Kaptzis v Dakin
2024 NY Slip Op 35433(U)
April 26, 2024
Supreme Court, Queens County
Docket Number: Index No. 700350/2021
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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HRISOULA KAPTZIS,

Plaintiff,

-against-

GREGORY F. DAKIN, M.D., DANNY ISSA, M.D., WEILL CORNELL MEDICAL CENTER, NEW YORK-PRESBYTERIAN HOSPITAL D/B/A NEW YORK-PRESBYTERIAN HOSPITAL WEILL CORNELL MEDICAL CENTER, NEW YORK-PRESBYTERIAN HEALTHCARE SYSTEMS, INC.,

Defendants.

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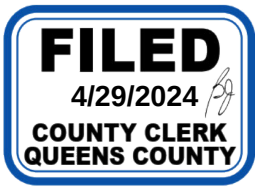
Index No. 700350/2021

Part MDP
Motion Date: April 10, 2024

Calendar No. 5
Sequence No. 2



The following papers numbered EF-55 to EF-88 read on this motion by defendants GREGORY F. DAKIN, M.D., DANNY ISSA, M.D., WEILL CORNELL MEDICAL CENTER, NEW YORK-PRESBYTERIAN HOSPITAL D/B/A NEW YORK-PRESBYTERIAN HOSPITAL WEILL CORNELL MEDICAL CENTER, NEW YORK-PRESBYTERIAN HEALTHCARE SYSTEMS, INC. for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits……	EF55-EF74
Affirmation in Opposition, Exhibits……...	EF80-EF83
Reply Affirmation, Exhibits……...	EF84-EF88

Upon the foregoing papers, and after oral argument, it is ordered that this motion is determined as follows:

Defendants Gregory F. Dakin, M.D., Danny Issa, M.D., Weill Cornell Medical Center, New York-Presbyterian Hospital d/b/a New York-Presbyterian Hospital Weill Cornell Medical Center, New York-Presbyterian Healthcare Systems, Inc.'s motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted in part and denied in part.

Defendants' motion for summary judgment is granted without opposition with respect to plaintiff's claims under a theory of *res ipsa loquitor* and for lack of informed consent and negligent hiring and supervision. Defendants' motion for summary judgment is also granted as to defendant Danny Issa, M.D. Defendants' motion for summary judgment is denied in all other respects.

Plaintiff commenced this action for medical malpractice, lack of informed consent and negligent hiring arising out of complications from her gallbladder surgery and hospital admission at defendant hospital in September 2018. Plaintiff filed the Summons and Complaint on January 7, 2021 and issue was joined via the filing of defendants' Answers on February 11, 2021.

Defendants argue that they are entitled to summary judgment and present the pleadings, deposition testimony, plaintiff's medical records, and expert affidavits from Michael Schweitzer, M.D. and Immanuel K. Ho, M.D. in support of their motion. Defendants argue that the care and treatment rendered to plaintiff was within the standard of care and did not proximately cause plaintiff's injuries. They argue that the elective laparoscopic cholecystectomy was indicated and properly performed, and a leak from a duct of Luschka was a known complication of the procedure. Defendants further argue that plaintiff's claims against defendant hospital must be dismissed because plaintiff failed to establish liability as to the hospital staff, and therefore defendant hospital cannot be vicariously liable. They argue that Dr. Issa was a fellow who treated plaintiff under the supervision of Dr. Carr-Locke, and therefore cannot be liable for any acts or omissions occurring during the medical treatment. Defendants also argue that plaintiff's claim for lack of informed consent must be dismissed because plaintiff was appropriately informed of the risks, benefits, and alternatives of the laparoscopic cholecystectomy, consented to the procedure, and executed a Consent Form. Defendants also argue that plaintiff's claims of negligent hiring, training, and supervision are baseless, unfounded, and should be dismissed, as the doctors were well credentialed and had appropriate experience and training. Finally, defendants argue that the doctrine of *res ipsa loquitur* is not applicable in this case, as plaintiff failed to meet the burden of establishing she was injured in a manner that could only occur because of defendants' negligence.

Defendants present the affidavit of Michael Schweitzer, M.D. in support of their motion. Dr. Schweitzer attested that he is a physician licensed to practice in Maryland and is board certified by the American Board of Surgery. Dr. Schweitzer further attested that he is fully familiar with the relevant standards of practice in the field of surgery in New York and on a national level during the relevant time frame. Dr. Schweitzer further attested that he reviewed the pleadings, plaintiff's Bills of Particulars and medical records, and the deposition testimony in rendering his opinions.

Dr. Schweitzer opined to a reasonable degree of medical certainty that defendants provided care and treatment to plaintiff consistent with the standard of care and did not proximately cause her injuries. Dr. Schweitzer further opined that plaintiff sustained a well-known and accepted risk of the laparoscopic cholecystectomy and that it was timely diagnosed and properly treated by

defendants. Dr. Schweitzer further opined that plaintiff's informed consent was properly obtained for the procedure and she was aware of the risk of injury to her intra-abdominal organs.

Dr. Schweitzer opined that plaintiff was a candidate for the procedure because gallstones were confirmed on imaging, she had at least two symptomatic episodes, during an emergency room visit she had a positive Murphy's sign on a physical exam, she had a history of symptomatic gallstones and cholecystitis, and she experienced recurrent episodes of severe pain caused by gallstones. Dr. Schweitzer further reasoned that it is preferable to do the surgery as an elective procedure, like plaintiff did, rather than waiting for an emergency, as urgent procedures carry more risk. Dr. Schweitzer further reasoned that while there are gallstone preventative and treatment methods, there are no alternatives to this surgery for symptomatic cholelithiasis that are within the standard of care. Dr. Schweitzer also opined that it was appropriate for defendant Dr. Dakin to perform a laparoscopic cholecystectomy rather than an open cholecystectomy, as it is less invasive, it is a shorter operation with a shorter post-operative hospital stay, it carries a lower risk of wound infection and incisional hernia rate, and there is better visualization during the procedure. Dr. Schweitzer also opined that defendant Dr. Dakin properly obtained plaintiff's informed consent prior to the surgery. Dr. Schweitzer reasoned that plaintiff signed a consent form prior to the surgery. Dr. Schweitzer further reasoned that based upon the medical records, defendant Dr. Dakin discussed the risks and benefits of the surgery including injury to the intra-abdominal organs.

Dr. Schweitzer articulated how defendant Dr. Dakin performed the surgery and opined that Dr. Dakin properly and appropriately performed the surgery within the standard of care. Dr. Schweitzer reasoned that during the surgery, defendant Dr. Dakin performed a cholangiogram which revealed signs that there was no visible leak in the liver bed during the procedure. Dr. Schweitzer acknowledged that a small leak may have existed at that point, but it was not detectable, as leaks are typically not visible on cholangiograms unless they are from a large accessory duct which was not the case here. Dr. Schweitzer further reasoned the leak in the instant case was very small and tiny leaks cannot be seen laparoscopically or with an intraoperative cholangiogram. Dr. Schweitzer also opined that the timing of the cholangiogram was appropriate. Dr. Schweitzer also opined that defendant Dr. Dakin's performance of the cholangiogram evidences the extra care he took to ensure that the biliary tree was intact. Dr. Schweitzer also opined that while intraoperative fluorescent cholangiography can be used to identify intraoperative leaks, it is not the standard of care and has visual limits, and is therefore inferior to the intraoperative cholangiogram. Dr. Schweitzer also opined that defendant Dr. Dakin's "two-handed approach" during the surgery with the help of residents was within the standard of care.

Dr. Schweitzer opined that the tear occurred when defendant Dr. Dakin dissected the gallbladder from the liver bed, because there are branches of the intrahepatic ducts located in the area where the gallbladder was resected. Dr. Schweitzer reasoned that the branch of the duct that was injured, referred to as ducts of Luschka, is very small and cannot be visualized while the

gallbladder is being dissected. Dr. Schweitzer further reasoned that leaks from ducts of Luschka heal spontaneously without medical intervention and can occur despite meticulous care and proper technique because of their location.

Dr. Schweitzer also opined that plaintiff was appropriately discharged after the surgery. Dr. Schweitzer reasoned that her condition in the PACU was normal and there was no reason to keep plaintiff in the hospital despite her reports of vomiting, nausea, and dizziness, as those are normal responses to anesthesia and not an indication of a leak. Dr. Schweitzer also opined that prioritizing a stroke work-up when plaintiff returned to the hospital three days post-surgery was appropriate, as she complained of left arm numbness and an untreated stroke can have devastating consequences. Dr. Schweitzer also reasoned that despite prioritizing the stroke work-up, the stroke team timely performed an abdominal CT scan that did not show a drainable collection. Dr. Schweitzer reviewed the imaging and opined that postoperative hematomas such as the one depicted on the CT scan are to be expected and not a reason for intervention. Dr. Schweitzer further opined that small bile leaks can resolve spontaneously and bile can be absorbed by the body without intervention and therefore there was no intervention that needed to be done upon plaintiff's return to the hospital. Dr. Schweitzer further opined that there was no need to perform additional imaging because the CT scan was sufficient to assess plaintiff's condition.

Dr. Schweitzer also opined that it was appropriate for plaintiff to be discharged two days after the Endoscopic Retrograde Cholangiopancreatography (hereinafter referred to as "ERCP") and stent placement. Dr. Schweitzer reasoned that plaintiff's bilirubin was going down, indicating that she was getting better, and her condition was improving. Dr. Schweitzer further reasoned that plaintiff had increasing alkaline phosphatase due to the stent that had just been placed. Dr. Schweitzer further reasoned that it is not the standard of care to keep patients in the hospital until after their liver functions tests return to normal, as prolonged hospitalizations are unnecessary when a patient can recover at home. Dr. Schweitzer further reasoned that a repeat CT scan was not necessary and was not within the standard of care. Finally, Dr. Schweitzer opined that defendant Dr. Dakin was qualified to perform the surgery, as at the time he performed the procedure on plaintiff, Dr. Dakin had performed approximately 700 laparoscopic cholecystectomies. Based upon the foregoing, Dr. Schweitzer opined to a reasonable degree of medical certainty that defendants provided treatment to plaintiff within the standard of care and did not proximately cause her injuries.

Defendants also presented the affidavit of Immanuel K. Ho, M.D. in support of their motion. Dr. Ho attested that he is a physician licensed to practice in Pennsylvania and board certified in Gastroenterology. Dr. Ho further attested that he is familiar with the standards of practice and care in gastroenterology and advanced endoscopy as they existed in New York and on a national level at the time of plaintiff's treatment. Dr. Ho further attested that he reviewed the pleadings, plaintiff's Bills of Particulars and medical records, and the deposition testimony in

rendering his opinions. Dr. Ho opined to a reasonable degree of medical certainty that the care defendants provided plaintiff was consistent with the standard of care at all times and did not proximately cause plaintiff's injuries. He further opined that defendants obtained informed consent from plaintiff after explaining the risks, benefits and alternatives to the procedure.

Dr. Ho rendered opinions specifically with respect to the care provided by the advanced endoscopy team of Dr. David Carr-Locke and the fellow working under his supervision, defendant Dr. Danny Issa, during plaintiff's hospital readmission on September 22, 2018. Dr. Ho opined that the care and treatment rendered to plaintiff during that admission was appropriate and within the standard of care. Dr. Ho reasoned that the CT scan performed on the day of her admission showed a hematoma, no drainable fluid collection, and indicated "small abdominal and pelvic ascites may be post-surgical if there is concern for a bile leak a HIDA scan should be obtained." Dr. Ho reasoned that post-surgical hematomas are to be expected and are not a reason for medical intervention.

Dr. Ho also opined that Dr. Dakin appropriately ordered a Magnetic Response Cholangiopancreatography (hereinafter referred to as "MRCP") on September 24, 2018. He also opined that on September 25, 2018, Dr. Dakin appropriately ordered the ERCP, the "gold standard" for diagnosing a bile leak. Dr. Ho opined that the timing of both exams was not only within the standard of care, but commendable. Dr. Ho reasoned that there was no delay in performing the ERCP and even if it had been performed earlier, it would not have changed the intervention or plaintiff's outcome. Dr. Ho opined that Dr. David Carr-Locke and defendant Dr. Issa appropriately and timely performed the ERCP with stent placement. Specifically with respect to defendant Dr. Issa, Dr. Ho opined that as a fellow Dr. Issa would have done everything regarding the procedure under Dr. Carr-Locke's responsibility and supervision as the attending physician. With respect to the procedure, Dr. Ho described how it is performed and opined that it was performed properly. Dr. Ho further opined that given the leak that was discovered, it was appropriate to place the stent. Dr. Ho attested that typically the stent would stay in place for up to three months and then would be removed during a subsequent ERCP, but sometimes the patient passes it naturally without need for surgical intervention. Dr. Ho also opined that the findings during the procedure were consistent with a duct of Luschka, also described by Dr. Schweitzer.

Dr. Ho disagrees with plaintiff's contention that post-ERCP imaging must be done shortly after the procedure and opined that imaging did not need to be performed prior to plaintiff's discharge from the hospital on September 27, 2018. Dr. Ho reasoned that re-imaging is not typically done after an ERCP because it takes time for the leak to heal, and would only be done if a patient was not feeling better after the procedure or their liver functions did not improve, which did not happen here. Dr. Ho also opined that an isolated elevated alkaline phosphatase is not necessarily an indication to do imaging. Dr. Ho also opined that a percutaneous drain did not have to be placed during plaintiff's second hospital admission as there was no discrete collection to

drain warranting this type of intervention. Dr. Ho also opined that plaintiff was appropriately discharged from the hospital on September 27th. Dr. Ho reasoned that the elevated alkaline phosphatase was not a contraindication to discharge and was viewed in conduction with the other liver function tests, elevated bilirubin was also not a contraindication to discharge as it comes down slowly, plaintiff's health was trending in the right direction, and she reported on September 27th that she was feeling better and wanted to go home.

Dr. Ho also opined that there was no delay in treating plaintiff and that a drainable collection was not missed. Dr. Ho reasoned that plaintiff presented to the hospital for a second time thirty-six hours after her initial discharge and immediately underwent a CT scan that revealed a biloma. He further opined that the biloma is a well-known and accepted finding post-ERCP because stenting does not always resolve the leak right away and a patient's body does not absorb the bile before it collects. He noted that plaintiff subsequently underwent a percutaneous drainage to remove the fluid collection at Mount Sinai Hospital, which Dr. Ho opined was within the standard of care. Dr. Ho opined that plaintiff likely had some fluid but not a drainable collection while at defendant hospital, as it takes time for a leak to accumulate and become substantial enough to be discovered. Dr. Ho also opined that despite the presence of Enterobacter in the biloma that was drained, plaintiff did not have an infection while at defendant hospital because her white blood count was normal shortly before her discharge. Dr. Ho also reasoned that even if she had started antibiotics at defendant hospital, antibiotics do not prevent bilomas. Dr. Ho also opined that Dr. Carr-Locke was amply qualified to perform the procedure and there is no evidence to suggest that he or any other physician who provided relevant treatment to plaintiff were not properly hired, trained, supervised, qualified, or competent to provide medical care. Based upon the foregoing, defendants argue they did not depart from the standards of care or proximately cause plaintiff's injuries and are therefore entitled to summary judgment.

Plaintiff partially opposes defendants' motion, conceding the causes of action for informed consent and negligent hiring and training should be dismissed, but arguing the remainder of the motion should be denied. She presents the affidavit of plaintiff's daughter Niki S. Kaptzis with the Greek MRCP records and affidavit of David A. Mayer, M.D. in support of her opposition. Plaintiff argues that defendants failed to eliminate all triable issues of fact with respect to whether they departed from accepted standards of care or proximately caused plaintiff's injuries. Plaintiff argues that defendants failed to address the significance of the MRCP plaintiff underwent in Greece in August 2018, and there are issues of fact as to whether Dr. Dakin reviewed the MRCP records from Greece. Based upon the evidence presented, plaintiff argues that the conflicting expert opinions warrants denial of defendants' motion.

Plaintiff presents the expert affidavit of David A. Mayer, M.D., D.A.B.S., F.I.C.S. in opposition to defendants' motion. Dr. Mayer attested that he is a physician licensed in New York and double board certified in general surgery by the American Board of Surgery and the National

Board of Physicians and Surgeons. Dr. Mayer further attested to reviewing plaintiff's medical records, the pleadings, and the motion papers in rendering his opinions.

Dr. Mayer articulated plaintiff's pertinent medical history noting that in August 2018, plaintiff suffered a gallbladder attack in Greece, underwent an MRCP, and was placed on antibiotics. She flew back to the United States, went to New York University Hospital on September 3, 2018 and September 7, 2018, and subsequently went to see defendant Dr. Dakin at defendant hospital on September 11, 2018. Niki S. Kaptzis attested that she accompanied plaintiff and presented Dr. Dakin with the imaging results from the MRCP performed in Greece. Dr. Mayer attested the MRCP clearly showed a subvesicle accessory duct of Lushka which was important for the operating surgeon to know to avoid injury to the accessory duct by staying in the correct place of dissection or by clipping and sealing the duct to prevent a bile leak and fluid collection.

Dr. Mayer opined that defendant Dr. Dakin ignored the Greek imaging records in violation of the standard of care. Dr. Mayer reasoned that the intraoperative cholangiogram performed is not a test for a subvesicle duct, which should be tested using an MRCP. Dr. Mayer also opined that defendants violated the standard of care by failing to obtain a HIDA scan upon plaintiff's re-admission to the hospital on September 22, 2018. Dr. Mayer reasoned that the radiologist suggested that if there was a concern for a bile leak, a HIDA scan should have been obtained. Dr. Mayer further reasoned that the bile leak was not discovered until the MRCP was done and would have been discovered and treated earlier had defendants obtained a HIDA scan. While Dr. Mayer does not render opinions with respect to how defendants performed the ERCP, Dr. Mayer opined that defendants violated good and accepted medical practice by failing to order post-ERCP abdominal imaging. Dr. Mayer reasoned that such imaging would have diagnosed plaintiff's enlarging biloma and a drainage could have been timely performed. Dr. Mayer further opined that defendants departed from accepted standard of care in failing to order percutaneous drainage and by "wrongly" discharging her on September 27, 2018 with a large, undrained biloma, which is a medical emergency. Dr. Mayer also opined that had defendants properly diagnosed plaintiff and drained the biloma, it is more likely than not that plaintiff's collection would have promptly resolved and would not have become infected. Dr. Mayer also opined that defendants' departures proximately caused plaintiff's injuries including the bile duct injury, a prolonged leak, infected biloma, need for ERCP with a stent, need to undergo a percutaneous drainage at Mount Sinai Hospital, prolonged hospital confinement, and pain and suffering.

Dr. Mayer also disagreed with Dr. Schweitzer and Dr. Ho's findings. Dr. Mayer opined that while Dr. Schweitzer stated an MRCP does not show accessory ducts for purposes of preoperative planning, this cannot be true because plaintiff's imaging done in Greece clearly shows a subvesicle duct. Dr. Mayer also disagreed with Dr. Schweitzer's classification of Dr. Dakin's performance of the intraoperative cholangiogram and opined that the purpose of doing that is to check for retained stones in the common bile duct, not check for leaks or fluid buildup. Dr. Mayer

also disagreed with Dr. Schweitzer's opinion that subvesicle ducts cannot be screened prior to a surgery and opined that they can be screened during a high quality MRCP. Dr. Mayer reasoned that while an MRCP is not typically done prior to gallbladder surgery, in this case it was done and available to Dr. Dakin for review. Dr. Mayer also disagreed with Dr. Ho's opinion that plaintiff's discharge on September 27, 2018 was warranted. Dr. Mayer reasoned that Dr. Ho improperly relied on plaintiff's de-escalating bilirubin and assurances that she was feeling better because she was taking Oxycontin and therefore her subject assurances regarding her pain levels were unreliable. Dr. Mayer also disagreed with Dr. Ho's opinion that plaintiff likely did not have a drainable collection prior to her discharge because imaging was not done and therefore his opinion is speculative. Based upon the foregoing, Dr. Mayer opined to a reasonable degree of medical certainty that defendants departed from accepted standards of care and proximately caused plaintiff's injuries.

Plaintiff also presented an affidavit from plaintiff's daughter, Niki S. Kaptzis. Niki Kaptzis attested that plaintiff was treated in a hospital in Greece in August of 2018 and underwent an MRCP. Kaptzis further attested that on September 11, 2018, she accompanied her mother to the doctor's appointment and provided defendant Dr. Dakin with a disc containing the records and imaging from the exam performed in Greece. Based upon the foregoing, plaintiff argues that defendants failed to establish a prima facie entitlement to summary judgment.

Pursuant to CPLR §3212, a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (*Smith v. City of New York*, 210 A.D.3d 53, 68 [2d Dept. 2022].) The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*Morejon v. New York City Tr. Auth.*, 216 A.D.3d 134, 136 [2d Dept. 2023].) If there is any doubt as to the existence of a triable issue of fact, the motion must be denied. (*Id.*) The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers. (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *see also Antonyuk v. Brightwater Towers Condo Homeowners' Assn., Inc.*, 147 A.D.3d 711, 712 [2d Dept. 2017].) In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party. (*Matter of New York City Asbestos Litig.*, 33 N.Y.3d 20, 25 [2019].) Additionally, the court's function in determining a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. (*Reyes v. S. Nicolia & Sons Realty Corp.*, 212 A.D.3d 851, 852-853 [2d Dept. 2023].) Once the moving party has demonstrated a prima facie entitlement to summary judgment, the burden then shifts to the non-moving party to demonstrate the existence of material issues of fact. (*See generally Coscia v. Mosca*, 203 A.D.3d 695 [2d Dept. 2022].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].)

In general, a hospital may be vicariously liable for the negligence or malpractice of its employees acting within the scope of employment under the doctrine of *respondeat superior*. (*Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].) However, a parent corporation will not be held liable for the torts or obligations of a subsidiary unless it can be shown that the parent exercised complete dominion and control over the subsidiary. (*Potash v. Port Auth.*, 279 A.D.2d 562, 562 [2d Dept. 2001].)

A medical resident cannot be held liable for malpractice for assisting a doctor during a medical procedure, if the resident does not exercise any independent medical judgment and so long as the supervising doctor's directions did not greatly deviate from normal practice that the resident should be liable for failure to intervene. (*Quille v. New York City Health & Hosp. Corp.*, 152 A.D.3d 808, 809 [2d Dept. 2017].)

Defendants established a prima facie entitlement to summary judgment. They demonstrated through the documentary evidence presented including the expert affidavits and deposition testimony that Dr. Issa cannot be liable, as he was working in his capacity as a fellow exclusively under attending physician Dr. Carr-Locke's supervision and direction, did not exercise independent judgment, and Dr. Carr-Locke's orders were not contraindicated by normal practice. (*See Poter v. Adams*, 104 A.D.3d 925, 927 [2d Dept. 2013].) With respect to defendant Dr. Dakin, defendants demonstrated through their expert affidavits that he properly performed the gallbladder surgery and discharged plaintiff, ordered proper testing upon plaintiff's readmission to defendant hospital, timely and properly performed an MRCP and ERCP, and properly discharged plaintiff. Defendants demonstrated that Dr. Dakin timely and properly performed a cholangiogram to identify leakage during the procedure. Defendants further demonstrated that bile leaks and fluid build-up are a known risk of the procedure and occurred in this case without negligence on behalf of the defendants. Defendants further demonstrated that it was appropriate to discharge plaintiff during her first admission because of her vitals and indications she was feeling better and wanted to go home. Defendants further demonstrated that upon re-admission plaintiff was properly

assessed and the MRCP and ERCP were timely and properly performed. Defendants demonstrated that a HIDA scan and post-ERCP were not necessary, and plaintiff was properly discharged.

Defendants also demonstrated a prima facie entitlement to summary judgment with respect to plaintiff's claims for lack of informed consent, as defendants demonstrated through the documentary evidence including plaintiff's medical records that she executed a Consent Form and was advised of the benefits, risks, and alternatives to the surgery. Defendants also demonstrated a prima facie entitlement to summary judgment with respect to plaintiff's claims for negligent hiring and supervision, as defendants demonstrated that defendant Dr. Dakin was qualified to work in the hospital and perform the procedure. They also demonstrated that plaintiff's claim under a theory of *res ipsa loquitor* must be dismissed as it is not supported by the medical records, deposition testimony and expert opinions. Based upon the foregoing, defendants established a prima facie entitlement to summary judgment.

Plaintiff failed to raise triable issues of fact with respect to the theory of *res ipsa loquitor*, and plaintiff's claims against defendant Dr. Issa and for lack of informed consent and negligent hiring and supervision. During oral argument, plaintiff conceded the lack of evidence to support her claims for lack of informed consent and negligent hiring and training. With respect to defendant Dr. Issa, plaintiff's expert conceded that Dr. Issa was a "trainee doctor doing a fellowship supervised by attending [physician] Dr. Carr-Locke" and made no opinions as to the work performed by Dr. Issa or the supervision he received. Therefore, plaintiff failed to raise triable issues of fact with respect to these claims.

Plaintiff also failed to raise triable issues of fact with respect to whether defendants departed from accepted standards of care in failing to review the MRCP imaging taken in Greece, as this is a new theory of liability first presented in plaintiff's opposition papers. (*Campbell v. Ditmars Park Rehabilitation & Care Ctr., LLC*, 2024 N.Y. Slip Op. 01697, *6 [2d Dept. 3/27/2024].) Plaintiff's Complaint and Bill of Particulars is devoid of any claim that defendant Dr. Dakin failed to review the imaging taken while plaintiff was in Greece, or that this failure was a proximate cause of plaintiff's injuries. As plaintiff cannot raise new theories of liability in opposition to a motion for summary judgment, and plaintiff failed to cross-move to amend the Bill of Particulars, plaintiff failed to raise a triable issue of fact with regard to this claim.

However, plaintiff raised triable issues of fact with respect to her claims for medical malpractice against defendant Dr. Dakin and defendant hospital with regard to whether defendants departed from the standard of care by failing to consider a subvesicle duct during the surgery, failing to obtain a HIDA scan, failing to order post-ERCP imaging, and failing to percutaneously drain plaintiff's biloma and prematurely discharging her during the second hospital admission. Plaintiff's expert sufficiently rebutted the opinions of defendants' experts and raised issues of fact as to whether Dr. Dakin should have ordered a HIDA scan and post-ERCP imaging which would

have prevented the extent of plaintiff's injuries. Plaintiff's expert Dr. Mayer further opined that the percutaneous drainage should have been performed prior to plaintiff's untimely discharge during her second admission at defendant hospital. As there are conflicting expert opinions presented by defendants' experts and plaintiff's expert, there are material issues of fact necessitating a jury determination. (*See Mehtvin v. Ravi*, 180 A.D.3d 661, 664 [2d Dept. 2020][holding that summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions, as issues of credibility are properly left to a jury for its resolution].)

Accordingly, defendants Gregory F. Dakin, M.D., Danny Issa, M.D., Weill Cornell Medical Center, New York-Presbyterian Hospital d/b/a New York-Presbyterian Hospital Weill Cornell Medical Center, New York-Presbyterian Healthcare Systems, Inc.'s motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted in part and denied in part. Defendants' motion for summary judgment is granted with respect to plaintiff's claims under a theory of *res ipsa loquitor* and for lack of informed consent and negligent hiring and supervision. Defendants' motion for summary judgment is also granted as to defendant Danny Issa, M.D. Defendants' motion for summary judgment is denied in all other respects. It is hereby

ORDERED that plaintiff's Complaint is dismissed as to defendant Danny Issa, M.D., and it is further

ORDERED that plaintiff's claims for lack of informed consent are dismissed, and it is further

ORDERED that plaintiff's claims for negligent hiring and supervision are dismissed.

The parties are directed to appear for a court conference on Wednesday, June 5, 2024 at 9:30am in Courtroom 48.

This constitutes the decision and Order of the Court.

Dated: April 26, 2024

Tracy Catapano-Fox

Hon. Tracy Catapano-Fox, J.S.C.

FILED
4/29/2024
COUNTY CLERK
QUEENS COUNTY