

<b>Maikish v Good Samaritan Hosp. Med. Ctr.</b>
2022 NY Slip Op 33787(U)
November 3, 2022
Supreme Court, New York County
Docket Number: Index No. 805030/2016
Judge: Erika M. Edwards
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ERIKA M. EDWARDS PART 10M**

*Justice*

-----X

CHARLES MAIKISH,

Plaintiff,

- v -

GOOD SAMARITAN HOSPITAL MEDICAL CENTER,  
PATRICK REID, M.D., STEVE CAGEN, M.D., LONG  
ISLAND ANESTHESIOLOGISTS PLLC, STEVEN BLAU,  
M.D., JOSEPH A. BONAFEDE, M.D., AUGUSTO DA SILVA,  
M.D., KATHLEEN O'HARA, M.D., KHALID A. NOORI, M.D.,  
ANDREA BAIERLEIN, PATRICK NORTON and IRAM  
AHSANUDDIN,

Defendants.

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INDEX NO. 805030/2016

02/22/2022,  
04/14/2022,  
04/14/2022,

MOTION DATE 05/19/2022

007, 008, 009,  
010

MOTION SEQ. NO. 010

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 293, 294, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 360, 362, 369, 372, 378, 379, 380, 381

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 363, 370, 377, 382, 383

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 364, 368, 371, 373, 374, 375, 384

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 295, 296, 297, 298, 299, 300, 376, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, after oral argument held before this court on August 31, 2022, the court grants all of the summary judgment motions filed under motion sequences 007, 008, 009 and 010 and dismisses Plaintiff Charles Maikish's complaint against all defendants.

Plaintiff Charles Maikish ("Plaintiff") brought this medical malpractice and lack of informed consent action against Defendants Good Samaritan Hospital Medical Center ("Good Sam"), Patrick Reid, M.D. ("Dr. Reid"), Steve Cagen, M.D. ("Dr. Cagen"), Long Island Anesthesiologists PLLC ("LIA"), Steven Blau, M.D. ("Dr. Blau"), Joseph A. Bonafede, M.D. ("Dr. Bonafede"), Augusto Da Silva, M.D. ("Dr. Da Silva"), Kathleen O'Hara, M.D.'s ("Dr. O'Hara"), Khalid A. Noori, M.D.'s ("Dr. Noori"), James McHale, M.D. ("Dr. McHale"), Brian Weber, M.D. (Dr. Weber"), Andrea Baierlein ("Nurse Baierlein"), Patrick Norton ("RT Norton") and Iram Ahsanuddin ("PA Ahsanuddin") (collectively "Defendants"). Plaintiff subsequently discontinued the action against Dr. Bonafede, Dr. Da Silva, Dr. Weber and Dr. McHale.

Plaintiff alleged in substance that Defendants departed from good and accepted medical practice in their care and treatment of Plaintiff during his admission at Defendant Good Sam from December 29, 2013 to January 13, 2014, and that they failed to obtain his informed consent. Plaintiff further alleges that Defendants' departures caused injuries to his membranes, cords and nerves, which included recurrent laryngeal nerve, vocal cord paresis, palsy and speech impairment.

Plaintiff, who was 67 years old at the time, was admitted to the emergency room at Good Sam on December 28, 2013, after falling off of his bicycle, which caused multiple facial fractures, lacerations and abrasions. Plaintiff had weakness and numbness to various parts of his body. On December 29, 2013, Plaintiff underwent surgery and Defendant Dr. Cagen, an anesthesiologist, intubated Plaintiff using a cuffed 7.0 mm endotracheal (ET) tube. Dr. Reid, a

neurosurgeon, performed the surgery which included posterior C5-C7 decompression and instrumented fusion in the prone position, followed by an anterior cervical discectomy and arthrodesis at C5-C6 and C6-C7 in the supine position. Dr. Da Silva, a plastic surgeon, performed a repair of the facial lacerations with debridement and local skin flaps and reduced the nasal fracture. After the surgery, Plaintiff was treated in the Post-Anesthesia Care Unit (PACU) and Surgical Intensive Care Unit (SICU).

Plaintiff alleges in substance that based on periodic chest x-ray results, it was apparent that the ET tube had shifted and moved during the surgery when the cuff was not inflated and that the cuff was subsequently inflated when the ET tube was in an improper position. Over the next three days, Plaintiff alleges in substance that the ET tube was not properly secured so it had to be advanced four times. On December 29, 2013, RT Farjana Sajib advanced the ET tube 2 cm as per PA Jennifer Carrion's order. On December 30, 2013, RT Naughton advanced the tube 2 cm as per PA Ahsanuddin's orders at 8:00 a.m. and 10:36 a.m. On January 1, 2014 at 6:07 a.m., PA Maria Spano advanced it 4 cm.

Throughout the day on December 31, 2013, several attempts were made to wean Plaintiff off of the ET tube and ventilator, but they were unable to do so because Plaintiff had a low breathing rate, apnea with a long inspiratory phase and fevers. Plaintiff was not extubated until January 1, 2014. During the days following extubation, Plaintiff's condition worsened and he was unable to speak or swallow food. On January 9, 2014, a feeding tube was placed in Plaintiff. It was determined that Plaintiff had aphonia and dysphagia with a vocal cord injury. On January 14, 2014, Plaintiff was discharged and transferred to a rehabilitation facility.

Plaintiff alleges in substance that Defendants departed from good and accepted medical practice by failing to ensure proper placement and re-positioning of the ET tube prior to inflating

the cuff, failing to properly document the position of the ET tube, failing to properly communicate with each other regarding the ET tube and cuff, failing to timely order an appropriate number of x-rays, improperly intubating Plaintiff for a protracted period of time, among additional departures. Plaintiff further alleges in substance that Defendants' departures caused his alleged injuries.

The following Defendants now move for summary judgment in their favor: 1) Defendants Dr. Noori and Dr. O'Hara (007); 2) Defendants Good Sam, R.N. Baierlein, RT Naughton and PA Ahsanuddin (008); 3) Defendants Dr. Cagen and LIA (009); and Defendants Dr. Reid and Dr. Blau (010).

Plaintiff submitted a consolidated opposition opposing portions of the motions pertaining to some of his medical malpractice claims against Dr. O'Hara, Good Sam, RT Naughton, PA Ahsanuddin, Dr. Cagen, LIA, and Dr. Blau. He opposes dismissal of his lack of informed consent claim as against Dr. Cagen and LIA only. He does not oppose dismissal of his complaint against Dr. Noori, R.N. Baierlein and Dr. Reid or dismissal of his lack of informed consent claim against Dr. O'Hara, Good Sam, RT Naughton, PA Ahsanuddin and Dr. Blau.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

In a medical malpractice action, a defendant doctor or provider moving for summary judgment must establish that in treating the plaintiff there was no departure from good and accepted medical or dental practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]). It is well settled that expert opinion must be detailed, specific, based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). If a defendant's expert affidavit contains "[b]are conclusory denials of negligence without any factual relationship to the alleged injuries" and "fails to address the essential factual allegations set forth in the complaint" or bill of particulars, then it is insufficient to establish defendant's entitlement to summary judgment as a matter of law (*Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003] [internal quotations omitted]; *see Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or

her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In medical malpractice actions, to defeat the motion, a plaintiff must rebut the defendant's prima facie showing by submitting an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Roques*, 73 AD3d at 207). An expert affidavit which sets forth general allegations of malpractice or conclusions, misstatements of evidence or assertions unsupported by competent evidence is insufficient to demonstrate that defendants failed to comport with accepted medical practice or that any such failure was the proximate cause of a plaintiff's injuries (*Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]; *Alvarez*, 68 NY2d at 325).

Competing expert affidavits alone are insufficient to avert summary judgment since experts almost always disagree, but the question is whether plaintiff's expert's opinion is based upon facts sufficiently supported in the record to raise an issue for the trier of fact (*De Jesus v Mishra*, 93 AD3d 135, 138 [1<sup>st</sup> Dept 2012]). "Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hospital*, 99 NY2d 542, 544 [2002] [internal quotations omitted]). However, "[w]here the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*id.*).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5<sup>th</sup> ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Summary judgment should be

awarded when a party cannot raise a factual issue for trial (*Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1<sup>st</sup> Dept 1984]; CPLR 3212[b]).

For a plaintiff to prevail on a lack of informed consent claim, “a plaintiff must establish, via expert medical evidence, that defendant failed to disclose material risks, benefits and alternatives to the medical procedure, that a reasonably prudent person in plaintiff’s circumstances, having been so informed, would not have undergone such procedure, and that lack of informed consent was the proximate cause of (plaintiff’s) injuries” (*see* Public Health Law § 2805-d; *Balzola v Giese*, 107 AD3d 587, 588 [1<sup>st</sup> Dept 2013]; *Shkolnik v Hospital for Joint Diseases Orthopaedic Inst.*, 211 AD2d 347, 350 [1st Dept 1995]).

1) Dr. Noori and Dr. O’Hara’s Summary Judgment Motion (007)

Defendants Dr. Noori and Dr. O’Hara now move for summary judgment in their favor, for dismissal and severance of all claims and cross-claims against them, and for severance of their names from the caption, under motion sequence 007. The court grants this motion and dismisses Plaintiff’s complaint and all cross-claims against Dr. Noori and Dr. O’Hara.

The movants rely on the expert affirmations of Sanford Goldberg, M.D., Alex Stone, M.D. and Jason C. Hoffman, M.D. and argue that they conformed to good and accepted medical practices at all times and were not a substantial factor in causing any injury to Plaintiff.

The movants argue in substance that Dr. Noori was an internist who was called in to consult by the SICU on December 28, 2013 regarding Plaintiff’s internal medicine issues. Dr. Noori began treating Plaintiff on December 28, 2013, he cleared him for surgery on December 29, 2013, and followed up with him until January 9, 2014. Defendants argue in substance that as a consulting internist, Dr. Noori was not responsible for monitoring, altering, adjusting or advancing Plaintiff’s ET tube and he never re-positioned it, advanced it, or monitored it. The

SICU intensivist on duty was responsible for monitoring the ET tube and Plaintiff's airway. Since the SICU is a closed unit, Dr. Noori did not and was not permitted to issue any orders regarding Plaintiff's treatment. They further argue that Plaintiff's allegations regarding Dr. Noori's alleged deviations involve treatment which is well outside the scope of practice of an internist consultant.

The movants further argue in substance that Dr. O'Hara's care and treatment of Plaintiff, including monitoring his intubation, the manner and frequency in which she assessed him, ascertained and documented the location of the ET tube, and rendered instructions and orders, were appropriate and proper at all times. Dr. O'Hara treated Plaintiff from December 30, 2013 at approximately 3:10 p.m. to January 1, 2014. The movants argue that Plaintiff's ET tube and cuff were in an appropriate and proper position at all times and that whenever the tube was moved, it was moved into a better position to prevent self-extubation. The movants further argue that on December 31, 2013, the ET tube was positioned at the lower margin of the clavicle and it was appropriate for Dr. O'Hara to leave the tube in this location. On January 1, 2014, the movants argue that it was an appropriate exercise of medical judgment to advance the ET tube 4 cm because the x-ray revealed that it was 8 cm above the carina. The movants further argue that the tube and cuff were never positioned near Plaintiff's laryngeal nerve, its branches or vocal cords and they did not cause Plaintiff's alleged injuries. The movants argue that Plaintiff had multiple periodic x-rays to determine the position of the endotracheal tube and cuff and Dr. O'Hara appropriately responded to the results.

The movants further argue in substance that throughout the day on December 31, 2013, several attempts were made to wean Plaintiff off of the ET tube and ventilator, but they were unable to do so because Plaintiff failed the trials and had a low breathing rate, apnea with a long

inspiratory phase and fevers. Plaintiff was extubated on January 1, 2014, without difficulty. Dr. O'Hara noted that Plaintiff was doing well after he was extubated. The movants further argue that Plaintiff was only intubated for 3 to 3 ½ days, which is not excessive because two weeks or more is considered excessive.

The movants' expert, Dr. Stone, opines in substance that CT scans and MRIs revealed that Plaintiff's trachea is measured to be longer than an average trachea so the distance from the true vocal cords to the carina is further than in a normal trachea. Therefore, the medical records demonstrate that the ET tube and cuff were never located within Plaintiff's vocal cords and could not have caused any of Plaintiff's alleged injuries to his vocal cords or laryngeal nerve while he was under Dr. O'Hara's care from December 30, 2013 to January 1, 2014.

Plaintiff, relying on his expert physician's affirmation, opposes dismissal of portions of his medical malpractice claim against Dr. O'Hara only. He fails to oppose the portion of the motion seeking dismissal of the complaint against Dr. Noori or dismissal of his lack of informed consent claim against Dr. O'Hara. Therefore, the court grants dismissal of Plaintiff's complaint against Dr. Noori and dismissal of his lack of informed consent claim against Dr. O'Hara without opposition. Thus, the court will discuss Plaintiff's allegations against Dr. O'Hara.

In his consolidated opposition, Plaintiff argues in substance that Dr. O'Hara, Good Sam, RT Naughton, PA Ahsanuddin and Dr. Blau all failed to ensure proper placement and location of the ET tube before they initially inflated its cuff; they failed to adequately secure the ET cuff which resulted in four advancements because it was migrating too proximally; they failed to appropriately manage and monitor Plaintiff's ET tube placement and cuff pressure; and they failed to order timely x-rays on December 31, 2013, during a period of 9 hours and 50 minutes after a documented 5 cm proximal migration of the ET tube. Plaintiff further argues that these

departures were a substantial factor in causing Plaintiff's recurrent laryngeal nerve, vocal cord paresis, palsy and speech impairment.

The court finds that Defendants Dr. Noori and O'Hara demonstrated their entitlement to summary judgment in their favor as a matter of law and Plaintiff failed to raise any issues of fact based on admissible evidence to rebut the movants' experts' opinions. Here, Plaintiff's expert failed to support many of Plaintiff's initial theories of departures set forth in his Bill of Particulars and supplemental Bill of Particulars. Plaintiff's expert also failed to rebut or even address Defendants' experts' specific opinions that there were no departures and no proximate causation as to Dr. O'Hara. The court finds that Plaintiff's expert's statements were too general, conclusory and speculative to rebut the movant's experts' opinions and failed to create triable issues of fact sufficient to defeat this motion.

The court agrees with the movants that Plaintiff's expert failed to address Dr. Stone's opinions that Plaintiff's trachea was measured to be longer than the average trachea and that the records indicate that the location of the ET tube was never near Plaintiff's vocal cords or recurrent laryngeal nerve so it could not have caused Plaintiff's injuries. The movants' experts supported their opinions with detailed measurements to describe the location of the ET tube, yet Plaintiff's expert's opinion failed to contradict these details with his own measurements based on the medical records with sufficient details explaining why he believed the ET tube was malpositioned, where it was located within Plaintiff's trachea with respect to Plaintiff's vocal cords and recurrent laryngeal nerve, whether it made contact with Plaintiff's vocal cords and recurrent laryngeal nerve, where the ET tube was located when the injuries allegedly occurred, or how the position of the ET tube caused Plaintiff's injuries.

Specifically, Plaintiff's expert stated in substance that Defendants Dr. O'Hara, Good Sam, RT Naughton, PA Ahsanuddin and Dr. Blau all departed from good and accepted standard of medical care by failing to appropriately manage and monitor Plaintiff's ET tube placement and cuff pressure, including their failure to record the ET tube's metrics for 9 hours and 51 minutes from December 29, 2013 to December 30, 2013, and that such departure caused Plaintiff's injuries. However, Plaintiff's expert failed to specify how such alleged departure caused Plaintiff's injuries. It is insufficient to simply state that it was malpositioned for an extended period of time without providing a detailed explanation.

Additionally, Plaintiff's expert opined that Defendants Dr. O'Hara, Good Sam, RT Naughton, PA Ahsanuddin and Dr. Blau all departed from good and accepted standard of medical care by failing to order timely chest x-rays on December 31, 2013, until 9 hours and 50 minutes after it was documented that the ET tube had migrated 5 cm proximally, that this departure "caused and permitted the ETT to remain malpositioned for an extended period, causing compression and injury to the vocal cord structures," and he or she stated that this departure caused injury to Plaintiff's recurrent laryngeal nerve, vocal cord paresis, palsy and speech impairment. However, Plaintiff's expert failed to explain with sufficient specificity based on admissible evidence why he or she believed that the ET tube was malpositioned during this period, why this period was "an extended period," how close the ET tube was located with respect to Plaintiff's recurrent laryngeal nerve and vocal cord, or how the ET tube caused Plaintiff's alleged injuries.

Plaintiff's expert further opined in substance that Plaintiff's vocal cords "received repeated compression injuries" on "several instances" beginning from the initial placement of air into the ET tube cuff while the tube was malpositioned until it was advanced four times because

of inadequate securing of the tube. He or she further opined in substance that Defendants Dr. O'Hara, Good Sam, RT Naughton, PA Ahsanuddin and Dr. Blau departed from good and accepted standard of medical care by failing to adequately manage the ET tube placement and cuff pressure, by inadequately securing the tube, by preventing its recurrent migration "proximally towards the vocal cords" and by permitting inflation of the cuff when it "approximates the vocal cords." Plaintiff's expert further opined that such departures were a substantial factor in causing injury to Plaintiff's recurrent laryngeal nerve, vocal cord paresis, palsy and speech impairment.

The court finds these opinions to be too general, conclusory, speculative and lack support in the record. The terms "towards" the vocal cords and "approximates" the vocal cords are too general, speculative and conclusory and they provide no measurements or details as to how close the ET tube came to the vocal cords. Additionally, Plaintiff's expert failed to sufficiently explain how Plaintiff's vocal cords received "repeated compression injuries," or how the placement of the ET tube caused such "repeated compression injuries." The expert simply stated that Plaintiff received such injuries on "several instances." Plaintiff's expert failed to state when during this period such injuries were alleged to have occurred or provide the details of the location of the ET tube when Plaintiff's vocal cords were alleged to have received such injuries. Additionally, Plaintiff's expert's opinions regarding proximate causation were conclusory, speculative and without evidentiary basis.

Furthermore, even if the court determined that Plaintiff's expert's affirmation was sufficient to rebut the movants' expert's affirmations, then the court finds that Plaintiff lumped Dr. O'Hara, Good Sam, RT Naughton, PA Ahsanuddin and Dr. Blau together and failed to specify how each of them deviated from good and accepted standard of care. It is clear that Dr.

O'Hara treated Plaintiff on December 30, 2013 at approximately 3:10 p.m. until January 1, 2014. Many of Plaintiff's alleged departures attributable to Dr. O'Hara and the others occurred prior to the beginning of her treatment of Plaintiff.

Therefore, the court finds that Plaintiff failed to raise any triable issues of fact sufficient to defeat this motion.

The court grants the motion and dismisses Plaintiff's complaint and all claims and cross-claims against Defendants Dr. Noori and Dr. O'Hara.

2) Defendants Good Sam's, Nurse Baierlein's, RT Naughton's and PA Ahsanuddin's Summary Judgment Motion (008)

Defendants Good Sam, Nurse Baierlein, RT Naughton and PA Ahsanuddin now move for summary judgment in their favor and for dismissal of and severance of the claims against them under motion sequence 008. The court grants this motion and dismisses Plaintiff's complaint against Defendants Good Sam, Nurse Baierlein, RT Naughton and PA Ahsanuddin.

The movants rely on the expert affirmations of Warren Zelman, M.D. and Jason C. Hoffman, M.D. The movants argue in substance that their care and treatment of Plaintiff conformed with good and accepted standards of medical care and practice at all times and it did not cause Plaintiff's alleged injuries. They further argue in substance that Nurse Baierlein, RT Naughton and PA Ahsanuddin reasonably and appropriately relied on the evaluations, diagnosis and recommendations of the attending physicians with respect to the placement, positioning, adjustment and/or advancement of Plaintiff's ET tube.

The movants further argue that RT Naughton was not responsible for interpreting Plaintiff's x-rays and that he properly followed the orders and directives which were provided to him. They further argue that PA Ahsanuddin was not responsible for managing Plaintiff's

airway, she did not place or adjust Plaintiff's ET tube and that she appropriately followed and entered the orders and directives which were provided to her.

As mentioned above, Plaintiff relies on his expert affirmation and opposes portions of this motion pertaining to his medical malpractice claims against Good Sam, RT Naughton and PA Ahsanuddin, only. He does not oppose dismissal of his complaint against Nurse Baierlein or his lack of informed consent claim against any of the movants.

The court finds that the movants demonstrated their entitlement to summary judgment in their favor as a matter of law and that Plaintiff failed to raise any issues of fact sufficient to defeat this motion. Plaintiff's expert's affirmation failed to specifically rebut the movant's experts' opinions. As stated above in its discussion of Plaintiff's consolidated opposition under motion sequence 007, the court finds that Plaintiff's expert affirmation was too general, speculative, conclusory and lacking in evidentiary support to sufficiently rebut the movants' experts' opinions. It failed to even mention the movants' experts' opinions.

Since the court is dismissing Plaintiff's complaint against all Defendants for the reasons set forth herein and the court finds that Plaintiff's expert failed to rebut any of the Defendants arguments regarding no departures or proximate causation on the part of Defendants or any employees or agents of Good Sam, the court finds that Good Sam cannot be held vicariously liable for Plaintiff's alleged injuries.

The court finds that Plaintiff's expert failed to raise an issue of fact based on admissible evidence that Defendants Nurse Baierlein, RT Naughton or PA Ahsanuddin acted independently or on their own behalf to depart from good and accepted medical practice or that it was inappropriate for them to rely on and carry out the instructions, orders and recommendations of

the attending physicians, or which were passed down to them through others. Plaintiff's expert failed to refute the movants' experts' opinions that they all conformed to the standard of care.

Therefore, the court grants the motion and dismisses Plaintiff's complaint against Defendants Good Sam, Nurse Baierlein, RT Naughton and PA Ahsanuddin.

3) Defendants Dr. Cagen's and LIA's Summary Judgment Motion (009)

Defendants Dr. Cagen and LIA now move for summary judgment in their favor under motion sequence 009. The court grants the motion.

The movants rely on the expert affirmations of Dr. Ethan Bryson and Dr. Evan Mair and argue in substance that there was no departure from accepted medical practice and the movants did not cause any of Plaintiff's alleged injuries. The movants further argue in substance that Dr. Cagen was the anesthesiologist who attended Plaintiff until approximately 4:45 p.m. on December 29, 2013, during Dr. Reid's surgery on Plaintiff's cervical spine. At this time, Dr. Annon took over Plaintiff's anesthesia care and Dr. Cagen did not render any additional treatment to Plaintiff, nor was he responsible for Plaintiff's respiratory care. Dr. Cagen and Dr. Reid agreed that Dr. Cagen should perform an awake fiberoptic intubation on Plaintiff, to prevent Plaintiff's neck from being moved. Dr. Cagen did not inflate the pressure cuff on Plaintiff's ET tube.

Dr. Mair opined in substance that the uninflated balloon cuff and tube of the ET tube could not have created pressure or in any way caused damage to Plaintiff's vocal cords or laryngeal nerves during Dr. Cagen's intraoperative care to Plaintiff. He opined in substance that the ET tube was in an acceptable position for the purposes of mechanical ventilation, that its tip was located at the level of the clavicular head, which was below and not near Plaintiff's laryngeal nerves and vocal cord.

Dr. Bryson opined in substance that Dr. Cagen did not depart from good and accepted medical practice and that he did not cause Plaintiff's alleged injuries. Prior to the surgery, Dr. Cagen spoke with Dr. Reid and Dr. Reid told Dr. Cagen that he wanted Plaintiff to undergo an awake fiberoptic intubation with no cervical spine manipulation. Dr. Bryson further stated in substance that Dr. Cagen met with Plaintiff prior to the surgery, discussed with Plaintiff the risks and complications of the awake fiberoptic procedure and general anesthesia that would be administered after the awake fiberoptic procedure and responded to their questions. Dr. Bryson further opined that the performance of the awake fiberoptic intubation with sedation on a patient with Plaintiff's injuries was completely in accordance with accepted medical practice and that Dr. Cagen properly performed the procedure. Dr. Bryson also opined that the ET tube was an appropriate size to prevent pressure on the trachea, soft tissues or areas of the vocal cord and that it could not have caused Plaintiff's alleged injuries.

Plaintiff opposes the motion in his consolidated opposition and relies on his expert affirmation. Plaintiff argues in substance that Dr. Cagen departed from good and accepted medical practice by failing to appropriately document and communicate the position where the ET tube was placed and secured, that the cuff was not inflated and that it had migrated during the surgery, so that it needed to be repositioned prior to inflation. Plaintiff's expert further stated in substance that the standard of care required proper documentation of the position of the ET tube, particularly in Plaintiff's case where his surgery required him to move from the supine to prone position and back, the ET tube had migrated, there was another anesthesiologist taking over, and because the cuff was not going to be inflated until later. Plaintiff also argues in substance that Dr. Cagen's departures allowed the ET tube cuff to be inflated when it was malpositioned in the trachea because it was too proximal at the vicinity and level of the vocal cords, which was a

substantial factor in causing Plaintiff's recurrent laryngeal nerve, vocal cord paresis, palsy and speech impairment.

Plaintiff further argues in substance that Defendants Dr. Cagen and LIA failed to demonstrate their entitlement to dismissal of Plaintiff's lack of informed consent claim as they failed to demonstrate that a reasonably prudent person in Plaintiff's position would not have declined to undergo the procedure in question if he or she had been fully informed. Plaintiff also argues that Plaintiff's procedure and intubation were not emergent.

In reply, the movants argue in substance that Plaintiff's expert failed to support any of Plaintiff's claims involving Dr. Cagen's departures involving Plaintiff's intubation and Dr. Cagen's conduct during Plaintiff's surgery. They also argue that Plaintiff's expert even contradicted Plaintiff's claims raised in his Bill of Particulars. Plaintiff's expert agreed that there were no departures in Dr. Cagen's performance of the intubation, the placement of the ET tube, the decision not to inflate the cuff and Dr. Cagen's performance of his responsibilities during the surgery. The movants further argue that the court should preclude allegations regarding Dr. Cagen's and LIA's departures as they are new claims and new theories of liability and causation which Plaintiff failed to include in his Bill of Particulars and which were raised for the first time in Plaintiff's opposition to the movants' summary judgment motion. The movants argue that Plaintiff never included in his Bill of Particulars that Dr. Cagen departed by failing to document or communicate the position of the ET tube, that the cuff was not inflated, that the ET tube had migrated and that such departures were a proximate cause of Plaintiff's alleged injuries.

Here, the court finds that Dr. Cagen and LIA demonstrated their entitlement to summary judgment in their favor as a matter of law as to Plaintiff's medical malpractice claim and that Plaintiff failed to raise any issues of fact sufficient to defeat this motion.

As discussed above, Plaintiff's expert's affirmation failed to specifically rebut the movant's experts' opinions. As stated above in its discussion of Plaintiff's consolidated opposition under motion sequence 007, the court finds that Plaintiff's expert's affirmation was too general, speculative, conclusory and lacking in evidentiary support to sufficiently rebut the movants' experts' opinions. Here, the movants expert's opinion lacked support in the record regarding Dr. Cagen's testimony that he placed the ET tube between 2.5 and 3 tracheal rings from the carina and not 3 cm, that he failed to tell Dr. Annon and others about the cuff not being inflated and details regarding the alleged misplacement and migration of the ET tube.

The court finds that even if the record supported these departure allegations, then there was still no issue of fact as to how these alleged departures caused Plaintiff's injuries. The record demonstrates that Plaintiff had several chest x-rays where the physicians and staff in the SICU and PACU made their own determinations regarding the location of the ET tube, which also indicated whether the cuff was inflated or not. For example, the record indicated that shortly after Plaintiff was transferred to the PACU, which the movants stated to be three minutes, Plaintiff had a chest x-ray for the PACU physicians and staff to determine the location of the ET tube and whether it needed to be adjusted. Plaintiff failed to discuss how this short period of time caused or contributed to Plaintiff's injuries.

However, the court disagrees with the movants' arguments that Plaintiff's expert's claims are new theories of liability and proximate causation. The court finds to the contrary because Plaintiff included these claims in his Second Supplemental Bill of Particulars, dated March 18, 2021. The movants failed to include the Supplemental Bills of Particulars as exhibits to their motion and they failed to address them. In Plaintiff's Second Supplemental Bill of Particulars, Plaintiff alleged that Dr. Cagen's and LIA's departures included "failing to properly document

the anesthesia record regarding the position and inflation status of the cuff of the endotracheal tube” and “failing to communicate with the subsequent anesthesiologist as to the position and inflation status of the cuff of the endotracheal tube.” Therefore, such claims were not new theories of liability raised for the first time in Plaintiff’s opposition to the movants’ summary judgment motion.

As to Plaintiff’s lack of informed consent claim against Dr. Cagen and LIA, the court finds that Dr. Bryson’s expert affirmation and the record satisfied the movant’s initial burden of demonstrating a prima facie showing of entitlement to judgment in their favor as a matter of law and that Plaintiff failed to raise an issue of fact as to this issue.

Dr. Bryson stated in substance that Dr. Cagen met with Plaintiff prior to the surgery, discussed the risks and complications of the awake fiberoptic and general anesthesia procedures and responded to their questions. Although Dr. Bryson failed to provide any further details regarding this conversation and failed to state that a reasonably prudent person in Plaintiff’s position would not have declined to undergo the procedure if he or she had been fully informed of the risks, benefits and alternatives of the procedure, the court finds that the record supports the absence of factual issues which remain to be tried. The Plaintiff’s expert failed to discuss Plaintiff’s lack of informed consent claim and Plaintiff’s attorney affirmation is insufficient to raise an issue of fact to defeat this portion of the motion.

Finally, there is no vicarious liability on the part of LIA.

Therefore, the court grants this motion and dismisses Plaintiff’s complaint as against Defendants Dr. Cagen and LIA.

4) Defendants Dr. Reid's and Dr. Blau's Motion for Summary Judgment (010)

Defendants Dr. Reid and Dr. Blau now move for summary judgment in their favor under motion sequence 010. The court grants this motion.

The movants rely on the expert affirmations of Dr. Nirit Weiss and Dr. Steven Salzman and argue in substance that Dr. Reid's and Dr. Blau's care and treatment of Plaintiff was appropriate at all times. The movants state in substance that Dr. Reid was the neurosurgeon who performed Plaintiff's cervical spine surgery and Dr. Blau was the general surgeon or surgical care intensivist who supervised the post-operative care of Plaintiff in the PACU and SICU. The movants argue in substance that Dr. Blau's only relevant treatment of Plaintiff occurred during the night after his surgery and the following morning. After the surgery on December 29, 2013, Dr. Blau directed that Plaintiff's ET tube be advanced 2 cm and he was responsible for managing Plaintiff's post-operative care, including the placement of his ET tube and settings on his ventilator.

The movants' experts opined that there were no departures in Dr. Blau's care and treatment of Plaintiff, that he appropriately assessed the position of the ET tube and correctly ordered that it be adjusted at all times.

Dr. Weiss opined in substance that even though an injury to the recurrent laryngeal nerve during an anterior cervical disc decompression is a known and accepted risk of the procedure, Dr. Reid's surgery could not have caused Plaintiff's injuries to both Plaintiff's right and left recurrent laryngeal nerves, unless Plaintiff's nerve anatomy is abnormal in some fashion, which is not supported by the record. Dr. Weiss further stated in substance that Dr. Reid used a right-sided approach during the procedure which could have injured Plaintiff's right recurrent laryngeal nerve, but not both nerves. Dr. Weiss further stated in substance that such an injury

could not be explained by any of Plaintiff's treating physicians at the three separate facilities where Plaintiff was treated.

Dr. Salzman opined in substance that Dr. Blau did not depart from the standard of care; that the initial placement of the ET tube was not so high as to cause any of Plaintiff's alleged injuries; that when the x-rays were made available, Dr. Blau timely and appropriately directed that the ET tube be advanced 2 cm for the Plaintiff's safety and that Plaintiff's alleged injuries are common during cervical disc decompression surgeries, even when there are no departures. He also opined in substance that it is common for ET tubes to migrate up and down because of movement and common to reposition ET tubes by advancing them at 2 cm increments.

Plaintiff failed to oppose dismissal of his claims against Dr. Reid or his lack of informed consent claim against Dr. Blau. Plaintiff only opposed dismissal of his medical malpractice claim against Dr. Blau.

As discussed above, in Plaintiff's consolidated opposition, he alleged in substance that Dr. Blau, along with Dr. O'Hara, RT Naughton and PA Ahsanuddin failed to appropriately manage, monitor and record Plaintiff's ET tube placement and cuff pressure, including during a period of 9 hours and 51 minutes from December 29, 2013 to December 30, 2013, and that they failed to timely order chest x-rays, including a delay of 9 hours and 50 minutes on December 31, 2013, which was after the documented 5 cm proximal migration of the ET tube. Plaintiff further argues that they caused and permitted the ET tube to remain malpositioned for an extended period of time; they failed to adequately manage the ET tube placement and cuff pressure on several instances; they failed to adequately secure the ET tube; they failed to prevent its recurrent migration proximally towards the vocal cords and they permitted inflation of the cuff when it

was in the vicinity of the vocal cords. Plaintiff further alleges that all of these departures was the proximate cause of Plaintiff's injuries.

In reply, the movants argue in substance that Plaintiff's expert is not qualified to render an opinion about Dr. Blau's care and treatment of Plaintiff since the expert is licensed in North Carolina, he or she is not a surgeon, he or she has no experience with post-operative care after spinal surgery, and he or she has no non-academic hospital experience. Therefore, the movants argue that Plaintiff's expert is not qualified to speak on the standard of care in place in New York City metropolitan hospitals. The movants also argue in substance that Plaintiff's expert fails to differentiate between the alleged departures attributed to Dr. Blau, Dr. O'Hara, RT Naughton or PA Ahsanuddin and Plaintiff failed to identify any specific departures on Dr. Blau's behalf. Additionally, Plaintiffs attempt to hold Dr. Blau responsible for issuing inappropriate orders, yet also argue that the Physician Assistants and Respiratory Therapists were also responsible for failing to properly implement his orders.

Here, the court finds that Dr. Reid and Dr. Blau demonstrated their entitlement to judgment in their favor as a matter of law and that Plaintiff failed to raise any issues of fact sufficient to defeat this motion.

As an initial matter, the court determines that Plaintiff's expert is qualified to render an opinion as to Dr. Blau and the court is not persuaded by the movants' arguments to the contrary. However, as discussed above, the court finds that Plaintiff's expert's affirmation is insufficient to rebut the movants' experts' claims because Plaintiff's expert's affirmation is too general, conclusory, speculative and unsupported by the record to rebut the movants' arguments. Plaintiff's expert failed to address the specific opinions of the movants' experts, failed to differentiate between the conduct of each defendant, failed to specify with sufficient detail how

Dr. Blau's care or his orders deviated from good and accepted medical practice and how such departures proximately caused Plaintiff's injuries. The language used by Plaintiff's expert was vague and failed to provide sufficient evidentiary basis to support his or her opinion that the ET tube was malpositioned, too close to Plaintiff's vocal cords and recurrent laryngeal nerve, or how the positioning of such ET tube caused Plaintiff's injuries and when such injuries occurred.

Therefore, the court grants this motion and dismisses Plaintiff's complaint against Dr. Reid and Dr. Blau.

The court considered any additional arguments raised by the parties, but not specifically discussed herein and the court denies any additional request for relief not expressly granted herein.

As such, it is hereby

ORDERED that, as to motion sequence 007, the court grants Defendants Khalid A. Noori, M.D.'s and Kathleen O'Hara, M.D.'s motion for summary judgment, the court dismisses Plaintiff Charles Maikish's complaint and all claims and cross-claims against Khalid A. Noori, M.D. and Kathleen O'Hara, M.D., and directs the Clerk of the Court to enter judgment in favor of Defendants Khalid A. Noori, M.D. and Kathleen O'Hara, M.D. as against Plaintiff Charles Maikish, without costs to any party; and it is further


ORDERED that, as to motion sequence 008, the court grants Defendants Good Samaritan Hospital Medical Center's, Andrea Baierlein's, Patrick Norton's and Iram Ahsanuddin's motion for summary judgment, the court dismisses Plaintiff Charles Maikish's complaint and all claims and cross-claims against Defendants Good Samaritan Hospital Medical Center, Andrea Baierlein, Patrick Norton and Iram Ahsanuddin, and directs the Clerk of the Court to enter judgment in favor of Defendants Good Samaritan Hospital Medical Center, Andrea Baierlein,

Patrick Norton and Iram Ahsanuddin as against Plaintiff Charles Maikish, without costs to any party; and it is further

ORDERED that, as to motion sequence 009, the court grants Defendants Steve Cagen, M.D.'s and Long Island Anesthesiologists PLLC's motion for summary judgment, the court dismisses Plaintiff Charles Maikish's complaint and all claims and cross-claims against Defendants Steve Cagen, M.D. and Long Island Anesthesiologists PLLC, and directs that Clerk of the Court to enter judgment in favor of Defendants Steve Cagen, M.D. and Long Island Anesthesiologists PLLC as against Plaintiff Charles Maikish, without costs to any party; and it is further

ORDERED that as to motion sequence 010, the court grants Defendants Patrick Reid, M.D.'s and Steven Blau, M.D.'s summary judgment motion, the court dismisses Plaintiff Charles Maikish's complaint and all claims and cross-claims against Defendants Patrick Reid, M.D. and Steven Blau, M.D., and directs that Clerk of the Court to enter judgment in favor of Defendants Patrick Reid, M.D. and Steven Blau, M.D. as against Plaintiff Charles Maikish, without costs to any party.

This constitutes the decision and order of the court.

  
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<u>11/3/2022</u> DATE					<u>ERIKA M. EDWARDS, J.S.C.</u>		
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE