

Gargano v Langman
2020 NY Slip Op 35258(U)
April 22, 2020
Supreme Court, Rockland County
Docket Number: Index No. 030988/2017
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
PHYLLIS GARGANO,

Plaintiff,

-against-

**DECISION AND ORDER
ON MOTION FOR
SUMMARY JUDGMENT**

Index No.: 030988/2017

Motions #6, 8, 9, 11 & 12

YARON LANGMAN, VIPUL SHAH, PETER KAYE, MICHAEL
SCHWARTZ, KENNETH ZWEIG, MICHELLE SLIFKIN,
JACOB OUSEPH, ANNA KOMOROWSKI, DIGESTIVE
DISEASE ASSOCIATES OF ROCKLAND, P.C., RAMAPO
VALLEY SURGICAL ASSOCIATIONS, P.C., ROCKLAND
THORACIC AND VASCULAR ASSOCIATES, P.C., ROCKLAND
INFECTIOUS DISEASE, LLP, HEMATOLOGY ONCOLOGY
ASSOCIATES OF ROCKLAND and GOOD SAMARITAN
HOSPITAL d/b/a BON SECOURS CHARITY HEALTH
SYSTEMS, INC.

Defendants.

-----X
Sherri L. Eisenpress, J.

The following papers, numbered 1 to 18, were reviewed in connection with the following motions seeking an Order, pursuant to Civil Practice Law and Rules § 3212, dismissing the instant medical malpractice action as against said defendants as follows: (i) Notice of Motion by Dr. Sifkin and Rockland Infectious Diseases (**Motion #6**); (ii) Notice of Motion by Dr. Yaron and Digestive Disease Associates (**Motion #8**); (iii) Notice of Motion by Dr. Shah and Digestive Disease Associates (**Motion #9**); (iv) Notice of Motion by Dr. Peter Kaye and Good Samaritan Hospital (**Motion #11**); and (v) Notice of Motion by Dr. Zweig and Dr. Ouseph (**Motion #12**):

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Motion #6	
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Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

The instant negligence/medical malpractice action was commenced on March 2, 2017, and alleges that during the course of treatment from June through September 2014, and as a result of undergoing a colonoscopy and an enema, Plaintiff, a 64 year old woman with multiple co-morbidities, developed a rectovaginal fistula which resulted in the need for a colostomy, and caused, aggravated, accelerated or enhanced renal injury/failure; rectal wound; rectal bleeding; sepsis; pneumothorax; urinary tract infection; tissue damage; intestinal damaged; altered mental state and pain and suffering. Issue was joined as to the

various Defendants; discovery took place and a Note of Issue and Certificate of Readiness was filed. The Court has before it multiple summary judgment motions timely filed by the various Defendants.

Factual Allegations

On June 30, 2014, after developing leg weakness at home, plaintiff was taken by ambulance to Good Samaritan Hospital ("GSH") and was admitted with a diagnosis of hyperkalemia, anemia, acute renal failure and congestive heart failure. On July 3, 2014, Defendant, Dr. Langman, performed a colonoscopy on Plaintiff, with normal results and no documented rectal issues, mass or inflammation, no abscess and no fistula. On July 6, 2014, the nurses noted that Mrs. Gargano had not had a bowel movement since the colonoscopy. Defendant Langman saw Plaintiff each day after the colonoscopy until July 8, 2014, at which time Digestive Disease Associates of Rockland "signed off," meaning that they were no longer providing medical care to plaintiff. On July 9, 2014, the Plaintiff was administered an enema.

On July 15, 2014, Nurse Baker noted that Plaintiff had not had a bowel movement for several days. On July 16, 2014, Nurse Baker again noted that Plaintiff had not had a bowel movement for six days and was requesting laxatives. The next day, July 17, 2014, Physician Assistant ("PA"), Julie Andrews, noted that Mrs. Gargano had not had a bowel movement in a full week and ordered an enema. A tap water enema was administered by a nurse who Plaintiff believed to be named "James." Plaintiff testified that the nurses were very rough with her during the enema and felt like "they just jammed it in there." She further testified that she heard a popping sound and complained of a sharp pain during the procedure. It does not appear from the records that a doctor was called after these complaints and no one evaluated Plaintiff's rectum at this time.

Plaintiff's son, Michael, testified that he informed the nursing staff at GSH about his mother's rectal pain every day following the enema but was ignored. The hospital record notes that on July 21, 2014, Plaintiff was unable to sleep due to pain and on July 22, 2014,

PA Julie Andrews noted complaints of buttocks pain. On July 23, 2014, endocrinologist, Janna Cohen-Lehman documents "a lot of pain due to rectal pain and cramping and PA Julie Andrews notes that Plaintiff had been "complaining about rectal pain for the past couple of days," and that she was having loose stools and was unable to sleep. On July 24, 2014, GHS's wound care specialist, noted skin tears that were "oozing blood," and noted complaints of rectal pain. That same day Nurse Crapella noted oozing stool which was tinged with blood; PA Andrews noted Plaintiff still had pain in her back and rectal area; and that evening, Nurse Ostine documented Plaintiffs continuous and repeated complaints of rectal pain. No rectal examination was performed or specialist was consulted.

On July 26, 2014, Dr. Komorowski performed a gastrointestinal consult and noted repeated rectal bleeding after complaints of rectal pain for the last five days and she was transferred to the Intensive Care Unit. On July 27, 2014, Defendant Dr. Shaw from Digestive Disease Associates of Rockland, saw Plaintiff in response to concerns regarding rectal bleeding. Dr. Shah noted dark red blood "per rectum" and testified that he did not know when the rectal bleeding began. On July 27, 2014, Nurse Isabelle Ryan noted that Plaintiff was experiencing "[A]ctive rectal bleeding, red with big clots." Later that day, approximately ten days after the initial complaints of rectal pain, Dr. Shah performed an emergency sigmoidoscopy due to the development of rectal bleeding, which he noted to be "profuse and bright red." Dr. Shah noted multiple elliptical deep ulcerations at the anorectal junction and a separate ulceration that had a bleeding vessel which was clipped due to it being fibrotic. The procedure was terminated and Dr. Shah called for a surgical consultation with Dr. Kaye to control the bleeding. On the same date, at the request of Dr. Shah, Dr. Kaye, a colorectal surgeon, evaluated Mrs. Gargano and performed a rectal exam under anesthesia, at which time he diagnosed her as having an anal rectal ulcer. Dr. Kaye indicated that he would be following Mrs. Gargano "peripherally" from that point.

On July 28, 2014, Dr. Langman examined Plaintiff and noted that rectal bleeding had ceased at that point. However, by July 30, 2014, Mrs. Gargano's rectal bleeding had returned. Dr. Yablon noted on that day that the bleeding was due to deep ulcerations and fissures in the anal canal. Dr. Kaye also evaluated Plaintiff on July 30, 2014 but did not note any rectal bleeding. On July 31, 2014, Plaintiff was transferred to the Critical Care Unit. On August 1, 2014, Dr. Langman noted continual rectal pain but did not perform a rectal exam. Dr. Bikramjit Singh also noted blood coming from Mrs. Gargano's rectum but did not request a consult to further investigate the cause of the bleeding or perform a rectal exam.

On August 2, 2014, Nurse Donna Minicucci noted that Plaintiff had been experiencing "moderate loose brown/black stool" and Dr. Lonberg, a hematologist, also noted complaints of rectal pain and the passing of dark stool that morning. Complaints of rectal pain were made on August 3, 2015. On August 5, 2014, doctors and nurses noted that her mental status was delirious and confused. On August 6, 2014, Mrs. Gargano was noted to be lethargic, delirious and passing liquid maroon stool with clots. Nurse Awed informed Dr. Kaye of the bloody stool but Dr. Kaye was "not concerned if it is mixed in stool unless the patient bleeds." Dr. Kaye did not see Plaintiff from July 29, 2014, through August 6, 2014. On August 6, 2014 Dr. Zweig, one of the hospital based internists, became involved in the care and treatment of Mrs. Gargano after she was returned to the ICU.

On August 7, 2014, nurses found a large pool of blood in Mrs. Gargano's bed that was dripping onto the floor and she was rushed to the operating room. The blood was noted to be "perfuse from the rectal area." Dr. Kaye performed a diverting colostomy on August 7, 2014, where he noted a "gaping hole between the rectum and vagina, pouring stool into abscess, which is extensive, and into the vagina." Plaintiff was noted to be septic at that time. On August 8, 2014, Dr. Shah saw plaintiff in the ICU where the follow-up focused on the gallbladder mass. Dr. Shah did not examine plaintiff's rectum as he testified that any rectal issues were being managed by the surgical team.

On September 2, 2014, Dr. Ouseph was assigned to Mrs. Gargano as her hospitalist and saw her for the first time. Mrs. Gargano remained at the hospital until she was discharged to rehabilitation at the Friedwald Center by Dr. Ouseph on September 4, 2014. At the time of her discharge, she was suffering from an existing recto-vaginal fistula, and had a colostomy, respiratory insufficiency following septic shock, skin tear, anemia, depression, perirectal bleeding, oral thrush, perirectal abscess, anasarca, G.I bleed, hyperalaninemia, encephalopathy and respiratory failure.

On September 19, 2014, Plaintiff returned to Good Samaritan Hospital from the Friedwald Center and was re-admitted by Dr. Ouseph with a complaint of a fever. She was diagnosed with a urinary tract infection, cellulitis and abscess of the lower leg, and diabetes. Plaintiff was admitted to the ICU where she was treated with fluids and a ten-day course of antibiotics. She was seen by Dr. Kaye on September 22, 2014 to make sure she did not have an infection in her perineum or abdomen, which she did not, and it was his plan to follow her peripherally. Thereafter, Plaintiff was transferred between Friedwald and Good Samaritan intermittently from September 2014 through March 2015, when she was able to return home. To date, her colostomy has not been able to be reversed and Plaintiff alleges that given her renal failure, although a kidney transplant has been recommended, she is precluded from receiving that treatment due to the presence of the recto-vaginal fistula.

Legal Discussion

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been

made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

The requisite elements of proof in a medical malpractice action are: 1) a deviation or departure from accepted practice; and 2) evidence that such departure was a proximate cause of injury or damage. Wiands v. Albany Medical Center, 29 A.D.3d 982, 983, 816 N.Y.S.2d 162 (2d Dept. 2006). In a summary judgment motion on a medical malpractice action, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured thereby. Belak-Redl v. Bollinger, 74 A.D.3d 1110, 1111, 903 N.Y.S.2d 508 (2d Dept. 2010). The defendant doctor must establish his or her entitlement to judgment as a matter of law by proffering competent evidence, such as affidavits of medical experts, hospital or medical records, examinations before trial, etc.. Georges v. Swift, 194 A.D.2d 517, 518, 598 N.Y.S.2d 545 (2d Dept. 1993).

Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions, as such credibility issues can only be resolved by a jury. Feinberg v. Feit, 23 A.D.3d 517, 519, 806 N.Y.S.2d 661 (2d Dept. 2005); Roca v. Perel, 51 A.D.3d 757, 859 N.Y.S.2d 203 (2d Dept. 2008); Bengston v. Wang, 41 A.D.3d 625, 839 N.Y.S.2d 159 (2d Dept. 2007); Barbuto v. Winthrop University Hosp., 305 A.D.2d 623, 760 N.Y.S.2d 199 (2d dept. 2003); Fink v. DeAngelis, 117 A.D.3d 894, 986 N.Y.S.2d 212 (2d Dept. 2014). Where an expert's opinion is neither speculative nor conclusory, but relies on specifically cited evidence in the record, it may be sufficient to raise

a question of fact precluding summary judgment. Roca v. Perel, 51 A.D.3d 757, 859 N.Y.S.2d 203 (2d Dept. 2008).

Dr. Sifkin and Rockland Infectious Diseases (Motion #6)

Defendants Dr. Sifkin and Rockland Infectious Disease timely moved for summary judgment and dismissal of the action against them. On June 18, 2019, Plaintiff's attorney submitted to the Court a partial stipulation of discontinuance with respect to these defendants. At that time, moving defendants advised Plaintiff's attorney they would withdraw their summary judgment motion only if all co-defendants' signed the stipulation of discontinuance, which they refused to do. Given that Plaintiff did not oppose the motion, and in fact executed a Stipulation of Discontinuance, and no other co-defendant opposed these Defendants' summary judgment motion, the motion is granted and the action is dismissed as against these Defendants.

Dr. Peter Kaye and Good Samaritan Hospital (Motion #11)

Defendants Dr. Peter Kaye, a colon and rectal surgeon, and Good Samaritan Hospital move for summary judgment and dismissal of the Complaint as against them including claims of medical malpractice, lack of informed consent and negligent hiring and supervision. With regard to the lack of informed consent, Defendants argue that Plaintiff was capable of participating in her own medical care and medical decisions. Thereafter, after her health and mental status declined, her son, Michael Gargano undertook her medical decisions. They contend that the medical charts contain properly executed consent for treatment executed either by Plaintiff and her son. With respect to the lack of supervision claim, Defendants note that it must be dismissed because there are no allegations that Good Samaritan providers injured Plaintiff while acting outside the scope of their employment. As for the negligent hiring claim, Plaintiff does not plead gross negligence in the hiring, training or supervision of employees and this claim must be dismissed as well.

Plaintiff makes the following allegations against Defendant Hospital: failure to

provide proper care and treatment, including timely and proper examinations, workup, diagnostic tests, and development of a proper plan of care; failure to properly monitor and observe Plaintiff; failure to timely administer proper IV fluids, vasopressors, and antibiotics; failure to heed Plaintiff's complaints and symptoms; failure to obtain appropriate medical consultations and improperly discharging plaintiff. Defendant Hospital submits the affirmation of Dr. Marvin Corman, Board Certified in General Surgery and Colon and Rectal Surgery. Specifically with regard to the Hospital, Dr. Corman opines that the records clearly document that Plaintiff was timely and properly assessed throughout her admissions. He states that the Nursing Flowsheets and Assessments document the nursing and nurses' and physicians' daily interactions with the patient including general assessments, vital sign checks, and plan of care. Dr. Corman opines that to a reasonable degree of medical certainty the Plaintiff's claim that she was not provided proper care and treatment is belied by the medical records. He states that proper consults were ordered and undertaken including by specialists in colon and rectal surgery, gastroenterology, gynecology, cardiology, infectious diseases and others. He opines that she was given proper medications.

With respect to Dr. Kaye, Plaintiff claims that Dr. Kaye failed to follow the progression of Plaintiff's rectal bleeding; allowed her rectal bleeding to progress untreated; failed to treat the underlying cause of rectal bleeding; failed to follow the progression of perianal abscess and allowed it to progress untreated; failed to timely and properly diagnose the patient's infection and sepsis; failed to timely transfer her to ICU; failed to treat the underlying cause of infection; and failure to timely order an infectious disease consult. Dr. Corman opines that D. Kaye promptly and properly assessed the patient for the first time on July 27, 2014 after a consult in colon and rectal surgery was requested. Dr. Corman notes that Dr. Kaye's involvement was requested after ulcerations with a bleeding vessel was observed by Dr. Shah on the same date and Ms. Gargano was already in the ICU. He opines that Dr. Kaye timely performed a rectal exam under anesthesia, stopping the bleeding and

ulceration. Dr. Kaye performed a reevaluation on August 7, 2014 at which time Dr. Corman states that he properly performed a diverting loop colostomy and incision and drainage and he thereafter properly continued to monitor her before discharge. Dr. Corman opines that Dr. Kaye did not fail to take preventative measures to guard against the development of a perianal abscess, as it is not the standard of care to do so.

As an initial matter, Plaintiff does not oppose the branches of Defendants' summary judgment motion which seek to dismiss the claims of lack of informed consent, negligent hiring and negligent supervision claims, and as such, those claims are dismissed. Plaintiff does oppose dismissal of the medical malpractice and negligence claims and argues that moving Defendants have failed to meet their prima facie burden upon summary judgment. More specifically, she argues that the Hospital has failed to offer the affidavit of a registered nurse, or nursing expert of any kind to directly support its claim that the nursing care provided to Plaintiff, or lack thereof, was appropriate. Additionally, Plaintiff argues that Dr. Corman does not attest to having any experiences in the diagnosis of recto-vaginal fistulas, repairing recto-vaginal fistulas, the causes or their monitoring. Mrs. Gargano further contends that Dr. Corman fails to state what standard of care Good Samaritan followed.

Plaintiff submits three redacted expert affirmations including one from a registered nurse, a colorectal surgeon and a gastroenterologist and argues that these affirmations raise triable issues of fact such that the summary judgment motion must be denied. With regard to the allegations against defendant Hospital, Plaintiff's experts opine that the standard of care required nursing staff to administer enemas in such a way as to not cause a traumatic injury; the standard of care requires that the procedure cease immediately when the patient experiences pain; and that the complaints be documented in the chart. Plaintiff's experts also opine that Defendant Hospital deviated from the standard of care in that they allowed the progression of severe constipation, which would result in the need for numerous enemas, and in the administration of the enema with excessive force so as to cause

an anal ulcer which eventually developed into a recto-vaginal fistula; in failing to monitor the patient following the enema; and in failing to timely recognize and respond to the signs and symptoms of an anal ulceration including rectal pain and bleeding.

Lastly, with regard to Defendant Hospital, Plaintiff's experts opine that in failing to perform a rectal examination on Mrs. Gargano at any point from July 18, 2014 through July 27, 2014, Defendant Hospital allowed an iatrogenic injury from the enema administered on July 18, 2014 to manifest in an infection and erosion, an abscess and eventually a recto-vaginal fistula. Further, her experts opine that had the staff at Defendant Hospital timely responded to Mrs. Gargano's complaints, the serious and irreversible complication, sepsis and recto-vaginal fistula could have been avoided altogether.

With regard to Dr. Kaye, Plaintiff's colorectal surgeon opines that to a reasonable degree of medical certainty, the standard of care requires that a colorectal surgeon that has performed a rectal examination under anesthesia with suture ligation of an anorectal hemorrhage to monitor his patients post-operative and that Dr. Kaye departed from this standard of care in his treatment of Plaintiff from July 27, 2014 through August 7, 2014 when he failed to monitor her following performance of an operation on July 27, 2014. More specifically, the expert notes that while Dr. Kaye followed up with Mrs. Gargano on July 27 and July 28, 2014, his notes are very brief and then he ceased all follow up visits. On August 1, 2014, Mrs. Gargano was noted to have rectal bleeding, which was again noted on August 3, 2014. Dr. Kaye did not see Mrs. Gargano again until August 7, 2014 when she was found in a pool of blood. The expert opines that had this been done, he would have appreciated her continued rectal bleeding and infection.

In reply, moving Defendants argue that Dr. Corman is properly credentialed to render an opinion with respect to issues concerning general nursing care and/or recto-vaginal fistulas. They argue that claims regarding the improper administration of an enema amount to an attempt to assert a new theory of liability and should therefore be disregarded.

Turning first to Defendant Good Samaritan Hospital, and applying the law as set forth in the legal discussion section of this decision, the Court finds that Defendant Hospital has failed to sustain its burden upon summary judgment, but that even if it had, Plaintiff has established triable issues of fact sufficient to warrant denial of the motion. While it is generally true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field... the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable. Behar v. Coren, 21 A.D.3d 1045, 1046-47, 803 N.Y.S.2d 629 (2d Dept. 2005), *appeal denied by* 6 N.Y.3d 705 (2006); Shectman v. Wilson, 68 A.D.3d 848, 849, 890 N.Y.S.2d 117 (2d Dept. 2009). In order to lay such foundation, the affidavit must state that the purported expert has had specific training or has expertise in a particular field, has familiarized his/her-self with relevant literature or has become familiar with the applicable standards of care in the specialized area of practice. Behar v. Coren, 21 A.D.3d at 1046; Mustello v. Berg, 44 A.D.3d 1018, 1019, 845 N.Y.S.2d 86 (2d Dept. 2007), *appeal denied by* 44 A.D.3d 1018 (2008).

While Dr. Corman is certainly qualified to opine with respect to Dr. Kaye as he states that he has "become and am familiar with the applicable standards of medical care and practice as they pertain to General Surgery and Colon and Rectal Surgery, which includes those standards that applied in 2014 and 2015," he makes no such representations with respect to the applicable nursing standards. Moreover, Plaintiff's allegations with respect to Good Samaritan Hospital are not solely limited to general colon and rectal surgery and thus he is unqualified to opine with respect to those allegations. Additionally, with regard to the allegations against Good Samaritan Hospital, this Court finds the Dr. Corman's affirmation to be general and conclusory without identifying specific examples of how the nursing staff conformed with accepted standards of nursing practice particularly with regard to her complaints as documented in the chart and testified to by Plaintiff and her son.

Even if Defendant Hospital had met its burden on summary judgment, Plaintiff has established triable issues of fact based upon submission of their experts' affirmations. Plaintiff's experts also opine that Defendant Hospital deviated from the standard of care in that they allowed the progression of severe constipation, which would result in the need for numerous enemas, and in the administration of the enema with excessive force so as to cause an anal ulcer which eventually developed into a recto-vaginal fistula; in failing to monitor the patient following the enema; and in failing to timely recognize and respond to the signs and symptoms of an anal ulceration including rectal pain and bleeding. As such, Defendant Hospital's summary judgment motion is denied with respect to the negligence and/or medical malpractice causes of action.

With regard to Dr. Kaye's motion, the Court finds that based upon the affidavit of Dr. Corman, he has met his prima facie burden upon summary judgment. However, in opposition thereto, Plaintiff has established a triable issue of fact with respect to his malpractice based upon her competing expert affidavits. More specifically, Plaintiff's colorectal surgeon opines that while Dr. Kaye followed up with Mrs. Gargano on July 27 and July 28, 2014, his notes are very brief and then he ceased all follow up visits. On August 1, 2014, Mrs. Gargano was noted to have rectal bleeding, which was again noted on August 3, 2014. However, Dr. Kaye did not see Mrs. Gargano again until August 7, 2014 when she was found in a pool of blood. The expert opines that had this been done, he would have appreciated her continued rectal bleeding and infection. Accordingly, Dr. Kaye's summary judgment motion is denied in its entirety.

Dr. Kenneth Zweig and Dr. Jacob Ouseph (Motion #12)

Dr. Zweig and Dr. Ouseph, both hospitalists at Defendant Good Samaritan Hospital, move for summary judgment and dismissal of the Complaint against them. Dr. Zweig was involved in the care and treatment of Mrs. Gargano from August 7, 2014 through August 11, 2014. Dr. Ouseph, was involved in the care and treatment of Ms. Gargano from

September 2, 2014 through September 4, 2014, the date of her discharge. Defendants assert that although the allegations against the moving defendants are voluminous and vague, they focus on the failure to timely and properly consult with specialists; fail to diagnose and treat sepsis; fail to diagnose and treat a urinary tract infection; and fail to properly manage the care and treatment of Mrs. Gargano.

In support of their summary judgment motion, Defendants submit the affirmation of Dr. Bhupendra Patel, a physician Board Certified in Internal Medicine. Dr. Patel opines that when Dr. Zweig first saw Plaintiff on August 7, 2014, he had appropriately reviewed her chart; he appreciated the fact that she had significant infection secondary to the perirectal abscess; considered her vital signs and labs; realized that she was being seen by specialists and that he did not need to issue any orders because there was nothing more he could do that day. She reaches the same opinion with regard to August 8, August 9, August 10 and August 11, 2014, and notes that during this time, Plaintiff's infection was improving.

With respect to Dr. Ouseph, Dr. Patel opines that on September 2, 2014, when he first saw Mrs. Gargano, he appropriately recognized the care and treatment that she was receiving and appropriately saw her and assessed Plaintiff and there was simply nothing more that he could do that date. Dr. Patel offers the same opinion with respect to Dr. Ouseph's treatment on September 3, 2014. Dr. Patel further opines that it was appropriate for dr. Ouseph to discharge Plaintiff on September 4, 2010 to a lower level of care.

In opposition, Plaintiff argues that as hospitalists, it was Dr. Ouseph and Dr. Zweig's duty to act as the primary care providers for their patients who were admitted into their care, including reviewing nursing notes and speaking with the patient to ensure that any complaints of pain are being addressed and responded to. Plaintiff's gastroenterologist expert opines that Dr. Zweig departed from acceptable medical practice in the following manner: on August 6, 2014 when he noted that she had an elevated white blood cell account and he did not order any tests; in failing to order any tests in the following two days when she was not

improving and he noted that she was septic due to the perianal abscess; in failing to perform any tests at all from August 6, 2014 through August 11, 2014; in relying on other specialists to perform tests; in failing to monitor plaintiff during the time she was experiencing signs and symptoms of sepsis. The expert further opines that these departures were a proximate cause of Mrs. Gargano's persistent infection and prolonged hospitalization. With respect to Dr. Ouseph, the gastroenterologist expert opines that to a reasonable degree of medical certainty, Mrs. Gargano was discharged prematurely on September 4, 2014 which resulted in an untreated urinary tract infection and her developing urosepsis and the need for further hospitalization on September 19, 2014.

The Court finds that Defendants both established their prima facie entitlement to summary judgment; however, in opposition, Plaintiff established triable issues of fact as to each Defendant. With respect to Dr. Zweig, the dueling expert affidavits raise triable issues of facts as whether Dr. Zweig appropriately appreciated Plaintiff's deteriorating condition or whether additional tests should have been ordered. Triable issues of fact as raised as to whether Dr. Ouseph prematurely discharged Plaintiff on September 4, 2014. As such, Dr, Zweig and Dr. Ouseph's motions for summary judgment are denied.

Dr. Yaron Langman, Dr. Shaw and Digestive Disease Associates of Rockland County (Motions #8 and #9)¹

Among the allegations Plaintiff makes against Dr. Langman and Dr. Shah include the failure to properly monitor and observe plaintiff; failure to administer appropriate and necessary IV fluids, vasopressor and antibiotics; failure to appreciate ongoing signs and symptoms of Plaintiff's condition; negligently performing a colonoscopy and endoscopy;

¹Although separate motions were made by Dr. Langman and Dr. Shah, they are addressed together in this decision as they are employed by the same practice, involve similar allegations, share the same expert, and have the same defense counsel.

allowing Plaintiff's infection to progress untreated; in failing to timely diagnose sepsis; in failing to take appropriate steps to minimize the risks of perianal abscess; in failing to monitor plaintiff after enema procedure; in failing to appreciate Plaintiff's abdominal pain and the possible correlation with the enema and in failing to timely address complaints post enema.

In support of their motion, Defendants submit the expert affirmation of Dr. Sandford Goldberg, a physician Board Certified in Gastroenterology. Dr. Goldberg opines that Dr. Langman properly performed the colonoscopy on July 3, 2014 and there was no evidence of any colonic damage from the colonoscopy and it is his opinion that nothing done by Dr. Langman proximately caused Plaintiff's injury. He notes that Dr. Langman, nor his partners, had any contact with Plaintiff from July 9, 2014 through July 27, 2014. Dr. Langman next saw Plaintiff on July 28, 2014 and August 1, 2014. He opines that on these dates, Dr. Langman appropriately reviewed the prior notes and conducted a physical exam but did not ask about rectal pain as Plaintiff had just had surgery on her rectum. He opines that while Plaintiff had small streaks of blood, this was common following surgery and was not indicative of active bleeding. It is further his opinion that Dr. Langman appropriately monitored plaintiff's complete blood count and appropriately did not order any radiologic studies with contrast as that would involve manipulation of the rectum, an area where Dr. Kaye had recently operated.

With respect to Dr. Shah, Dr. Goldberg notes that Dr. Shah first saw Plaintiff on July 27, 2014 when he was asked to evaluate her for lower gastrointestinal bleeding including multiple episodes of rectal bleeding that day. Later that day, due to Plaintiff's active bleeding, Dr. Shah performed an emergent sigmoidoscopy, which he terminated upon noting multiple deep ulcerations, including one with a bleeding vessel, which he clipped. Dr. Goldberg opines that Dr. Shah properly performed the sigmoidoscopy, properly terminated the procedure and then properly called for a surgical consult to control the bleeding. After calling for the consult, Dr. Shah had no further involvement of the medical care focused on Plaintiff's rectum.

In opposition to the motion, Plaintiff argues that both Dr. Langman and Shah were responsible for Mrs. Gargano's gastroenterological care during her admission from June 30, 2014 through September 4, 2014. Additionally, Plaintiff argues that Dr. Goldberg's purported qualifications are too vague to allow him to opine.

Plaintiff also argues that there are triable issues of fact as to Dr. Langman and Dr. Shah's malpractice based upon the redacted affirmation from her expert, a physician Board Certified in Internal Medicine and Gastroenterology. The expert opines that Defendants deviated from the standard of care when they allowed their patient to remain chronically constipated. Additionally, the expert opines that they were negligent in failing to monitor Plaintiff June 30, 2014 through September 4, 2014 and because they failed to conduct a rectal examination at any time between July 18, 2014 and August 7, 2014, despite numerous complaints of rectal pain and rectal bleeding. The expert further opines that these departures were a cause of Mrs. Gargano suffering serious pain, sepsis, encephalopathy, respiratory failure and septic shock, and will likely have a colostomy bag for the remainder of her life.

In reply, Defendants note that Plaintiff's expert does not oppose those portions of the motion which relate to allegations of the negligent performance of the colonoscopy and sigmoidoscopy, including the performance of the procedures and that they were not the proximate causes of Plaintiff's injuries. Additionally, Defendants note that the majority of Plaintiff's allegations focus on complaints of rectal pain and bleeding following enemas performed on July 9, 2014 and July 18, 2014, and argues that Dr. Langman and Shah should have been monitoring. However, following the colonoscopy of July 3, 2014, Dr. Langman did not treat Plaintiff again until July 28, 2014 and Digestive Disease Associates of Rockland and its physician's signed off on July 8, 2014. Dr. Shah had no involvement in Plaintiff's treatment until July 27, 2014, and his treatment was limited solely to performance of this one procedure, and then he did not see her again until August 8, 2014. Thus, moving Defendants contend that any complaints involving the enemas performed on July 9, 2014 or

July 18, 2014 or the complaints of rectal pain and bleeding should be dismissed. Dr. Langman further asserts that Plaintiff had already undergone surgery with Dr. Kaye to address the rectal bleeding by July 28, 2014, when Dr. Langman next saw Plaintiff. His note of August 1, 2018 references a bowel movement with small streaks of blood and continued rectal pain such that any allegation that no rectal examination was performed is false.

Contrary to Plaintiff's contentions, Defendants have met their prima facie burden on summary judgment and Dr. Goldberg, a Board Certified Gastroenterologist, is qualified to offer an expert opinion in this matter. In opposition thereto, the Court finds that Plaintiff failed to demonstrate a triable issue of fact as to these defendants. Though Plaintiff made a variety of allegations against Dr. Langman and Dr. Shah in her Verified Bill of Particulars, review of Plaintiff's expert affirmation limits the claims of malpractice to: (i) allowing chronic constipation and (ii) failure to conduct a rectal examination. Based upon the record, it is clear that moving Defendants cannot be held responsible for permitting chronic constipation which appears to begin after July 8, 2014. Dr. Langman last saw Plaintiff on July 3, 2014, and the practice signed off on July 8, 2014, after which an enema was performed on July 9, 2014. Thereafter, he did not see Plaintiff until July 28, 2014, the day after Plaintiff had undergone a rectal examination under general anesthesia in response to rectal bleeding. Dr. Langman only examined Plaintiff on one other occasions, that being August 1, 2014. Dr. Shah never treated Plaintiff until he was requested to do a consult on July 27, 2014 and then only saw her on that day. The Court finds Plaintiff's expert affirmation with respect to the alleged negligence of Dr. Langman and Dr. Shah, including with respect to issues of proximate cause, to be general and conclusory. As such, the action is hereby dismissed as against Dr. Langman, Dr. Shah and Digestive Disease Associates of Rockland, P.C.

Accordingly, it is hereby

ORDERED that the Notice of Motion by Dr. Sifkin and Rockland Infectious Diseases (**Motion #6**) for summary judgment and dismissal of the Complaint as against them is hereby GRANTED in its entirety; and it is further

ORDERED that the Notice of Motion by Dr. Yaron and Digestive Disease Associates for summary judgment and dismissal of the Complaint against them (**Motion #8**) is GRANTED in its entirety; and it is further

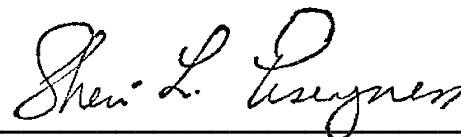
ORDERED that the Notice of Motion by Dr. Shah and Digestive Disease Associates (**Motion #9**) for summary judgment and dismissal of the Complaint against them is GRANTED in its entirety; and it is further

ORDERED that the Notice of Motion by Dr. Peter Kaye and Good Samaritan Hospital (**Motion #11**) for summary judgment and dismissal of the Complaint against them is DENIED, except to the extent that the causes of action for lack of informed consent, negligent hiring and negligent supervision are dismissed; and it is further

ORDERED that Notice of Motion by Dr. Zweig and Dr. Ouseph (**Motion #12**) for summary judgment and dismissal of the Complaint against them is DENIED, except with regard to claims for lack of informed consent which are dismissed.

The foregoing constitutes the Decision and Order of this Court on Motion #6, #8, #9, #11 and #12.

Dated: New City, New York
April 22, 2020



HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

To: All parties via e-filing