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SHORT FORM ORDER

PUBLISH

INDEX No. 07-16128

CAL. No. 15-02250MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY



***PRESENT:***

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 5-5-16
ADJ. DATE 12-1-16
Mot. Seq. # 012 - MotD
# 013 - MG

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NANCY ROSEN and PAUL B. ROSEN,

Plaintiff,

- against -

FABIAN D. BITAN, M.D., ROBERT BRADY, M.D., NORMAN BLOOM, M.D., BETH ISRAEL MEDICAL CENTER and JEAN-PIERRE CLAUDE FARCY, M.D.,

Defendants.

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Upon the following papers numbered 1 to 115 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; 18 - 31 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 32 - 39; 40 - 109 ; Replying Affidavits and supporting papers 110 - 113; 114 - 115 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that these motions are hereby consolidated for purposes of this determination; and it is further

***ORDERED*** that the motion (# 012) by defendant Jean-Pierre Claude Farcy, M.D., for summary judgment dismissing the cause of action for medical malpractice and lack of informed consent regarding the August 7, 2006 surgery and the claim for punitive damages against him is determined as follows; and it is further

***ORDERED*** that the motion (# 013) by defendants Fabian D. Bitan, M.D., and Beth Israel Medical Center for summary judgment dismissing the request for punitive damages against them is granted.

This is a medical malpractice action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Nancy Rosen ("plaintiff") due to defendants' alleged departures from good and accepted medical practice and failure to obtain informed consent. As relevant to the instant motions, plaintiff, having been diagnosed as suffering from flat back syndrome and pseudarthrosis, began treating with defendant Jean-Pierre Claude Farcy, M.D., in 2004. Plaintiff was scheduled to have a spinal fusion surgery on November 3, 2004. Prior to the surgery, plaintiff read an article regarding artificial disc replacement and asked Dr. Farcy to consider such a procedure for her. Subsequently, Dr. Farcy referred plaintiff to defendant Fabian D. Bitan, M.D. After reviewing plaintiff's medical history and x-ray films, on November 2, 2004, both Dr. Farcy and Dr. Bitan informed plaintiff that she was a candidate for a Charite disc replacement at L5-S1. On November 3, 2004, plaintiff underwent a pedicle subtraction osteotomy and fusions of L4-L5 performed by Dr. Farcy at the Hospial of Joint Diseases ("HJD"). On December 2, 2004, plaintiff underwent a disc replacement surgery at level L5-S1 performed by Dr. Bitan at Beth Israel Medical Center ("BIMC"). Following the December 2, 2004 surgery, both Dr. Farcy and Dr. Bitan observed that plaintiff had poor balance. Due to plaintiff's poor balance, the disc was removed and fusion at level L5-S1 was performed by Dr. Bitan on December 15, 2004.

By the complaint, as amplified by the verified bill of particulars, plaintiff alleges she was injured as a result of defendants' medical malpractice in connection with the following eight spinal surgeries undergone by her between November 2004 and October 2007: (1) L4-L5 fusion performed on November 3, 2004 by Dr. Farcy at HJD; (2) L5-S1 discectomy and Charite artificial disc replacement performed on December 2, 2004 by Dr. Bitan at BIMC; (3) removal of the artificial disc and L5-S1 fusion performed on December 15, 2004 by Dr. Bitan at BIMC; (4) Chevron osteotomy at L3 with fusion performed on October 19, 2005 by Dr. Farcy at HJD; (5) revision of fusion and repair of L2-L3 pseudarthrosis performed on August 7, 2006 by Dr. Farcy at HJD; (6) removal of spinal hardware performed on April 9, 2007 by Dr. Farcy at HJD; (7) fusion at T11-S1, pseudarthrosis repair of L2-L3, and removal of hardware performed on October 9, 2007 by Dr. Matthew Cunningham at Hospital for Special Surgery ("HAS"); and (8) fusion at L2-L3 and removal of screw at S1 performed on October 31, 2007 by Dr. Cunningham at HAS. With regard to the August 7, 2006 surgery, plaintiff alleges that Dr. Farcy was negligent in failing to provide sufficient support of the lower back during the surgery to prevent the lower spine from dropping down and in negligently heating and bending the spinal rods intra operatively. Plaintiff alleges that, as a result of defendants' malpractice, she has sustained injuries and conditions, including deformed maligned spine, pain in her legs, heels, pelvis and groin, and complex regional pain syndrome.

Dr. Farcy now moves for summary judgment, arguing that he did not depart or deviate from good and accepted medical practice in his treatment of plaintiff regarding the August 7, 2006 surgery. Dr. Farcy also seeks partial summary judgment dismissing plaintiffs' claim for punitive damages against him on the grounds that plaintiffs' claim sounds in ordinary negligence/medical malpractice and does not warrant punitive damages. In support of his motion, Dr. Farcy submits, inter alia, an affirmation of Andrew Hecht, M.D., who is board certified in orthopedic surgery, medical records purportedly related to the injuries related to this action, and transcripts of the parties' deposition testimony. In opposition, plaintiffs submit, inter alia, a redacted expert affirmation from a physician, who is board certified in orthopedic surgery.

A physician owes a duty of reasonable care to his patients and will generally be insulated from liability where there is evidence that he conformed to the acceptable standard of care and practice (*see* ***Spencer v Lanky***, 94 NY2d 231, 701 NYS2d 689 [1999]; ***Barrett v Hudson Valley Cardiovascular Assoc., P.C.***, 91 AD3d 691, 936 NYS2d 304 [2d Dept 2012]; ***Geffner v North Shore Univ. Hosp.***, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]). A doctor is not a guarantor of a correct diagnosis or a successful treatment, nor is a doctor liable for a mere error in judgment if he or she has considered the patient's best interest after careful evaluation (*see* ***Nestorowich v Ricotta***, 97 NY2d 393, 740 NYS2d 668 [2002]; ***Oelsner v State of New York***, 66 NY2d 636, 495 NYS2d 359 [1985]; ***Park v Kovachevich***, 116 AD3d 182, 982 NYS2d 75 [1st Dept 2014]; ***Wulbrecht v Jehle***, 89 AD3d 1470, 933 NYS2d 467 [4th Dept 2011]). A defendant seeking summary judgment in a medical malpractice action bears the initial burden of establishing, prima facie, either that there was no departure from the applicable standard of care, or that any alleged departure did not proximately cause the plaintiff's injuries (*see* ***Nidre v Mt. Sinai Hosp.***, 129 AD3d 801, 11 NYS3d 636 [2d Dept 2015]; ***Michel v Long Is. Jewish Med. Ctr.***, 125 AD3d 945, 5 NYS3d 162 [2d Dept 2015]; ***Barricades v New York Methodist Hosp.***, 122 AD3d 648, 996 NYS2d 155 [2d Dept 2014]; ***Matos v Khan***, 119 AD3d 909, 910, 991 NYS2d 83 [2d Dept 2014]).

Where the defendant has met that burden, the plaintiff, in opposition, must demonstrate the existence of a triable issue of fact as to the elements with respect to which the defendant has met its initial burden (*see* ***Michel v Long Is. Jewish Med. Ctr.***, *supra*; ***DeLaurentis v Orange Regional Med. Ctr.-Horton Campus***, 117 AD3d 774, 775, 985 NYS2d 709 [2d Dept 2014]; ***Rivers v Birnbaum***, 102 AD3d 26, 43, 953 NYS2d 232 [2d Dept 2012]). General allegations of medical malpractice, merely conclusory in nature and unsupported by competent evidence establishing the essential elements of the claim, are insufficient to defeat a motion for summary judgment (*see* ***DeLaurentis v Orange Regional Med. Ctr.-Horton Campus***, *supra*; ***Arkin v Resnick***, 68 AD3d 692, 890 NYS2d 95 [2d Dept 2009]; ***Flanagan v Catskill Regional Med. Ctr.***, 65 AD3d 563, 884 NYS2d 131 [2d Dept 2009]; ***Rebozo v Wilen***, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (***Fink v DeAngelis***, 117 AD3d 894, 986 NYS2d 212 [2d Dept 2014]; ***Feinberg v Feit***, 23 AD3d 517, 806 NYS2d 661 [2d Dept 2005]), as "such conflicting medical opinions will raise credibility issues, which can only be resolved by a jury" (***Fink v DeAngelis***, *supra*; *see* ***DeGeronimo v Fuchs***, 101 AD3d 933, 957 NYS2d 167 [2d Dept 2012]).

Plaintiff testified that after she was diagnosed with flat back syndrome in 2004, she had been treated by Dr. Farcy. On the night before the November 3, 2004 surgery, Dr. Farcy called her and introduced Dr. Bitan over the phone. Dr. Farcy told her that she was a candidate for the artificial disc replacement surgery. When she indicated that he previously told her she was not a candidate for such procedure, Dr. Farcy responded that, after meeting with Dr. Bitan that afternoon, he changed his mind. Dr. Farcy explained to plaintiff that Dr. Bitan found that there was enough bone at level L5-S1 after having studied diagnostic images of her spine. Plaintiff testified that Dr. Bitan discussed with her the fact that the artificial disc could fail. She testified that on November 3, 2004, when Dr. Farcy performed a spinal fusion surgery on her, he had left her disc at level L5-S1 untouched and not fused in preparation for the disk replacement. On December 2, 2004, plaintiff underwent a disc replacement surgery at level L5-S1. Plaintiff had no recollection as to whether Dr. Bitan told her that the use of the Charite artificial disc in the surgery was considered "off label." Several days after the December 2, 2004 surgery was

performed, when plaintiff was forced to stand, she noticed that she was four inches shorter when she stood on one foot, and that she was off-kilter. On December 15, 2004, the artificial disc was removed by Dr. Bitan. Plaintiff testified that after the August 7, 2006 surgery was performed, she felt pain in her upper back. According to plaintiff, Dr. Farcy explained that because the operating table used for the August 7, 2006 surgery did not fully support plaintiff's back, and her spine dropped, he heated and bent the rods in her thoracic spine during the surgery to create balance. Plaintiff testified that following the August 7, 2006 surgery, her posture was not as good as it had been prior to the surgery.

In his affirmation, Dr. Hecht opines within a reasonable degree of medical certainty that the medical treatments provided by Dr. Farcy to plaintiff during and after the August 7, 2006 surgery was appropriate and in accordance with the accepted standards of care. Dr. Hecht found that the pre-operative and post-operative diagnosis was pseudoarthrosis at L2-L3, and the surgery involved a revision with iliac crest bone graft replacement to provide more bone supplementation on the posterior side. Dr. Hecht opines that contrary to plaintiff's allegation that her spine dropped during the surgery when Dr. Farcy removed hardware in plaintiff's back to add more bone material, the operative report and Dr. Farcy's testimony demonstrated that in correcting the pseudarthrosis, he compressed the construct above and below the level L2-L3, so that he did not have to contour the rod in between the two levels. Moreover, Dr. Hecht opines that Dr. Farcy corrected the lordosis during the surgery, and he was able to observe the corrected lordosis while in the operating room. Dr. Hecht states that the post-operative films, obtained on August 18, 2006, showed good alignment and that balance was preserved, and there were no indications of improper or increased lordosis. With respect to plaintiff's claim that during the surgery Dr. Farcy heated and bent plaintiff's spinal rods to compensate for the dropping of the lower spine, Dr. Hecht states that, pursuant to the operative report and testimony of Dr. Farcy, Dr. Farcy did not bend the rods during the surgery, and there was no indication in the operative report and medical records that a rod bender or any such tool was used during the surgery. Regarding the informed consent for the surgery, Dr. Hecht found that the consent form for the surgery was signed by plaintiff on the day of the surgery, and that Dr. Farcy discussed with her about the proposed surgery including the general risks and the chance of success for the surgery prior to the surgery. Dr. Hecht opines within a reasonable degree of medical certainty that Dr. Farcy obtained informed consent from plaintiff for the surgery. Finally, Dr. Hecht found that since the fusion at level L2-L3 was not completely healed, plaintiff was required to undergo further surgery on April 2007, which was also performed by Dr. Farcy. Dr. Hecht opines that the fact that the August 7, 2006 surgery resulted in a non-union is not malpractice because non-union is a risk of fusion procedures, and that since plaintiff had undergone multiple fusions prior to the August 7, 2006 surgery, the non-union risk was increased in her case.

Dr. Farcy testified that he wrote a note regarding his visit with plaintiff on July 26, 2006, stating that he was dealing with instability at the level of L2-L3, where it had to be considered as a pseudarthrosis and needed revision surgery and that he would add more bone graft. He testified that prior to the August 7, 2006 surgery, he discussed with plaintiff the risks and complications of the surgery. When asked what would have happened if the surgery was not done, Dr. Farcy answered "nothing" and stated that the surgery was performed to facilitate plaintiff's healing. He testified that although his handwriting in the hospital's consent form stated that it was a repair of pseudarthrosis at level L4, it was in error. Rather, Dr. Farcy intended to operate at L3 and operated at that level.

In opposition, plaintiff submits an affidavit of her expert who is a physician licensed to practice medicine in New York State, and is board certified in orthopedic surgery. Plaintiff's expert opines, within a reasonable degree of medical certainty, that Dr. Farcy departed from the standards of care in his medical treatment of plaintiff in that he failed to inform plaintiff that she was not a candidate for revision surgery at level L2-L3 in August 2006, because that surgery would increase her alleged high risk for pseudarthrosis without relieving her back pain. Plaintiff's expert opines that plaintiff was not a candidate for the August 7, 2006 revision surgery for the following reasons: the radiology studies after the October 19, 2005 surgery until the subject surgery on August 7, 2006 showed adequate fusion of level L2-L3; based on plaintiff's prior multiple spine surgeries, complete fusion of the spine at any level could be delayed and required a waiting period of a minimum of one to two years; and a diagnosis of pseudarthrosis cannot be made until the required time for the spinal fusion has passed and clinical and radiological evidence of pseudarthrosis are present. Plaintiff's expert opines that the standard of care in plaintiff's case for the subject surgery required a waiting period of a minimum of one to two years and ruling out any other causes of pathology at all other levels of the spine. Plaintiff's expert opines that if plaintiff was informed of the risk associated with a premature revision surgery, she would not have agreed to undergo the surgery. Plaintiff's expert opines that Dr. Farcy was negligent and departed from good and accepted practice by failing to advise plaintiff that the radiology studies prior to the subject surgery demonstrated adequate bone fusion at level L2-L3; that plaintiff was not a candidate for the revision surgery because the required minimum waiting period of one to two years had not passed; that the subject revision surgery would increase her risk of pseudarthrosis to level L2-L3; that the surgery may not relieve her pain in her back and legs; and that premature revision surgery could result in new pain generations from scar tissue encroaching on the spinal nerve roots.

Here, Dr. Farcy failed to meet his burden for summary judgment as to medical practice in his treatment of plaintiff regarding the August 7, 2006 surgery. Dr. Farcy's expert, Dr. Hecht, failed to provide a copy of his curriculum vitae, or set forth his qualifications, education, training, or work experience (*see* ***Flange v 2461 Elm Realty Corp.,*** 123 AD3d 1196, 998 NYS2d 502 [3d Dept 2014]; ***McNee v ShopRite***, 116 AD3d 742, 982 NYS2d 898 [2d Dept 2014]). Although Dr. Hecht states that he is a licensed physician, board-certified in orthopedic surgery and has years of training, knowledge and experience in orthopedic surgery, he gives no indication as to whether he had any specialized training, personal knowledge or practical experience related to the subject at issue (*see* ***Silverman v Doell***, 138 AD3d 1339, 30 NYS3d 382 [3d Dept 2016]). This lack of information prohibits the court from determining whether Dr. Hecht possesses the requisite background to provide a reliable opinion (*see* ***Matott v Ward***, 48 NY2d 455, 423 NYS2d 645 [1979]; ***Flange v 2461 Elm Realty Corp.***, *supra*; ***Dyckes v Stabile***, 2015 NY Slip Op 30602[U], 2015 N.Y. Misc Lexis 1286 [Sup Ct, Suffolk County 2015]). In a medical malpractice action, expert medical opinion evidence is required to demonstrate merit (*see* ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [1985]; ***Public Admr. v Levine***, 142 AD3d 467, 37 NYS3d 475 [1st Dept 2016]; ***Zak v Brookhaven Mem. Hosp. Med. Ctr.***, 54 AD3d 852, 863 NYS2d 821 [2d Dept 2008]). In any event, even assuming that Dr. Hecht qualifies as an expert to render an opinion in this matter, based upon a review of the evidentiary submissions, it is determined that the parties have presented conflicting expert opinion as to whether there was a lack of informed consent to the August 7, 2006 surgery. An order granting summary judgment with regard to the claim for a lack of informed consent, therefore, is not appropriate (*see* ***Conto v Lynch***, 122 AD3d 1136, 997 NYS2d 174 [3d Dept 2014]; ***Rivera v Albany Med. Ctr. Hosp.***, 119 AD3d 1135, 990 NYS2d 310 [3d Dept 2014]). Thus, the

branch of the motion by Dr. Farcy for summary judgment dismissing the cause of action for medical malpractice and lack of informed consent against him is denied.

Dr. Bitan and BIMC move for partial summary judgment dismissing plaintiffs' claim for punitive damages against them on the grounds that plaintiffs failed to offer any evidence warranting an award of punitive damages. Dr. Bitan alleges that there is no evidence indicating that he acted with the level of malice required for an award of punitive damages. BIMC alleges that, as Dr. Bitan's employer, it cannot be held accountable for punitive damages because there was no evidence that BIMC authorized, participated in, consented to or ratified Dr. Bitan's alleged gross negligent conduct. As mentioned previously, Dr. Farcy also seeks summary judgment in his favor on the claim for punitive damages.

Dr. Bitan testified that upon Dr. Farcy's request, he considered performing a Charite artificial disc replacement surgery on plaintiff. When Dr. Bitan reviewed plaintiff's medical history and x-ray films with Dr. Farcy, he made a determination that there was enough disc space to insert the implant at plaintiff's L5-S1. Although the review of x-ray films revealed that level L5-S1 was quite arthritic, Dr. Bitan decided that the replacement surgery was a viable option for plaintiff because she was young. He testified that he wrote a note dated November 30, 2004 stating that plaintiff knew that this was an "off-label" use of the artificial disc and that there was a risk of failure. Dr. Bitan testified he told plaintiff prior to the surgery that the planned procedure involved an off-label use of the artificial disc, and dictated such fact in his operative report. However, he does not have a document signed by plaintiff showing that he made such a statement to her. On December 2, 2004, Dr. Bitan performed a disc replacement surgery at level L5-S1 of plaintiff. Dr. Bitan testified that prior to the surgery, he told plaintiff the risks of a failure were much higher in her case and he conducted a physical examination of her.

Punitive damages are recoverable in a medical malpractice action only where the defendant's conduct evinces a high degree of moral culpability or willful or wanton negligence or recklessness (*see* ***Dmytryszyn v Herschman***, 78 AD3d 1108, 912 NYS2d 107 [2d Dept 2010]; ***Hill v 2016 Realty Assoc.***, 42 AD3d 432, 839 NYS2d 801 [2d Dept 2007]; ***Morton v Brookhaven Mem. Hosp.***, 32 AD3d 381, 820 NYS2d 294 [2d Dept 2006]). In order for a hospital to be held vicariously liable for punitive damages arising from the conduct of its employees, it must have "authorized, participated in, consented to or ratified the conduct giving rise to such damages, or deliberately retained the unfit servant" such that it is complicit in that conduct (*see* ***Judith M. v Sisters of Charity Hosp.***, 93 NY2d 932, 693 NYS2d 67 [1999]; ***Loughry v Lincoln First Bank***, 67 NY2d 369, 502 NYS2d 965 [1986]; ***Melfi v Mount Sinai Hosp.***, 64 AD3d 26, 877 NYS2d 300 [1st Dept 2009]).

Here, the Court finds that the record is devoid of any evidence of willful or wanton negligence on the part of Dr. Farcy or Dr. Bitan which would warrant an award of punitive damages (*see* ***Morton v Brookhaven Mem. Hosp.***, *supra*; ***Lee v Health Force***, 268 AD2d 564, 702 NYS2d 108 [2d Dept 2000]). In opposition, plaintiffs failed to raise a triable issue of fact as to whether the alleged conduct of Dr. Farcy or Dr. Bitan was so gross, wanton, or willful, or of such high moral culpability, as to warrant an award of punitive damages (*see* ***Stormes v United Water N.Y., Inc.***, 84 AD3d 1351, 924 NYS2d 281 [2d Dept 2011]; ***Schiffer v Speaker***, 36 AD3d 520, 828 NYS2d 363 [1st Dept 2007]). Plaintiffs allege that an issue of fact exists as to whether the disc replacement surgery performed by Dr. Farcy and Dr.

Bitan when there were unequivocally known contraindications to plaintiff for the disc constituted gross negligence and reckless disregard of plaintiff's health. However, the Court finds that although there is a triable issue of fact as to whether Dr. Farcy and Dr. Bitan were negligent in failing to properly consider whether plaintiff was a candidate for the disc replacement surgery, the evidence established that, as a matter of law, the level of culpability required for an award of punitive damages could not be proven at trial (*see* ***Ross v Louise Wise Servs.***, 28 AD3d 272, 282, 812 NYS2d 325 [1st Dept 2006]; ***Williams v Halpern***, 25 AD3d 467, 468, 808 NYS2d 68 [1st Dept 2006]). Moreover, there is no evidence that BIMC authorized, participated in, consented to or ratified Dr. Bitan's alleged gross negligent conduct. Thus, the branch of the motion by Dr. Farcy and the motion by Dr. Bitan and BIMC for summary judgment dismissing the claim against them for punitive damages are granted.

Dated: MAY 19 2017.

HON. JOSEPH A. SANTORELLI
J.S.C.

____ **FINAL DISPOSITION** ___X__ **NON-FINAL DISPOSITION**