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SUPREME COURT OF THE STATE NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS Justice PART 6

BOCCHETTI, ASUNDA

- v -

DONNA HARTMANN, D.P.M., ETAL.

INDEX NO. 105331/08

MOTION DATE 9/10/13

MOTION SEQ. NO. 02

MOTION CAL. NO.

The following papers, numbered 1 to 22 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	16-20, 21
Replying Affidavits	22

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

RECEIVED
OCT 25 2013
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

FILED
OCT 25 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/16/13

JOAN B. LOBIS J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

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

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ASUNDA BOCCHETTI,

Plaintiff,

Index No. 105331/08

-against-

Decision and Order

DONNA HARTMANN, D.P.M., JEFFREY L. ADLER, D.P.M., and ADLER FOOTCARE OF GREATER NEW YORK, P.C.,

Defendants.

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

This medical malpractice case arises out of foot surgery performed on Asunda Bocchetti. Bocchetti sues Donna Hartmann, D.P.M., Jeffrey L. Adler, D.P.M., and Adler Footcare of Greater New York, P.C. (Adler Footcare), alleging medical negligence and lack of informed consent. Defendants Adler and Adler Footcare move for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules. For the following reasons, that motion is denied.

On December 2, 2005, Asunda Bocchetti attended a health fair sponsored by her employer. At the fair, Ms. Bocchetti obtained a foot screening from Dr. Hartmann for bunions and foot pain. The screening form provided was entitled "Free Footcare Screening." At the top of the form, the provider was listed as "Adler Footcare of Greater New York, PC, Dr. Jeffrey L. Adler, D.P.M. Director Podiatrist, Foot Specialist." The company, for which Dr. Adler was the sole shareholder and President, listed two offices, one in Midtown Manhattan, and one in White Plains, New York. In conducting Ms. Bocchetti's screening, Dr. Hartmann noted that Ms. Bocchetti had hammertoes and bunions on both feet and recommended further treatment.

On December 9, 2005, Ms. Bocchetti visited Adler Footcare at its Manhattan office. The signage on the door to that office included a sign for Adler Footcare and a sign for Donna Hartmann, D.P.M. At the time of the relevant events, Dr. Hartmann maintained her own malpractice insurance but shared Adler Footcare's office space and staff, paying a management fee in exchange. Dr. Hartmann, who testified that she was an independent contractor, worked out of both the Manhattan and White Plains offices of Adler Footcare. She further testified that she saw Dr. Adler's patients when he went on vacation and vice versa. Ms. Bocchetti signed various forms on letterhead indicating, "Donna Hartmann, D.P.M., Practicing at: Adler Footcare of Greater New York, PC."

Ms. Bocchetti met with Dr. Hartmann at that initial office visit. Dr. Hartmann examined the patient, took x-rays, and ordered physical therapy for Ms. Bocchetti. The medical report for that visit was originally dated February 2, 2006, but was corrected in an Addendum to reflect December 9, 2005.

Ms. Bocchetti continued to treat with Dr. Hartmann over the course of the next several weeks but her foot pain continued. On January 11, 2006, Ms. Bocchetti signed an authorization permitting Dr. Hartmann and any assistants she might designate to perform surgery on Ms. Bocchetti's left foot to perform an Austin Bunionectomy, and Aiken Osteotomy on the big toe, an Osteotomy 2 and 3 Metatarsal, a Fox Arthodesis Hammer Toe Correction for toes 3, 4, and 5, a Capsulotomy MP Joints 1-5, an EHL Slide, and an Adductor Tenotomy to eliminate the bunion and straighten the big toe and the hammertoes.

Dr. Hartmann performed these procedures in ambulatory surgery on January 13, 2006,

2006, with Dr. Adler assisting. Numerous post-operative visits followed. Over the course of those visits, Ms. Bocchetti complained about bruising and swelling in several of her toes as well as swelling of the foot generally. She was prescribed pain medication, antibiotics, and provided with physical therapy. In her deposition, Ms. Bocchetti testified that on one of these visits, Dr. Hartmann asked Dr. Adler to come into the examining room and look at Ms. Bocchetti's foot. Ms. Bocchetti does not recall the exact date of that consultation. The records show that the first page of Ms. Bocchetti's visit on February 10, 2006, is missing. The pharmacy records further show that the patient received the prescription drug Feldene on February 2, 2006, which she was supposed to have started after the surgery performed on January 13, 2006. While the record includes copies of numerous prescriptions, there are no copies of prescriptions for Feldene in the record. Also, the February 2 date is the same date as the original date for the medical report corrected to read December 9, 2005.

On February 10, 2006, Ms. Bocchetti saw Dr. Hartmann. Dr. Hartmann testified that Ms. Bocchetti, who had returned to work following the surgery, was a "hysterical mess," "crying," and "stressed out." Ms. Bocchetti asked Dr. Hartmann to put her on disability leave. The doctor agreed and recommended two weeks leave since usually patients were in a shoe by this time. The disability certification was written on Adler Footcare stationery and certified that Ms. Bocchetti was totally disabled for two weeks. The preprinted signature stated "DR. JEFFREY L. ADLER." Dr. Hartmann's handwritten signature appeared on the signature line, and, below Dr. Adler's name, she added in print: "Dr. Donna Hartmann." This office visit and certification were from the same date that the first page of the medical report has been missing from the medical records: February 10, 2006.

Ms. Bocchetti continued to treat with Dr. Hartmann for another month but during that time was not able to reduce the swelling enough to fit into a shoe. There were extended efforts to increase circulation to Ms. Bocchetti's foot and toes. Ms. Bocchetti's toenail fell off her 4th toe. She was also having stomach irritation from the prescription medications.

In April 2008, Ms. Bocchetti filed suit. She alleged medical malpractice and lack of informed consent. Among other things, she claimed as injuries diminished sensation in her third, fourth and fifth toes of her left foot and inability to move those toes. Following disclosure in this action, Defendants Adler and Adler Footcare moved for summary judgment. In claiming that there are no genuine issues of material fact and that they are entitled to summary judgment as a matter of law, they have attached various portions of the record, including the depositions of Ms. Bocchetti, Dr. Hartmann and Dr. Adler, as well as extensive medical records.

In further support of their motion, Dr. Adler and Adler Footcare provide an expert opinion by Raymond J. Mollica, D.P.M. Dr. Mollica is a New York-licensed podiatrist in Brooklyn, New York, where he is affiliated with The New York Methodist Hospital, among others. He opines that Dr. Adler and Adler Footcare did not depart from accepted standards of podiatric practice. He claims repeatedly in his opinion that Dr. Adler's only involvement with Ms. Bocchetti was assisting during her surgery. He further opines that Adler Footcare "is immune from liability" for any deviations by Dr. Hartmann because he asserts that Dr. Hartmann "was not an employee" or partner of Adler Footcare for purposes of this action. Dr. Mollica follows that legal conclusion with the statement that "[i]n fact, the relevant medical records and deposition testimony of all parties, including plaintiff, conclude that plaintiff was the sole patient [sic] of DR. HARTMANN."

Plaintiff Bocchetti opposes Dr. Adler's and Adler Footcare's motion. She claims that they failed to established a prima facie case of entitlement to summary judgment because there are disputed issues of material fact. In support she challenges the claim by Defendants' expert that Dr. Adler's involvement did not extend beyond Dr. Adler's role as assistant in her surgery. Plaintiff cites her deposition testimony in which she recalled that Dr. Adler looked at her foot during one of her post-operative visits. Defendants' failure to acknowledge this testimony, Plaintiff asserts, does not allow this Court to overlook that dispute in considering Defendants' motion.

In her opposition to summary judgment on her claims of medical malpractice and lack of informed consent, Plaintiff Bocchetti also relies on the legal theory of agency by estoppel. In her deposition, Plaintiff testified that she thought that Dr. Hartmann was an employee or partner of Adler Footcare. Plaintiff's opposition cites various indicia of Dr. Hartmann's relationship with Adler Footcare. Among those indicia, Plaintiff refers to a fee-splitting arrangement between Dr. Hartmann and the movants.

In reply, Defendants dispute Plaintiff's claim that Dr. Adler saw her post-operatively, citing Dr. Adler's and Dr. Hartmann's deposition testimonies. They claim that Plaintiff had to present a medical expert's opinion to defeat their prima facie case. They also note that Plaintiff filed an amended bill of particulars for Dr. Hartmann alone. Lastly they dispute any apparent or ostensible agency by estoppel.

Dr. Hartmann takes no position on the Defendants' motion for summary judgment but did file a "partial response" to Plaintiff's opposition papers. She contends that any fee-splitting

arrangement among these Defendants is permissible under the law.

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). The 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 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. This Court does not weigh disputed issues of material facts. See, e.g., Matter of Dwyer's Estate, 93 A.D.2d 355 (1st Dep't 1983). It is well-established that summary judgment proceedings are for issue spotting, not issue determination. See, e.g., Suffolk County Dep't of Soc. Servs. v. James M., 83 N.Y.2d 178, 182 (1994).

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 195. 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 fail to establish prima facie entitlement to summary judgment. 73 A.D.3d at 195. Expert opinion that fails to address a plaintiff's essential factual allegations fails to establish prima facie entitlement to summary judgment as a matter of law. Id. If a defendant establishes a prima facie case, only then must a plaintiff 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.

Claims of lack of informed consent are statutorily defined. Pub. Health § 2805-d. The law requires persons providing professional treatment or diagnosis to disclose alternatives and reasonably foreseeable risks and benefits involved to the patient to permit the patient to make a knowing evaluation. Id. § 2805-d(1). Causes of action for lack of informed consent are limited to non-emergency procedures or other treatment and include diagnostic procedures that involve invasion or disruption to bodily integrity. Id. § 2805-d(2). To ultimately prevail on a lack of informed consent claim, a claimant must prove that a reasonably prudent person in the patient's position would not have undergone the treatment or diagnosis had the patient been fully informed, and the claimant must prove that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought. Id. § 2805-d(3).

This Court is not persuaded that Defendants have established a prima facie case of

entitlement to summary judgment. The record before this Court plainly shows that the parties in sworn testimony dispute the extent of Dr. Adler's involvement in Plaintiff's treatment. Plaintiff recalls Dr. Adler looking at her foot at some point during her post-operative treatment. Defendants' exhibit of Plaintiff's medical records is missing the first page of the February 10, 2006, report. Defendants' motion papers disregard that dispute and rely solely on the Defendants' testimonies that Dr. Adler's involvement was limited to serving as assistant surgeon in seeking dismissal. This Court will not credit Dr. Adler's and Dr. Hartmann's testimonies over Ms. Bocchetti's testimony and the medical records in this case to resolve this dispute. The extent of Dr. Adler's involvement in Ms. Bocchetti's treatment remains a disputed issue of material fact for the trier of fact, not this Court. Dr. Mollica's expert opinion in asserting that Dr. Adler's involvement did not extend beyond serving as assistant in the surgery improperly relies on Defendants' characterization of that disputed fact.

Alternatively, Plaintiff asserts that the Defendants are not entitled to summary judgment on either of the claims in this case because as a matter of law they are estopped from denying that Dr. Hartmann acted as their agent. See, e.g., Malcolm v. Mount Vernon Hosp., 309 A.D.2d 704, 705-06 (1st Dep't 2003) (proponent must demonstrate the absence of any material facts regarding agency by estoppel to prevail on summary judgment). In this case there are numerous indicia that suggest that Drs. Adler and Hartmann failed to distinguish their practices. Plaintiff first encountered Dr. Hartmann at the health fair, where Plaintiff was given an Adler Footcare screening form. Dr. Adler testified that some Adler Footcare brochures bore the likeness of Dr. Hartmann without distinguishing her relationship to the practice. Dr. Hartmann, in turn, practices out of Adler Footcare offices and shares the staff and equipment. In excusing Ms. Bocchetti from work, Dr.

Hartmann drafted the disability certification on Adler Footcare stationery. Several of Ms. Bocchetti's prescriptions were written on a prescription pad that states:

> DONNA M. HARTMANN DPM
> ADLER FOOTCARE OF GREATER NY
> 25 WEST 45TH STREET/SUITE 1407
> NEW YORK, NY 10036
> (212) 704-4310
> LIC. 65-003244

The phone number listed above is the same phone number as that of the moving Defendants. Several of the third-party vendors providing diagnostic testing addressed their reports to Dr. Adler or listed Dr. Hartmann as the ordering physician but used Dr. Adler's client number. Under these circumstances, this Court finds that the movants have not established the absence of any issue of agency by estoppel.[1]

Even should a jury find that Dr. Hartmann is not an agent of the Defendants, Adler Footcare may be liable for lack of informed consent where it knew or should have known that the private physician using its facilities was acting or would act without the patient's informed consent. E.g., Salandy v. Bryk, 55 A.D.3d 147, 152 (2d Dep't 2008). Defendants' expert, Dr. Mollica, is silent on the issue of informed consent other than to acknowledge that the Plaintiff signed one.

The available proof attached to Defendants' motion raises genuine issues of material fact whether Plaintiff gave informed consent. Defendants' papers include the form purportedly showing informed consent, entitled Authorization for Surgery, which Plaintiff did sign. In this case,

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[1]This Court does reject Plaintiff's contention, however, that the movants somehow engaged in an illegal fee-splitting arrangement. As Dr. Hartmann points out, to the extent that the parties split fees, New York Education Law Section 6530(19) permits those arrangements.

there is no physician's signature acknowledging the consent for the procedure, nor is there any signature certifying that informed consent, including an explanation of alternatives, was provided for the surgery. Plaintiff specifically testified that Dr. Hartmann told her when she asked about risks that she should not worry; they have never happened. Ms. Bocchetti further testified she was told that there would be no permanent damage to her foot. Under these circumstances Defendants have failed to establish a prima facie case that there are no genuine issues of material fact and they are entitled to summary judgment as a matter of law on Plaintiff's lack of informed consent claim.

Lastly this Court considers Defendants' claim that Plaintiff only served an amended bill of particulars regarding Dr. Hartmann. A separate bill of particulars for Dr. Adler and Adler Footcare was served in this case in 2009. The amended bill of particulars regarding Dr. Hartmann, without more, does not vitiate the separate bill of particulars in place against Defendants Adler and Adler Footcare. Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that the parties appear for a pretrial conference on November 19, 2013, at 9:30 am.

Dated: October 16, 2013

ENTER:

JOAN B. LOBIS, J.S.C.