[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS Justice PART 6

POBLADOR, BENJICE

- v -

ELIZABETH KAVALER, M.D., ET AL.

INDEX NO. 109861/09

MOTION DATE 5/21/13

MOTION SEQ. NO. 002

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-15
Answering Affidavits — Exhibits	see MS 003: 14-16
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION & ORDER

FILED

JUL 18 2013

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/17/13

JOAN B. LOBIS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

----------X

BERNICE POBLADOR,

Plaintiff,

Index No. 109861/09

-against-

Decision and Order

ELIZABETH KAVALER, M.D., LENOX HILL HOSPITAL, and NEW YORK UROLOGICAL ASSOCIATES, P.C.,

Defendants.

----------X

JOAN B. LOBIS, J.S.C.:

Defendant Lenox Hill Hospital moves for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules in motion sequence number 2. Defendants Elizabeth Kavaler, M.D., and New York Urological Associates, P.C., move for the same relief in motion sequence number 3. Plaintiff Bernice Poblador opposes the motions, which have been consolidated for purposes of this decision and order. For the following reasons, the Defendants' motions are denied.

Bernice Poblador, age 50, sought treatment from Dr. Elizabeth Kavaler in March 2007. She complained among other things of urinary problems. Dr. Kavaler, who is a board-certified urologist, and who had been treating Ms. Poblador for several years, operated on Ms. Poblador the following month, on April 19. The surgery involved two procedures: a rectocele, to repair a bulging of the rectum into the patient's vagina, and a perineal body repair, to strengthen support between the back wall of the patient's vagina and rectum. The surgery was an ambulatory procedure that was performed under general anesthesia.

Dr. Kavaler operated on the patient in the morning of April 19. At 10:10 am,

anesthesia was started. Ms. Poblador was intubated for the procedure. At 10:35 am Dr. Kavaler incised the posterior vaginal wall. She was assisted in the procedure by a resident, Dr. John Bruno. Lenox Hill Hospital employees, David Perkins and Natalie Gubareff, also participated. In their depositions Perkins and Gubareff testified that they did not have specific recollection of the events of this case. Reviewing the operating room record, however, Perkins testified that he served as the certified scrub technician (CST), who passed instruments and materials, including sponges,[1] to the surgeons.

For this type of surgery a pack usually contains ten sponges. The sponges have a blue line through them. Sponges that are used are returned by the surgeon to the CST or tossed into a bucket by the surgeon. Perkins testified that for rectocele surgeries, "we use more than ten sponges." The circulating nurse then removes the used sponges and puts them in packaging. After surgery a count sheet, which actually lists the numbers of items such as sponges is given to the charge nurse. Ms. Gubareff testified that she performed the duties of circulating nurse, providing any materials that the CST needed to hand to the surgeons. She indicated that until recently count sheets were not retained but new policy now requires that they be kept. There is no count sheet for this patient in this record.

At 11:00 am, during the course of the surgery, the operating room record further

---

[1]It is uncontroverted from the medical personnel's testimony in this case that sponges and gauzes are closely synonymous. Only CST Perkins drew a distinction that is not relevant for purposes of this case: he characterizes gauze as that material used to bandage an exterior wound. The other witnesses characterized gauze used to wipe blood or other bodily fluids as a sponge. Regardless of the term, "sponge" or "gauze," the witnesses further testified without controversy that the gauze items used to wipe bodily fluids are not cut.

indicates that Rosemary Magtubay arrived to replace Perkins as scrub technician. Perkins testified that Magtubay came in so that he could take his lunch break. The record shows that the two technicians overlapped for the last five minutes of the operation, at which time, 11:05 am, Perkins signed out. Seven minutes later, Ms. Poblador's anesthesia ended.

While Ms. Poblador was in the operating room, there were three counts conducted. A first count was conducted before the procedure started; a second was conducted at pre-closure, when Dr. Kavaler announced that she was ready to start closing the patient's incision, and a final count was conducted after the site was closed. Mr. Perkins and Ms. Gubareff initialed the form memorializing that the three counts had been conducted. In her deposition, Dr. Kavaler testified that she could not tell from the form which of the support personnel present would have done the final sponge count. Nurse Gubareff initially claimed that the final count had been completed as of 11:00 am when Ms. Magtubay scrubbed in but then testified that she did not know. Ms. Gubareff added that if the operation had ended where the patient was getting washed there would be no reason to have a replacement scrub technician come in.

During the month following surgery, Ms. Poblador complained of a number of symptoms, including a bad vaginal odor, discharge, pain, and fever. She first saw Dr. Kavaler for a post-operative office visit on April 23, 2007. Dr. Kavaler did not record any notes for that date, testifying that she "forgot." Dr. Kavaler did indicate, however, that she did not examine Ms. Poblador at that visit, because the patient was swollen and very tender and "the yield" from any exam was in her opinion "certainly not worth putting her through." Dr. Kavaler did take a urine sample.

Ms. Poblador next saw Dr. Kavaler on May 1, 2007. In a brief office note, Dr. Kavaler indicated that Ms. Poblador was having bowel problems and that the physical examination showed the patient was "still very swollen; tender." Dr. Kavaler testified that she did not have a specific recollection but that she performs a vaginal examination by inserting two fingers into the patient's vaginal canal and palpating along the incision to the back wall of the canal to ensure closure, to rule out any blood in the back of the vaginal vault, or problematic discharge or abscess.

On May 15, 2007, Ms. Poblador returned to Dr. Kavaler for a third post-operative visit. Ms. Poblador testified that she told the doctor that she was in more pain, dizzy, could not eat, had a fever, and felt lethargic. Ms. Poblador testified that the doctor looked at her vagina but did not conduct a physical examination of the area. Dr. Kavaler testified that she has no independent recollection of that visit, and could have prescribed antibiotics but "didn't document it, no." She "forgot to make notes." Two days after the visit, Ms. Poblador telephoned Dr. Kavaler, but the doctor was away at a conference.

The next day, May 18, Ms. Poblador was washing herself in the shower when she discovered in her vagina what she described as a stringy object, a square piece of gauze, that had a bad odor. She put the gauze in plasticware and went to the emergency room of New York-Presbyterian Hospital. Ms. Poblador told the hospital staff that earlier in the day she had a temperature of 101 degrees. The hospital performed tests to rule out any other foreign objects; none were found. Plaintiff testified that she was told at the hospital that she could have gotten toxic shock syndrome from such an object.

Ms. Poblador confronted Dr. Kavaler regarding the gauze on a visit to her office in December 2007. Dr. Kavaler offered to examine Ms. Poblador, who refused. Dr. Kavaler did prescribe Vessicare at the time, however, for Ms. Poblador's urinary urgency. Ms. Poblador had called Dr. Kavaler in September 2007, requesting a letter for her insurance company, which Dr. Kavaler did provide, indicating that the procedure among other things did not involve a preexisting condition. In seeking that letter from Dr. Kavaler, Ms. Poblador did not mention the gauze.

Plaintiff sued Dr. Kavaler, her professional corporation, New York Urological Associates, P.C., and Lenox Hill Hospital in a summons and complaint filed in July 2009. Among other things, Plaintiff contends that the Lenox Hill Hospital employees miscounted the sponges and Dr. Kavaler failed to timely discover and remove the foreign object during post-operative care. In her deposition in this case, Dr. Kavaler testified that foreign material in the vagina "would cause a discharge and an odor." She acknowledged that the sponge that Ms. Poblador showed her was "the kind of sponge that is used in operating rooms." She testified that sponges are used to daub bleeding or to pack an area. The patient's vagina was not packed in this procedure, however. Following disclosure among the parties in this case, Plaintiff filed the note of issue in January 2013. Defendants now move for summary judgment, which Plaintiff opposes.

In seeking summary judgment, Lenox Hill Hospital (LHH) submits the expert affirmation of Dr. Scott W. Smilen. Dr. Smilen is a New York-licensed physician and urogynecologist. He opines that the LHH employees acted within good and accepted standards of medical/surgical care. He states that regarding the May 1, 2007, examination, "[o]bviously, there was no retained sponge/gauze in the plaintiff's vagina, as had there been one, DR. KAVALER would

have discovered and removed it then." He opines similarly regarding the May 15, 2007, visit. He goes on to contend that in his medical opinion, Ms. Poblador's condition as documented in the emergency room visit on May 18, 2007, is inconsistent with a retained foreign object inside the vagina for a month. He claims the lab results showed "normal findings."

Dr. Kavaler and her professional corporation, New York Urological Associates, P.C. (NYUA), also move for summary judgment, claiming that there are "no triable issues at fact" regarding allegations of "medical malpractice." They argue that Dr. Kavaler is not responsible for the count and even assuming Ms. Poblador had a retained sponge from the surgery performed by Dr. Kavaler, Ms. Poblador was not injured. To support that argument, the movants submit the expert affirmation of Dr. Michael S. Brodherson, a New York-licensed physician, who is board-certified in urology. Dr. Brodherson opines that the movants acted within good and accepted standards of medical practice, and no act or omission on their behalf proximately caused any injury to the Plaintiff.

In opposing Defendants' motions, Plaintiff submits the expert opinion of Dr. Bernard S. Strauss. Dr. Strauss is a New Jersey-licensed physician, who is board-certified in urology. Dr. Strauss opines that the miscount of sponges was responsible for Plaintiff's complications. Those complications, however, were not systemic, but rather local. Removal of the foreign body from Ms. Poblador's vagina would provide her almost immediate relief of symptoms such as odor, discharge, pain, and elevated temperature. Therefore Dr. Strauss did not consider it necessary that Ms. Poblador have an elevated white blood cell count later in the day that she removed the sponge from her vagina. He noted that the pathology report from her visit to New York-Presbyterian Hospital on

May 18, 2007, did show "altered vaginal flora." Any ragged edges of the sponge that Ms. Poblador claims she pulled from her vagina, he opined, were caused by the month-long contact with the patient's vaginal flora. Dr. Strauss noted that he has had specific experience with patients who have had retained sponges, including symptoms of fever, pain, and bad odor. Dr. Strauss further opined that Dr. Kavaler departed from accepted practice in failing to order an x-ray to rule out any retained foreign object as a source of the patient's complaints. He criticized Dr. Kavaler's failure to document two of the three visits as failing to comply with standards of procedure. In addition to submitting Plaintiff's expert opinion, Plaintiff argues that Defendants' expert, Dr. Brodherson, did not even address the initial post-operative visit on April 23, 2007, in opining that Dr. Kavaler did not deviate from standards of care. Plaintiff further contends that the theory of res ipsa loquitor applies.

Only Dr. Kavaler and her professional corporation, NYUA, filed any reply to Plaintiff's opposition. They claim that Plaintiff's reliance on Dr. Kavaler's failure to record notes at two out of the three postoperative visits is "irrelevant and misleading." They also claim it "is a medical an anatomical [sic] impossibility that a sponge or gauze could have ended up" in the patient's vaginal cavity. They also claim that this Court should grant them summary judgment on plaintiff's claim of "negligent retention."

In considering a motion for summary judgment, this Court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). A movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. C.P.L.R. Rule 3212(b). The affidavit

must recite all material facts and show, where a defendant is the movant, that the cause of action has no merit. Id. This Court may grant the motion if, upon all the papers and proof submitted, it is established that the Court is warranted as a matter of law in directing judgment. Id. It must be denied where facts are shown "sufficient to require a trial of any issue of fact." Id.

In a medical malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). Expert opinion must be based on the facts in the record or those personally known to the expert. Roques, 73 A.D.3d at 206. The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep't 2010). A defendant's expert opinion must "explain 'what defendant did and why.'" Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep't 2003)). Conclusory medical affirmations or expert opinions that fail to address a plaintiff's essential factual allegations are insufficient to establish prima facie entitlement to summary judgment. 73 A.D.3d at 206. Once a defendant establishes a prima facie case, a plaintiff must then rebut that showing by submitting an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure proximately caused the alleged injuries. Id. at 207.

This Court finds that summary judgment is not warranted as Defendants have failed to establish a prima facie case that there are no genuine issues of material fact and that they are entitled to summary judgment as a matter of law. Lenox Hill Hospital's expert opinion is legally deficient. Dr. Smilen assumes material facts not supported by record evidence: he assumes that the sponge count was correct and that no sponge was left in Ms. Poblador's vaginal canal. These facts, however, are contested on the record before this Court both in the pleadings and the deposition testimony. Even in stating his opinion, Dr. Smilen commits the familiar logical fallacy, post hoc ergo propter hoc, when he states "[o]bviously, there was no retained sponge/gauze in the plaintiff's vagina, as had there been one, DR. KAVALER would have discovered and removed it then." See Black's Law Dictionary 1186 (7th ed. 1999). He repeats that fallacy several times in the course of his opinion.

In addition, Dr. Smilen's opinion is both overinclusive and underinclusive. It includes facts for which he lacks foundation. For example, he claims there were "several examinations of the plaintiff" post-surgery. Even Dr. Kavaler's reply indicates there was one confirmed physical examination, and, at most, a second. Dr. Smilen's opinion also omits essential factual allegations. See Roques, 73 A.D.3d at 206. For example, he fails to address Ms. Poblador's symptoms during the month following surgery, including testimony of intermittent fevers, a foul vaginal odor, lower abdominal pain, brown vaginal discharge, and a feeling of pressure or discomfort in the vaginal and rectal areas. Nor does he address Dr. Kavaler's prescribing antibiotics. Lastly Dr. Smilen's reference to Ms. Poblador's failure to raise the discovery of the sponge at the time that she sought Dr. Kavaler's assistance with an insurance matter in September to imply that her claim is not

truthful goes to Ms. Poblador's credibility, which on this record remains for the factfinder to determine. See C.P.L.R. Rule 3212(b).

Movants Kavaler and NYUA similarly fail to establish a prima facie case of entitlement to summary judgment. This Court finds that their expert opinion, which contains 10 paragraphs and consists of two and one half pages, is speculative and conclusory. It treats only the allegations of medical malpractice and at most claims that the doctor was not responsible for the sponge count. Dr. Brodherson fails to address with any detail or specificity movants' conduct in the month prior to Ms. Poblador's discovery of the sponge. 54 A.D.3d at 729. And it assumes material facts, e.g., "[t]he sponge count was correct . . . . on May 1, 2007 . . . . Dr. Kavaler inserted her fingers into Ms. Poblador's vagina, establishing that there was no abnormality, and by obvious implication that there was no retained object." These bare assertions beg the very questions raised in this case. As noted above, Dr. Kavaler herself indicated following the May 1 examination that the patient was "very swollen; tender" and testified that foreign material in the vagina "would cause a discharge and an odor."[2] Under these circumstances, where the movants have failed to establish prima facie cases of entitlement to summary judgment, this Court need not address the Plaintiff's rebuttal.

---

[2]In their reply, Dr. Kavaler and NYUA cite to further testimony by Dr. Kavaler that migration would be impossible because there were no access points. That testimonial excerpt assumes that the sponge would have been left inside the incision, following suturing. The record, shows, however, that the sponges were used to wipe excess blood in the surgical field generally. Defendant Kavaler's statement in interest does not resolve this disputed issue of material fact. The assertion in the reply papers that an x-ray "would not be necessary" were the sponge to have migrated through the vaginal cavity ignores the month-long interval of post-operative recovery during which the patient's vagina was swollen and tender. As Dr. Kavaler testified during that period of time the patient was to avoid douching, tampons or intercourse, and a genuine issue of material fact remains whether there was retained sponge in the patient's vagina during that interval.

Accordingly, it is

ORDERED that Defendant Lenox Hill Hospital's motion for summary judgment is denied; and it is further

ORDERED that the motion of Defendants Elizabeth Kavaler, M.D., and New York Urological Associates, P.C., is denied; and it is further

ORDERED that the parties appear for a pretrial conference on August 27, 2013, at 9:30 am.

Dated: July 17, 2013

ENTER:

JOAN B. LOBIS, J.S.C.