At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 16th day of December 2021.

P R E S E N T:
HON. PAMELA L. FISHER,
J.S.C.

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CHERYL CLARKE,

Plaintiff,

DECISION/ORDER

- against -

Index No: 516849/2019

BRUNO CASANOVA, M.D., ADVANTAGECARE PHYSICIANS, P.C., THE BROOKLYN HOSPITAL CENTER, ALBERTO L. CAYTON, M.D. and ALBERTO L. CAYTON, M.D. P.C.,

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	1-5
Opposing Affidavits (Affirmations)	6, 7-8
Reply Affidavits (Affirmations)	9, 10

Upon the foregoing papers in this medical malpractice action, defendant, The Brooklyn Hospital Center, moves, pursuant to CPLR § 3212, for summary judgment, dismissing plaintiff's complaint, and directing the Clerk of the Court to enter judgment in favor of defendant. Defendant also moves to amend the caption to reflect its dismissal from the action.

Plaintiff commenced this action by filing a summons and complaint on July 31, 2019 (Summons & Complaint, annexed as Exhibit A to defendant's motion papers). Issue was joined by defendant, The Brooklyn Hospital Center on September 30, 2019, and plaintiff served a bill of particulars upon defendant on November 26, 2019 (Answer annexed as Exhibit B to defendant's motion papers; Verified Bill of Particulars annexed as Exhibit D to defendant's motion papers). In her complaint and bill of particulars, plaintiff alleges that the staff at The Brooklyn Hospital Center

departed from good and acceptable medical practice in their treatment of the plaintiff from September 29, 2017 through October 2, 2017 by failing to "diagnose and treat" plaintiff's "small bowel perforation," "fail[ing] to keep plaintiff NPO," and upgrading her diet "prior to [her] passing flatus," neglecting to order a CT scan and/or "abdominal/pelvic ultrasounds" prior to discharge, and "fail[ing] to timely and properly monitor plaintiff's medical condition post-operatively," including "her bowel activity" (Complaint ¶ 25; Verified Bill of Particulars ¶¶ 1, 5). As a result of defendant's alleged malpractice, plaintiff is claiming to have sustained the following injuries: further surgeries, "[r]esection of approximately 10 cm of distal ileum," small bowel enterotomy, sepsis, abdominal abscesses, wound infection, peritonitis, tachycardia, intra-abdominal post-operative infection, leaking colostomy, severe abdominal pain, vomiting, fever, conscious pain and suffering, need for extensive wound care, need for extensive antibiotics, "[h]ospitalization from 1/11/18-2/22/18 due to ileostomy dysfunction and abdominal pain," extensive weight loss, diarrhea multiple times per day, and "[i]nability to conduct activities of daily living due to pain" (*Id.* at ¶ 8).

The following facts are not in dispute. On September 7, 2017, plaintiff first presented to Dr. Casanova, an OB/GYN employed by AdvantageCare Physicians, P.C., with "complaints of uterine bleeding and pelvic pain" (Defendant's Expert Affirmation ¶ 4). Dr. Casanova diagnosed plaintiff with fibroids, and plaintiff "agreed to undergo" a myomectomy, which was scheduled for September 29, 2017 (*Id.*; Defendant's Statement of Material Facts ¶ 3). On September 11, 2017, plaintiff returned to Dr. Casanova with complaints of "intense intermittent pain" (*Id.* at ¶ 4). On September 18, 2017, plaintiff presented to Dr. Casanova for an "endometrial biopsy and hysteroscopy," "to determine if cancer cells were growing within the uterus" (*Id.* at ¶ 5). There were no complications from the procedure (*Id.*). On September 28, 2017, plaintiff returned to Dr. Casanova, and they "discuss[ed] [the] surgery scheduled for the following day" (*Id.* at ¶ 6). On September 29, 2017, "plaintiff presented to The Brooklyn Hospital Center," where she "underwent a D&C, uterine polypectomy, abdominal

myomectomy of 11 leiomyomas, [and] lysis of adhesions from bowel to uterus and between bowel loops" (Defendant's Expert Affirmation ¶ 5). The surgery was performed by Dr. Casanova, "plaintiff's private attending physician," with "assistance" from Dr. Julia Cooper, an OB/GYN resident employed by The Brooklyn Hospital Center (*Id.*; Counter-Statement of Material Facts ¶ 7). During the surgery, "[a]fter dissecting away from the bowel from the posterior wall of the uterus, Dr. Casanova noted that the bowel was devitalized" (Defendant's Expert Affirmation ¶ 5). Dr. Cayton, a general surgeon, "was called in to repair the enterotomy" (*Id.*). After Dr. Cayton finished "repair[ing] the small bowel enterotomy," he "scrubbed out," and Dr. Casanova "resumed with the myomectomy" (*Id.*). The operative report states that "[g]eneral surgery will follow the patient in order to dictate the diet," and it was "recommended to keep the patient NPO ("Nothing by mouth") until there was a return of bowel function" (*Id.*).

After the surgery, the plaintiff was monitored by the OB/GYN and general surgery teams, which included the attending physicians, Dr. Casanova and Dr. Cayton, residents, and nurses (*Id.* at ¶ 6). On September 30, 2017, at 8:02 a.m., an OB/GYN resident reported that plaintiff "had no flatus or bowel movement" (Counter-Statement of Material Facts ¶ 8; Relevant TBHC Records at 1438, annexed as Exhibit 2 to plaintiff's opposition papers). At 9:12 a.m., a surgical resident documented that plaintiff had "not yet passed flatus," and was "complaining of mild nausea" and "shortness of breath" (Counter-Statement of Material Facts ¶ 8; Relevant TBHC Records at 1442). At 9:34 a.m., an OB/GYN resident noted in plaintiff's discharge summary dated September 30, 2017, that plaintiff was "tolerating [a] regular diet," "voiding, and passing flatus, and bowel movement" (*Id.* at 1444; Counter-Statement of Material Facts ¶ 9). Later that day, "an OB/GYN resident upgraded [plaintiff] from NPO to a clear liquid diet" (*Id.* at ¶ 10; TBHC Records at 1383). The following day, on October 1, 2017, at 3:33 a.m., an OB/GYN resident recorded that plaintiff was "started on clear liquid diet with passage of flatus," and that she was "[c]omplaining of an episode of emesis with nausea following a large amount

of liquid intake" (*Id.* at 1448). The note also indicates that plaintiff was "instructed to reduce [the] amount of [her liquid] intake" (*Id.*). Dr. Casanova's notes from October 1, 2017 at 3:33 a.m., state that the "plaintiff passed gas [the day before], and she was advanced in diet to clear [liquids]" (*Id.* at 1449). Dr. Casanova wrote that plaintiff had "not vomited," her abdomen was "soft," and "appropriately tender for hysterectomy," there were "no signs of acute abdomen," and her CBC was normal (*Id.*). At 8:36 a.m., an OB/GYN resident documented that the plaintiff had "[n]o flatus or bowel movement," and that she complained of "intermittent pain" and "one episode of bloody vomitus overnight" (*Id.* at 1450; Counter-Statement of Material Facts ¶ 12). The OB/GYN resident placed an order upgrading the plaintiff's diet to "general, healthful" at 8:46 a.m. (*Id.* at ¶ 13; Relevant TBHC Records at 1385). Later that morning, at 10:33 a.m., a surgical resident noted that the plaintiff was "tachycardic overnight," and "denie[d] passing flatus or having a [bowel movement]" (*Id.* at 1453; Counter-Statement of Material Facts ¶ 14). He recommended that the plaintiff remain "NPO until [she] pass[ed] flatus," and an order was placed discontinuing the "general, healthful diet" (Relevant TBHC Records at 1454, 1385). On October 2, 2017, at 6:48 a.m., an OB/GYN resident recorded that the patient "[d]enie[d] passing flatus or having [a] bowel movement," and was "currently NPO" (*Id.* at 1456). At 8:32 a.m., a surgical resident documented that the "patient denie[d] passing flatus, [or] having a [bowel movement]" (*Id.* at 1459). He also recorded that the plaintiff was "tachycardic" that morning, and he recommended a CT scan of the abdomen/pelvis with oral contrast (*Id.* at 1459, 1461). At 11:55 a.m., an "OB/GYN resident upgraded Ms. Clarke from NPO to healthful, general diet," and recorded that the OB/GYN team was aware of the recommendations by the surgical team (*Id.* at 1386-87, 1462; Counter-Statement of Material Facts ¶ 17). Her note also states that the "covering attending," Dr. Casanova, agreed to discharge plaintiff if she "tolerate[d] [a] small meal" (*Id.*; Relevant TBHC Records at 1462). At 3:59 PM on October 2, 2017, a physician assistant documented that the plaintiff had "not passed flatus since [the day before]," and that she only "had 1 episode of flatus since surgery" (*Id.* at 1468). The physician

assistant indicated that the plaintiff was given crackers, and that she "tolerated it without vomiting" (*Id.*). At 11:34 a.m. on October 3, 2017, "Dr. Casanova wrote an addendum" to the physician assistant's note, attesting that he "personally evaluated [the] patient," and that "Ms. Clarke's vomiting was due to the fact that she drank a whole bottle of juice and overdid it when it came to diet" (*Id.* at 1469-70; Counter-Statement of Material Facts ¶ 18). Further, he wrote that he did "not find any contraindication" to "advanc[ing] her diet" (Relevant TBHC Records at 1469). Plaintiff was discharged on October 2, 2017 at approximately 5:36 PM (*Id.* at 1387).

On October 4, 2017, plaintiff presented to The Brooklyn Hospital Center emergency room with complaints of "severe abdominal pain and distension" (Counter-Statement of Material Facts ¶ 21). On October 5, 2017, "[s]he underwent an exploratory laparotomy, extensive lyses of adhesions, small bowel resection and end ileostomy with Dr. Cayton, with Drs. Casanova and Patel assisting" (Relevant TBHC Records at 3619-20; Defendant's Expert Affirmation ¶ 17). Plaintiff was "found to have a small bowel perforation and intra-abdominal fluid collection" (Counter-Statement of Material Facts ¶ 21).

In support of its motion for summary judgment, defendant maintains that its residents and nurses were acting pursuant to the directives of private attending physicians, and that the hospital is not vicariously liable for any negligence or malpractice committed by the private attending physicians (Defendant's Affirmation in Support ¶¶ 30-35, 57). In support of these contentions, defendant provides an expert affirmation from Dr. Dan Reiner, M.D., a physician board certified in surgery and surgical critical care, contending that the staff at the Brooklyn Hospital Center did not deviate from acceptable medical practice during their treatment of the plaintiff, and that no act or omission of theirs proximately caused any of plaintiff's injuries (Defendant's Expert Affirmation ¶ 26). Dr. Reiner's opinion is based on review of the bill of particulars, medical records, and deposition transcripts (*Id.* at ¶ 3). Dr. Reiner opines that "plaintiff's bowel function and over-all condition [were] properly monitored by both the OB/GYN and General Surgery residents and nurses" (*Id.* at ¶ 19). This conclusion is based

on the fact that the notes "[document] whether the plaintiff had flatus and/or a bowel movement, as well as other findings," such as "pain, emesis, [and] nausea" (*Id.*). Further, the notes indicate that the "plaintiff was to remain NPO until such time as she passed gas or had a bowel movement," and that "[t]he findings made by the OB/GYN team were discussed with the Attending, Dr. Casanova" (*Id.*). Dr. Reiner concludes that Dr. Casanova was "fully aware of the plaintiff's condition on a day-to-day basis" based on his deposition testimony that "he tries to regularly round on his patients," the fact that many of the residents' notes were also electronically signed by Dr. Casanova, and his statements of attestation in plaintiff's chart confirming "that he was aware of the plaintiff's condition, including whether she passed gas, had a bowel movement, or offered any complaints" (*Id.* at ¶¶ 19-20). Dr. Reiner maintains that the decisions to upgrade plaintiff's diet and to discharge her without a CT scan were made by Dr. Casanova as the attending physician after speaking to the plaintiff, and examining her (*Id.* at ¶¶ 22-23). Further, Dr. Reiner contends that the orders to "advance the plaintiff's diet and to discharge her home without a having a CT scan [were] not so clearly contraindicated by normal practice that ordinary prudence required inquiring into the correctness of Dr. Casanova's orders" (*Id.* at ¶ 24). This conclusion is based on Dr. Casanova's note from October 2, 2017, documenting that plaintiff "had normal bowel sounds, [her] abdomen was appropriately tender, [there was] no rebound [and] no guarding," and her "[b]lood work was also stable with a normal white blood cell count" (*Id.*).

In opposition to defendant's motion for summary judgment, plaintiff argues that the hospital staff committed independent acts of malpractice for which the hospital is liable, that the orders to advance plaintiff's diet and to discharge her were "clearly contraindicated" requiring intervention by the hospital staff, and that triable issues of fact remain, precluding summary judgment (Plaintiff's Affirmation in Opposition ¶¶ 5, 8, 46, 55). Plaintiff has provided a redacted expert affidavit from a board-certified surgeon, licensed in New Jersey, contending that the staff at The Brooklyn Hospital Center departed from the standard of care by failing to properly monitor the plaintiff's condition after

her surgery, and that this departure "contributed to the delay in diagnosing and treating [plaintiff's] perforated bowel, and in the worsening of her condition" (Plaintiff's Expert Affidavit ¶¶ 1, 21, annexed as Exhibit 1 to plaintiff's opposition papers). Plaintiff's expert opinion is based on review of the pleadings, bill of particulars, medical records, deposition transcripts, Dr. Reiner's expert affirmation, and plaintiff's affidavit (*Id.* at ¶ 3). Plaintiff's expert opines that "the conflicting documentation by the OB/GYN residents, the General Surgery residents, and the nurses" regarding whether the plaintiff "passed gas" and/or "vomited blood" demonstrates that plaintiff was not properly monitored following her surgery, and that "the different departments were [not] adequately communicating about Ms. Clarke's condition" (*Id.* at ¶¶ 21-22). Plaintiff's expert maintains that the "conflicting documentation" "resulted in injury to Ms. Clarke, as [it] caused inaccurate information to be the basis for poor medical decisions in Ms. Clarke's care, namely in upgrading Ms. Clarke's diet and in discharging Ms. Clarke without a CT scan" (*Id.* at ¶ 21). He/she claims that an attending physician "relies on the residents and nurses to accurately inform him or her of the condition of [his/her] patients," and disputes Dr. Reiner's contention that Dr. Casanova was "fully aware of the plaintiff's condition on a day-to-day basis" given the conflicting notes in the chart (*Id.* at ¶ 22). Further, plaintiff's expert explains that these notes were important for assessing plaintiff's condition, as "[p]assing flatus is one of the most critical ways of determining whether or not bowel functioning has returned," and "[u]pgrading a patient's diet to a clear liquid diet from NPO status is only appropriate in a patient who is passing flatus" (*Id.* at ¶¶ 24-25).

Plaintiff's expert also points out that there is an issue of fact as to whether the plaintiff vomited blood or cranberry juice after her diet was upgraded to clear liquid (*Id.* at ¶ 26). He/she alleges that a resident's note indicated that plaintiff vomited blood, but that "Dr. Casanova testified that based on a discussion with nurses, residents, and the patient, he thought Ms. Clarke did not actually vomit blood, but rather, vomited cranberry juice after drinking a whole bottle" (*Id.*). He/she explains that this

distinction is important, as an "immediate CT scan of the abdomen and pelvis" is "required" "to evaluate whether" there is a "bowel perforation" or obstruction in a patient that "had not yet passed flatus and had vomited blood after the introduction of liquids" (*Id.*). Further, plaintiff's expert suggests that there is an issue of fact as to whether the surgical team's reasons for recommending a CT scan were communicated to Dr. Casanova (*Id.* at ¶ 29). He/she refers to Dr. Cayton's deposition testimony stating that "surgical residents would have communicated with Dr. Casanova's OB/GYN residents that Ms. Clarke required a CT scan because of the potential for a bowel perforation or obstruction" (*Id.*). However, plaintiff's expert points out that there is "no documentation in the chart that the surgical residents conveyed this information to the OB/GYN residents," and Dr. Casanova testified that "he did not recall having an understanding as to whether or not Surgery was concerned about a bowel perforation when they recommended a CT [scan of the] abdomen/pelvis" (*Id.*). Plaintiff's expert affirms that the surgical team was required to communicate this information to Dr. Casanova prior to plaintiff's discharge (*Id.* at ¶ 30).

Plaintiff's expert disagrees with Dr. Reiner's opinion that "Dr. Casanova's order[s] to advance plaintiff's diet and to discharge her home without having a CT scan [were] not so clearly contraindicated by normal practice that ordinary prudence required inquiring into the correctness of Dr. Casanova's orders" (*Id.*). He/she alleges that these orders were contraindicated, given the conflicting documentation in the record as to whether the patient had passed flatus (*Id.*). Plaintiff's expert opines that "it is a clear and obvious contraindication and departure from good and accepted [medical] practice to advance [a patient's] diet," and to "discharge the patient home without a CT scan," when the patient "suffered an intra-operative enterotomy of the bowel," "was 4 days post-op," "ha[d] not yet passed flatus," "ha[d] not yet had a bowel movement," and had "bloody vomit," "persistent pain," "abdominal distension," and "tachycardia" (*Id.*). Although the chart documents that plaintiff's "blood

work was stable with a normal white blood cell count," plaintiff's expert affirms that this was "outweighed by Ms. Clarke's condition at the time of discharge" (*Id.*).

In reply, defendant reiterates that its staff did not commit any independent acts of malpractice, and that they were acting under the direction of private attending physicians (Defendant's Reply Affirmation ¶ 6). Defendant argues that Dr. Casanova was aware of the plaintiff's condition despite "any inconsistencies in the residents' notes," given that the OB/GYN residents "could not place orders" upgrading a patient's diet without consulting him, and he reviewed their notes, and was directly involved in the decisions to upgrade the plaintiff's diet, and to discharge her from the hospital (*Id.* at ¶ 7). Defendant concludes that "[t]here is no evidence of record to indicate that [d]efendant" was "negligent in failing to intervene to ensure Ms. Clarke underwent a CT scan prior to her October 2, 2017 discharge" (*Id.* at ¶ 17). Defendant refers to Dr. Casanova's deposition testimony, indicating that the surgical team recommended a CT scan, and Dr. Casanova was aware of the recommendation, but decided to evaluate the patient himself given the conflicting documentation in the chart concerning whether plaintiff had passed flatus and/or vomited blood (*Id.*). Further, the deposition testimony of the parties indicates that it was up to the OB/GYN team, with Dr. Casanova as the attending, to make final decisions regarding the patient's treatment (*Id.* at ¶¶ 7, 17-18). Defendant contends that "[t]he only intervention plaintiff's expert appears to contemplate was for Dr. Cayton and his team…to discuss the fact that they were concerned about bowel perforation, prior to Ms. Clarke being discharged," and Dr. Casanova's deposition testimony does not state that he was unaware that the surgical team was concerned about a possible perforation (*Id.* at ¶¶ 19-20).

To prevail on a cause of action for medical malpractice, the plaintiff must prove that defendant "deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries" (*Stukas v. Streiter*, 83 AD3d 18, 23 [2d. Dept. 2011]). On a motion for summary judgment, defendant must "make a prima facie showing that there was no

departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Iulo v. Staten Is. Univ. Hosp.*, 106 AD3d 696, 697 [2d. Dept. 2013]). Once the defendant meets its burden, the burden then shifts to the plaintiff to "raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing" (*Stukas*, 83 AD3d at 24). If the defendant "makes only a prima facie showing that he or she did not deviate or depart from accepted medical practice, the plaintiff, in order to defeat summary judgment, need only raise a triable issue of fact as to the alleged deviation or departure, and need not address the issue of proximate cause" (*Hayden v. Gordon*, 91 AD3d 819, 821 [2d. Dept. 2012]). Conclusory allegations that are "unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat defendant physician's summary judgment motion" (*Deutsch v. Chaglassian*, 71 AD3d 718, 719 [2d. Dept. 2010]). Where the parties have submitted conflicting expert reports, summary judgment should not be granted; "[s]uch credibility issues can only be resolved by a jury" (*Id.*).

Ordinarily, a hospital may not be held vicariously liable for the "negligent treatment provided by an independent physician" who is "retained by the patient" (*Cynamon v. Mount Sinai Hospital*, 163 AD3d 923, 924 [2d. Dept. 2018]; *Corletta v. Fischer*, 101 AD3d 929, 930 [2d. Dept. 2012]). Further, "[w]here hospital staff, such as resident physicians and nurses, have participated in the treatment of the patient, the hospital may not be held vicariously liable for resulting injuries where the hospital employees merely carried out the private attending physician's orders" (*Cynamon*, 163 AD3d at 924; *Doria v. Benisch*, 130 AD3d 777, 777 [2d. Dept. 2015]). There are three exceptions to this rule, and a hospital is not "shield[ed]" "from liability" "when (1) the staff follows orders despite knowing that the doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders; (2) the hospital's employees have committed independent acts of negligence; or (3) the words or conduct of the hospital give rise to the appearance and belief

that the physician possesses the authority to act on behalf of the hospital" (*Cynamon*, 163 AD3d at 924-25; *Doria*, 130 AD3d at 777-78).

Here, defendant met its prima facie burden. Defendant established that Dr. Casanova was a private attending physician retained by the patient, and that the hospital is not vicariously liable for any act or omission on his part. Through the submission of the expert opinion of Dr. Reiner, a board-certified surgeon, defendant demonstrated that none of the exceptions apply to allow the Court to impose liability on the hospital. Dr. Reiner affirmed that the practice and procedures by the hospital employees were within acceptable standards of medical practice, and that no act or omission of theirs proximately caused any injury to the plaintiff. Dr. Reiner maintained that the hospital employees properly monitored plaintiff's post-operative condition, including whether she had passed gas, and documented their findings in the patient's chart. Further, Dr. Reiner opined that the orders upgrading the patient's diet, and discharging her from the hospital, were not so "clearly contraindicated," as to require the hospital staff to intervene in these decisions (*Cynamon*, 163 AD3d at 924-25). Dr. Reiner's opinion constitutes competent evidence, in that it is based on the bill of particulars, deposition transcripts, and medical records.

In opposition, plaintiff produced an affidavit of merit from a board-certified surgeon, attesting to departures from accepted standards of medical practice, and that these departures were a competent producing cause of the plaintiff's injuries. Plaintiff's expert opinion fails to raise a triable issue of fact, as it is conclusory, "unsupported by the evidence," and does not "address specific assertions made by the [defendant's] expert" (*See Elstein v. Hammer*, 192 AD3d 1075, 1078 [2d. Dept. 2021]; *Attia v. Klebanov*, 192 AD3d 650, 652 [2d. Dept. 2021]). Plaintiff's expert claims that the hospital staff deviated from the standard of care by not properly monitoring the plaintiff's condition after her surgery, and that the conflicting documentation in the record as to whether plaintiff had passed flatus, resulted in Dr. Casanova's reliance on inaccurate medical information when making treatment

decisions (Plaintiff's Expert Affidavit ¶ 21). However, plaintiff's expert's opinion overlooks that Dr. Casanova did not exclusively rely on the hospital staff's notes when making treatment decisions. Dr. Casanova's deposition testimony, Dr. Reiner's expert affirmation, and the medical records state that Dr. Casanova personally evaluated the plaintiff on October 1, 2017 and October 2, 2017, prior to her discharge, and she confirmed to him that she had passed flatus (Dr. Casanova's EBT tr. 155, lines 7-20; at 156, lines 1-10; at 157, lines 13-15; at 173, lines 18-19; at 179, lines 12-15; at 190, lines 3-16, annexed as Exhibit G to defendant's motion papers; Defendant's Expert Affirmation ¶¶ 10, 16, 22-23; Relevant TBHC Records at 1449, 1469-70). Therefore, even if defendant deviated from acceptable medical practice by the alleged failure to monitor plaintiff's condition, plaintiff's expert has failed to establish that this failure proximately caused any injury to the plaintiff, as all of the treatment decisions were made by Dr. Casanova, who independently evaluated the plaintiff. Further, plaintiff's expert has failed to raise a triable issue of fact as to whether the orders upgrading the plaintiff's diet, and discharging her, were "clearly contraindicated" (*Cynamon*, 163 AD3d at 924-25). Although plaintiff's expert alleges that the orders were "clearly contraindicated" due to inconsistencies in the record regarding whether the plaintiff had passed flatus, and whether she vomited blood or cranberry juice, Dr. Casanova confirmed in his notes and deposition testimony that he was aware of the inconsistencies in the record, and decided to speak to and examine the patient due to the conflicting documentation (*Id.*; Plaintiff's Expert Affidavit ¶ 30; Dr. Casanova's EBT tr. 171, lines 20-23; at 178, lines 14-25; at 194, lines 14-19; at 195, lines 17-22; Relevant TBHC Records at 1449, 1469-70). Further, Dr. Casanova's statement of attestation and deposition testimony indicate that he was aware that the surgical team was recommending a CT scan, but did not think it was necessary based on his examination of the patient, and what she communicated to him (*Id.* at 1468-70; Dr. Casanova's EBT tr. 180, lines 19-25; at 181, lines 10-25; at 182, lines 1-6). Based on the foregoing, plaintiff has failed to establish that Dr. Casanova's orders were "so clearly contraindicated," as to require the hospital to

intervene (*Cynamon*, 163 AD3d at 924-25). Defendant's motion for summary judgment is granted. The Court also grants defendant's motion to amend the caption of this action to reflect its dismissal, and all future papers filed with the Court shall bear the amended caption. The Clerk of the Court is directed to enter judgment in favor of defendant, The Brooklyn Hospital Center.

This constitutes the decision and order of the Court.

ENTER:

Hon. Pamela L. Fisher
J.S.C.

HON. PAMELA L. FISHER