SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 2
NASSAU COUNTY

CATHERINE GALGANO and MICHAEL GALGANO,
Plaintiffs,

ORIGINAL
RETURN DATE:03/09/12
SUBMISSION DATE:04/30/12

-against-

INDEX No.: 7533/08

RICHARD J. STRAUSS, M.D., RICHARD J. STRAUSS, M.D., P.C., LEROY R. LEVIN, M.D., F.A.C.S. AND RICHARD J. STRAUSS, M.D., F.A.C.S., P.C., L.L.P., DR. J. KLEIN, M.D., whose full first name is unknown to Plaintiffs but is intended to be the Assistant Surgeon who participated in surgery on Plaintiff Catherine Galgano on 10/24/2005, LONG ISLAND JEWISH MEDICAL CENTER, and NORTH SHORE LONG ISLAND JEWISH HEALTH SYSTEM, INC.,
Defendants.

MOTION SEQUENCE #3

The following papers read on this motion:

Notice of Motion	1
Affirmation in Opposition	2
Reply Affirmation	3
Affirmation in Sur-Reply	4

This motion by defendants Richard J. Strauss, M.D., Richard J. Strauss, M.D., P.C., Leroy R. Levin, M.D., F.A.C.S. and Richard J. Strauss, M.D., F.A.C.S. for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint against them is determined as provided herein.

The facts pertinent to the determination of this motion are as follows: Plaintiff Catherine Galgano ("plaintiff") began treatment by Dr. Strauss on October 12, 2005, upon referral by her internist Dr. Hammer. She had been diagnosed with a sigmoid colon via a colonoscopy which was done in response to her rectal

bleeding. On October 23, 2005, plaintiff engaged in bowel preparation for surgery via Citrate of Magnesium. On the day of her surgery, October 24, 2005, she was put on IV antibiotic and underwent a low anterior resection and a left oophorectony by Dr. Strauss at Long Island Jewish Medical Center ("LIJ").

The pathology from the surgery revealed a Stage IIIC colorectoral carcinoma which involved plaintiff's lymph nodes. Each day thereafter until her discharge on November 2, 2005, Dr. Strauss examined plaintiff including the abdominal incision. On November 1, 2005, Dr. Strauss found the incision draining at the bottom which he deemed indicative of an infection. The bottom of the incision was opened, irrigated and packed. Plaintiff was discharged the next day on November 2nd with instructions concerning diet, the resumption of her surgical medications and a return to full activity. She was instructed to follow up with Dr. Strauss in ten days.

On November 3, 2005, plaintiff was seen by a visiting nurse and given a note to see Dr. Hammer because the incision was infected. Dr. Hammer prescribed Cipro and contacted Dr. Strauss regarding expediting plaintiff's follow-up visit scheduled for November 8th but Dr. Strauss did not find it necessary. Plaintiff returned to Dr. Strauss on November 8th on which date he observed a little drainage at the lower angle of her incision. He irrigated it, cleaned it with peroxide and repacked it. Plaintiff was first seen at John T. Mather Memorial Hospital Wound Care Center (Mather Hospital") on November 10 because she was concerned about her incision healing.

The record reflects an impression of a non-healing abdominal surgical wound. On November 16th, Dr. Strauss was contacted by the staff at Mather Hospital reporting that they suspect a fistula at the incision. While Dr. Strauss was not convinced that a fistula was present and he remained confident that the incision would heal on its own, he agreed that he would open up the incision under local anesthesia. There is no evidence he instructed Mather Hospital's staff regarding how it should proceed, however, plaintiff testified at her examination before trial that she was told by the doctor at Mather Hospital after she spoke with Dr. Strauss that they could not treat her anymore.

Dr. Strauss saw plaintiff on November 16, 2005, on which date he agreed to surgically open and clean the incision, but he wanted to wait until after Thanksgiving. At the insistence of plaintiff and her family, he scheduled the surgery for November 21st. Dr. Hammer's medical clearance report dated November 17, 2005, indicates that plaintiff had a wound dehiscence which required debridement and restitching/surgical repair.

On November 21st, plaintiff underwent an exploration of her incision by Dr. Strauss under intravenous and local sedation at LIJ. The exploration of the incision wound involved an opening of the incision and a debridement and packing of the wound. Dr. Strauss did not find fistulas or other abnormalities during that procedure. Staples were not used because Dr. Strauss wanted the incision to drain well. Dr. Strauss prescribed Cipro.

Following that surgery, plaintiff was again seen by a visiting nurse. Prior to plaintiff's return to Dr. Strauss, on November 30, 2005, at plaintiff and her family's insistence, Dr. Strauss approved the visiting nurse's request for a wound VAC. When Dr. Strauss examined plaintiff on December 20, 2005, January 4, 2006, and January 27, 2006, the wound appeared to be healing well, and there was no sign of infection. On January 4, 2006, Dr. Strauss prescribed the hydrophilic cream Biafine to aid in the healing of the incision. At plaintiff's last visit on January 31, 1006, the plaintiff's wound was nearly completely healed.

As a result of the infection of her incision, plaintiff's chemotherapy treatment at Mather Hospital was delayed for several weeks. At her examination before trial, plaintiff testified that she was cancer free following the completion of chemotherapy in July 2006 and that she was again told by her oncologist that she was free of colon cancer in April 2011.

Plaintiff alleges that Dr. Strauss was negligent in his pre-operative surgical care, as well as in his premature discharge of her, which lead to the infection of her incision. He is also alleged to have wrongly induced Mather Hospital to stop treating plaintiff; to have improperly performed post-operative surgery; and failing to adequately and properly care for plaintiff thereafter.

More specifically, plaintiffs have alleged that Dr. Strauss failed to properly and

adequately perform pre-operative preparation of plaintiff's body so as to prevent, reduce the risk of and avoid pre-operative and post-operative infection in her body; failed to take and properly perform all necessary steps to reduce the risk of and avoid infection in and about the site of the surgical incision and wounds; failed to create and maintain a sterile surgical field during surgery, and/or failed to properly care for, monitor and treat her surgical wounds following surgery so that she was exposed to and caused to sustain a severe infection in and about her surgical wounds and the vicinity thereof; failed to timely and properly monitor, observe and care for her during the post-operative period so as to timely and properly observe, become aware of and treat any post-operative infection that may occur; discharged her from the hospital following surgery with an infection and oozing and leaking surgical wound; disregarded her concerns and complaints regarding the post-operative infection which she sustained; failed and refused to heed her expression of concern regarding the post-operative infection with which she was afflicted and failed and/or refused to grant her timely appointments for examination and treatment upon her communication of her concerns regarding the post-operative infection with which she was afflicted; wrongfully, carelessly and negligently obstructed and delayed the care of the infection and infected wounds by the Wound Care Center to which she turned for care and treatment of her infection; induced the Wound Care Center to which she turned for care and treatment of her infection to cease treating her; wrongfully, negligently and carelessly interfered with her treatment by the Wound Care Center; and, negligently and carelessly departed from good and accepted medical practices during the performance of the subsequent wound exploration surgery on her on November 21, 2005, such that she was caused to sustain severe disfigurement of her body at and in the vicinity of the aforesaid surgical sites as a result of such surgery.

Plaintiff is alleged to have suffered an operative and/or post-operative infection at the site of her surgical wound which was caused and allowed to persist for an extended period of time causing her to experience severe pain, suffering and physical and mental anguish for the period from October 24, 2005, through January 31, 2006.

"On a motion for summary judgment, the facts must be viewed 'in the light most favorable to the non-moving party.' " *Vega v Restani Constr. Corp.*, 18 NY3d 499

[2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]. Summary judgment is a drastic remedy, to be granted only where the moving party has " 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' . . . and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.' " *Vega v Restani Constr. Corp.*, 18 NY3d at 503, quoting *Alvarez v Propsect Hosp.*, 68 NY2d 320, 324 [1986]. "The moving party's '[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers.' "*Id.*

"The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury (quotations omitted)." *Faicco v Golub*, 91 AD3d 817 [2d Dept 2012]; see also, *Roca v Perel*, 51 AD3d 757, 758 [2d Dept 2008]; *DiMitri v Monsouri*, 302 AD2d 420, 421 [2d Dept 2008[; *Flaherty v Fromberg*, 46 AD3d 743, 745 [2d Dept 2007]. "Thus, [o]n a motion for summary judgment dismissing the complaint in a medical malpractice action, the defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby." *Faicco v Golub,* 91 AD3d at 817; see also, *Roca v Perel*, 51 AD3d at 758, 759; *Chance v Felder*, 33 AD3d 645 [2d Dept 2006]; *Stukas v Streiter*, 83 AD3d 18, 24 [2d Dept 2011].

"Once a defendant physician has made such a showing, the burden shifts to the plaintiff to 'submit evidentiary facts or materials to rebut the prima facie showing by the defendant . . . so as to demonstrate the existence of a triable issue of fact.' " *Savage v Quinn*, 91 AD3d 748 [2d Dept 2012], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see, Stukas v Streiter,* 83 AD3d, at 24. "General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a defendant's motion for summary judgment (citations omitted)." Savage v Quinn, supra.

Nevertheless, "[i]n determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party." *Caggiano*

v Cooling, 92 AD3d 634 [2d Dept 2012], citing *Stukas v Streiter*, 83 AD 3d at 23. In fact, " '[i]n medical malpractice action, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the defendant's deviation was a substantial factor in causing the injury." *Goldberg v Horowitz*, 73 AD3d 691, 694 [2d Dept 2010], quoting *Johnson v Jamaica Hosp. Medical Center*, 21 AD3d 883 [2d Dept 2005], citing *Alicea v Ligouri*, 54 AD3d 784 [2d Dept 2008]; *Flaherty v Fromberg*, supra; *Bunea v Cahaly*, 37 AD3d 389, 390-391 [2d Dept 2007]; *Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852 [2d Dept 1998], lv den., 92 NY2d 818 [1999].

"A plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, 'as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased [the] injury.' " *Goldberg v Horowitz*, 73 AD3d at 694, quoting *Alicia v Ligouri*, 54 AD3d at 786 (internal quotation marks omitted), citing *Flaherty v Fromberg*, 37 AD3d at 745; *Jump v Facelle*, 275 AD2d 345, 346 [2d Dept 2000], lv dism., 95 NY2d 931 [2000], lv den., 98 NY2d 612 [2002].

In support of their motion, the moving defendants have submitted the affirmation of Marvin Carman, M.D., who is Board Certified by the National Board of Medical Examiners, the American Board of Surgery and the American Board of Colon and Rectal Surgery. Having reviewed the pertinent legal documents and medical records, he opines that Dr. Strauss conformed with accepted standards of medical care and did not depart from any appropriate standards. He opines to a reasonable degree of medical certainty that the surgical bowel preparation was appropriate because a laxative and antibiotic were employed; that the surgery was appropriately done; and that Dr. Strauss' care of plaintiff post-operatively was appropriate as well.

As for the infection of the incision, he opines that wound infections, bleeding and scarring are well known risks of any surgery and, standing alone, do not evidence or indicate a departure from the standard of care, especially with colon and rectal surgery. He opines that plaintiff's discharge was appropriate because she was

afebrile and tolerating a regular diet; Dr. Strauss' post-operative monitoring and treatment of her was appropriate; and that the November 21, 2005, exploratory surgery was appropriate and properly performed as well. As for Dr. Strauss' care of plaintiff following that surgery, he opines that it, too, was appropriate. Finally, he opines that nothing Dr. Strauss did or failed to do caused plaintiff's incision to become infected or her ensuing pain and suffering. He opines: "Significantly, this was simply a wound infection, which is not atypical and for which DR. STRAUSS did more than necessary or required pursuant to the standards of care for a colon and rectal surgeon. There were no departures nor was there any injury to the plaintiff" (Movant's Ex. A¶ 26).

The moving defendants have established their entitlement to summary judgment thereby shifting the burden to plaintiff to establish the existence of a material issue of fact.

Plaintiffs have submitted the affirmation of a doctor Board Certified by the American College of Osteopathic Surgeons and a Fellow of the American College of Osteopathic Surgeons. Having reviewed the pertinent legal documents and medical records, she opines within a reasonable degree of medical certainty that the treatment Dr. Strauss rendered to plaintiff did not conform to the accepted standards of medical care and in fact deviated from good and accepted medical standards and practices thereby giving rise to injury, pain and suffering by plaintiff which could have been avoided had Dr. Strauss' treatment conformed to the generally accepted standards and practices in effect at the time and place of treatment rendered to plaintiff.

More specifically, she opines that in addition to the IV antibiotics, oral antibiotics should have been given the day before the surgery. She explains that "[p]rescribing a course of oral antibiotics the day prior to the surgery is the appropriate standard in a case such as this where the surgical procedure involves risk of infection due to the fact that the surgical site involves the bowel [and that] [i]t was even more necessary and appropriate in this case given Mrs. Galgano's physical characteristics which left her at increased risk for infection." (Pl's Ex. A, ¶ 18) S/he explains that "with someone who is 5'3" in height and weighs 155 lbs., the resulting BMI of 27.5 puts her in the category of an overweight individual. The increased depth of the fatty tissue in the abdominal area results in an increased

rate of infection in incisions in such an individual, thereby making the appropriate administration of antibiotics the day prior to the surgery essential"(*Id.*)

She further opines that "in any case, the pre-operative bowel preparation of a single bottle of Citrate of Magnesium would not have been sufficient to completely clear the bowel of bacterial laden stool in preparation for a low anterior resection, and [also] subjected the plaintiff to an increased likelihood of infection."(Pl's Ex. A ¶ 19) S/he explains that "[d]ue to the initially watery stool becoming formed as it moves from the right portion of the bowel to the left portion of the bowel, it is more difficult to cleanse the area, necessitating an increase in the amount of Citrate of Magnesium or other agents needed to provide an adequate cleansing in the area of the surgical procedure" (*Id.*)

Plaintiff's expert opines to a reasonable degree of medical certainty that these departures substantially increased the likelihood of post-operative infection, even the infection plaintiff suffered from, Morganella Morganii. Via the affirmation of her expert, plaintiff has clearly established the existence of a material issue of fact necessitating the denial of the moving defendants' motion. See, *Magel v John T. Mather Memorial Hosp.*, __ AD2d __, 2012 WL 1699392 [2d Dept 2012]; *Moray v City of Yonkers*, __ AD2d __, 2012 WL 1606031 [2d Dept 2012]; *Hayden v Gorden,* 91 AD3d 819 [2d Dept 2012].

This decision constitutes the order of the court.

Dated: June 6, 2012

J.S.C.

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