

DeMaria v Chowdhery
2020 NY Slip Op 35262(U)
August 4, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 601620/2017
Judge: Joseph A. Santorelli
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SHORT FORM ORDER

INDEX No. 601620/2017
CAL. No. 201902291MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 4/2/20
ADJ. DATE 7/2/20
Mot. Seq. # 002 - MotD

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PATRICIA DEMARIA Individually and as
Administrator of the Estate of JOSEPH
DEMARIA, Deceased ,

DUFFY & DUFFY, PLLC
Attorney for Plaintiff
1370 RXR Plaza
Uniondale, New York 1556

Plaintiff,

LETITIA JAMES
ATTORNEY GENERAL OF THE
STATE OF NEW YORK
Attorney for Defendant Imbasciani
28 Liberty Street, 18th Floor
New York, New York 10005

- against -

VIGORITO, BARKER, PORTER &
PATTERSON, LLP
Attorney for Defendants Chowdhery and Long
Island Nephrology Consultant, P.C.
115 East Stevens Avenue, Suite 26
Valhalla, New York 10595

SUMIT CHOWDHERY, M.D., LONG ISLAND
NEPHROLOGY CONSULTANT, P.C., NICOLE
IMBASCIANI, N.P., CHIRAYU GOR, M.D.,
KENNETH ROSENTHAL, M.D., and
KENNETH G. ROSENTHAL, M.D., P.C.,

FUMUSO, KELLY, SWART, FARRELL,
POLIN, & CHRISTENSEN, LLP
Attorney for Defendant Gor
110 Marcus Blvd., Suite 500
Hauppauge, New York 11788

Defendants.

KELLY, RODE & KELLY, LLP
Attorney for Defendant Rosenthal
330 Old Country Road
Mineola, New York 11501
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Upon the following papers read on this e-filed motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendant Imbasciani, filed February 4, 2020 ; Notice of Motion/ Order to Show Cause and supporting papers _____ ; Answering Affidavits and supporting papers by plaintiff, filed June 15, 2020 ; Replying Affidavits and supporting papers by defendant Imbasciani, filed June 25, 2020 ; Other _____ ; it is,

ORDERED that the motion by defendant Nicole Imbasciani, N.P., for summary judgment dismissing the complaint against her is granted to the extent of dismissing the cause of action for informed consent, and is otherwise denied.

This is a medical malpractice action brought to recover damages for injuries allegedly arising from the treatment of plaintiff Patricia DeMaria's husband, Joseph DeMaria, then 70 years of age, by the defendants. The medical malpractice claims arise from defendant Nicole Imbasciani, N.P.'s treatment of Mr. DeMaria from August 7, 2014 to August 14, 2014, while he was a patient at Stony Brook University Hospital ("SBUH"). The plaintiff alleges that Ms. Imbasciani was negligent in, among other things, failing to diagnose bladder cancer, failing to obtain bladder imaging studies, and failure to review records from the transferring hospital facility. She also alleges a cause of action for lack of informed consent.

Ms. Imbasciani now moves for summary judgment dismissing the complaint against her on the ground that she did not exercise independent medical judgment, that she did not depart from good and accepted practices in the treatment she rendered to Mr. DeMaria, and that such treatment did not cause his alleged injuries or death. She submits, in support of the motion, copies of the pleadings, the bills of particulars, certified medical records of Stony Brook University Hospital, the affirmation of Stephen Siegel, M.D., her clinical practice agreement, and the transcripts of the deposition testimony of Ms. Imbasciani, Chirayu Gor, M.D., and the plaintiff. In opposition, the plaintiff argues that Ms. Imbasciani exercised independent medical judgment, that she deviated from good and accepted practices in the medical treatment she rendered to Mr. DeMaria, and that such deviations proximately caused his alleged injuries and death. The plaintiff submits, in opposition, a redacted expert affirmation and the transcript of Dr. Chowdhery's deposition testimony.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Healthcare providers owe a duty of reasonable care to their patients while rendering medical treatment; a breach of this duty constitutes medical malpractice (*Dupree v Giugliano*, 20 NY3d 921, 958 NYS2d 312, 314 [2012]; *Scott v Uljanov*, 74 NY2d 673, 675, 543 NYS2d 369 [1989]; *Tracy v Vassar Bros. Hosp.*, 130 AD3d 713, 13 NYS3d 226, 288 [2d Dept 2015]). A nurse whose work is supervised by a physician and who does not exercise independent medical judgment cannot be liable for medical

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malpractice unless (1) the directions from the supervising physician so greatly deviate from normal medical practice that the nurse should be held liable for failing to intervene, or (2) the nurse commits an independent act that constitutes a departure from accepted medical practice (*see Yakubov v Jamil*, 121 AD3d 884, 994 NYS2d 190 [2d Dept 2014]; *Poter v Adams*, 104 AD3d 925, 961 NYS2d 556 [2d Dept 2013]; *Bellafigliore v Ricotta*, 83 AD3d 632, 920 NYS2d 373 [2d Dept 2011]). To recover damages for medical malpractice, a plaintiff patient must prove both that his or her healthcare provider deviated or departed from good and accepted standards of medical practice and that such departure proximately caused his or her injuries (*Gross v Friedman*, 73 NY2d 721, 535 NYS2d 586 [1988]; *Macancela v Wyckoff Heights Med. Ctr.*, 176 AD3d 795, 109 NYS3d 411 [2d Dept 2019]; *Jagenburg v Chen-Stiebel*, 165 AD3d 1239, 85 NYS3d 558 [2d Dept 2018]; *Bongiiovanni v Cavagnuolo*, 138 AD3d 12, 24 NYS3d 689 [2d Dept 2016]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]).

To establish a prima facie entitlement to summary judgment in a medical malpractice action, a defendant healthcare provider must prove, through medical records and competent expert affidavits, the absence of any such departure, or, if there was a departure, that such departure did not proximately cause the plaintiff's injuries (*Macancela v Wyckoff Heights Med. Ctr.*, *supra*; *Wright v Morning Star Ambulette Servs., Inc.*, 170 AD3d 1249, 96 NYS3d 678 [2d Dept 2019]; *Wodzinski v Eastern Long Is. Hosp.*, 170 AD3d 925, 96 NYS3d 80 [2d Dept 2019]; *Jagenburg v Chen-Stiebel*, *supra*; *Mitchell v Grace Plaza of Great Neck, Inc.*, 115 AD3d 819, 982 NYS2d 361 [2d Dept 2014]). The defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; *LaVecchia v Bilello*, 76 AD3d 548, 906 NYS2d 326 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]). However, "bare conclusory assertions by defendants that they did not deviate from good and accepted medical practices . . . do not establish that the cause of action has no merit so as to entitle defendants to summary judgment" (*DiLorenzo v Zaso*, 148 AD3d 1111, 1112, 50 NYS3d 503 [2d Dept 2017], quoting *Winegrad v New York Univ. Med. Ctr.*, *supra* at 853; *see Garcia-DeSoto v Velpula*, 164 AD3d 474, 77 NYS3d 887 [2d Dept 2018]).

After making this prima facie showing, the burden shifts to the plaintiff to submit evidentiary facts or materials that raise a triable issue as to whether a deviation or departure occurred and whether this departure was a competent cause of plaintiff's injuries (*Williams v Bayley Seton Hosp.*, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]; *Makinen v Torelli*, 106 AD3d 782, 965 NYS2d 529 [2d Dept 2013]; *Stukas v Streiter*, *supra*). The plaintiff need only raise a triable issue as to the elements on which the defendant met the prima facie burden (*Bueno v Allam*, 170 AD3d 939, 96 NYS3d 623 [2d Dept 2019]; *Spiegel v Beth Israel Med. Ctr.-Kings Hwy. Div.*, 149 AD3d 1127, 53 NYS3d 166 [2d Dept 2017]; *Hernandez v Hwaishienyi*, 148 AD3d 684, 48 NYS3d 467 [2d Dept 2017]). "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 defendant physician's summary judgment motion" (*Alvarez v Prospect Hosp.*, *supra* at 325; *see Wright v Morning Star Ambulette Servs., Inc.*, *supra*; *Spiegel v Beth Israel Med. Ctr.-Kings Hwy. Div.*, *supra*; *Hernandez v Hwaishienyi*, *supra*). Summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (*Macancela v Wyckoff Heights Med. Ctr.*, *supra*; *Lefkowitz v Kelly*, 170 AD3d 1148, 96 NYS3d 642 [2d Dept 2019]; *Lowe v Japal*, 170

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AD3d 701, 95 NYS3d 363 [2d Dept 2019]; *Henry v Sunrise Manor Ctr. for Nursing and Rehabilitation*, 147 AD3d 739, 46 NYS3d 649 [2d Dept 2017]).

Ms. Imbasciani established a prima facie case of entitlement to summary judgment dismissing the medical malpractice claims against her by demonstrating that she did not exercise independent medical judgment and the absence of a deviation or departure from good and accepted standards of medical practice in the medical treatment she rendered to Mr. DeMaria, and lack of proximate causation (see *Jagenburg v Chen-Stiebel, supra*; *Galluccio v Grossman*, 161 AD3d 1049, 78 NYS3d 196 [2d Dept 2018]; *Bongiovanni v Cavagnuolo, supra*; *Mitchell v Grace Plaza of Great Neck, Inc., supra*; *Faccio v Golub, supra*). By his affirmation, Dr. Siegel stated that he reviewed the pleadings, the bills of particulars, various medical records, Ms. Imbasciani's clinical practice agreement, and deposition testimony of plaintiff, Ms. Imbasciani, and co-defendants. He opined within a reasonable degree of medical certainty that Ms. Imbasciani did not exercise independent medical judgment or depart from any good and accepted medical practice in her treatment of Mr. DeMaria, and that such medical care was not a proximate cause of Mr. DeMaria's alleged injuries. Dr. Siegel determined that Ms. Imbasciani properly evaluated and treated Mr. DeMaria during his admission to Stony Brook University Hospital in August 2014.

Dr. Siegel explained that Ms. Imbasciani properly notified Dr. Gor, her supervising cardiologist, of Mr. DeMaria's August 12, 2014 abdominal ultrasound results, as she was obligated to do. He also stated that Ms. Imbasciani properly collaborated with Dr. Gor by directly communicating with him, which ended her duty regarding the abdominal ultrasound. Dr. Siegel stated that Ms. Imbasciani was not obligated to speak to other physicians about the ultrasound results, as she directly communicated with Dr. Gor about the findings. He also opined that Ms. Imbasciani properly documented her conversations with Dr. Gor and Mr. DeMaria regarding the ultrasound results. Dr. Siegel explained that Ms. Imbasciani did not have the clerical responsibility to send copies of reports to Mr. DeMaria's physicians. Dr. Siegel opined that Dr. Syali and Dr. Lipera, the hematologists who requested the abdominal ultrasound, had the responsibility to follow-up on the ultrasound and notify Mr. DeMaria's primary care physician, not Ms. Imbasciani.

Dr. Siegel opined that Ms. Imbasciani went above and beyond the standard of care on August 13, 2014 when she informed Mr. DeMaria of the bladder ultrasound results and advised him to consult with a urologist. He explained that informing Mr. DeMaria of the ultrasound results was not required, as the results were equivocal and concerned a non-acute condition, and did not relate to Mr. DeMaria's cardiac condition. Dr. Siegel opined that as Ms. Imbasciani's focus of care pertained to cardiology, she was not obligated to perform a physical examination including a rectal examination. He stated that a digital rectal examination would not have uncovered Mr. DeMaria's bladder cancer anyway.

Dr. Siegel opined that Ms. Imbasciani was not obligated to investigate work-up to diagnose bladder cancer, as Dr. Gor appropriately decided that Mr. DeMaria needed an outpatient urology consultation. He explained that since Mr. DeMaria did not exhibit signs of a urinary obstruction or gross blood in his urine, and did not complain of pelvic pain, gross blood in his urine, or difficulty in urinating, Ms. Imbasciani was not required to order a urine cytology. For the same reasons, Dr. Siegel

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determined that Ms. Imbasciani was not required to order an MRI, CT scan, or x-ray of Mr. DeMaria's abdomen or pelvis.

Dr. Siegel opined that Ms. Imbasciani was not required to recommend a cystoscopy, because she was not authorized to order one, urologists customarily perform cystoscopies as outpatient procedures, and the procedure was not urgently needed. He explained that the cystoscopy was not urgently needed, as Mr. DeMaria was on blood thinners and the procedure has some risk of bleeding, and he had no complaints or symptoms to indicate a significant urinary obstruction. In addition, Dr. Siegel opined that deferring a possible cystoscopy to be done on an outpatient basis was reasonable given the psychological stress already associated with Mr. DeMaria's cardioversion.

Dr. Siegel opined that while Ms. Imbasciani played an active role in Mr. DeMaria's care, she did not exercise independent medical judgment regarding to his urological work-up. He stated that the directions from her attending physician, Dr. Gor, did not so greatly deviate from normal medical practice that she should have intervened or inquired as to the correctness of the orders. Dr. Siegel further opined that Ms. Imbasciani implemented the reasonable treatment plan formulated by Dr. Gor, namely, to have Mr. DeMaria follow-up with a urologist on an outpatient basis. He determined that Dr. Gor's treatment plan was not so contraindicated by normal practice that it should have been questioned by Ms. Imbasciani.

Dr. Siegel opined that Ms. Imbasciani was not responsible for the discharge instructions given to Mr. DeMaria, as Dr. Gor decided to discharge him and she did not write his discharge orders or discharge summary. Dr. Siegel stated that Theresa Stayola, N.P., and Deborah Schwartz, N.P., formulated the August 14, 2014 discharge orders. Finally, Dr. Siegel opined that Ms. Imbasciani's treatment of Mr. DeMaria was not a proximate cause of his alleged injuries or death, as she was not involved in the decision to discharge him on August 14, 2014 or in the preparation of discharge instructions.

Ms. Imbasciani having met her initial burden on the motion as to the cause of action for medical malpractice, the burden shifted to the non-moving parties to submit admissible evidence raising a triable issue of fact (*see Jagenburg v Chen-Stiebel, supra; Williams v Bayley Seton Hosp., supra; Mäkinen v Torelli, supra; Stukas v Streiter, supra*). The plaintiff contends that Ms. Imbasciani has not met her burden, as plaintiff testified that her and Mr. DeMaria were not informed of anything related to his bladder, in contradiction to Ms. Imbasciani's testimony. However, as Dr. Siegel opined that Ms. Imbasciani was not obligated to inform Mr. DeMaria about anything related to his bladder, the conflict in testimony did not bar her from meeting her initial burden.

By his affirmation, plaintiff's expert stated that he reviewed the pleadings, various medical records, Ms. Imbasciani's clinical practice agreement, and all deposition testimony. He opined within a reasonable degree of medical certainty that Ms. Imbasciani exercised independent medical judgment and departed from good and accepted medical practice in her treatment of Mr. DeMaria, and that such medical care was a proximate cause of his alleged injuries.

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The plaintiff's expert opined that Ms. Imbasciani exercised her own independent medical judgment and committed independent acts of negligence, as her role was not limited to telling Dr. Gor the ultrasound results and then "parroting back" to Mr. DeMaria what Dr. Gor said. Plaintiff's expert determined that Ms. Imbasciani made her own decisions and then informed Dr. Gor what she had done. He explained that as the nurse practitioner responsible for coordinating Mr. DeMaria's care, she was required to communicate and come to an agreement and understanding between all the healthcare providers involved in the case regarding a specific and clear plan as to who was receiving, reviewing, and acting upon the finding of a potential malignancy and making decisions. The plaintiff's expert opined that as the primary service, it was Ms. Imbasciani and Dr. Gor's duty to ensure that appropriate communication between healthcare providers took place to formulate a clear plan, which they did not do.

The plaintiff's expert further opined that Ms. Imbasciani had a duty beyond telling Dr. Gor the ultrasound results, including informing Mr. DeMaria and the hematologists. He explained that if the hematologists were responsible for discussing the results with Mr. DeMaria and formulating a plan, as she contends, it was Ms. Imbasciani's independent obligation to affirmatively collaborate with them to formulate a plan. The plaintiff's expert opined that Ms. Imbasciani did not meet this obligation by simply making a notation in the records that she had no reason to believe the hematologists would see when they had not seen Mr. DeMaria in days and had already established a discharge plan. Plaintiff's expert further opined that Ms. Imbasciani made her own determinations as to when and what to tell Mr. DeMaria about the ultrasound, as she admitted that she came to her own conclusion that the findings were incidental, non-urgent, and not significant enough to warrant a conversation with another health care provider before discussing it with Mr. DeMaria. Plaintiff's expert also stated that Ms. Imbasciani was required to inform the hematologists about the ultrasound results regardless of the results.

The plaintiff's expert stated that both Ms. Imbasciani and Dr. Gor had the responsibility to collaboratively analyze the case before concluding that Mr. DeMaria had no issues with urination, residuals, other genitourinary issues, or indication of possible obstruction. He explained that the standard of care required that as the primary team, they were to conduct an appropriate work-up and analysis before a decision could be made. He opined that neither of them met such obligation. The plaintiff's expert stated that the standard of care did not allow Ms. Imbasciani or Dr. Gor to make a determination that testing and work-up should not be done on an inpatient basis without having done a thorough evaluation, irrespective of what Mr. DeMaria was told.

Plaintiff's expert opined that the standard of care required Ms. Imbasciani, alone or in collaboration with Dr. Gor, to assess whether Mr. DeMaria required additional imaging studies, a more focused physical examination, laboratory testing, diagnostic studies, and inpatient consultations. He explained that Ms. Imbasciani was required to ask Mr. DeMaria what he was feeling in the moment and explore information about his past. Plaintiff's expert also opined that the medical records do not reflect that Ms. Imbasciani made an attempt to elicit this information. He further opined that even without clinical complaints, there were indications of abnormalities that demonstrated the need for an inpatient consult for work-up to establish Mr. DeMaria's status from a urology standpoint. He further stated that a proper assessment on August 13, 2014 would have required additional imaging by CT scan, MRI, urine cytology, and an inpatient consult. Plaintiff's expert opined that after such work-up, a urologist should determine whether a patient should have a cystoscopy inpatient or not.

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The plaintiff's expert stated that the medical records from Mather Hospital sent with Mr. DeMaria upon his transfer to SBUH included ultrasound results of a bladder outlet obstruction and post-void residuals. He explained that Ms. Imbasciani and Dr. Gor were required to be aware of the availability of the Mather Hospital records and that an ultrasound was performed at Mather Hospital on August 7, 2014. Plaintiff's expert opined that Ms. Imbasciani was required to review the available medical records and interview Mr. DeMaria regarding his genitourinary health, as it is a basic aspect of providing appropriate care. He determined that neither Ms. Imbasciani nor Dr. Gor made themselves aware of Mr. DeMaria's documented bladder outlet obstruction, trabeculated bladder, abnormal blood cells in the urinalysis, or his complaints of dysuria on the day they determined he did not need an inpatient work-up.

The plaintiff's expert stated that there were red blood cells identified on the urinalysis conducted at SBUH and Mather Hospital demonstrating a possible sign of bladder cancer and other abnormalities. He opined that such findings should be incorporated into a determination of whether to request an inpatient consult. The plaintiff's expert opined that despite having the ability to request an inpatient urology consult, Ms. Imbasciani decided not to order an inpatient urology consult based on the ultrasound results and her experience regarding cystoscopies being conducted out an outpatient basis. He stated that how urgently a cystoscopy or urological consult was required would depend on the results of the required work-up that should have been conducted.

The plaintiff's expert further opined that Ms. Imbasciani and Dr. Gor's decision not to pursue an inpatient consultation or cystoscopy based on Mr. DeMaria's psychological stress was incredulous, as there was no notation that he was experiencing psychological stress that would justify withholding a proper work-up. He further stated that even if Mr. DeMaria could not handle the stress of a cystoscopy, Ms. Imbasciani and Dr. Gor were still required to perform a work-up using other less invasive testing and a urology consult.

The plaintiff's expert opined that Ms. Imbasciani's departures from accepted standards of care were substantial contributing factors in causing a disruption to the continuity of care and placed Mr. DeMaria at increased risk of being harmed by "falling through the cracks." More specifically, plaintiff's expert stated that Ms. Imbasciani's departures contributed to a prolonged delay in timely and properly diagnosing and treating Mr. DeMaria's bladder cancer, which led to its progression to advance metastatic cancer after diagnosis in June 2015.

As plaintiff's expert described how Imbasciani exercised independent medical judgment, the applicable standards of care under the circumstances, how Ms. Imbasciani departed or deviated from such standards, and that these departures were competent causes of Mr. DeMaria's injuries, his affirmation is sufficient to raise triable issues of fact (*see Memoli v Winthrop-University Hosp.*, 147 AD3d 931, 47 NYS3d 128 [2d Dept 2017]; *Kitt v Okonta*, 143 AD3d 601, 39 NYS3d 456 [1st Dept 2016]; *Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]; *Williams v Bayley Seton Hosp.*, *supra*; *Stukas v Streiter*, *supra*). As the parties have presented conflicting opinions by medical experts as to whether a departure from good and accepted medical practice occurred and whether such departure was a proximate cause of the alleged injuries, an order granting summary

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judgment is not appropriate (*see Jagenburg v Chen-Stiebel, supra; Leto v Feld, supra; Gressman v Stephen-Johnson, supra; Moray v City of Yonkers, supra*).


To establish a claim for medical malpractice based on lack of informed consent, a plaintiff must prove: (1) that the person providing the professional treatment failed to disclose alternatives to such treatment, and the alternatives, and failed to inform the plaintiff of the reasonably foreseeable risks of such treatment that a reasonable medical practitioner would have disclosed in the same circumstances; (2) that a reasonably prudent patient in the same situation would not have undergone the treatment had he or she been fully informed of the risks; and (3) that the lack of informed consent was a proximate cause of the plaintiff's injuries (*see Public Health Law § 2805-d [1]; Wright v Morning Star Ambulette Servs., Inc., supra; Dyckes v Stabile, 153 AD3d 783, 785, 61 NYS3d 110 [2d Dept 2017]; Schussheim v Barazani, 136 AD3d 787, 24 NYS3d 756 [2d Dept 2016]*). To establish the proximate cause element, a plaintiff must show that the operation, treatment or procedure for which there was no informed consent was a substantial cause of the injury (*Thompson v Orner, 36 AD3d 791, 828 NYS2d 509 [2d Dept 2007]; Trabal v Queens Surgi-Center, 8 AD3d 555, 779 NYS2d 504 [2d Dept 2004]; Mondo v Ellstein, 302 AD2d 437, 754 NYS2d 579 [2d Dept 2003]*).

Ms. Imbasciani established, prima facie, entitlement to summary judgment dismissing the cause of action for lack of informed consent against her on the ground that she did not have a duty to obtain Mr. DeMaria's informed consent (*see Cynamon v Mount Sinai Hosp., 163 AD3d 923, 81 NYS3d 520 [2d Dept 2018]*). Dr. Siegel opined that Ms. Imbasciani did not perform surgery or an invasive procedure on Mr. DeMaria. He stated that Ms. Imbasciani did not engage in a violation of Mr. DeMaria's physical integrity and that the hospital's records do not indicate that she needed to obtain informed consent for some aspect of care that she rendered. The plaintiff does not oppose the dismissal of the cause of action for informed consent.

Accordingly, the motion is granted to the extent of dismissing the cause of action of informed consent, and is otherwise denied.

The unredacted affirmation of the plaintiff's medical expert submitted for in camera review will be returned by mail to plaintiff's counsel.

Dated: AUG 04 2020


 HON. JOSEPH A. SANTORELLI
 J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION