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SHORT FORM ORDER

INDEX No. 08-19926
CAL. No. 18-00612MM

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

PRESENT:

Hon. DAVID T. REILLY
Justice Supreme Court

MOTION DATE 8-29-18 (007 & 008)
MOTION DATE 7-24-19 (009)
ADJ. DATE 7-24-19 (007 & 008)
Mot. Seq. # 007 - MG
008 - MG
009 - MD

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KENNETH SCHOOK and MARYELLEN SCHOOK,

Plaintiffs,

- against -

SEBASTIAN LATTUGA, M.D., ORLIN & COHEN ORTHOPEDIC ASSOCIATES, LLP, XENOPHON XENOPHONTOS, M.D., MICHAEL W. DUFFE, P.A., NORTH SHORE LONG ISLAND JEWISH HEALTH SYSTEM, INC., and FRANKLIN HOSPITAL MEDICAL CENTER,

Defendants.

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Upon the following papers read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendant Duffe, dated July 26, 2018, by defendant Lattuga, dated July 27, 2018, and by defendant Duffe, dated ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers ___; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the unopposed motions (#007 and #009) by defendant Michael Duffe, P.A., and the unopposed motion (#008) by defendant Dr. Sebastian Lattuga, hereby are consolidated for the purposes of this determination; and it is

ORDERED that the unopposed motion by defendant Michael Duffe, P.A. seeking summary judgment dismissing the complaint is granted;

ORDERED that the unopposed motion by defendant Dr. Sebastian Lattuga seeking summary judgment dismissing the complaint is granted; and it is further

ORDERED that the unopposed motion by defendant Michael Duffe, P.A. for, *inter alia*, an Order dismissing the complaint against him and amending the caption to remove his name is denied, as moot.

This is an action to recover damages for medical malpractice and lack of informed consent against defendants Dr. Sebastian Lattuga, Orlin & Cohen Orthopedic Associates, LLP, Dr. Xenophon Xenophontos, P.A. Michael Duffe, North Shore-Long Island Jewish health System, Inc, and Franklin Hospital Medical Center. By his complaint, amplified by his bill of particulars, plaintiff Kenneth Schook alleges that defendants improperly performed an anterior laminectomy and spinal fusion procedure, lacerating the left common iliac vein during the surgery on December 28, 2005, and that they negligently failed to provide him with follow-up care from the period of December 28, 2005 through July 1, 2006. In addition, plaintiff's wife, Maryellen Schook, instituted a derivative action for loss of services. The Court's records indicate that a stipulation dated January 26, 2016, discontinuing the action with prejudice against defendants Orlin & Cohen Orthopedic Associates, LLP, North Shore-Long Island Jewish Health System, Inc., and Franklin Hospital Medical Center was filed with the Court on April 13, 2016.

The following facts are not in dispute: On August 13, 2003, plaintiff, a sanitation worker, while at work, injured his lower back picking up a garbage can and was treated by Dr. Ahmed Elfiky, a neurologist. He also received chiropractic care and physical therapy to help alleviate his pain in his lower back. On August 1, 2005, based upon Dr. Elfiky's referral, plaintiff presented to Dr. Sebastian Lattuga, an orthopedic surgeon, at New York Spine Specialists, LLC with complaints of lower back pain and numbness of the leg. Physician Assistant (P.A.) Duffe is an employee at Dr. Lattuga's practice, whose duties include interviewing patients, documenting patients' medical histories, performing physical examinations, and noting any complaints made by patients. During plaintiff's visit, his pain level was documented at level 8 out of 10 with 10 being the most severe, with lower extremity radiculopathy. Radiographs taken of plaintiff's spine revealed no acute fracture of the lumbar spine, but a magnetic resonance image (MRI) examination revealed that he had herniated discs at levels L4 through S1 with collapse of the disc space. As result, Dr. Lattuga recommended that plaintiff undergo fusion and decompression of the lumbar spine. Dr. Lattuga also informed plaintiff of the risks and benefits of the surgery, as well as informed plaintiff of the alternatives of surgical versus non-surgical procedures.

On November 28, 2005, plaintiff returned to Dr. Lattuga's office for a follow-up. Along with Dr. Lattuga, P.A. Duffe reviewed with plaintiff a discogram, which was performed on November 1, 2005, a computer tomography (CT) scan and an MRI of plaintiff's lumbar spine. Dr. Lattuga determined that plaintiff would benefit from spinal fusion surgery and decompression of the lumbar spine with circumferential arthrodesis. Dr. Lattuga informed plaintiff that the procedure would be performed anteriorly in the hospital under general anesthesia, and he once again discussed with plaintiff the risks

and benefits of the surgical procedure. Dr. Lattuga further informed plaintiff that Dr. Xenophon Xenophontos, a vascular surgeon, would perform part of the surgery and that P.A. Duffe would assist Dr. Xenophontos. Thereafter, Dr. Lattuga gave plaintiff a consent form, which was signed by Dr. Lattuga and plaintiff prior to the surgery, and on December 28, 2005, plaintiff signed a general consent form for treatment.

Prior to the surgery, plaintiff underwent preoperative surgical clearance, and on December 28, 2005, plaintiff was admitted into Franklin Hospital Medical Center for spinal surgery. The surgical plan was for Dr. Xenophontos to perform the approach, Dr. Lattuga to assist with the approach and to perform the actual surgery, and P.A. Duffe to assist under the direction and supervision of the physicians. After plaintiff was anesthetized, an incision was made in the left side of the abdomen, Dr. Xenophontos identified and mobilized the left iliac vessels and ureter, the L4-L5 lumbar disc space was exposed anteriorly and confirmed with a lateral lumbar X-ray, and Dr. Xenophontos inserted the needle. During the retraction of the left iliac vein, a longitudinal tear was observed, causing "brisk bleeding" in the area, and resulted in plaintiff becoming transiently hypotensive, but he was treated successfully with intravenous (IV) fluids and cell saver blood. Dr. Xenophontos repaired the iliac artery, and plaintiff was resuscitated with fluids and blood products. The wound was packed and the bleeding was controlled using sponge sticks and vascular clamps, and within minutes plaintiff's blood pressure normalized. Due to the significant blood loss, the spinal fusion procedure was aborted, and plaintiff was transferred to the recovery room in stable condition, but was later transferred to the Intensive Care Unit (ICU), where his vital signs were stable and his neurologic status was at baseline. On December 29, 2005, he was transferred to the surgical floor. Plaintiff's postoperative care was followed by Dr. Lattuga and P.A. Duffe until he was discharged on January 3, 2006.

Thereafter, from January 13, 2006 until September 24, 2007, plaintiff was seen by Dr. Lattuga and P.A. Duffe at Dr. Lattuga's office. Plaintiff continued to have severe lower back pain, and on March 24, 2006, the plan was developed for plaintiff to undergo a posterior lumbar interbody fusion and decompression once plaintiff lost weight, sometime at the end of May or the beginning of June. Plaintiff continued to undergo physical therapy and take his pain medication as needed, as well as to refrain from lifting, carrying, and bending. On May 3, 2006, plaintiff was admitted into Franklin Hospital where he underwent a posterolateral lumbar fusion and a posterior lumbar interbody fusion surgery performed by Dr. Lattuga with P.A. Duffe assisting. P.A. Duffe's role was limited to suctioning fluids from the surgical field and assisting with suturing at Dr. Lattuga's direction. Following the surgery, plaintiff continued to report pain in his lumber spine, worsening with all levels of activity, tingling and numbness in the leg. A physical examination of plaintiff and radiographs of his lumbar spine revealed satisfactory placement of the implants, and he was told to continue with physical therapy and his medications as needed, and to refrain from any heavy lifting, carrying and bending, and to followup in several weeks. On May 4, 2007, plaintiff was referred for a lumbar spine MRI examination, which revealed a cystic lesion on the left side of the pelvis, and an electromyography and nerve conduction velocity (EMG/NCV) test of the lower extremities. Dr. Lattuga referred plaintiff to Dr. Xenophontos for treatment of the cystic lesion, who recommended that the cyst be drained under CT guidance. Plaintiff continued to have back pain consistent with chronic pain syndrome and mild numbness.

Physician Assistant Duffe now moves for summary judgment on the basis that he did not deviate from acceptable medical practice while assisting during the performance of an anterior laminectomy and spinal fusion procedure on plaintiff's lumbar spine on December 28, 2005, and that his treatment of plaintiff was not a proximate cause of plaintiff's alleged injuries. In support of the motion, P.A. Duffe submits copies of the pleadings, copies of the parties' deposition transcripts, copies of plaintiff's medical records, and the sworn medical report of his expert, Dr. Andrew Hecht. Dr. Lattuga also moves for summary judgment on the grounds that he did not deviate from acceptable medical practice while performing an anterior laminectomy and spinal fusion procedure on plaintiff's lumbar spine on December 28, 2005, and that his treatment was not a proximate cause of the injuries allegedly sustained by plaintiff. In support of the motion, Dr. Lattuga submits, among other things, the sworn medical report of his expert, Dr. Larry Scher.

In a medical malpractice action, the requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such deviation was a proximate cause of injury or damages (*see* ***Ramsay v Good Samaritan Hosp.***, 24 AD3d 645, 808 NYS2d 374 [2d Dept 2005]; ***DiMitri v Monsouri***, 302 AD2d 420, 754 NYS2d 674 [2d Dept 2003]). On a motion for summary judgment in a medical malpractice action, a medical professional must establish through medical records and competent expert affidavits that he or she did not deviate or depart from accepted medical practice in his or her treatment of the patient and that he or she was not the proximate cause of the plaintiff's injuries (*see* ***Dray Castro v Staten Is. Univ. Hosp.***, 160 AD3d614, 75 NYS2d 59 [2d Dept 2018]; ***New York City Health & Hosps. Corp.***, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; ***Deutsch v Chaglassian***, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; ***Plato v Guneratne***, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]). This burden is equally applicable to physician assistants subject to liability in a medical malpractice action (*see* ***Bleiler v Bodnar***, 65 NY2d 65, 489 NYS2d 885 [1985]; ***Wahler v Lockport Physical Therapy***, 275 AD2d 906, 713 NYS2d 405 [4th Dept 2000], *lv denied* 96 NY2d 701, 722 NYS2d 793 [2001]).

Where the defendant has met his or her burden, the plaintiff, in opposition, must demonstrate the existence of a triable issue of fact through the submission of evidentiary acts or materials, but only as to the elements on which the defendant met the prima facie burden (*see* ***Schmitt v Medford Ctr.***, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]; ***Gillespie v New York Hosp. Queens***, 96 AD3d 901, 947 NYS2d 148 [2d Dept 2012]; ***Savage v Quinn***, 91 AD3d 748, 937 NYS2d 265 [2d Dept 2012]; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a medical provider's summary judgment motion (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Garbowski v Hudson Val. Hosp. Ctr.***, 85 AD3d 724, 924 NYS2d [2d Dept 2011]). Further, an expert witness must possess the requisite skill, training, knowledge, or experience to ensure that an opinion rendered is reliable (*see e.g.* ***Brady v Westchester County Healthcare Corp.***, 78 AD3d 1097, 912 NYS2d 104 [2d Dept 2010]; ***Geffner v North Shore Univ. Hosp.***, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]; ***Mustello v Berg***, 44 AD3d 1018, 845 NYS2d 86 [2d Dept 2007]).

Additionally, to succeed on a cause of action based on lack of informed consent, a plaintiff must establish that the doctor failed to disclose the reasonably foreseeable risks, benefits, and alternatives to

the surgery that a doctor in a similar circumstance would have disclosed; that a reasonably prudent person in the plaintiff's position would not have undergone the surgery if he or she had been fully informed of the reasonable foreseeable risks, benefits, and alternatives to the surgery; and that the lack of informed consent is a proximate cause of the injury sustained (*see* Public Health Law § 2805-d; ***James v Greenberg***, 57 AD3d 849, 870 NYS2d 100 [2d Dept 2008]; ***Innucci v Bauersachs***, 201 AD2d 460, 607 NYS2d 130 [2d Dept 1994]).

Here, P.A. Duffe established his prima facie entitlement to judgment as a matter law by proffering, among other things, the detailed affirmation of his expert physician, Dr. Andrew Hecht, board certified in orthopedic surgery and fully familiar with the standard of care pertaining to physician assistants, who opined that P.A. Duffe did not deviate from accepted standards of medical care while treating plaintiff from December 28, 2005 through July 2006, and that his treatment was not a proximate cause of plaintiff's injuries (*see* ***Macancela v Wycokoff Hgts. Med. Ctr.***, 176 AD3d 795, 109 NYS3d 411 [2d dept 2019]; ***Pagano v Cohen***, 164 AD3d 516, 82 NYS3d 492 [2d Dept 2018]; ***Ortiz v Wycokoff Hgts. Med. Ctr***, 147 AD3d 1093, 53 NYS3d 189 [2d Dept 2017]; ***Vacarro v St. Vincent Med. Ctr.***, 71 AD3d 1000, 898 NYS2d 163 [2d Dept *cf.* ***Daniele v Pain Mgt. Ctr. of Long Is.***, 163 AD3d 672, 91 NYS3d 496 [2d Dept 2019]).

Dr. Hecht states, within a reasonable degree of medical certainty, that all of the care and treatment P.A. Duffe rendered to plaintiff was within accepted standards of good medical care, and that his care was limited to duties that were assigned to him by Dr. Lattuga, who is a board certified orthopedic surgeon and who is fully qualified, with years of experience, to perform an anterior laminectomy and spinal fusion procedure, as well as to manage plaintiff's care. Dr. Hecht states that as a physician assistant, P.A. Duffe only was allowed to perform medical services within the scope of physician assistant practice and under the continuous supervision of Dr. Lattuga. Dr. Hecht further states that P.A. Duffe appropriately performed all duties and responsibilities assigned to him by Dr. Lattuga, and that the assigned duties and responsibilities were not contraindicated by normal practice. Additionally, Dr. Hecht states that P.A. Duffe did not have a duty to second guess any of the testing or preoperative tests that Dr. Lattuga determined plaintiff needed to undergo prior to the December 2005 surgery. He also states that P.A. Duffe did not perform any part of the procedure that plaintiff underwent in December 2005, nor was he involved in the repair of the tear of plaintiff's left iliac vein. He states that P.A. Duffe's role as an assistant in the surgery was limited to holding a retractor, which was placed an inch or two above the left iliac vein by Dr. Xenophontos, and suctioning the surgical area, that his involvement in the surgery was continuously supervised by either Dr. Lattuga or Dr. Xenophontos, and that he performed such duties appropriately and within good acceptable standards of medical care. Moreover, Dr. Hecht explains that the holding of the retractor and suctioning the surgical area did not cause the tear that occurred in the left common iliac vein. Dr. Hecht states that, in his opinion, within a reasonable degree of medical certainty, P.A. Duffe's pre and post-operative care of plaintiff was within good and acceptable standards of medical care. He states that P.A. Duffe only was permitted to assist Dr. Lattuga in interviewing patients, taking patients' medical histories, conducting physical examinations, prescribing medications, and ordering diagnostic testing, and that all of the aforementioned tasks are within the purview of a physician assistant's scope of practice. Dr. Hecht further states that P.A. Duffe appropriately documented and conveyed all findings to Dr. Lattuga as is

evinced by the fact that all notes contained in Dr. Lattuga's charts pertaining to vitals in which P.A. Duffe was present also are initialed by Dr. Lattuga.

Lastly, Dr, Hecht states that it was not within the scope of P.A. Duffe's licensure as a physician assistant to independently recommend treatment, and that none of Dr. Lattuga's treatment recommendations were contraindicated by the standard of care such that P.A. Duffe had a duty to second guess them. "When supervised medical personnel are not exercising their independent medical judgment, they cannot be held liable for medical malpractice unless the directions from the supervising superior or doctor so greatly deviates from normal medical practice that they should be held liable for failing to intervene" (***Bellafiore v Ricotta***, 83 AD3d 632, 633, 920 NYS2d 373 [2d Dept 2011]; *see* ***Crawford v Sorkin***, 41 AD3d 278, 839 NYS2d 40 [1st Dept 2007]; ***Soto v Andaz***, 8 AD3d 470, 779 NYS2d 104 [2d Dept 2004]; *see also* Education Law §6542 [1][3]; 10 NYCRR § 94.2 [a][f]). P.A. Duffe proffered evidence showing that he did not commit any independent acts of negligence, that he ordered diagnostic tests and implemented the treatment plans created by Dr. Lattuga, and that such plans were not "so contraindicated by normal practice that he should have inquired into [the] plans' correctness" (***Costello v Kirmani***, 54 AD3d 656, 657, 863 NYS2d 262 [2d Dept 2008]; *see* ***Arocho v D. Kruger, P.A.***, 110 AD3d 749, 973 NYS2d 252[2d Dept 2013]; ***Motto v Beirouti***, 90 AD3d 723, 935 NYS2d 307 [2d Dept 2011]; ***Vacarro v St. Vincent Med. Ctr.***, 71 AD3d 1000, 898 NYS2d 163 [2d Dept 2010]; *see also* 10 NYCRR § 94.2 [e]; *cf.* ***Zapata v Buitriago***, 107 AD3d 977, 969 NYS2d 79 [2d Dept 2013]; ***Shajan v South Nassau Communities Hosp.***, 99 AD3d 786, 952 NYS2d 448 [2d Dept 2012]).

P.A. Duffe also has made a prima facie showing that he did not have a duty to obtain informed consent from plaintiff for the performance of the procedure on December 28, 2005 (*see* ***Cerny v Williams***, 32 AD3d 881, 822 NYS2d 548 [2d Dept 2006]; ***Domaradzki v Glen Cover OB/GYN Assocs.***, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]; ***Spinosa v Weinstein***, 168 AD2d 32, 571 NYS2d 747 [2d Dept 1991]). Dr. Hecht states that it is his opinion to a reasonable degree of medical certainty that P.A. Duffe did not have an independent duty to obtain informed consent for the procedure. Dr. Hecht further explains that it is the duty of the surgeon performing the procedure to obtain informed consent from the patient for the procedure, and that the sufficiency of such consent is solely the nondelegable duty of the operating physician, and not the responsibility of the physician assistant. Thus, P.A. Duffe cannot be held liable for lack of informed consent for a procedure he neither ordered nor performed. Plaintiff has not opposed P.A. Duffe's motion. Accordingly, P.A. Duffe's motion to dismiss the complaint against him is granted.

Likewise, Dr Lattuga has established that he did not deviate or depart from good and acceptable medical standards in his performance of plaintiff's anterior laminectomy and spinal fusion procedure on December 28, 2005, and throughout his continued treatment of plaintiff until July 1, 2006, and that his treatment of plaintiff was not a proximate cause of the injuries plaintiff allegedly sustained (*see* ***Derrick v North Star Orthopedics, PLLC***, 121 AD3d 741, 994 NYS2d 159 [2d Dept 2014]; ***Muniz v Mount Sinai Hosp. of Queens***, 91 AD3d 612 [2d Dept 2012]; ***Ellis v Eng***, 70 AD3d 887, 895 NYS2d 462 [2d Dept 2010]; ***Adjetey v New York City Health & Hosps. Corp.***, 63 AD3d 865, 881 NYS2d 472 [2d Dept 2009]). Dr. Lattuga has submitted the sworn affirmation of his expert, Dr. Larry Scher, a board certified vascular surgeon, who states that in his opinion, within a reasonable degree of medical certainty, Dr. Lattuga, at all times, acted within the appropriate standard of care in providing care and treatment to

plaintiff, and that no act or omission on Dr. Lattuga's behalf contributed or proximately caused plaintiff's injuries.

Dr. Scher states that Dr. Lattuga acted appropriately in recommending the December 28, 2005 surgery after diagnosing him with lumbar sprain, lumbar radiculopathy and chronic low back pain, as well as reviewing the MRI of the lumbar spine showing herniated disc with collapse of the disc space at levels L4 through S1, and plaintiff's failure to receive relief from physical therapy. Dr. Scher states that Dr. Lattuga's recommendation of using an anterior approach for a lumbar discectomy with fusion was appropriate, and that Dr. Lattuga appropriately requested that Dr. Xenophontos, a vascular surgeon, perform the incision and dissection down to the lumbar discs to provide Dr. Lattuga with the exposure to the lumbar discs to be operated on. Dr. Scher further states that Dr. Lattuga did not assist in performing the incision or in mobilizing the vessels, and that at the moment it was observed by Dr. Xenophontos that plaintiff was bleeding, Dr. Lattuga's hands were not physically inside of plaintiff's body. Moreover, Dr. Scher explains that an injury to the left iliac vein is a commonly known and accepted complication of the procedure, and in plaintiff's case, it was appropriately managed, including the decision to stop the surgery after the vein was repaired, once the injury was identified by Dr. Xenophontos.

Dr. Lattuga has also made a prima facie showing of informed consent by submitting deposition testimony and medical records, including the signed written consent forms indicating an understanding of the associated risks of the surgery, establishing that he informed plaintiff of the risks associated with the procedure (*see* Public Health Law § 2805-d; ***Lynn G. v Hugo***, 96 NY2d 306, 728 NYS2d 121 [2001]; ***Gray v Williams***, 108 AD3d 1085, [4th Dept 2013]; ***DeCintio v Lawrence Hosp.***, 33 AD3d 329, 821 NYS2d 587 [1st Dept 2006]). Moreover, plaintiff has not presented any evidence to rebut Dr. Lattuga's showings or to establish that Dr. Lattuga was the proximate cause of his injuries (*see* ***Resnick v Linkow***, 28 AD3d 256, 813 NYS2d 396 [1st Dept 2006]). Accordingly, defendant Lattuga's motion for summary judgment is granted. The action is severed an continued only as against defendant Xenophon Xenophontos.

Having granted P.A. Duffe summary judgment dismissing the complaint, his motion seeking to so order the stipulation dismissing the complaint against him and amending the caption to remove his name is denied.

Dated: April 28, 2020

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**