SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

LYNN G. LONGBOAT,

Plaintiff,

-against-

MARK J. CORONEL, M.D., MARK J. CORONEL, M.D., P.C., EAST END GASTROENTEROLOGY AND HEPATOLOGY, PECONIC BAY MEDICAL CENTER a/k/a PECONIC BAY MEDICAL SERVICES, P.C. and NORTHWELL HEALTH, INC.,

Defendants.

Index No.
606979/17

Motion Seq:
001 MG; 002 MG
Decision/Order

The following numbered papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	26-36; 37-47
Answering Papers.....	
Reply.....	
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Defendants Mark J. Coronel, M.D., Mark J. Coronel, M.D., P.C. and East End Gastroenterology and Hepatology (the Coronel defendants) move this Court unopposed for an Order granting summary judgment in their favor and dismissing the complaint and any and all cross-claims asserted against them (Motion Sequence 001).

The remaining defendants, Peconic Bay Medical Center a/k/a Peconic Bay Medical Services, P.C. and Northwell Health, Inc. (Peconic/Northwell) also move this Court unopposed for an Order granting summary dismissal of the complaint, or in the alternative dismissing the complaint pursuant to 22 NYCRR 202.27 (b) based on plaintiff's failures to appear for scheduled conferences (Motion Sequence 002).

Background

Plaintiff commenced this action to recover damages for injuries she claims to have suffered as the result of Dr. Coronel's alleged negligence in performing a colonoscopy upon her, and for lack of informed consent as to the colonoscopy procedure. Plaintiff claims, *inter alia*, that she suffered a colon perforation and had to undergo subsequent surgeries as a result of the defendants' negligence. Plaintiff apparently sought treatment from the Coronel defendants due, in part, to the death of her forty-two (42)-year-old son from colon cancer.

When plaintiff commenced this medical malpractice action, she was represented by counsel who has since resigned from the practice of law due to disciplinary reasons. By Decision and Order dated October 16, 2018, the Court (Rebolini, J.) granted counsel's application to be relieved from representing plaintiff since he resigned from the New York State Bar on April 25, 2018. The Court stayed this action for sixty (60) days in order to afford plaintiff an opportunity to retain new counsel and directed that all counsel and *pro se* litigants to appear before the Court on December 19, 2018. Plaintiff, appearing *pro se* on December 19, 2018, requested additional time to find new counsel, and this matter was adjourned to February 6, 2019. On February 6, 2019, an attorney appeared and advised the Court that his firm was still reviewing the file in order to determine if his firm would decide to represent plaintiff; accordingly, this matter was adjourned to April 17, 2019. On April 17, 2019, the same firm advised the Court that it was still reviewing the file and requested an adjournment to July 10, 2019. The Court (Rebolini, J.) granted that further request for an adjournment. Finally, on July 10, 2019, prospective counsel advised the Court and the defendants that the firm would not be representing plaintiff in this action. This matter was then adjourned to September 18, 2019.

Neither the plaintiff nor any attorney appearing on her behalf were present before the Court on September 18, 2019, and the matter was adjourned to December 18, 2019, and thereafter to February 5, 2020. Despite having been advised of the various court dates, the plaintiff has failed to appear before the Court since the time that prospective counsel advised that it would not represent plaintiff.

On August 10, 2020, this Court held a telephone conference with counsel for the defendants and with the plaintiff on her cell phone. During the course of that telephone conference, the plaintiff expressed her desire to discontinue this action against all of the named defendants. Toward that end, the Court sent plaintiff a letter requesting that she indicate in writing her intent to discontinue this action, or her wish not to discontinue this action, and to return the letter to the Court by first class mail, fax, or email (NYSCEF Doc. # 49). The Court's letter provided plaintiff with the choices of discontinuing this action or not, and provided lines for her signature and the date next to each option. Plaintiff provided the Court with her current address and the Court sent plaintiff the letter on August 11, 2020, via first class mail. To date, November 25, 2020, plaintiff has failed to return the letter to this Court by any means specified therein, and the letter has not been returned to this Court by the United States Postal Service as undeliverable.

The Summary Judgment Motions

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v Pomeroy,*** 35 NY2d 361 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

"'The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice and evidence that such departure was a proximate cause of injury or damage'" (***Whitnum v Plastic and Reconstructive Surgery, P.C.***, 142 AD3d 495 [2d Dept 2016], *quoting* ***Geffner v. North Shore University Hospital***, 57 AD3d 839, 842 [2d Dept 2008]). A defendant "moving for summary judgment must establish, *prima facie*, either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries" (***Leigh v Kyle***, 143 AD3d 779 [2d Dept 2016], *quoting* ***Gillespie v New York Hospital Queens***, 96 AD3d 901, 902 [2d Dept 2012]). This showing must be established "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 plaintiff" (***Jones v. Ricciardelli***, 40 AD3d 935, 935 [2d Dept 2007]).

"'Once this showing has been made, a plaintiff, in opposition, need only demonstrate the existence of a triable issue of fact as to those elements on which the defendant met the *prima facie* burden'" (***Reid v Soults***, 138 AD3d 1087 [2d Dept 2016] *quoting* ***DeGiorgio v Racanelli***, 136 AD3d 734, 737 [2d Dept 2016] [internal quotation marks and citation omitted]). "'Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause'" (***Whitnum v Plastic and Reconstructive Surgery, P.C., supra*** *quoting* ***Novick v South Nassau Communities Hospital***, 136 AD3d 999, 1000 [2d Dept 2016]; ***Meade v Yland***, 140 AD3d 931 [2d Dept 2016]). "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion" (***Arocho v Kruger***, 110 AD3d 749 [2d Dept 2013]).

To establish a cause of action to recover damages for medical malpractice based on lack of informed consent, it must be established that the medical professional providing the treatment failed to disclose alternatives and failed to inform the patient of reasonably foreseeable risks associated with the treatment that a reasonable practitioner would have disclosed, that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and that the lack of informed consent is a proximate cause of the injury (***Public Health Law § 2805-d***; ***Schuck v. Stony Brook Surgical Associates***, 140 AD3d 725 [2d Dept 2016]; ***Zapata v. Buitriago***, 107 AD3d 977 [2d Dept 2013]; ***Johnson v. Staten Island Medical Group***, 82 AD3d 708 [2d Dept 2011]).

The Coronel Defendants' Motion

In support of their summary judgment motion, the Coronel defendants submit, *inter alia*, plaintiff's medical records, including the colonoscopy instructions, and the affidavit of their expert, Perry Craig Gould, M.D.

Dr. Gould states in his affidavit that he reviewed the pleadings in tis matter, Dr. Coronel's records pertaining to the plaintiff, as well as the hospital records. No depositions were ever held in this matter; therefore, there were no transcripts for Dr. Gould to review.

Dr. Gould states that he is a physician duly license to practice medicine in the State of New York and has been so licensed since 1978. He is also board certified in internal medicine and in gastroenterology. Dr. Gould states that he is presently a gastroenterologist in Uniondale, New York and is affiliated with NYU-Winthrop Hospital.

Based upon his review of the pertinent medical records and the pleadings, Dr. Gould opines that the colonoscopy was performed in a technically correct manner, and within the accepted standards of gastroenterology care as they existed in the year 2014. Dr. Gould further states that, with respect to plaintiff's cause of action sounding in informed consent, the medical records further reflect that the plaintiff was provided the proper information about the risks, benefits and alternatives to the procedure, that she was made aware of all of the risks of undergoing a colonoscopy, including possible bowel perforation, and that she had a complete discussion with Dr. Coronel during a pre-colonoscopy appointment.

The written colonoscopy instructions themselves list, among other risks, the possibility of colon perforation that may required hospitalization, surgery and may be serious enough to cause death. Dr. Coronel's notes also reflect that, on October 13, 2014, he explained all the risks and benefits of undergoing a screening colonoscopy and "she is agreeable." Dr. Coronel also noted that he thoroughly discussed the risks, benefits and alternatives to the procedure, and that the "patient has demonstrated to me verbal understanding of the risks, benefits and alternatives and wished to proceed with the procedure." Specifically as to the informed consent issue, Dr. Gould opines that, "[n]o reasonably prudent patient, whose son was diagnosed with colon cancer and passed away, would not have undergone the screening colonoscopy had she been fully informed of the risks of the procedure and the risks associated with [not] undergoing the procedure."

According to Dr. Gould's review of Dr. Coronel's operative report, the procedure was performed on October 15, 2014, without complications "or unplanned events." Dr. Gould further opines that he procedure was performed not only in accordance with accepted standards of medical care at the time, but was performed by Dr. Coronel with the reasonable degree of skill and knowledge required of the medical community at that time, that Dr. Coronel used reasonable care and diligence in his treatment of plaintiff, and that he used his best judgment in treating her. Further according to the hospital records (Peconic Bay), Dr. Gould states that the chart "bears out that he plaintiff met the specific criteria in order to be discharged from the hospital following the screening colonoscopy and that "at no time did Dr. Coronel or any defendant depart from accepted standards of medical care in their treatment of the patient during her hospitalization or in the decision to discharge [her] from Peconic Bay Medical Center on October 15, 2014." Dr.

Coronel was not involved in any further treatment of the plaintiff after the colonoscopy. The hospital records further demonstrate to Dr. Gould that the plaintiff's colon perforation was timely diagnosed at Peconic Bay on October 16, 2014, and plaintiff was thereafter treated by a non-party physician.

Based on the foregoing, the Court finds that all of the Coronel defendants have established their *prima facie* entitlement to summary judgment as a matter of law on the causes of action alleged in the complaint sounding in medical malpractice/negligence and lack of informed consent.

The Peconic/Northwell Defendants' Motion

In support of their motion, these defendants submit, *inter alia*, the pleadings and the same medical records pertaining to the plaintiff as those submitted by the Coronel defendants. Also, these moving defendants rely upon the affidavit of Dr. Gould submitted by the Coronel defendants.

Plaintiff's Bill of Particulars makes identical claims as to all defendants, without any independent claims of liability as against Peconic/Northwell. Moreover, there is no dispute that Dr. Coronel and the Coronel defendants were plaintiff's private treating physician.

A hospital is normally protected from tort liability when its staff follows the orders of the patient's private physician, unless the hospital staff knows that the doctor's orders are so clearly contraindicated that ordinary prudence requires inquiry into the propriety of those orders (***Hill v. St. Clare's Hospital***, 67 NY2d 72 [1986]; ***Cook v. Reisner***, 295 AD2d 466 [2d Dept 2002]).

Based upon the Court's review of Dr. Gould's affidavit, Dr. Coronel's care and treatment of the plaintiff was within good and accepted medical practice; accordingly, Peconic/Northwell cannot be held liable for following Dr. Coronel's orders/directives, as they were apparently not contraindicated. Moreover, Dr. Gould opined that Peconic timely diagnosed plaintiff's colon perforation, for which she was treated by a non-party physician. Thus, Peconic/Northwell cannot, in the first instance, be held vicariously liable for the alleged acts and/or omissions of the Coronel defendants when the Coronel defendants did not commit any negligence, and secondly, based upon Dr. Gould's affidavit, the Peconic/Northwell defendants have independently established, *prima facie*, that they did not depart from good and accepted medical practice.

Regarding the cause of action for informed consent, it is well settled that where a private physician attends his or her patient at a hospital, it is the private physician's responsibility to obtain informed consent from the patient prior to performing any procedure, not the duty of the hospital or its staff to do so (***Sela v. Katz***, 78 Ad3d 681 [2d Dept 2010]). Here, since Dr. Coronel was the plaintiff's private treating physician who only utilized Peconic/Northwell's medical facility, Peconic/Northwell have also established that they were under no duty to obtain informed consent from the plaintiff; thereby, Peconic/Northwell has demonstrated their *prima facie* entitlement to summary judgment dismissal of the cause of action sounding in lack of informed consent.

Having established their *prima facie* entitlement to summary judgment as a matter of law as to all claims for medical malpractice and lack of informed consent asserted against them based upon the submitted evidence, the Court need not reach Peconic/Northwell's alternate argument.

At this juncture, plaintiff must come forward with some evidence to rebut the *prima facie* showings made by the moving defendants. "[I]n order to defeat defendant[s'] motion for summary judgment some statement of expert medical opinion [is] required. . ." (***Alvarez v. Prospect Hospital***, 68 NY2d 320, 327 [1986]).

Since there is no opposition to the instant motion by the plaintiff, no triable issue of fact has been raised. By failing to controvert defendants' claims, the statements made in the affidavit of defendants' expert submitted in support of the respective summary judgment motions are deemed admitted by plaintiff (***Kuehne & Nagel, Inc. v. Baiden***, 36 NY2d 539 [1975]; ***McNamee v. City of New Rochelle***, 29 AD3d 544 [2d Dept 2006]; ***Bell Atlantic Yellow Pages Co., v. Padded Wagon, Inc.***, 292 AD2d 317 [1st Dept 2002]; ***Schneider Fuel Oil, Inc. v. DeGennaro***, 238 AD2d 495 [2dDept 1997]).

Defendants' respective summary judgment motions are each granted in their entirety (Motion Sequences 1 and 2), and the complaint and any and all cross-claims are hereby dismissed. The Suffolk County Clerk is directed to enter judgment in favor of all of the defendants.

The foregoing constitutes the Decision and Order of this Court.

Dated: November 25, 2020
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

AS TO MOTION SEQUENCE 001: FINAL DISPOSITION [X] NON-FINAL ISPOSITION [ ]

AS TO MOTION SEQUENCE 002: FINAL DISPOSITION [X] NON-FINAL DISPOSITION [ ]