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SHORT FORM ORDER

INDEX No. 07-7350
CAL. No. 11-00843MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 9-12-11
ADJ. DATE 12-21-11
Mot. Seq. # 004 - MD

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TERRY LEE, Individually and as the Administratrix of the Estate of DOROTHY LEE, Deceased,

Plaintiff,

- against -

MICHAEL JOSEPH FRACCHIA, M.D., LONG ISLAND BONE & JOINT, LLP, DAVID LOUIS GALINKIN, D.O., ARTHUR STUART KLEIN, M.D., JONATHAN ADAM KROHN, M.D., EASTERN INFECTIOUS DISEASE ASSOCIATES, P.C., PATRICIA ELAINE WEBLEY-BETHUNE, M.D., SELDEN MEDICAL, P.C., SELDEN PRIMARY MEDICINE, P.C., HAROLD THIBOU JOSEPH, M.D., TRIAGE MEDICAL CARE, P.C., and ST. CHARLES HOSPITAL AND REHABILITATION CENTER,

Defendants.

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (004) 1 - 18 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 19-22 ; Replying Affidavits and supporting papers 23-24 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (004) by the defendants, Patricia Elaine Webley-Bethune, M.D., Selden Medical, P.C., Selden Primary Medicine, P.C., Harold Thibou Joseph, M.D., Triage Medical Care, P.C., and St. Charles Hospital and Rehabilitation Center, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against each defendant, is denied.

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In this medical malpractice action, the plaintiff asserts that the defendants were negligent and departed from accepted standards of medical care and treatment of the decedent, Dorothy Lee, further failed to provide her with proper informed consent, and wrongfully caused her death. A derivative claim has been asserted on behalf of Terry Lee, son of the decedent. A separate cause of action has been asserted against St. Charles Hospital and Rehabilitation Center premised upon the negligent hiring, inter alia, of its employees and medical staff. It is alleged that the defendants negligently cleared the decedent for hip surgery which was contraindicated and improperly performed, that the defendants failed to prevent and properly diagnose and treat the decedent's pre-operative infection and the post-operative wound infection, that the defendants caused and failed to treat the MRSA infection which the decedent contracted, and that the decedent's hip replacement hardware should have been removed. It is claimed that as a result of these negligent departures, that the decedent suffered dehydration, infection/MRSA, wound dehiscence, renal/respiratory failure, pain and suffering, anemia, pneumonia, sepsis, multi-system failure, and death.

The moving defendants seek summary judgment dismissing the complaint as asserted against them on the bases that no member of St. Charles Hospital staff exercised independent medical judgment and, instead, carried out the direct orders of the private attending physicians, and thus cannot be held liable as to the plaintiff's claims; that the defendants did not depart from accepted standards of care and treatment; and that the defendants did not cause or contribute to the decedent's injuries and death.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014 [1981]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Holton v Sprain Brook Manor Nursing Home***, 253 AD2d 852 [1998], *app denied* 92 NY2d 818). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see* ***Derdiarian v Felix Contracting Corp.***, 51 NY2d 308 [1980]; ***Prete v Rafla-Demetrious,*** 221 AD2d 674 [1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see* ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [1985]; ***Lyons v McCauley,*** 252 AD2d 516 [1998], *app denied* 92 NY2d 814; ***Bloom v City of New York,*** 202 AD2d 465 [1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see* ***Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.***, 7 AD3d 759 [2d Dept 2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.***, 242 AD2d 282 [2d Dept 1997]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (***Bengston v Wang,*** 41 AD3d 625 [2d Dept 2007]).

The medical records submitted in support of a motion for summary judgment must be certified to be in admissible form as required by CPLR 3212. Expert testimony is limited to facts in evidence. (*see also* ***Allen v Uh,*** 82 AD3d 1025 [2d Dept 2011]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273 [Sup Ct, Tomkins County 2002]; ***Marzuillo v Isom,*** 277 AD2d 362 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435 [2d Dept 1984]).

In support of motion (004), the moving defendants have submitted, inter alia, an attorney's affidavit, copies of the summons and complaint, the answer served by St. Charles Hospital and combined demands for discovery, the answer served by the defendant Harold Thibou Joseph, M.D. and Triage Medical Care, P.C. with attendant discovery demands, the plaintiff's verified bill of particulars as to Harold Thibou Joseph, M.D, Triage Medical Care, P.C. and Patricia Elaine Webley-Bethune, M.D., Selden Medical P.C., Selden Primary Medicine, P.C., and St Charles Hospital and Rehabilitation Center; certified copies of the plaintiff's medical records; the affirmation of the defendant's expert Dr. Janet L. Beccaro, M.D.; and the transcripts of the examinations before trial of Terry Lee dated August 25, 2008, Michael Joseph Fracchia, M.D. dated June 26, 2009; and the deposition transcripts of David Galinkin dated August 25, 2009, Arthur S. Klein, M.D. dated October 19, 2009, and Harold Thibou Joseph, M.D. dated July 20, 2010 which are not admissible in that they are essentially illegible and fail to comport with CPLR 2101(a). It is further noted that the answers served on behalf of the remaining moving defendants have not been provided with the moving papers as required pursuant to CPLR 3212. Thus, this court cannot ascertain if any cross claims have been asserted by those defendants to properly decide this matter.

It is determined that even if the moving papers comported with CPLR 3212, that the moving defendants have failed to establish prima facie entitlement to summary judgment dismissing the complaint. The defendants' expert failed to set forth the proper standards of care from which she claimed the defendants did not depart. She states in a conclusory manner that defendants did not proximately cause or contribute to the decedent's injuries and death. Additionally, the plaintiff's expert has raised factual issues which preclude summary judgment and has set forth the standards of care and how the defendants' departures from the standards of care caused and/or contributed to the decedent's claimed injuries and death.

It is undisputed that the plaintiff was a patient in St. Charles Hospital from April 19, 2004 to May 12, 2004 and underwent knee replacement surgery by defendant Dr. Michael Fracchia. It was during this admission that the decedent was first treated by defendants Dr. Arthur Klein, Dr. Jonathan Krohn, and Dr. David Galinkin, in their capacity as infectious disease specialists. On October 8, 2004, the decedent was admitted to St. Charles Hospital by her private attending physician, Dr. Webley-Bethune, for progressive pain in her right hip and left knee with accompanying inability to ambulate. She saw the decedent on

October 8, 9 and 11, 2004, after which time she transferred the decedent's care to Dr. Harold Joseph who started the decedent on antibiotics after reviewing her chest x-rays. Dr. Fracchia was contacted on October 8, 2004 to perform hip replacement surgery on the decedent. On October 20, 2004, Dr. Joseph cleared the decedent for surgery for October 21, 2004.

Janet L. Beccaro, M.D., the moving defendants' expert, affirms that she is licensed to practice medicine in New York State and that she is board certified in internal medicine. She has set forth the records and materials which she reviewed and has set forth her opinions with a reasonable degree of medical certainty. Dr. Beccaro stated that by 2000, the decedent suffered from several co-morbidities, including morbid obesity, congestive heart failure, anemia, sepsis, DVT, insertion of a Greenfield filter, and a colostomy, and that these co-morbidities caused decedent's immobility and forced sedentary lifestyle. The decedent was able to ambulate only short distances with the use of a walker and had leg pain, which immobility, the defendant's expert stated, increased the decedent's potential for skin breakdown, multi-system failure, and weight gain.

Dr. Beccaro opines that there is no correlation between the care and treatment provided by the staff and employees of St. Charles Hospital and the damages alleged by the plaintiff in this action, including infection, need for further surgery, pain and suffering, and death. She continues that the staff and employees of St. Charles Hospital exercised good and acceptable professional judgment in the treatment of the decedent, that they did not depart from accepted standards of medical practice; and that the treatment provided by the employees of St. Charles Hospital was not proximately related to the alleged injuries/damages, or was not a proximate cause of her alleged injuries and damages, including her death.

Dr. Beccaro continues that defendant Dr. Webley-Bethune, the decedent's primary care physician, did not clear the decedent for surgery, did not perform any of the surgeries, and did not follow the decedent with regard to any infectious process, that her care was extraneous to the claims asserted by the plaintiff and was not contraindicated, and that she did not cause or contribute to the eventual MRSA infection, pneumonia and death of the decedent.

Dr. Beccaro opines that Dr. Harold Thibou Joseph did not improperly clear the decedent for surgery; that he properly weighed the urgency of the right hip replacement, the decedent's clinical condition, and objective diagnostic results to determine that the decedent's health was optimized for surgery prior to giving medical clearance; that none of Dr. Joseph's care and treatment was contraindicated by normal practice; and that there is no correlation between the care and treatment provided by Dr. Joseph and the damages alleged to have been suffered by the decedent.

Dr. Beccaro stated that the need for the hip replacement surgery was urgent, and that the subsequent MRSA infection which the decedent developed post-surgery was too remote to link with the decision to proceed to surgery. She opines, instead, that the risk of post-surgical infection was created, not by the timing of the medical clearance, but by the confluence of the aforementioned co-morbidities. Although the blood work performed on October 8, 13, and 20, 2004 revealed a urinary tract infection, Dr. Beccaro opines that a urinary tract infection is considered a reason to withhold medical clearance for surgery only under certain clinical conditions, such as an overwhelming urinary tract infection, which the decedent did not have. She opines that the urinary tract infection and bed sores the decedent was suffering did not rise to the level that contraindicated medical clearance. She stated that although the decedent was admitted on

October 8, 2004 with a Stage II ulcer on the left gluteal fold, that it was 100% granulated and properly healed by October 20, 2004. She added that in any event, a grade 2 pressure ulcer or skin fold wound should not, by itself, affect any decision whether or not to clear a patient for surgery. Dr. Beccaro opines that a post-surgical infection is a known risk associated with many of the decedent's co-morbidities.

Dr. Beccaro stated that on November 29, 2004, the decedent was admitted to St. Charles Hospital due to a wound infection and was discharged on December 13, 2004 after surgical irrigation and debridement of the wound by Dr. Fracchia. She adds that Dr. Joseph was not involved in the decedent's care during this admission. On March 24, 2005, the decedent was again admitted to St. Charles due to shortness of breath, and that she died on March 26, 2005 due to multi-system failure secondary to septic shock and pneumonia. Klebsiella pneumoniae bacteria was found on urinalysis. Dr. Beccaro stated that the decedent's health had been deteriorating since 2000 and that her co-morbidities resulted in her inability to resist the pneumonia and multi-system failure that caused her death.

In opposing this motion, the plaintiff has submitted, inter alia, the affidavit of his expert physician[1] who is licensed to practice medicine and is board certified in internal medicine and infectious disease, and who sets forth the basis of expertise, and the records and materials reviewed. The plaintiff's expert set forth the definitions and explanations relative to some of the various conditions encountered by the decedent, including, but not limited to, decubitus ulcer, excoriation, surgical site infection, sepsis/septic shock, and medical clearance. The plaintiff's expert sets forth that Dorothy Lee was a 71 year old woman, with a past medical history of bilateral hip replacements, left knee replacement, anemia and colostomy, who presented to the emergency department at St. Charles Hospital on October 8, 2004 with complaints of right hip pain and difficulty ambulating, and was admitted for elective hip replacement surgery under the care of Dr. Webley-Bethune, who noted that the pain caused the inability to walk for two weeks and that the decedent was in no acute distress. The decedent presented with a one centimeter stage II pressure ulcer (decubitus) on her left gluteal fold. Dr. Fracchia, as requested by Dr. Webley-Bethune, conducted an orthopedic consult on October 9, 2004, and formed the impression of right hip degenerative joint disease. His plan was for a total right hip replacement if it was cleared by medicine and after discussion with Dr. Webley-Bethune. The decedent was started on an antibiotic due to a urinary tract infection. In addition to the decubitus on her buttock, it was noted that she had excoriation under the folds of her stomach and breast area. On October 11, 2004, she was transferred to the service of Dr. Joseph by Dr. Webley-Bethune; Safe Gel was applied to the decubitus ulcer; and the hip replacement surgery was scheduled for October 14, 2004. On October 12th she was noted to be out of bed with a walker and was sitting in a chair. On October 13, 2004, a chest x-ray demonstrated persistence of an infiltrate in the left perihilar region of the lung, a radiographic sign of pneumonia. Thus, Dr. Joseph did not clear her for surgery and continued antibiotic treatment until resolution of the infiltrate. Dr. Fracchia cancelled the surgery scheduled for October 14th.

The rash under her abdominal folds and the decubitus was again noted on October 15th and 16th, and were treated with Safe Gel. Dr. Joseph ordered Mycolog powder to the rash under the skin folds twice a day. On October 19, 2004, despite the CT revealing patchy ground-glass opacities, mostly in the left upper

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[1]The Court has conducted an in-camera inspection of the original unredacted affidavit and finds it to be identical in every way to the redacted affidavit in plaintiff's opposition papers with the exception of the redacted expert's name and State and notary. In addition, the Court has returned the unredacted affidavit to the plaintiff's attorney.

lung, associated with bronchiectasis and subpleural interstitial thickening, and despite the nurses' notes indicating that there was excoriation under the abdominal folds, and an open area on the left side under a fold, the decedent was cleared medically for surgery. On October 20th, one day prior to surgery, it was noted for the first time that the gluteal decubitus ulcer had healed. Total hip replacement was performed by Dr. Fracchia on October 21, 2004. The plaintiff's expert states, that although the Mycolog powder was ordered, it was never administered post-operatively by the St. Charles staff prior to discharge on October 26, 2004. The discharge summary to St. Charles Hospital Inpatient Rehabilitation Facility noted that there was still a Stage II under the decedent's abdominal folds, but it was not until October 29, 2004 that the decedent received any treatment to the wound with Nystatin powder under the abdominal fold and breasts. She was discharged on November 3, 2004.

The plaintiff's expert continues that on November 29, 2004, the decedent presented to Dr. Webley-Bethune with copious purulent drainage from her right hip surgical site, so she referred the decedent to Dr. Fracchia, who admitted her that same day to St. Charles Hospital with an infection of her right hip. A chest x-ray taken that day revealed degenerative changes of osseous structures, patchy opacity in the left upper lobe and both bases of the lungs, for which clinical correlation was recommended. On December 1, 2004, Dr. Fracchia performed an incision and drainage of the right hip wherein abscess fluid was drawn and sent for culture, which was positive for MRSA, and for which she was started on Vancomycin on December 2, 2004. The December 8, 2004 note indicates that the decedent had a Stage II to the right side of her belly fold which was treated for several days with lotion, creme, and sheets or liners, placed between the skin. The plaintiff's expert continues that on March 24, 2005, the decedent was admitted to St. Charles Hospital with difficulty breathing. She was diagnosed with respiratory failure, renal failure, pneumonia, sepsis, and an infected right hip. She died on March 26, 2005.

It is the plaintiff's expert's opinion within a reasonable degree of medical certainty that the defendants, Patricia Elaine Webley-Bethune, M.D., Selden Medical P.C., Selden Primary Medicine P.C., Harold Thibou Joseph, M.D., Triage Medical Care P.C., and St. Charles Hospital and Rehabilitation Center, departed from accepted standards of care in their treatment of the plaintiff's decedent, and that those departures were substantial contributing factors in the development of the surgical site infection, multi-system failure, septic shock, pneumonia and death. The plaintiff's expert notably points out that the defendant's expert, Dr. Beccaro, does not set forth or discuss the standard of care applicable in this case as to each defendant.

The plaintiff's expert states that prior to clearing a patient for surgery, the physician responsible for such clearance, according to the appropriate standard of care, must assess all risk factors. Where there is evidence that there is risk of post-operative surgical site infection, clearance must be withheld until such time as that risk has been eliminated, or an appropriate plan has been formulated to address that risk factor. In this case, the presence of Stage II excoriation under the abdominal folds, and recent Stage II decubitus ulcer, were risk factors for the development of post-operative surgical site infection and, therefore, contraindications to the performance of this non-emergent hip replacement were present. Thus, states plaintiff's expert, it was a departure from the standard of care to have given medical clearance for surgery on the decedent. The plaintiff's expert further opines that withholding medical clearance until the risk of surgical site infection had been properly addressed would not have resulted in medical complications, and the presence of Stage II excoriation and recent history of Stage II decubitus ulcer resulted in the surgical site infection. The plaintiff's expert further opines that the decedent's pain, suffering, and eventual death

occurred due to the fact that she had been cleared for surgery with evidence of Stage II excoriation under the abdominal folds and recent history of decubitus ulcer, and that it was a departure from the standard of care not to postpone surgery until the risk of surgical site infection had been properly addressed.

The plaintiff's expert further opines that it was a departure from the standard of care for the staff at St. Charles not to follow Dr. Joseph's orders to administer the Mycolog powder to the excoriation rash under Ms. Lee's abdominal folds, and that the surgical site infection was a direct result of the failure to follow this order, substantially contributing to the injuries the decedent suffered. It was also a departure from the accepted standard of care to discharge the decedent on October 26, 2004 without an appropriate plan of care in place to address the Stage II excoriation in order to reduce and/or eliminate the risk of developing a surgical site infection, states the plaintiff's expert, who continues to opine with a reasonable degree of medical certainty that the surgical site infection was a direct result of the decedent being discharged and transferred to rehabilitation without an appropriate plan of care, including orders for antibiotics to reduce or eliminate the risk of surgical site infection. The plaintiff's expert opines that the pain, suffering, and eventual death of the decedent occurred due to the fact that she was discharged without the appropriate care plan for treatment, increasing her risk for surgical site infection.

The plaintiff's expert also opines that it was a departure from the accepted standard of care for St. Charles Hospital Inpatient Rehabilitation Facility to fail to properly and timely treat the decedent's Stage II excoriation during her time at that facility, that the surgical site infection was a direct result of that excoriation not being timely and properly treated, causing the pain, suffering, and eventual death of the decedent. The plaintiff's expert continues that these departures caused or contributed to the decedent's death. Proper and timely care and treatment would have avoided the ensuing surgical site infection, multi-system failure, septic shock, and pneumonia, which resulted in her death. The expert continues that there would have been no negative impact on the decedent's health if the hip replacement surgery had been postponed until such time as the risk of surgical site infection had been properly addressed, and, despite her co-morbidities, she would not have developed the septic shock, pneumonia, and multi-system failure which resulted in her death. Sepsis, states the plaintiff's expert, was the direct result of the surgical site infection, which lead to septic shock, multi-system failure, and the decedent's death, and that the decedent's co-morbidities did not cause the injuries and premature death of the decedent, as claimed by the defendants.

In view of the foregoing, it is determined that even if the defendants' application had comported with CPLR 3212 and 2101, and all the defendants' answers were provided in support of the motion, the plaintiff has raised sufficient factual issues to preclude summary judgment from being granted to the moving defendants.

Dated: January 31, 2012

HON. JOSEPH C. PASTORESSA

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION