SHORT FORM ORDER

INDEX No. 08-10276
CAL. No. 12-00099MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5-29-12 (#007 & #011)
MOTION DATE 6-8-12 (#008, #009 & #010)
MOTION DATE 7-16-12 (#012)
ADJ. DATE 7-16-12
Mot. Seq. # 007 - MG # 010 - MG
008 - MG # 011 - MG
009 - MG # 012 - MG; CASEDISP

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JANET ORLANDO, as administratrix of the good, chattels and credits which were of KEITH ORLANDO, deceased and JANET ORLANDO, Individually,

Plaintiffs,

- against -

SCOTT ELLIOTT, R.P.A., PAUL MONTHIE, P.A., LAWRENCE GOLDMAN, M.D., JOHN KALARICKAL, M.D., SAMSON MEBRAHTU, M.D., FIRST CHOICE MEDICAL, PLLC, JOHN T. MATHER MEMORIAL HOSPITAL and BROOKHAVEN MEMORIAL HOSPITAL MEDICAL CENTER,

Defendants.

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Upon the following papers numbered 1 to 78 read on these motions and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (007) 1-16 ; Notice of Cross Motion and supporting papers (008) 17-34; (009) 35-50; (010) 51-62; (011) 63-66; (012) 67-78 ; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers ____; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (007) by the defendants, Lawrence Goldman, M.D., and First Choice Medical, PLLC, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is granted; and it is further

ORDERED that motion (008) by the defendant, Brookhaven Memorial Hospital Center, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against it is granted; and it is further

ORDERED that motion (009) by the defendant, John Kalarickal, M.D., pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against him is granted; and it is further

ORDERED that motion (010) by the defendant, Sampson Mebrahtu, M.D., pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against him is granted; and it is further

ORDERED that motion (011) by the defendant, Scott Elliott, R.P.A., pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against him is granted; and it is further

ORDERED that motion (012) by the defendants, Paul Monthie, P.A. and John T. Mather Memorial Hospital, M.D, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is granted.

In this medical malpractice action, the plaintiff, Janet Orlando, as administratrix of the goods, chattels, and credits of Keith Orlando, alleges that the defendants departed from good and accepted standards of medical care and treatment of plaintiff's decedent, Keith Orlando, causing him to suffer severe personal injuries, mental anguish, and death. A derivative claim has been asserted by Janet Orlando. The gravamen of this complaint is that the plaintiff's decedent came under the care and treatment of the defendants from March 9, 2006 through March 27, 2006, after lifting a heavy door and sustaining injuries diagnosed as lumbar, thoracic and cervical sprains and strains, and right knee/leg sprain. He ultimately died from a massive stroke.

It is undisputed that initially, the decedent was seen at Mather Memorial Hospital (Mather Hospital) on March 9, 2006 by defendant Paul Monthie, P.A. for his complaints regarding his neck, back and knee, and was discharged home with instructions for follow-up care. On March 14, 2006, the plaintiff's decedent was seen for these same injuries by Scott Elliot, P.A. at First Choice Medical, owned by defendant Lawrence Goldman, M.D., and was discharged with instructions. On March 17, 2006, the plaintiff's decedent collapsed at home and became unconscious. He was transported to Brookhaven Memorial Hospital Medical Center (Brookhaven Hospital) where he was diagnosed with a stroke and administered tPA in the emergency department pursuant to the order of neurologist Samson Mebrahtu, M.D. He was admitted to Brookhaven Hospital by defendant hospitalist, John Kalarickal, M.D., with neurologist Samson Mebrahtu, M.D. as the lead physician for decedent's care. The decedent's condition

continued to deteriorate. Craniotomy surgery, to treat severe brain swelling and herniation of the brain, was thereafter performed on March 20, 2006, by non-defendant neurosurgeon Dr. Sumeer Sathi. The plaintiff's decedent died on March 26, 2006, at thirty-four years of age after having been declared brain dead.

The moving defendants seek summary judgment dismissing the complaint on the bases that they did not depart from good and accepted standards of care and treatment of the plaintiff's decedent, and that there is nothing that they did or failed to do which proximately caused the claimed injuries and death of the decedent. These motions have not been opposed by the plaintiff who has, thus, failed to raise triable issues of fact to preclude summary judgment.

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, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [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, 427 NYS2d 595 [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, 435 NYS2d 340 [2d Dept 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, 678 NYS2d 503 [2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420 [1999]). 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, 434 NYS2d 166 [1980]; ***Prete v Rafla-Demetrious***, 224 AD2d 674, 638 NYS2d 700 [2d Dept 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, 675 NYS2d 375 [2d Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; ***Bloom v City of New York***, 202 AD2d 465, 609 NYS2d 45 [2d Dept 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, 776 NYS2d 907 [2d Dept 2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.***, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

MOTIONS (007) and (011)

The notice of motion in motion (007) sets forth that Scott Elliott, R.P.A., Lawrence Goldman, M.D., and First Choice Medical, PLLC seek summary judgment dismissing the complaint as asserted against them, however, it is noted that the law office of Kelly, Rode & Kelly, LLP represents Lawrence Goldman, M.D. and First Choice Medical, PLLC. Scott Elliott, R.P.A. is represented by the law office of Crafa & Sofield, P.C., which has made application for summary judgment dismissing the complaint as asserted against defendant Elliott in motion (011). In this regard, it is necessary to determine first whether Scott Elliott has established his prima facie entitlement to summary judgment before considering whether defendants Lawrence Goldman, M.D. and First Choice Medical, PLLC are entitled to summary judgment. Therefore, motions (007) and (011) are consolidated for determination.

Scott Elliott testified to the extent that he began working with First Choice Medical in September 1998, and was employed there as a physician's assistant in March 2006. He saw the plaintiff's decedent on March 14, 2006, for complaints regarding pain in his neck, lower back, and right knee, with onset on March 9, 2006 after lifting a heavy object.

Lawrence Goldman, M.D. testified to the effect that he is the owner and sole partner of First Choice Medical, and hired Scott Elliott to work at First Choice. His obligation was to oversee the care rendered by Scott Elliott, to review his decision-making process, and to discuss cases where medical treatment is necessary. Keith Orlando was seen and examined by Scott Elliott at First Choice on March 14, 2006 for complaints of back pain, neck, and right knee pain. Goldman signature-stamped the chart after the visit. Based upon his review of the decedent's chart, he did not feel that the decedent had exhibited signs or symptoms of a stroke.

Howard Kolodny, M.D., defendants' expert, opined with a reasonable degree of medical certainty that Lawrence Goldman, M.D., First Choice Medical, and Scott Elliott, R.P.A. did not depart from acceptable medical care, or the standard of care, in the treatment rendered to Keith Orlando on March 14, 2006, and that there is no evidence that any treatment rendered on that date caused the patient's death. Entitlement to summary judgment is supported by the record and the opinions of Dr. Kolodny.

The record supports that the care and treatment provided by P.A. Elliott was appropriate. The allegations that P.A. Elliott failed to take a complete and comprehensive medical history is without merit. Dr. Kolodny continued that Janet Orlando testified that her husband made no other complaints that could be remotely associated with a stroke prior to March 17, 2006, and thus there were no other signs and symptoms which could have been appreciated by P.A. Elliott. He continued that the decedent was properly referred to a chiropractor and was not discharged prematurely. Dr. Kolodny stated that this was a young, asymptomatic man, who unfortunately occluded a large number of blood vessels three days later, making recovery impossible. No other testing was indicated on March 14, 2006, other than what was provided. Dr. Goldman was not required to see the decedent as a physician's assistant is allowed to diagnose and treat a patient. Dr. Kolodny opined that there was no deviation by Dr. Goldman or P.A.

Elliot from the standards of care and treatment, and there is nothing that was done for the patient at First Choice on March 14, 2006, which caused any injury or damage to the decedent.

Based upon the foregoing, it has been established prima facie that Scott Elliott, P.A., Lawrence Goldman, M.D., and First Choice Medical are entitled to summary judgment dismissing the complaint on the bases that they did not depart from good and accepted standards of medical care and practice in the treatment of the plaintiff's decedent on March 14, 2006, and that they did not proximately cause the injuries and death of the plaintiff's decedent.

Accordingly, the unopposed motions (007) and (011) are granted, and the complaint as asserted against Scott Elliott, R.P.A., Lawrence Goldman, M.D., and First Choice Medical is dismissed.

MOTION (008)

In motion (008), Brookhaven Memorial Hospital Medical Center seeks summary judgment dismissing the complaint as asserted against it. Brookhaven Memorial Hospital Medical Center has established prima facie entitlement to summary judgment dismissing the complaint on the bases that none of the employees or staff at Brookhaven Hospital departed from good and accepted standards of care and treatment, and that there is nothing that they did or did not do which caused or contributed to the decedent's injuries or death.

Dr. Anthony C. Mustalish, the expert physician for Brookhaven Memorial Hospital, set forth the care, diagnostic testing, and treatment which was ordered, the time intervals for the various testing, and opined that all was accomplished in an efficient and timely manner, representing good and accepted emergency care and treatment and evaluation of an unresponsive patient with the decedent's presentation. Dr. Mustalish established that the decedent was properly monitored, and vital signs and findings were properly recorded. Dr. Mustalish set forth that in the emergency room, Dr. O'Malley performed a stroke assessment according to protocol, and based upon the findings, called a Code Gray for the immediate institution of stroke treatment protocol, standard protocol based on the National Institute of Health Stroke Scale, representing good and accepted medical care.

Dr. Mustalish continued that Dr. Mebrahtu, the treating neurologist who was called in by Dr. O'Malley, obtained written consent for tPa administration from the decedent's wife, and discussed all questions and the risks and benefits of such administration with her. There is no evidence that tPA (to help break up the clot) caused or contributed to the decedent's demise. Dr. Mustalish continued that the tPA was timely administered within the gray area, just minutes after the three hour window. Dr. Mustalish continued that during the decedent's hospital admission, there was nothing that the nurses or physicians at Brookhaven Hospital did or did not do which caused or contributed to the injuries claimed herein; that they did not depart from good and accepted standards of care and treatment; and that the medical care and treatment rendered to the plaintiff's decedent at Brookhaven Hospital was at all times within accepted standards of care. Dr. Mustalish opined that a stroke in a 34 year old is unusual and is not a preliminary primary consideration in a presentation such as the decedent's. Thus, it was not a deviation from accepted care to not include stroke as a primary differential diagnosis. He continued that the evaluations that were timely performed, led to the diagnosis of stroke, and that the initial treatment and

stabilization that was carried out was also appropriate for a stroke victim. Based upon the foregoing, defendant Brookhaven Memorial Hospital has established prima facie entitlement to summary judgment dismissing the complaint.

Accordingly, the unopposed motion (008) is granted, and the complaint as asserted against defendants Brookhaven Memorial Hospital Medical Center is dismissed.

In motion (009), the defendant, John Kalarickal, M.D., seeks summary judgment dismissing the complaint asserted against him. In 2005 and 2006, he was employed by Cogent Healthcare, a company that provided hospitalist physicians to hospitals across the country. Patients who either did not have an outpatient primary care provider, or whose outpatient primary care provider did not provide inpatient services at Brookhaven Hospital, were typically admitted under the hospitalist service. He stated that Keith Orlando arrived at Brookhaven Hospital emergency room on the morning of March 17, 2006. He was the decedent's admitting physician, and as an internist, much of his role was to communicate with the family and other consultants. In reviewing the hospital record, he noted the decedent's history of lifting a 1,200 pound door with co-workers when he hurt his neck, knee, and back. Dr. Kalarickal stated that this presentation was important for consideration of an injury to the vessels in the neck, since he did not have a head injury. Dr. Kalarickal's expert, Leon Zacharowicz, M.D., opined that Dr. Kalarickal did not depart from good and accepted medical practice in the care and treatment rendered to Keith Orlando, and that no negligent acts or omissions by him caused any injury to the plaintiff's decedent.

Dr. Zacharowicz stated that Dr. Kalarickal admitted the plaintiff's decedent on March 17, 2006 to Brookhaven Hospital and followed the plan of care set forth by neurologist Dr. Mebrahtu. On March 20, 2006, Dr. Kalarickal saw the decedent and reviewed the CT scan performed on March 19th, which indicated a left middle cerebral artery infarct with mass effect and midline shift, without evidence of intracranial hemorrhage. Dr. Kalarickal immediately notified Dr. Mebrahtu, and they agreed that a neurosurgical evaluation was appropriate. Immediately thereafter, Dr. Kalarickal called Dr. Sumeer Sathi, a neurosurgeon, and requested a consultation and evaluation of the decedent. Dr. Sathi's impression was that of severe catastrophic swelling and herniation of the brain, with a poor prognosis for recovery. He recommended surgery to relieve the pressure on the decedent's brain and advised Dr. Kalarickal to discontinue the Heparin, to intubate the decedent, and to prepare him for surgery. On March 20th, a craniotomy was performed by Dr. Sathi, who noted that the decedent's chances of survival were poor, and that any meaningful neurological recovery was unlikely. Dr. Kalarickal last saw the decedent on March 22, 2006. He noted that the decedent's prognosis remained extremely grim as there was no brain stem function. The plaintiff's decedent was declared brain dead by neurology and neurosurgery on two separate occasions. Pursuant to the family's wishes, life support was withdrawn. Keith Orlando died on March 26, 2006.

Dr. Zacharowicz opined that any allegation that Dr. Kalarickal failed to refer the decedent to a proper specialist, or improperly administered tPA, and failed to adhere to protocols regarding its use, is without merit. Dr. Mebrahtu, who ordered and administered the tPA, was responsible for obtaining the informed consent for its administration. Dr. Mebrahtu also ordered the administration of Heparin, an appropriate follow-up treatment as part of the anticoagulation therapy. On March 18th and 19th, the decedent was under the care of another hospitalist, Dr. Sadiq, as well as Dr. Mebrahtu. Dr. Kalarickal saw

the decedent on the morning of March 20th and noted that his condition was deteriorated. Dr. Kalarickal acted appropriately in reviewing the CT scan of March 19th, calling Dr. Mebrahtu, and obtaining a neurosurgical consultation with Dr. Sathi, who evaluated the decedent and assumed the lead role in the decedent's care and treatment thereafter. The record supports that when Dr. Kalarickal saw the decedent on March 20, 2006, he was already experiencing catastrophic swelling and herniation of the brain. His condition was grave and almost certainly irreversible, with major brain damage already having occurred. Dr. Zacharowicz opined that Dr. Kalarickal acted in accordance with good and accepted medical practice, and that there were no negligent acts or omissions by Dr. Kalarickal which caused injury to the decedent.

Dr. Kalarickal has also submitted the expert affirmation of Howard Kolodny, M.D. It is Dr. Kolodny's opinion within a reasonable degree of medical certainty that Dr. Kalarickal did not depart from good and accepted medical practice in his care and treatment of the plaintiff's decedent, and that there were no negligent acts or omissions by Dr. Kalarickal which caused injury to the plaintiff's decedent. Entitlement to summary judgment is supported by the record.

Dr. Klodony stated that Dr. Kalarickal did not see the decedent until March 17, 2006, after Dr. Mebrahtu decided to treat the decedent with tPA, and thus Dr. Kalarickal was not involved in that decision to administer tPA. Dr. Kalarickal, however, did write the order at 9:40 p.m. to admit the plaintiff's decedent to ICU, with Dr. Mebrahtu as the lead physician. Dr. Kalarickal had no involvement in the decedent's care and treatment on March 18th and 19th. On March 20, 2006, when Dr. Kalarickal saw the decedent at 10:00 a.m., the plaintiff's decedent had already been seen by Dr. Mebrahtu, who ordered a stat CT scan and ordered Decadron and Mannitol to reduce brain swelling. Upon completion of the scan, Dr. Kalarickal immediately contacted Dr. Mebrahtu with the results, and they agreed to a neurosurgical consultation. Dr. Sathi saw the decedent and performed a craniotomy to help relieve the severe catastrophic swelling and herniation of the decedent's brain.

Dr. Kolodny set forth his opinion that Dr. Mebrahtu, as the neurologist, made the decisions concerning the administration of tPA and Heparin; provided informed consent to the decedent's wife concerning the tPA; and ordered all the proper tests. He continued that a neurosurgical consultation was not indicated on March 17th as the decedent was being followed by Dr. Mebrahtu, the proper specialist, and there were no notable changes in the decedent's condition. On March 20, 2006, Dr. Kalarickal properly performed a thorough examination of the decedent, reviewed the CT scan reports, promptly called Dr. Mebrahtu to discuss the results, and then promptly called Dr. Sathi for a neurosurgical consultation.

Accordingly, the unopposed motion (009) is granted and the complaint asserted against Dr. Kalarickal is dismissed.

In motion (010) the defendant, Samson Mebrahtu, M.D., seeks summary judgment dismissing the complaint on the bases that he did not depart from good and accepted standards of medical care and treatment and did not proximately cause the decedent's injuries or death. Samson Mebrahtu, M.D. testified to the extent that the plaintiff's decedent had a non-bleeding type of stroke rather than a stroke caused by bleeding. He continued that a non-bleeding type of stroke causes a lack of blood flow to certain

areas of the brain, resulting in either a reversible deficit or permanent deficit. A non-contrast CT scan of the brain can determine which type of stroke the patient has.

Dr. Mebrahtu has submitted the affirmation of his expert, Alan Z. Segal, M.D. who opined with a reasonable degree of medical certainty that there is no basis to support the plaintiff's allegations of negligence relative to Dr. Mebrahtu's care and treatment of Keith Orlando from March 17, 2006 through March 27, 2006. Such opinions are supported by the record and demonstrate Dr. Mebrahtu's entitlement to summary judgment.

Dr. Segal has set forth the plaintiff's decedent's course of treatment while admitted to Brookhaven Hospital and under the care and treatment of Dr. Mebrahtu, and opined that all of his medical recommendations for diagnostic testing, administration of tPA and Heparin, differential diagnoses of embolic left middle cerebral artery thrombus, hypercoagulable state, and carotid dissection; diagnosis of acute left middle cerebral artery CVA; administration of Decadron and Mannitol, and discontinuance of Heparin, intubation, hyperventilation, and neurosurgical consultation on March 20, 2006, were timely, appropriate, and proper. Dr. Segal continued that at all times, Dr. Mebrahtu properly and timely evaluated the decedent; properly appreciated the patient's condition; properly assessed brain swelling and ordered appropriate medications and neurosurgical consultation and intervention. He added that Dr. Mebrahtu as a neurologist, is a stroke specialist, and did not depart from accepted standards of care and treatment. He adhered to proper protocols, gave proper informed consent advising of the inherent risks and benefits of the tPA. Dr. Segal opined that none of the alleged departures from the standards of care by Dr. Mebrahtu were the proximate cause of the decedent's injuries and death which were the result of his catastrophic stoke. Based upon the foregoing, it is determined that Dr. Mebrahtu has demonstrated prima facie entitlement to summary judgment dismissing the complaint.

Accordingly, the unopposed motion (010) is granted and the complaint asserted against Dr. Mebrahtu is dismissed.

In motion (012) the defendants, Paul Monthie, P.A. and John T. Mather Memorial Hospital, seek summary judgment dismissing the complaint on the bases that they did not depart from good and accepted standards of medical care and treatment, and did not proximately cause the decedent's injuries or death.

Paul Monthie testified to the effect that on March 9, 2006, he was working in the emergency department at Mather Hospital and saw Keith Orlando as a patient for complaints of pain in his neck, lower back, and both knees, which occurred while he was lifting a heavy glass door at 10 a.m. After examining and evaluating the decedent, Monthie discharged him with instructions to follow up with his private attending for further medical care and treatment. In support of his application, Monthie has submitted the expert affirmation of Howard B. Reiser, M.D. who opined within a reasonable degree of medical certain that there were no deviations or departures from acceptable medical care or the standard of care in the treatment of Keith Orlando on March 9, 2006, and there is no evidence that any treatment rendered on that date caused the patient's death. Entitlement to summary judgment is supported by the record.

Dr. Reiser has opined that there was nothing in the decedent's history or physical exam performed by P.A. Monthie to suggest that the decedent was about to suffer a cerebral vascular accident, transient ischemic attack, or impending stroke. His symptoms and complaints were consistent with the diagnosis made by P.A. Monthie of muscle strain resulting from heavy lifting of an object. The exam was appropriate and adequate based upon the decedent's presentation, and a correct diagnosis was made. No consultation was necessary, and no admission to a hospital was required. Dr. Reiser concluded that the decedent's stroke and subsequent death were due to atherosclerosis with subsequent thrombosis.

Accordingly, the unopposed motion (012) is granted and the complaint as asserted against defendant Paul Monthie, P.A. and Mather Memorial Hospital is dismissed.

Dated: 8/16/12

THOMAS F. WHELAN, J.S.C.