Short Form Order

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

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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FRANCISCA TURI,

Plaintiff,

-against-

JOHN BIRK, M.D., JOSEPH ANDERSON, M.D., NANCY OSWOLD, R.N. and STONY BROOK INTERNISTS,

Defendants.

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INDEX NO.: 37813/2008
CALENDAR NO.: 201101447MM
MOTION DATE: 4/19/2012
MOTION NO.: 006 MG CASEDISP
007 MG

PLAINTIFF'S ATTORNEY:
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Upon the following papers numbered 1 to 78 read on this motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-16; 17-35 ; ~~Notice of Cross Motion and supporting papers~~ ___ ; Answering Affidavits and supporting papers 36-47; 48-62 ; Replying Affidavits and supporting papers 63-38; 69-75 ; Other 76, 77, 78 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 006) of defendant Nancy Oswold, R.N., for an order pursuant to CPLR R. 3212 granting summary judgment dismissing the complaint against her is granted; and it is further

ORDERED that the motion (motion sequence no. 007) of defendants John Birk, M.D., Joseph Anderson, M.D., and Stony Brook Internists for summary judgment dismissing the complaint against them is granted.

On June 12, 2007, plaintiff was scheduled to have a screening colonoscopy performed by defendant Dr. Joseph Anderson at Stony Brook University Medical Center. However, as Dr. Anderson was unable to perform the procedure, defendant Dr. John Birk performed the colonoscopy on plaintiff that day. After the procedure, plaintiff allegedly called the medical center several times complaining of cramps, and was told by Dr. Anderson and Nurse Oswold that it was normal to experience cramping after a colonoscopy. The complaint alleges that defendants were negligent in providing medical care to plaintiff, resulting in perforation of her colon, and that they failed to timely and properly diagnose such condition.

Defendant Oswold now moves for summary judgment dismissing the complaint against her on the grounds that she did not depart from accepted standards of nursing practice in her care and that her conduct was not the proximate cause of plaintiff's injury. In support of her motion, she submits, *inter alia*, a copy of the pleadings, transcripts of the parties' deposition testimony, and an affidavit of Dr. Mark Korsten.

Defendants Birk, Anderson and Stony Brook Internists (hereinafter collectively referred to as the Stony Brook defendants) also move for summary judgment dismissing the complaint against them, arguing that they acted in accord with good medical practice. In support of their motion, they submit, *inter alia*, a copy of the pleadings, transcripts of the parties' deposition testimony, medical records regarding plaintiff's treatment, and an affidavit of Dr. Edward Lebovics.

Plaintiff opposes the motions by Oswold and the Stony Brook defendants, arguing that issues of fact exist as to whether defendants departed from accepted standards of medical care. In opposition, plaintiff submits, *inter alia*, medical records regarding her treatment, her own affidavit, an affidavit of Rita Kennedy Smith, and a redacted affirmation of a physician licensed in the state of New York who is certified in internal medicine and gastroenterology.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The requisite elements of proof in an action to recover damages for medical malpractice are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage (*Feinberg v Feit*, 23 AD3d 517, 806 NYS2d 661 [2d Dept 2005]; *Lyons v McCauley*, 252 AD2d 516, 675 NYS2d 375 [2d Dept 1998], *lv denied* 92 NY2d 814 [1998]). On a motion for summary judgment dismissing the complaint, a defendant hospital or physician has the burden of establishing through medical records and competent expert affidavits the absence of any departure from good and accepted practice, or, if there was a departure, that the plaintiff was not injured thereby (*see Luu v Paskowski*, 57 AD3d 856, 871 NYS2d 227 [2d Dept 2008]; *Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). In opposition, "a plaintiff must submit evidentiary facts or materials to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact" (*Deutsch v Chaglassian*, 71 AD3d 718, 719, 896 NYS2d 431 [2d Dept 2010]). Further, the plaintiff "need only 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 v Streiter*, 83 AD3d 18, 24, 918 NYS2d 176 [2d Dept 2011]).

Dr. Lebovics' affidavit states that the subject procedure was performed by Dr. Birk and gastroenterology fellow Dr. Michael Harris. He states that Dr. Harris started the procedure, under the supervision of Dr. Birk, and that Dr. Birk took over the procedure when Dr. Harris encountered looping of the colonoscope. Dr. Lebovics describes looping as a known feature of a colonoscopy in that the colonoscope tube loops while attempting to be advanced, which typically occurs in the sigmoid colon. He opines that Dr. Birk acted in accord with good and accepted

gastroenterology practice when he monitored the attempts by Dr. Harris to reduce or straighten the looping, and thereafter decided to intervene and take over the colonoscopy procedure. He states that Dr. Birk completed the procedure in accord with good and accepted medical practice in that as he withdrew the scope he attempted to visualize the inner lining or lumen of the colon and determined that no significant abnormalities or injuries to the colon existed. He further states that Dr. Birk appropriately followed up with the patient after the procedure, and was not advised of any worrisome circumstance or complaints by plaintiff. Dr. Lebovics concludes that plaintiff was properly discharged from the endoscopy unit by the staff of the hospital, and notes that Dr. Birk did not have any further contact with plaintiff.

Dr. Lebovic noted that plaintiff made telephone calls to the endoscopy unit complaining of cramps following the procedure, and that Dr. Anderson's note reflects that plaintiff was advised to walk and to call back if "she did not feel better." Dr. Lebovics states that it is not particularly unusual to have patients continue to complain of bloating and/or cramping several days after a colonoscopy. He states that as plaintiff denied that she had a fever or any abdominal distention, it was reasonable for Dr. Anderson to advise plaintiff to move around to attempt to relieve the discomfort commonly due to excess gas within the lumen of the bowel following a colonoscopy. Dr. Lebovics opines to a reasonable degree of medical certainty that Dr. Anderson acted in accord with good and accepted gastroenterology practice when he spoke to plaintiff, and that it was not a departure from accepted practice to fail to advise her to return to the hospital for further evaluation. He explains that the complaints of plaintiff were not of a "suspicious character" so as to trigger further interventions, and that even if such interventions were undertaken the diagnosis would not have changed. Further, having reviewed the report of Dr. Watkins, who operated on plaintiff's perforated colon, Dr. Lebovics opines that during plaintiff's colonoscopy a split of the outer layer (serosa) of the colon occurred as a result of the looping. He states that the split did not create a hole through the entire wall of the colon, but the split did not heal properly and became further compromised. He further states that it was only after one small section of the split went through the inner lining of the colon and created a hole through the entire wall of the colon that contents of the bowel begin spilling into the abdomen, leading to an acute and sudden deterioration of plaintiff's condition.

In addition, Dr. Lebovics states that even if Dr. Birk or Dr. Anderson had decided to evaluate plaintiff when she called to complain about cramping, the diagnosis of the serosal tear would have been impossible, as imaging studies such as CT or MRI would not be able to diagnose a tear limited to the outer wall of the colon. He further states that even if plaintiff had been admitted and placed on antibiotics, the perforation would still have occurred. He concludes that nothing Dr. Birk and Dr. Anderson did or did not do would have prevented the perforation from occurring.

Here, the Stony Brook defendants established a *prima facie* case that they did not deviate or depart from accepted medical practice through the submission of plaintiff's medical records, the parties' deposition testimony, and the expert affirmation of Dr. Lebovics (*see Sandmann v Shapiro*, 53 AD3d 537, 861 NYS2d 760 [2d Dept 2008]; *Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]; *Jonassen v Staten Is. Univ. Hosp.*, 22 AD3d 805, 803 NYS2d 700 [2d Dept 2005]). Therefore, the burden shifted to plaintiff to come forth with admissible evidence refuting the defendant's *prima facie* showing (*Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358, 669 NYS2d 631 [2d Dept 1998]; *Pierson v Good Samaritan Hosp.*, 208 AD2d 513, 616 NYS2d 815 [2d Dept 1994]).

Plaintiff's evidence in opposition to the motion was insufficient to raise a triable issue of fact. Plaintiff's affidavit states that during the colonoscopy, even though she had been given anesthesia, she woke up more than once in pain. She states that Dr. Birk kneaded her stomach and that she was given additional anesthesia. She states that after the procedure, she was advised that cramping was normal and was discharged without receiving any written discharge instructions. She further states that Dr. Anderson called to see how she was doing the day after the procedure, and that when she complained of very bad cramps he told her that it was normal and that she should exercise to alleviate the pain. She states that on June 14th, as the pain worsened, she called the medical center and spoke with either Dr. Birk or Dr. Anderson, who assured her that the cramps were normal and suggested that she purchase over-the-counter gas medication. She further states that on June 15th, she twice called the medical center, speaking to Dr. Anderson the first time and Nurse Oswold the second time, and that both of them assured her that she should not worry about the cramping. She states that the pain continued to worsen over the next two days, but that she could not call the medical center because it was closed for the weekend. She states that she went out for dinner on June 17th with her family, and that she woke up early the next morning in severe pain. She further states that her daughter drove her to the emergency room on June 18, and that she was admitted in septic shock due to a perforated colon. She states that she had surgery consisting of a bowel resection and colostomy, and remained in the hospital until July 6, 2007.

Significantly, the redacted affidavit of plaintiff's expert included with the opposition papers is insufficient to defeat summary judgment, as plaintiff failed to submit an unredacted original affidavit of its expert to the Court for in camera inspection or to explain the failure to identify such expert by name (*see Rose v Horton Med. Ctr.*, 29 AD3d 977, 816 NYS2d 174 [2d Dept 2006]; *Cook v Reisner*, 295 AD2d 466, 744 NYS2d 426; *Marano v Mercy Hosp.*, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]; *Kruck v St. John's Episcopal Hosp.*, 228 AD2d 565, 644 NYS2d 325 [2d Dept 1996]). However, even if it were signed and unredacted, plaintiff's expert's report is conclusory on the issue of proximate cause and failed to address the explanations of Dr. Lebovics as to why the alleged departures did not cause plaintiff's injuries (*see Andreoni v Richmond*, 82 AD3d 1139, 920 NYS2d 225 [2d Dept 2011]; *Rebozo v Wilen*, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]; *Ramirez v Columbia-Presbyterian Med. Ctr.*, 16 AD3d 238, 790 NYS2d 606 [2d Dept 2005]). Thus, the Stony Brook defendants' motion for summary judgment is granted.

As to Oswold's motion for summary judgment, her expert, Dr. Korsten, states in an affidavit that based on a review of the record, Nurse Oswold's contact with plaintiff occurred two days post-procedure during a telephone conversation when plaintiff called the endoscopy unit to complain about abdominal pain. Oswold allegedly asked plaintiff if it felt like gas and whether the plaintiff had tried to pass it. According to Oswold's deposition testimony, plaintiff did not provide further details about her condition, and switched the conversation to ask about the diverticulosis condition she was diagnosed with after the colonoscopy.

Dr. Korsten opines that Oswold did not commit any departures from accepted medical practice during the telephone conversation with plaintiff. He states that based upon Oswold's version of the events, she did not depart from accepted practice in asking plaintiff if she had passed gas, as it is normal for patients post-colonoscopy to experience abdominal cramping and pain. Moreover, he states she did not commit any departure from accepted practice, as Dr.

Anderson took over the phone call and properly addressed plaintiff's complaints. According to plaintiff's version of the events, in which Dr. Anderson did not take over the phone call, Dr. Korsten opined that as plaintiff only complained of abdominal pain, Oswold did not commit any departures from accepted medical practice. He states that a complaint of abdominal pain three days post-colonoscopy is not uncommon, and that it did not warrant Oswold instructing the patient to come in for evaluation or to speak with a physician. Dr. Korsten further states his belief within a reasonable degree of medical certainty that plaintiff did not have a colon perforation on June 15th when she allegedly spoke with Oswold, as she was still able to eat solid food and drink alcohol on June 17th. He explains that a colon perforation causes severe, debilitating pain and patients are unable to tolerate ingestion of food or liquid. Thus, Dr. Korsten concludes that Oswold did not fail to ascertain that plaintiff had a colon perforation when the two spoke on the telephone, as plaintiff did not have the condition at that time.

Oswold established *prima facie* her entitlement to summary judgment through the parties' deposition testimony and the affidavit of Dr. Korsten, who concluded that Oswold did not depart from the accepted standard of care during her phone conversation with plaintiff and that no causal relationship can be established between her failure to instruct plaintiff to go to the nearest emergency room and plaintiff's injuries (*see Bjorke v Rubenstein*, 53 AD3d 519, 861 NYS2d 757 [2d Dept 2008]; *Worthy v Good Samaritan Hosp. Med. Ctr.*, 50 AD3d 1023, 857 NYS2d 178 [2d Dept 2008]; *Rosen v John J. Foley Skilled Nursing Facility*, 45 AD3d 558, 846 NYS2d 208 [2d Dept 2007]). The burden of proof, therefore, shifted to plaintiff to show a triable issue exists as to Oswald's negligence.

Rita Kennedy Smith, a nurse, states in an affidavit submitted in opposition to Oswold's motion that Oswold's expert is a medical doctor and is not trained in the standards of nursing care. She asserts that Oswold departed from accepted standards during the telephone call with plaintiff by failing to ascertain who performed the colonoscopy, failing to inform the treating doctor of plaintiff's complaint and failing to recognize the symptoms of perforated colon. She also states that Oswold failed to advise plaintiff to go to the emergency room and failed to document the phone calls in a timely and accurate manner. Smith's affidavit further states that Oswold departed from accepted nursing care by failing to notify Dr. Birk, plaintiff's treating doctor, of plaintiff's complaint of pain and instead, handing the phone to Dr. Anderson, who was not aware of plaintiff's complications during the procedure. She states that Oswold handed the phone to Dr. Anderson without informing him that plaintiff complained of abdominal pain, thereby departing from accepted standard of nursing care. She states that when plaintiff called on June 15th, to advise that her abdominal pain was worsening, Oswold was negligent in telling plaintiff not to worry and that she would feel better. Smith further asserts that accepted nursing standards required Oswold to instruct a patient with the aforementioned complaints to go to the nearest emergency room to seek care for her worsening condition.

Smith's affidavit fails to establish her qualifications as an expert in gastrointestinal medicine, as she merely states that she is a registered nurse (*see Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 871 NYS2d 680 [2d Dept 2009]; *Hofmann v Toys "R" Us, NY Ltd. Partnership*, 272 AD2d 296, 707 NYS2d 641 [2d Dept 2000]). The affidavit does not set forth whether Smith had specific training or expertise in providing care to patients following a colonoscopy procedure or how she became familiar with the applicable standards for providing care for patients. Furthermore, Dr. Korsten states in his affidavit that plaintiff did not have a

perforated colon at that time plaintiff spoke to Oswold. Smith's affidavit does not address this issue, nor can it, as she is not a medical doctor and lacks the qualifications to render a medical opinion (*see Elliot v Long Is. Home, Ltd.*, 12 AD3d 481, 784 NYS2d 615 [2d Dept 2004]). Thus, Smith's purported expert affidavit failed to raise a triable issue of fact as to whether the alleged deviation from the nursing standard was the proximate cause of plaintiff's injuries (*see Romano v Stanley*, 90 NY2d 444, 661 NYS2d 589 [1997]; *Keevan v Rifkin*, 41 AD3d 661, 839 NYS2d 151 [2d Dept 2007]). Accordingly, the motion by Oswold for summary judgment is granted.

Dated: August 2, 2012

PAUL J. BAISLEY, JR.
J.S.C.