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

PRESENT: LOBIS Justice PART 6

RAPOSO, EDWIN, ET AL.

-v-

N.Y.-PRESBYTERIAN HOSPITAL, ET AL.

INDEX NO. 113188/09

MOTION DATE 7/12/11

MOTION SEQ. NO. 01

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 ...	1-13
Answering Affidavits — Exhibits	14-17
Replying Affidavits	18-22

FILED

SEP 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

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 and Order. The clerk of court is directed to enter judgment accordingly

Dated: 9/23/11

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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

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EDWIN RAPOSO, an infant, by his mother and natural guardian, BRIGIDA RAPOSO RODRIGUEZ, and BRIGIDA RAPOSO RODRIGUEZ, Individually,

Plaintiffs,

-against-

NEW YORK-PRESBYTERIAN HOSPITAL / WEILL CORNELL MEDICAL CENTER,

Defendant.

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Index No. 113188/09

Decision and Order

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

Defendant The New York and Presbyterian Hospital ("NYPH") s/h/a New York Presbyterian Hospital / Weill Cornell Medical Center moves, by order to show cause, for an order granting it summary judgment pursuant to C.P.L.R. Rule 3212 and dismissing plaintiffs' complaint in its entirety. Plaintiffs oppose the motion.

The allegations in this action pertain to a fall that the infant plaintiff Edwin Raposo sustained at NYPH. On February 6, 2009, the fifteen-year-old Mr. Raposo presented to the emergency department of St. Luke's Roosevelt Hospital ("St. Luke's") with complaints of severe abdominal pain, nausea, vomiting, diarrhea, and a fever of 103.7 degrees Fahrenheit. He had been experiencing these symptoms in greater degrees since January 20, 2009. Up until this time, however, Mr. Raposo had a relatively unremarkable medical history, with no notable emergency department visits, chronic conditions, surgeries, or medications.

On February 7, 2009, St. Luke's performed a computed tomography ("CT") scan of Mr. Raposo's abdomen, which showed the presence of large infarcts (lesions) in the spleen and both

kidneys. St. Luke's diagnosed Mr. Raposo with a Clostridium difficile ("C. diff") infection and suspected he had endocarditis or sepsis. On February 9, 2009, Mr. Raposo was transferred from St. Luke's to NYPH's pediatric intensive care unit ("PICU") for treatment of the C. diff infection and for follow-up treatment for the spleen and kidney infarcts. An abdominal CT scan on February 10, 2009, showed that the infarcts were progressing. On February 13, 2009, St. Luke's reported to NYPH that Haemophilus parainfluenzae, a gram-negative bacteria associated with infective endocarditis, had been harvested from a blood sample drawn at St. Luke's. Hematological work-up revealed the presence of the positive Lupus antibody and positive anti-cardiolipin antibodies, both of which are associated with increased coagulation and thrombus formation. A transesophageal echocardiogram ("TEE") performed on February 13 showed evidence of prior rheumatic disease but did not reveal intracardiac thrombi. The plan was to continue antibiotics to treat the endocarditis.

On February 15, 2009, Mr. Raposo appeared clinically improved and his abdominal pain had subsided. NYPH inserted a peripherally inserted central catheter ("PICC") line into Mr. Raposo's right arm to facilitate long-term administration of medication. Late in the afternoon on February 19, 2009, while being assisted out of bed by a nurse, Mr. Raposo fell on his right side, hit the right side of his head in the temporal region, and scraped his right knee and elbow. The records reflect that he did not lose consciousness or demonstrate deficits in mental status, but he complained of a headache. He was assisted back to bed and was examined by a physician. The medical records reflect that Mr. Raposo had started complaining of right arm weakness that afternoon, although this note was entered after the fall. Further nursing notes indicate that Mr. Raposo had complained of weakness in his right arm earlier that morning, and that a grip test indicated that his right arm

strength was slightly less than his left arm strength; these notes indicate that the nurse's assessment of the right arm grip strength took place at 9:30 a.m. on February 19, 2009, although the notes were electronically signed at 5:40 p.m., after the fall. Upon questioning after the fall, Mr. Raposo reported that he had been feeling shakiness, tingling, and heaviness in his right leg since the PICC line was placed, or for about four days. Mr. Raposo testified during his examination before trial ("EBT") that he had been experiencing right-sided weakness for a few days prior to his fall.

A head CT scan, performed approximately one hour after the fall, revealed the presence of a 4.1 centimeter by 2.7 centimeter density consistent with a hemorrhagic lesion in the left frontoparietal intraparenchymal region of the brain. The lesion was surrounded by edema. No trauma was noted on the right side of the brain. Magnetic resonance imaging (an "MRI"), performed approximately 5-6 hours after the fall, similarly showed the hemorrhagic lesion on the left frontoparietal region and no trauma to the right side of the brain, and also showed microhemorrhages without acute infarction in both hemispheres of the brain.

NYPH's neurosurgical team interpreted the multiple hemorrhagic lesions from the MRI studies as suspicious for septic emboli, not a traumatic event. On February 20, 2009, his right leg weakness improved but his right arm weakness persisted. The pediatric hematology attending physician noted that the radiological presentation was most likely due to the endocarditis. The pediatric neurology attending physician noted that the right-sided weakness was explained by the left intraparenchymal bleed. Mr. Raposo was discharged on February 27, 2009, with the PICC line and instructions for administering antibiotics and follow-up care.

On March 3, 2009, Mr. Raposo presented to NYPH's emergency department, having experienced a seizure which had resolved by the time he presented to the hospital. His right-sided sensory deficit had resolved, and his right-sided hemiparesis was mild. An MRI of his head showed some resolution of the intraparenchymal bleed and left-sided hematoma. An electroencephalography ("EEG") study was unremarkable. He was discharged on March 4 with a prescription for an anti-seizure medication, Keppra. On March 11, 2009, Mr. Raposo experienced seizure activity and was admitted to NYPH, where physicians were able to monitor the seizure activity as it was occurring by video electroencephalography ("VEEG") studies. The VEEG studies revealed that the right-sided seizure activity was originating from the left parietal region of the brain. Mr. Raposo was discharged on March 17, 2009, with a prescription for a stronger dose of Keppra. Mr. Raposo has not reported experiencing a seizure since the March 17, 2009 discharge.

Plaintiffs' complaint alleges five causes of action: personal injuries due to defendant's medical malpractice; personal injuries due to defendant's general negligence; lack of informed consent; spoliation of records; and a derivative claim on behalf of Mrs. Rodriguez. Plaintiffs' essential allegation is that the fall that Mr. Raposo experienced at NYPH on February 19, 2009, caused or aggravated a bleed in Mr. Raposo's brain, which in turn caused his seizure condition and other neurological and cognitive deficits. NYPH, in moving for summary judgment, maintains plaintiffs' medical malpractice claim must be dismissed, because that there is no causal connection between the alleged departure from the standard of care and Mr. Raposo's injuries. NYPH further asserts that plaintiffs' claims sounding in lack of informed consent must be dismissed because there was no invasion of the physical integrity of Mr. Raposo's body. Finally, NYPH argues that Mrs. Rodriguez's individual claim must be dismissed as derivative of Mr. Raposo's non-viable claims.

On a motion for summary judgment, a defendant in a medical malpractice action bears the initial burden of demonstrating that there was either no departure from the standard of care, or that any such departure did not proximately cause plaintiff's alleged injury or damage. King v. St. Barnabas Hosp., ___ A.D.3d ___, 2011 N.Y. Slip Op. 5641 (1st Dep't 2011). To satisfy that burden, the defendant must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Roques v. Nobel, 73 A.D.3d 204, 206 (1st Dep't 2010). If the defendant meets this initial burden, the "'nonmoving party 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.'" Barnett v. Fashakin, 85 A.D.3d 832, 835 (2nd Dep't 2011), quoting Stukas v. Streiter, 83 A.D.3d 18, 24 (2d Dep't 2011). To defeat a defendant's prima facie demonstration that its actions did not proximately cause the injuries alleged, a plaintiff must present expert opinion testimony that those actions were a substantial factor in bringing about the injury. Sisko v. New York Hosp., 231 A.D.2d 420, 422 (1st Dep't 1996).

In support of its argument that the fall did not proximately cause Mr. Raposo's injuries, NYPH offers expert opinion testimony in the form of an affidavit from Gordon Sze, M.D., who sets forth that he is a physician board certified in diagnostic radiology and neurology and duly licensed to practice medicine in the State of Connecticut. He opines, to a reasonable degree of medical certainty, that the actions of NYPH's staff did not proximately cause Mr. Raposo's brain damage, global developmental delays, motor delays, seizure disorder, neurological or cognitive deficits, or left frontal parietal intraparenchymal hemorrhage. In preparing his affidavit, Dr. Sze states that he reviewed the pleadings in the case, portions of the medical records, and all of the brain

imaging studies performed on Mr. Raposo at NYPH. In his opinion, the findings depict a longstanding, chronic, evolving problem that was not caused by the February 19, 2009 fall. He sets forth that the head CT scan, performed approximately one hour after the fall, shows a heterogeneous lesion with acute changes and edema; it is depicted as white and gray in color and is not uniform. Dr. Sze and opines that this appearance is typical of bleeds that have occurred over ten (10) or more days. Given that this CT scan was performed shortly after the fall, Dr. Sze opines that it could not be depicting an injury incurred from the fall. Further, he sets forth that the February 19 head CT scan shows no identifiable trauma to Mr. Raposo's right frontal area, where he fell, or indeed any identifiable head trauma at all, which Dr. Sze opines would be characterized by subarachnoid or subdural hemorrhage. Rather, the brain bleed depicted is deep within the brain and not in a superficial location, as would be expected from a traumatic brain injury. Dr. Sze points out that Mr. Raposo had endocarditis and that on February 13 (six days prior to the fall), a CT scan of Mr. Raposo's abdomen showed infarcts; taking those findings into consideration, Dr. Sze opines, to a reasonable degree of medical certainty, that emboli from the endocarditis caused the brain bleed seen on the February 19 head CT scan.

Dr. Sze sets forth that the brain MRI performed the next day provides conclusive evidence that the brain lesions were not caused by trauma but were consistent with septic emboli. He opines that the MRI shows hemorrhage on the left side of Mr. Raposo's brain, not the right side where he fell. Further, Dr. Sze explains that the MRI depicts a heterogenous brain bleed with blood of different ages, which is consistent with a long bleed over ten to fourteen days but inconsistent with a recent injury. He opines that there is no way that the February 19 fall caused the brain bleed depicted on the MRI images taken one day after the fall.

Dr. Sze also addresses the finding of microhemorrhages on the imaging studies, and explains that the images depicted are consistent with bleeds that are at least ten to fourteen days old, which are inconsistent with the fall and instead evidence of a long standing problem. He further addresses a third type of bleed depicted on images performed under contrast. The small areas of enhancement depicted on those images indicate to him new areas of injury caused from emboli due to endocarditis, and he sets forth that this third type of lesion does not occur from a fall.

In further support of its motion for summary judgment, NYPH offers an expert affirmation from Schlomo Shinnar, M.D., Ph.D., who affirms that he is a physician duly licensed to practice medicine in the State of New York and board certified in neurology with special competence in child neurology and clinical neurophysiology. Dr. Shinnar sets forth that he examined Mr. Raposo on March 16, 2011, and reviewed the medical records, including the radiology studies, from the NYPH admission. He also opines, to a reasonable degree of medical certainty, that the actions of NYPH's staff did not proximately cause Mr. Raposo's injuries, and that the fall did not cause or contribute to the intraparenchymal brain lesion. He sets forth that bacterial endocarditis, which Mr. Raposo had, is associated with clot and lesion formation in the body. The records document that Mr. Raposo had splenic and kidney infarcts prior to his admission at NYPH, which subsequently increased in size during this admission. In Dr. Shinnar's opinion, the left-sided brain intraparenchymal lesion found on the imaging studies from February 19, 2009, indicate another manifestation of infective endocarditis and not the fall that Mr. Raposo sustained. The location of the brain bleed in the parenchymal region signals to Dr. Shinnar that the lesion was the result of a septic process, and not external trauma, as the outer layers of the brain are unaffected. Further, the

appearance of multiple punctate microemboli (microhemorrhages) is typical of cerebral insult connected to bacterial endocarditis, which further confirms to Dr. Shinnar that the brain lesion and its sequella, including the subsequent seizures and cognitive effects, were the result of bacterial endocarditis and were not caused by the fall. Further indicating that the brain bleed predated the fall is the fact that Mr. Raposo was reporting right-sided weakness prior to the fall, which in Dr. Shinnar's opinion was related to the brain bleed. The fact that the right-sided weakness predated the fall indicates to Dr. Shinnar that the left-sided brain bleed also predated the fall. Additionally, during the live seizure monitoring performed at NYPH on March 13, 2009, the seizures were traced to the left parenchymal region, the same area where the lesion was first observed on February 19, 2009. Dr. Shinnar sets forth that seizures often result from brain lesions. It is his opinion, to a reasonable degree of medical certainty, that Mr. Raposo's seizure disorder was caused by the hemorrhagic lesion, which occurred as a direct consequence of bacterial endocarditis and not the fall.

In opposition, plaintiffs argue that NYPH's motion for summary judgment must be denied because genuine factual disputes exist. They point out that NYPH does not deny that a brain hemorrhage is depicted on the head CT scan of February 19, 2009, after Mr. Raposo fell. It is their position that while there may have been an older lesion in Mr. Raposo's brain prior to the fall, the lesion was worsened by the trauma that Mr. Raposo received to his skull during the fall.

In support of their position, plaintiffs submit an expert affirmation from Chone Ken Chen, M.D., who affirms that he is a physician licensed to practice medicine in the State of New York and board certified in pediatrics and neurology, with a special qualification in pediatrics. He

sets forth that in preparing his affirmation, he reviewed Mr. Raposo's medical records, the radiology reports, and NYPH's experts' opinions, and he also performed a neurological examination of Mr. Raposo. He agrees with Drs. Sze's and Shinnar's opinions that the neuroimaging studies taken after the infant-plaintiff's fall show a heterogenous bleed on the left side of the brain with some edema. Dr. Chen agrees that due to septic emboli secondary to endocarditis, there may have been microhemorrhages or bleeding in this area of the brain for several days before the fall. He maintains, however, that the fact that there may have been a prior bleed "in no way rules out the strong likelihood that the lesion . . . grew very rapidly as the direct result of the trauma to the skull" from the fall. Dr. Chen maintains that during the admission to NYPH prior to the fall, Mr. Raposo had no neurological symptoms or complaints. He opines that if the large lesion seen on the head CT scan performed an hour after the fall had actually been present prior to the fall, Mr. Raposo would have been experiencing major upper motor neuron signs and symptoms prior to the fall. Dr. Chen sets forth that immediately after the fall, Mr. Raposo did develop severe right hemiparesis and hemisensory loss. Dr. Chen maintains that the microhemorrhages seen on the neuroimaging studies are consistent with capillary damage from septic emboli, but that these emboli were asymptomatic prior to the fall. It is apparent to him that the rapid onset of symptoms after the fall and the large size of the lesion are consistent with arterial damage, not capillary damage. He states that septic emboli may weaken arteries, which would cause the arteries to become more susceptible to damage if subjected to trauma. Dr. Chen opines that Mr. Raposo's fall "would very likely have caused a transient but severe increase in blood pressure, consequent to stress and pain, sufficient to result in increased bleeding from already damaged blood vessels." He opines that the fact that the head CT scan did not depict swelling is immaterial because small acute and subacute brain injuries are not

always observed on neuroimaging studies due to limited resolution. He further opines that the absence of subdural or subarachnoid hemorrhage does not contradict his analysis. Dr. Chen states that the location of the large bleed in the left side of the brain simply establishes that site as the area subjected to the greatest amount of damage to the cerebral vasculature from prior septic emboli, which is "potentially consistent" with microscopic bleeding over several days. He opines that the fact that Mr. Raposo had only one large hemorrhage that was markedly different from the other microhemorrhages strongly supports the conclusion that he suffered two hemorrhagic events: first, the septic emboli caused by the endocarditis; and second, the large bleed that occurred from elevated blood pressure caused by the head trauma imposed on a pre-existing microhemorrhage situated close to a large arteriole or small artery. Dr. Chen opines that arterioles and arteries are under higher pressure than capillaries and veins, and are prone to bleed profusely. He states that he fact that there were microhemorrhages observed on the radiological studies does not contradict his conclusion that the large bleed was the direct result of the head trauma.

In reply, NYPH argues that plaintiffs have not raised a triable material issue of fact, and therefore summary judgment should be granted. NYPH sets forth that plaintiffs failed to submit expert rebuttal to Dr. Sze's opinion that the large bleed shown on the imaging studies was present prior to the fall based on its appearance on the studies. NYPH points out that Dr. Chen, who is not a radiologist and not qualified to review radiological studies, only reviewed the neuroimaging reports and cannot give an opinion as to the appearance of the bleed on the images themselves. NYPH also argues that Dr. Chen misrepresented that Mr. Raposo had experienced no adverse neurological symptoms prior to the fall, because both its records and Mr. Raposo's EBT testimony indicate that

he was experiencing strange sensation and weakness on his right side for a number of days prior to the fall. NYPH argues that Dr. Chen's statement that the bleed was caused by arterial damage due to trauma during the fall is conclusory and does not rebut NYPH's showing that the bleed depicted was one to fourteen days old at the time the head CT scan was performed, an hour after the fall.

NYPH met its prima facie burden on the medical malpractice cause of action by demonstrating that there are no issues of fact that the fall that Mr. Raposo experienced at NYPH on February 19, 2009, did not proximately cause the left-brain bleed. NYPH's showing was supported by detailed, non-conclusory expert medical testimony that the imaging studies show an evolving deep heterogenous bleed that predates the fall, but do not show trauma indicators that would be present after a fall such as bleeding near the outer layers of the brain. NYPH's experts established that because the bleed depicted is older than the fall, the fall could not have proximately caused the bleed. As plaintiffs do not dispute that NYPH established its prima facie entitlement to summary judgment on the medical malpractice cause of action, the only issue remaining is whether plaintiffs raised a triable issue of fact that NYPH's actions proximately caused plaintiffs' alleged injuries. See Orphan v. Pilnik, 15 N.Y.3d 907, 908 (2010). Plaintiffs failed to do so. They did not present expert testimony to rebut NYPH's showing that the bleed was older than the date of the fall. Further, Dr. Chen's opinion is substantially based on the premise that Mr. Raposo had no neurological deficits in the days preceding the fall but had a rapid onset of neurological deficits after the fall; however, Dr. Chen never addresses Mr. Raposo's testimony at his EBT that he had experienced strange sensation and weakness on his right-side for a few days prior to the fall. Dr. Chen's theory that a microhemorrhage near an artery was caused to intensify due to pressure from the fall and

subsequently developed into the large lesion depicted on the left side of Mr. Raposo's brain is speculative and conclusory, and in no way refutes NYPH's showing that the lesion depicted on the left side of Mr. Raposo's brain is an older lesion that predated the fall. Accordingly, plaintiffs have not raised a triable issue of fact supporting their allegation that the fall was a substantial factor in causing the lesion on the left side of Mr. Raposo's brain. This being the essential allegation against NYPH, summary judgment in NYPH's favor on the cause of action sounding in medical malpractice is warranted.

Plaintiffs have not addressed NYPH's showing that there is no viable claim sounding in lack of informed consent. See Public Health Law § 2805-d. Accordingly, this claim shall be dismissed as well.

The court notes that NYPH did not specifically address plaintiffs' negligence or spoilation causes of action in moving for summary judgment dismissal of the entire complaint, nor did plaintiffs raise specific arguments as to these causes of action in their opposition papers. First, spoliation is not recognized as a separate cause of action in New York. Ortega v. City of New York, 9 N.Y.3d 69, 83 (2007). Second, while NYPH clearly argued its motion to dismiss the claims for Mr. Raposo's personal injuries under the standard of medical malpractice, given the disposition of the medical malpractice claim and the court's finding that there is no proximate cause between the allegedly negligent acts of NYPH and the claimed injuries, there is no viable cause of action sounding in general negligence. It is appropriate to dismiss the complaint in its entirety at this time. Accordingly, it is hereby

ORDERED that the motion of defendant The New York and Presbyterian Hospital ("NYPH") s/h/a New York-Presbyterian Hospital / Weill Cornell Medical Center is granted and the complaint is dismissed in its entirety.

Dated: September 23, 2011

ENTER:

JOAN B. LOBIS, J.S.C.