

Harrison v Blyer

2022 NY Slip Op 34958(U)

June 1, 2022

Supreme Court, Kings County

Docket Number: Index No. 521364/2019

Judge: Pamela L. Fisher

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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 1st day of June 2022.

P R E S E N T:

HON. PAMELA L. FISHER,
J.S.C.

-----X
LATASHA HARRISON and RICARDO HARRISON,

Plaintiffs,

DECISION/ORDER

- against -

Index No: 521364/2019

SCOTT M. BLYER, DDS, M.D., NICHOLAS HOULIS,
D.O., JUSTO CONCEPCION, P.A., and CAMEO SURGERY
CENTER,

Defendants.

-----X

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 _____	<u>1-3, 4-5</u>
Opposing Affidavits (Affirmations) _____	<u>6-10</u>
Reply Affidavits (Affirmations) _____	<u>11, 12</u>

Upon the foregoing papers in this medical malpractice action, defendants, Nicholas Houlis, D.O. and Justo Concepcion, P.A., move in motion sequence 1, for summary judgment, pursuant to CPLR § 3212, dismissing plaintiffs' complaint against them in its entirety. Defendants also move to amend the caption to reflect their dismissal from the action, to sever the claims against them from the claims against the remaining defendants, and to direct the entry of judgment with prejudice in their favor. Defendants, Scott M. Blyer, DDS, M.D. and Cameo Medical Services, P.C. s/h/a Cameo Surgery Center, cross move in motion sequence 2, for summary judgment, pursuant to CPLR § 3212, dismissing plaintiffs' complaint against them in its entirety. Defendants also move to amend the caption to reflect their dismissal from the action, to sever the claims against them from the claims against the remaining defendants, and to direct the entry of judgment with prejudice in their favor.

MS 1 - XMO
MS 2 - XMO

Plaintiffs commenced this action by filing a summons and complaint on September 30, 2019 (Defendants' Affirmation in Support ¶ 7, motion sequence 1; Summons & Complaint, annexed as Exhibit B to defendants' motion papers, motion sequence 1). Issue was joined by defendants, Nicholas Houlis, D.O. and Justo Concepcion, P.A. on November 15, 2019, and by defendants, Scott M. Blyer, DDS, M.D. and Cameo Medical Services, P.C. on November 27, 2019 (Defendants' Affirmation in Support ¶ 8, motion sequence 1; Defendants' Affirmation in Support ¶ 8, motion sequence 2; Answers annexed as Exhibit C to defendants' motion papers, motion sequence 1, and as Exhibit O to defendants' motion papers, motion sequence 2). Plaintiffs served separate bills of particulars upon defendants, Nicholas Houlis, D.O. and Justo Concepcion, P.A. on or about December 13, 2019 (Verified Bill of Particulars as to Dr. Houlis, annexed as Exhibit D to defendants' motion papers, motion sequence 1; Verified Bill of Particulars as to P.A. Concepcion, annexed as Exhibit E to defendants' motion papers, motion sequence 1). In their complaint and bills of particulars, plaintiffs allege that defendants, Dr. Houlis and P.A. Concepcion, departed from good and acceptable medical practice in their treatment of Ms. Harrison on May 21, 2019 by "failing to have a pre-operative CT scan to evaluate whether the umbilical hernia hernia-sac had bowel or only fat in it," "failing to properly evaluate the plaintiff for potential perforation risks in light of her prior surgical history," "failing to identify where internal organs and structures were before and during the surgery," "negligently perforating the bowel in five locations," "performing liposuction too aggressively," and "failing to appreciate that [they] had perforated the bowel before closing the surgical wounds" (Complaint ¶ 17; Verified Bill of Particulars as to Dr. Houlis ¶¶ 1, 3; Verified Bill of Particulars as to P.A. Concepcion ¶¶ 1, 3). As a result of defendants' alleged malpractice, plaintiff claims that she sustained the following injuries: five small bowel perforations, mesentery perforation, peritonitis, enteric content in the abdominal cavity, midline disfiguring scar from the May 28, 2019 surgery, distended bowel, exteriorization of the bowel, decompression of the bowel, resection of the bowel,

anastomosis of the bowel, disfiguring scars from the surgeries, sepsis, enterobacteria, atelectasis, pleural fluid, pneumonia, small bowel obstruction, post-operative ileus, perihepatic free fluid, dilated air and fluid-filled small bowel loops, collapse of small bowel, sinus tachycardia, nonspecific T wave abnormality, abnormal ECG, hypotensive, shortness of breath, diffuse abdominal pain, abdominal distension, vomiting, constipation, inability to eat, abdominal tenderness, drainage of gastric contents, fever and chills, hypokalemic metabolic acidosis, decreased urinary output, dehydration, pre renal azotemia, acute kidney injury (AKI), elevated lactic acidosis, elevated white blood cell (WBC) count, and decreased breath sounds (Verified Bill of Particulars as to Dr. Houlis ¶ 9; Verified Bill of Particulars as to P.A. Concepcion ¶ 9).¹

The following facts are not in dispute. On February 5, 2018, Ms. Harrison “presented to Cameo Surgery Center” “for a consultation with Dr. Blyer” “for a Brazilian Butt Lift and a tummy tuck” (Defendants’ Affirmation in Support ¶ 17, motion sequence 1; Plaintiffs’ Affirmation in Opposition ¶ 5). Ms. Harrison “completed a Patient History form, wherein she denied a history of any significant medical conditions, and reported two prior Cesarean sections” (Defendants’ Affirmation in Support ¶ 17, motion sequence 1). The records indicate that “Dr. Blyer performed a physical examination, including [plaintiff’s] abdomen, and found her to be a good candidate for the proposed surgery” (Plaintiffs’ Affirmation in Opposition ¶ 5). Plaintiff “did not go forward with the surgery at that time,” and did not return to Cameo Surgery Center until February 27, 2019 (*Id.* at ¶¶ 5-6). On February 27, 2019, plaintiff informed Dr. Blyer that she “was interested in a Tummy Tuck, or Lipo 360” (Defendants’ Affirmation in Support ¶ 18, motion sequence 1). In his chart, “Dr. Blyer noted the presence of an umbilical hernia, which would be repaired during lipo-abdominoplasty” (*Id.*). Dr. Blyer “requested” that plaintiff receive “[m]edical clearance” from another physician before the surgery, and she “obtained” “[m]edical clearance” “from non-party Dr. Ahmadue Rahman on April 30, 2019 (*Id.*;

¹ Dr. Blyer and Cameo Medical Services, P.C. did not attach bills of particulars to their motion papers.

Cameo Surgery Center Records at 19, annexed as Exhibit L to defendants' motion papers, motion sequence 1). On May 21, 2019, plaintiff returned to Cameo Surgery Center "for liposuction of the abdomen and flanks and abdominoplasty with repair of umbilical hernia" (Defendants' Affirmation in Support ¶ 19, motion sequence 1). The operative report documents "pre and postoperative diagnoses of lipodystrophy of the abdomen, umbilical hernia, and that Dr. Blyer was the attending surgeon, with Dr. Houlis and PA Concepcion as assistants" (*Id.* at ¶ 21). Dr. Houlis was a fellow on May 21, 2019 (Statement of Material Facts ¶ 12, motion sequence 1). Dr. Blyer and the plaintiff communicated via text messages "[i]n the days following the May 21st procedure" (Defendants' Affirmation in Support ¶ 23, motion sequence 1). On May 23, 2009, Ms. Harrison called "Cameo Surgery Center," "complaining of abdominal pain and requesting more pain medication" (*Id.* at ¶ 25). Dr. Houlis "returned" plaintiff's phone call, and she reported that she was experiencing "abdominal pain with mild nausea, but denied fever, chills, or sweats" (*Id.*). Dr. Houlis advised Ms. Harrison "to drink plenty of fluids, eat food, take Ibuprofen, and to call back the next day if there was no improvement" (*Id.*). On May 25, 2019, plaintiff "sent a text message to Dr. Blyer stating that there was blood in her urine," and Dr. Blyer responded that she should "let him know if it persisted for more than a day or two" (Defendants' Affirmation in Support ¶ 24, motion sequence 2). On May 27, 2019, Ms. Harrison "texted Dr. Blyer" that "she [had been] vomiting" "for the past 24 hours," and Dr. Blyer "asked her if she was passing gas, and she replied in the affirmative" (Plaintiffs' Affirmation in Opposition ¶ 12; Defendants' Affirmation in Support ¶ 26, motion sequence 2). Dr. Blyer responded that she should "walk," "maintain a bland diet," and "consider an enema" (*Id.*). On May 28, 2019, plaintiff returned to Dr. Blyer's office "for her one-week post-operative follow up appointment" (*Id.* at ¶ 27). At that time, "Dr. Blyer observed that she appeared diaphoretic, nauseous, had bowel sounds, and her abdomen was distended and non-tender" (*Id.*). Dr. Blyer "instructed the plaintiff to immediately go to the emergency room" (*Id.*).

On May 28, 2019, Ms. Harrison “was admitted to St. Joseph Hospital,” and was “diagnosed with small bowel perforations” (*Id.* at ¶ 28). Dr. Andrew Rochman performed a “resection” of “[a]pproximately 6 centimeters of the small bowel” (*Id.*; Plaintiffs’ Affirmation in Opposition ¶ 14). After the surgery, plaintiff “was put on a ventilator and remained in the hospital” until June 13, 2019 (*Id.*).

In support of their motion for summary judgment, defendants, Dr. Houlis and P.A. Concepcion, submit an expert affirmation from Richard W. Swift, JR., M.D., F.A.C.S., a physician board certified in plastic surgery and general surgery, contending that Dr. Houlis and P.A. Concepcion never deviated from the standard of care during their treatment of the plaintiff, and that they did not proximately cause her injuries (Defendants’ Expert Affirmation ¶¶ 1, 4, annexed as Exhibit A to defendants’ motion papers, motion sequence 1). Dr. Swift’s opinion is based on review of the medical records, bills of particulars, deposition transcripts, and his own education, training and experience (*Id.* at ¶ 3). He opines that the “lipo-abdominoplasty” procedure “was properly performed under the supervision of the attending surgeon” based on the “[o]perative [r]eport and the deposition testimony of Dr. Houlis and P.A. Concepcion regarding their custom and practice with respect to the performance of liposuction procedures” (*Id.* at ¶ 23). Dr. Swift maintains “that a bowel perforation is a common and accepted risk of lipo-abdominoplasty, and can, and did here, occur in the absence of negligence” (*Id.* at ¶ 26). He bases this conclusion on “the relatively small portion of the [p]laintiff’s bowel requiring resection,” the deposition testimony of the parties that “no resistance was encountered in the performance of the liposuction procedure,” and the deposition testimony of Dr. Houlis that “special attention was given to avoiding the area of the [p]laintiff’s known umbilical hernia during manipulation of the liposuction cannula” (*Id.* at ¶ 29). He explains that “liposuction procedures are performed without direct visualization of the subcutaneous plane,” and the “practitioner instead relies upon palpation and tactile resistance in their manipulation of the cannula” (*Id.* at ¶ 27). Dr. Houlis also testified that “a small

abdominal wall weakening can go undetected preoperatively where a patient is obese or had prior surgeries” (*Id.* at ¶ 28). Dr. Swift contends that the “small abdominal wall weakening” “can result in the formation of a small attenuation in the fascia, through which a small portion of the bowel can be exposed and then herniate slightly through the opening” (*Id.*). Further, “in the event of contact with the liposuction cannula,” this pre-existing condition “can result in multiple small perforations of that section of the bowel” (*Id.*). He concludes that the patient had a “small abdominal wall weakening” in this case, resulting in the bowel perforations (*Id.* at ¶ 29).

Although there are no claims in the bills of particulars regarding the postoperative care received by the plaintiff, Dr. Swift claims that “there were no delays on the part of Dr. Houlis’ in the diagnosis of the [p]laintiff’s bowel perforation” (*Id.* at ¶ 30). He notes that the “only postoperative contact between the [p]laintiff and Dr. Houlis was the May 23, 2019 telephone call” (*Id.* at ¶ 31). Dr. Swift alleges that Dr. Houlis responded appropriately to plaintiff’s complaints of nausea and abdominal pain, as these complaints, in the absence of “fever, chills, or sweats,” were not indicative of a bowel perforation (*Id.*). Further, even if there was a delay in the diagnosis of a bowel perforation, Dr. Swift opines that this delay did not proximately cause any injury to the plaintiff, as the plaintiff would have had to have the same operation regardless of the timing of the diagnosis (*Id.* at ¶ 32).

In support of their motion for summary judgment, Dr. Blyer and Cameo Medical Services, P.C, rely on the affirmation of co-defendants’ expert, Dr. Swift (Defendants’ Affirmation in Support ¶ 5, motion sequence 2). Counsel argues that Dr. Blyer responded appropriately to plaintiff’s post-operative complaints, and that “there were no signs or symptoms warranting suspicion of a bowel injury” prior to May 28, 2019 (*Id.* at ¶¶ 38-45).

In opposition to both motions, plaintiffs submit an expert affirmation from Adam Schaffner, M.D., a physician board certified in plastic surgery, otolaryngology/head and neck surgery, and facial plastic and reconstructive surgery, contending that defendants deviated from the standard of care

during their treatment of the plaintiff, and that they proximately caused her injuries (Plaintiffs' Expert Affirmation ¶¶ 1, 3, 21, 26). Dr. Schaffner's opinion is based on review of Dr. Swift's expert affirmation, Dr. Rochman's affirmation, the medical records, deposition transcripts, and his education, training, and experience (*Id.* at ¶ 4). Dr. Schaffner disputes Dr. Swift's contention that "perforating the bowel is a common and accepted complication of liposuction," based on the deposition testimony of the parties and the consent form for the procedure (*Id.* at ¶¶ 16, 17). He points out that Dr. Blyer testified that a bowel perforation rarely occurs during liposuction, and that it was not one of the risks disclosed on the consent form (*Id.* at ¶ 17). Further, he testified that he "never trained his staff about bowel perforation as a risk of the procedure" (*Id.*). Dr. Houlis concurred with Dr. Blyer's opinion in his deposition testimony, stating that the "risk" of a bowel perforation is "very small" (*Id.*). Dr. Schaffner also disagrees with Dr. Swift's opinion that "there was an undetected portion of the bowel that had herniated through the abdominal muscle wall that was unknowingly perforated while the defendant surgeons were operating in the correct plane above the abdominal wall" (*Id.* at ¶ 16). He highlights that there is no "direct proof of such a herniation," and that Dr. Rochman, the surgeon who performed the bowel resection, "submitted an affirmation attesting to the fact that the bowel was in its normal location within the peritoneal cavity, and that there was no bowel herniating through the abdominal wall" (*Id.* at ¶ 18). Further, "there were multiple physical examinations of the plaintiff's abdomen prior to the surgery," the day of the surgery, and in the emergency room at St. Joseph Hospital, and "no hernia was ever noted" (*Id.*). Dr. Schaffner opines that the "cannula being utilized by either Dr. Houlis or P.A. Concepcion penetrated the abdominal wall and perforated the bowel below five times, which is a departure from accepted standards of care" (*Id.* at ¶ 21). He bases this conclusion on the deposition testimony of the parties regarding the proper technique for handling the cannula, and the fact that the operating surgeon has "attested that there was no bowel herniation" (*Id.* at ¶¶ 19-21). Dr. Blyer testified that "the cannula must always be above the muscle, and if it goes below the muscle,

it is not the proper technique” (*Id.* at ¶ 19). P.A. Concepcion testified that if the surgeon “stays in the proper plane, there is no way to perforate the bowel” (*Id.*). Dr. Blyer also testified that “the surgeon may be unaware that he actually penetrated the bowel during the performance of liposuction” (*Id.* at ¶ 20). As Dr. Rochman has “attested that there was no bowel herniation,” Dr. Schaffner concludes that “the only other reasonable explanation is that the cannula was not in the proper plane,” constituting a deviation from the standard of care (*Id.* at ¶ 21).

Dr. Schaffner also disagrees with Dr. Swift’s opinion that Dr. Houlis properly handled the plaintiff’s phone call on May 23, 2019, and that the delay in diagnosing her bowel perforations did not cause her any additional injuries (*Id.* at ¶ 27). He states that the records indicate that the plaintiff called the office “complaining of intense pain that the OxyContin was not controlling,” and she “requested another prescription of OxyContin” (*Id.*). Dr. Schaffner points out that “Dr. Houlis’ note does not indicate how long the pain had been present, whether it was getting worse, how intense it was,” “if there was a specific focus for the pain,” and “if the plaintiff was asked if her abdomen was distended” (*Id.*). He opines that “[i]f a patient telephones the office following [surgery] complaining of intense pain not being controlled by OxyContin, the appropriate standard of care would be to have her come immediately to the office to be examined or sent directly to an emergency room” (*Id.*). Dr. Schaffner maintains that “had [plaintiff] been brought into the office or sent to an emergency room, a diagnosis would have been made at that time rather than five days later, and the complications from her bowel perforation would have been less severe” (*Id.*). Dr. Blyer testified that “when there is a bowel perforation, earlier intervention is better,” and the medical records from St. Joseph Hospital indicate that “her symptoms continued to worsen over the course of the week,” and “the bowel had become so markedly distended that the incision had to be extended in order to eviscerate the bowel” (*Id.* at ¶ 29). Dr. Schaffner explains that “[w]hen there is a perforation in the bowel, the contents of the bowel, containing bacteria, enter the body,” and “[e]ven a small hole in the bowel poses a significant risk of

death if not timely detected and corrected, and the risks are that much greater when the bowel is perforated five times” (*Id.* at ¶ 30). Dr. Schaffner claims that had the plaintiff’s perforation been corrected earlier, “[s]he likely would not have been put into respiratory distress requiring being placed on a ventilator” (*Id.*). He also suggests that Dr. Houlis also deviated from the standard of care by “[a]dvising the plaintiff to eat and drink during this period,” and that “all food and drink [should have been] withheld to prevent additional spillage” (*Id.*). Further, Dr. Blyer also deviated from the standard of care, as both “Dr. Houlis and Dr. Blyer” testified that Dr. Blyer “would be briefed on all such conversations” (*Id.* at ¶ 27). He concludes that “either Dr. Houlis or P.A. Concepcion,” deviated from the standard of care “by not staying in the proper surgical plane,” and Dr. Blyer deviated from acceptable medical practice by “not properly supervising them” (*Id.* at 14). Further, both Dr. Houlis and Dr. Blyer “departed from accepted standards by treating the patient over the phone rather than bringing her in for an examination,” resulting in plaintiff’s injuries (*Id.* at 15).

In opposition to both motions, plaintiffs also submit an affirmation from Andrew J. Rochman, M.D., a board-certified general surgeon who performed the small bowel resection on the plaintiff at St. Joseph Hospital (Treating Surgeon’s Affirmation ¶¶ 1-3). Dr. Rochman’s opinion is based on his “observations” during the surgery, and the “history obtained” at St. Joseph Hospital (*Id.* at ¶¶ 5-6). Dr. Rochman opines that “a cannula utilized during the liposuction had perforated the abdominal muscular wall, gone through the mesentery and perforated [plaintiff’s] bowel in five places” (*Id.* at ¶ 5). Further, he states that plaintiff’s “bowel was in its normal anatomical location at the time it was perforated, and that it had not herniated outside of the abdominal muscle wall at the time of the surgery” (*Id.* at ¶ 6). He affirms that the “bowel was adherent to the abdominal side wall within the peritoneal cavity because contents of the bowel had come out as a result of the perforations causing an inflammatory reaction resulting in the adherence” (*Id.*). Dr. Rochman maintains that “had the bowel perforation been diagnosed in a timelier fashion, the obstruction would have been relieved sooner and that [he] would

not have had to extend the incision in order to eviscerate the bowel” (*Id.* at ¶ 7). Further, he contends that the “inflammation caused by the toxic contents of [Ms. Harrison’s] perforated bowel likely continued to contaminate her system, resulting in her dehydration, acute kidney failure, and respiratory distress that necessitate[d] her being placed on a ventilator” (*Id.*). He concludes that “[i]t is more likely than not that had the diagnosis been made sooner, [plaintiff] would not have been in acute renal failure and respiratory distress requiring placement of a ventilator” (*Id.*).

In reply, defendants, Dr. Houlis and P.A Concepcion, reiterate that they did not deviate from the standard of care during their treatment of the plaintiff, and that no act or omission of theirs proximately caused her injuries (Reply Affirmation ¶ 11, motion sequence 1). Further, they claim that neither one of them can be found liable for plaintiff’s injuries, as they were “acting under the supervision of Dr. Blyer” during the surgery (*Id.* at ¶ 24). Defendants argue that all of the statements in their statement of material facts “shall be deemed admitted” pursuant to Uniform Trial Court Rule 22 NYCRR § 202.8-g, as the plaintiffs failed to cite to any evidence in their response to defendants’ statement of facts (*Id.* at ¶¶ 4, 6, 10). Defendants maintain that plaintiffs’ expert affirmation is “insufficient to raise a triable issue of fact,” as it is speculative, conclusory, and not based on facts in the record (*Id.* at ¶ 13). Defendants contend that all opinions regarding a failure to diagnose plaintiff’s bowel injury during the postoperative period must be disregarded, as these claims are “outside” “the scope of the” bills of particulars (*Id.* at ¶ 22).

In reply, defendants, Dr. Blyer and Cameo Medical Services, P.C., contend that “defendants have established their prima facie entitlement to judgment as a matter of law that plaintiff’s bowel injury occurred in the absence of negligence, and that there was no delay in diagnosing the plaintiff’s bowel injury” (Reply Affirmation ¶ 9, motion sequence 2). Defendants allege that Dr. Schaffner’s expert affirmation is insufficient to defeat summary judgment, as it is speculative and conclusory (*Id.* at ¶¶ 11-15).

Law

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” (*lulo v. Staten Is. Univ. Hosp.*, 106 AD3d 696, 697 [2d. Dept. 2013]). To “sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff’s bill of particulars” (*Anonymous v. Gleason*, 175 AD3d 614, 617 [2d. Dept. 2019]; *Bendel v. Rajpal*, 101 AD3d 662, 663 [2d. Dept. 2012]). 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]). Further, a plaintiff cannot defeat a motion for summary judgment by “rais[ing] a new or materially different theory of” “liability” “for the first time in opposition to a motion for summary judgment” that was not “pleaded in the complaint or bills of particulars” (*Gleason*, 175 AD3d at 617; *Cox v. Herzog*, 192 AD3d 757, 759 [2d. Dept. 2021]; *Abalola v. Flower Hosp.*, 44 AD3d 522, 522 [1st Dept. 2007]). 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” (*Deutsch*, 71 AD3d at 719).

Ordinarily, “[a] resident or fellow who is supervised by a doctor during a medical procedure,” “cannot be held liable for medical malpractice” (*Poter v. Adams*, 104 AD3d 925, 927 [2d. Dept. 2013]; *Bellafiore v. Ricotta*, 83 AD3d 632, 633 [2d. Dept. 2011]). However, there are exceptions to this rule if the “resident or fellow knows that the supervising doctor’s orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders, or the resident or fellow commits an independent act that constitutes a departure from accepted medical practice” (*Poter*, 104 AD3d at 927; *Nasima v. Dolen*, 149 AD3d 759, 760 [2d. Dept. 2017]). The same rules apply to a physician’s assistant who is working under the supervision of a physician (*Zhuzhingo v. Milligan*, 121 AD3d 1103, 1106 [2d. Dept. 2014]; *Bellafiore*, 83 AD3d at 633 (stating that “[w]hen supervised medical personnel are not exercising their independent medical judgment, they cannot be held liable for medical malpractice unless the directions from the supervising superior or doctor so greatly deviates from normal medical practice that they should be held liable for failing to intervene”)).

Analysis:

Before addressing the merits of defendants’ motions, the Court notes that defendants’ late filing of their motions for summary judgment is excused, as they have established the requisite “good cause,” required under CPLR § 3212(a) (*Brill v. City of New York*, 2 NY3d 648, 651 [2004]; CPLR § 3212(a)). Pursuant to the Kings County Supreme Court Uniform Civil Term Rules, “motions for summary judgment [must] be made no later than sixty (60) days after the filing of a Note of Issue,” except where the City of New York is a defendant in the case (Kings County Supreme Court Uniform Civil Term Rules Part C(6)).² The rules further provide that this deadline “may only be extended by the Court upon good cause shown” (*Id.*). The Note of Issue was filed on November 5, 2021, and therefore,

² <https://ww2.nycourts.gov/courts/2jd/kings/civil/KingsCivilSupremeRules.shtml>

defendants had until January 4, 2022 to file their motions for summary judgment (Defendants' Affirmation in Support ¶ 13, motion sequence 1; Note of Issue annexed as Exhibit K to defendants' motion papers, motion sequence 1). The motions for summary judgment were filed on February 3, 2022 and February 14, 2022, 90 and 101 days after the Note of Issue was filed, respectively (NYSCEF # 44, 65). However, the defendants were under the mistaken belief that their case was assigned to another judge based on the NYSCEF webpage, and that judge's rules extended the deadline to move for summary judgment to 90 days following the filing of the Note of Issue (Defendants' Affirmation in Support at 3 n.1, motion sequence 1; Exhibits K-3 and K-5 to defendants' motion papers, motion sequence 1). Based on these facts, the Court finds that the defendants have demonstrated a "reasonable excuse" for the late filing of their motions, and there has been no prejudice to the plaintiffs, as all parties signed a stipulation extending the deadline to move for summary judgment to 120 days after the filing of the Note of Issue (Defendants' Affirmation in Support at 3 n.1, motion sequence 1; Stipulation annexed as Exhibit K-4 to defendants' motion papers, motion sequence 1; *Brill*, 2 NY3d at 652; *Derby v Bitan*, 38 Misc.3d 516, 520 [Sup Ct, Dutchess County 2012] (excusing late filing of summary judgment motion where court website listed the incorrect filing date of Note of Issue, and counsel relied on that date)).

Motion Sequence 1:

Here, defendants, Dr. Houlis and P.A. Concepcion met their prima facie burden by "demonstrating that, during their treatment of [Ms. Harrison], they did not exercise any independent medical judgment, but were under the direct supervision of [Dr. Blyer], whose directions did not so greatly deviate from normal practice that defendants should be held liable for failing to intervene" (*Bellafiore*, 83 AD3d at 633). Both P.A. Concepcion and Dr. Houlis testified that they were always supervised by Dr. Blyer when they performed liposuction (P.A. Concepcion's EBT tr. 30, lines 8-24; at 31, lines 2-4, annexed as Exhibit J to defendants' motion papers, motion sequence 1; Dr. Houlis' EBT

tr. 40, lines 7-12, annexed as Exhibit I to defendants' motion papers, motion sequence 1). Further, P.A. Concepcion testified that Dr. Blyer "marks all the areas that need to be liposuctioned" before the procedure, and that he and Dr. Houlis perform the procedure in accordance with Dr. Blyer's plan (P.A. Concepcion's EBT tr. 38, lines 12-18; at 31, lines 6-13). Dr. Blyer testified that P.A. Concepcion and Dr. Houlis performed the liposuction aspect of the surgery, and that he was in the room at all times while they performed the procedure (Dr. Blyer's EBT tr. 50, lines 5-22, annexed as Exhibit H to defendants' motion papers, motion sequence 1). Defendants' expert, Dr. Swift affirmed that Dr. Houlis and P.A. Concepcion did not deviate from acceptable medical practice, and that they did not proximately cause Ms. Harrison's injuries (Defendants' Expert Affirmation ¶ 4). Further, he confirms that the surgery was "performed under the supervision of the attending surgeon," and that Dr. Houlis and P.A. Concepcion utilized the proper technique (*Id.* at ¶¶ 23, 25). Dr. Swift's affirmation constitutes competent evidence, in that it is based on the medical records, bills of particulars, and deposition transcripts (*Id.* at ¶ 3).

Before examining the merits of plaintiffs' opposition, the Court notes that plaintiffs' failure to comply with Uniform Rule 202.8-g(d) in opposing P.A. Concepcion's and Dr. Houlis' motion for summary judgment, is not fatal to their case. Uniform Rule 202.8-g(d) requires the plaintiff to cite to "evidence submitted in" "opposition to the motion" when the plaintiff disputes a material fact included in the defendants' statement of material facts (22 NYCRR 202.8-g(d)). Defendants allege that plaintiffs did not follow this procedure for paragraphs 13, 14, and 17 of their statement of material facts (Defendants' Reply Affirmation ¶ 6, motion sequence 1). Paragraph 13 disputes defendants' statement that "Dr. Houlis and P.A. Concepcion were at all times during the May 21, 2019, procedures acting under the supervision and direction of Dr. Blyer," and cites to plaintiffs' attorney affirmation (Statement of Material Facts ¶ 13, motion sequence 1; Plaintiffs' Counter-Statement of Facts ¶ 13, motion sequence 1). As plaintiffs' attorney affirmation cites to specific pages of Dr. Blyer's deposition

transcript in support of their argument that there is an issue of fact regarding whether Dr. Blyer was supervising defendants during the procedure, the Court will excuse plaintiffs' failure to cite to this evidence in their response to defendants' statement of material facts (Plaintiffs' Affirmation in Opposition ¶ 30). Paragraphs 14 and 17 "[n]either admit nor deny," that "[t]here were no signs, symptoms, or indications of a bowel perforation during the lipo-abdominoplasty procedure," and that "Dr. Houlis spoke with the [p]laintiff on May 23, 2019," "[u]nder the supervision of Dr. Blyer" (Statement of Material Facts ¶¶ 14, 17, motion sequence 1; Plaintiffs' Counter-Statement of Material Facts ¶¶ 14, 17, motion sequence 1). As there are no claims in the bills of particulars regarding plaintiff's post-operative care, whether the plaintiffs complied with the Uniform Rules in disputing paragraph 17 of defendants' statement of material facts, is inconsequential (Verified Bill of Particulars as to P.A. Concepcion; Verified Bill of Particulars as to Dr. Houlis). Whether paragraph 14 is deemed admitted or not, is also immaterial, as there are other allegations in the bills of particulars besides the defendants' "fail[ure] to appreciate that [they] had perforated the bowel before closing the surgical wounds" (*Id.* at ¶ 1; Verified Bill of Particulars as to P.A. Concepcion ¶ 1).

In opposition, plaintiffs produced affidavits of merit from Dr. Schaffner, a board-certified plastic surgeon, and Dr. Rochman, the surgeon who performed plaintiff's small bowel resection, attesting to departures from accepted standards of medical practice, and that these departures were a competent producing cause of the plaintiff's injuries (Plaintiffs' Expert Affirmation ¶¶ 3, 21, 26; Treating Surgeon's Affirmation ¶¶ 5, 7). They allege that defendants deviated from the standard of care by failing to keep the cannula in the proper plane, resulting in plaintiff's bowel perforations (Plaintiffs' Expert Affirmation ¶ 21; Treating Surgeon's Affirmation ¶ 5). Plaintiffs also submit an affirmation from their counsel alleging that there are questions of fact as to whether P.A. Concepcion and Dr. Houlis were acting under Dr. Blyer's direct supervision based on certain statements in Dr. Blyer's deposition testimony (Plaintiffs' Affirmation in Opposition ¶ 30). Counsel argues that P.A.

Concepcion and Dr. Houlis were “operating on their own during the liposuction procedure,” because Dr. Blyer testified that Dr. Houlis and P.A. Concepcion perform the liposuction part of the procedure, and then Dr. Blyer performs the abdominoplasty (*Id.*). Further, counsel contends that there are issues of fact regarding whether Dr. Blyer “directly observed [defendants’] technique” “at the time of the perforation,” based on his testimony that he “typically” “communicat[es] with everyone in the room,” and possibly checks his phone or email, while P.A. Concepcion and Dr. Houlis perform liposuction (*Id.*; Dr. Blyer’s EBT tr. 51, lines 18-23). Counsel also maintains that there are issues of fact as to whether Dr. Houlis and P.A. Concepcion were following Dr. Blyer’s directions, and whether they committed independent acts of malpractice (Plaintiffs’ Affirmation in Opposition ¶ 31). Plaintiffs’ submissions raise triable issues of fact regarding whether Dr. Blyer “controlled the surgery,” and “directed and supervised all actions” of P.A. Concepcion and Dr. Houlis (*Nasima*, 149 AD3d at 760 (affirming trial court’s decision granting summary judgment to resident where the “record established that the injured plaintiff’s private attending physician” “controlled the surgery, directed and supervised all actions of [the resident], and oversaw the injured plaintiff’s pre- and post-operative care”); *Kremer v. Buffalo Gen. Hosp.*, 269 AD2d 744, 746 [4th Dept. 2000] (affirming denial of resident’s motion for summary judgment where attending’s deposition testimony “establish[ed] that he did not observe [resident’s] technique in opening the sternum”)). Further, the conflicting expert reports indicate that there are triable issues of fact regarding whether Dr. Houlis and P.A. Concepcion deviated from the standard of care during the liposuction procedure (*Deutsch*, 71 AD3d at 719). Accordingly, defendants’ motion for summary judgment is denied in its entirety.

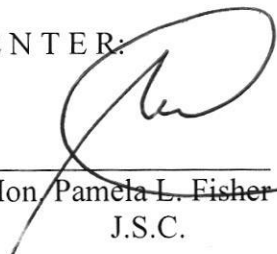
Motion Sequence 2:

Dr. Blyer’s and Cameo Medical Services, P.C.’s motion for summary judgement, pursuant to CPLR § 3212, is denied in its entirety. Defendants failed to meet their prima facie burden on this motion, as they did not attach bills of particulars identifying the allegations of medical malpractice

against them (*Gleason*, 175 AD3d at 617; *Bendel*, 101 AD3d at 663). They also did not submit expert testimony, and instead, relied on Dr. Swift's expert affirmation, who merely concludes that Dr. Blyer properly obtained plaintiff's informed consent, but does not comment further upon his treatment of Ms. Harrison (Defendants' Expert Affirmation ¶¶ 4, 21). Even if this affirmation were sufficient to establish defendants' prima facie entitlement to summary judgment, plaintiffs' physician affirmations raise triable issues of fact as to whether the liposuction was properly performed (Plaintiffs' Expert Affirmation ¶¶ 21, 30; Treating Surgeon's Affirmation ¶ 5). Accordingly, Dr. Blyer's and Cameo Medical Services, P.C.'s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the Court.

ENTER:



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

HON. PAMELA L. FISHER