signs and history was not alleged anywhere in plaintiff's bill of particulars. As such, this is a new theory of liability which was not readily discernable from the allegations in plaintiff's bill of particulars. It, therefore, cannot be properly considered by the court (*see Iodice v Giordano*, 170 AD3d 971, 972 [2d Dept 2019]; *Fox v Patriot* Saloon, 166 AD3d 950, 951 [2d Dept 2018] ["plaintiff's contention . . . was not set forth in his complaint or bill of particulars and, therefore, was improperly raised for the first time in opposition to the defendant's motion"]; *Mezger v Wyndham Homes, Inc.*, 81 AD3d 795, 796 [2011]); *Campos v Beth Israel Med. Ctr.*, 80 AD3d 642, 642 [2d Dept 2011]; *Abalola v Flower Hosp.*, 44 AD3d 522, 522 [1st Dept 2007]).

Plaintiff's expert also errs in attempting to require defendant nurses to make a physician's diagnosis. Nurses are not qualified to render an opinion with respect to the care rendered by other medical professionals (*see Boltyansky v New York Community Hosp.*, 175 AD3d 1478, 1479 [2d Dept 2019] ["The nurse was not a medical doctor and lacked the qualifications to render a medical opinion . . ."]; *Novick v South Nassau Communities Hosp.*, 136 AD3d 999, 1001 [2d Dept 2016]; *Makinen*, 106 AD3d at 784-785; *Mills v Moriarty*, 302 AD2d 436, 436-437 [2d Dept 2003], *lv denied* 100 NY2d 502 [2003]).

Hence, the portion of the affirmation of plaintiff's expert concerning defendant nurses is speculative, conclusory or without basis in the record (*see Spiegel v Beth Israel Med. Ctr.-Kings Highway Div.*, 149 AD3d 1127, 1129 [2d Dept 2017]; *Shashi v South Nassau Communities Hosp.*, 104 AD3d 838, 839 [2d Dept 2013]; *Simmons v Brooklyn Hosp. Ctr.*, 74 AD3d 1174, 1178 [2d Dept 2010]). The Court of Appeals has held in this regard that "Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Accordingly, it is

ORDERED that defendants' summary judgment motion, mot. seq. six, is granted as to North Shore-LIJ and defendant nurses Maria and Korman and is denied as to Forest Hills Hospital and Dr. Bruce.

This constitutes the decision and order of the court.

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