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SHORT FORM ORDER

INDEX No. 07-7247
CAL. No. 12-00203MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 6-26-12 (#004 & #005)
MOTION DATE 9-20-12 (#006)
ADJ. DATE 11-27-12 (#004 & #005)
Mot. Seq. # 004 - MD # 006 - MG
005 - MD

ALAINA TOMEO, Plaintiff,	DODGE & DODGE Attorney for Plaintiff 175 Pinelawn Road, Suite 105 Melville, New York 11747
-against-	MATTURRO & ASSOCIATES Attorney for Defendants Beccia & Suffolk Urology 1025 Old Country Road, Suite 110 Westbury, New York 11590
	SANTANGELO, BENVENUTO & SLATTERY Attorney for Defendant Southside Hospital 1800 Northern Boulevard Roslyn, New York 11576
DAVID BECCIA, M.D., SUFFOLK UROLOGY, P.C., SOUTHSIDE HOSPITAL, JASON L. SCHNEIDER, M.D., ISLAND SURGICAL AND VASCULAR GROUP, P.C. and GOOD SAMARITAN HOSPITAL, Defendants.	SHAUB, AHMUTY, CITRIN & SPRATT, LLP Attorney for Defendants Schneider & Island Surgical & Vascular 1983 Marcus Avenue Lake Success, New York 11042
	BOWER MONTE & GREENE, P.C. Attorney for Defendant Good Samaritan Hospital 1220 RXR Plaza Uniondale, New York 11556

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause (004)by the defendants Jason L. Schneider, M.D. and Island Surgical and Vascular Group, P.C. dated May 25, 2012 and supporting papers (including Memorandum of Law dated none); (2) Notice of Motion/Order to Show Cause (005) by the defendant Good Samaritan Hospital, dated August 22, 2012, and supporting papers (including Memorandum of Law dated none); (3) Notice of Motion/Order to Show Cause (006) by the defendant Southside Hospital, dated August 22, 2012, and supporting papers (including Memorandum of Law dated none); (4)Affirmation in Opposition by the defendants David Beccia, M.D. and Suffolk Urology dated August 30, 2012, and supporting papers; and by plaintiff and supporting papers; (5) Reply Affirmations by the defendants Good Samaritan Hospital dated November 21, 2012 and supporting papers; and Southside Hospital dated September 11, 2012; and by the defendant Jason L. Schneider, M.D. and Island Surgical and Vascular Group, P.C. dated November 26, and supporting papers ; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that motion (004) by the defendants Jason L. Schneider, M.D. and Island Surgical and Vascular Group, P.C. for summary judgment dismissing the complaint is denied; and it is further

ORDERED that motion (005) by the defendant Good Samaritan Hospital for summary judgment dismissing the complaint is denied; and it is further

ORDERED that motion (006) by the defendant Southside Hospital pursuant CPLR 3117 (b) to "So Order" the Stipulation of Discontinuance as to defendant Southside Hospital is granted and the action and any cross claims asserted against Good Samaritan Hospital are dismissed as to all parties; and plaintiff is directed to serve a copy of this order with notice of entry upon all parties and the Clerk of the Calendar Department, Supreme Court, Riverhead, and to file the Stipulation of Discontinuance with a copy of this order with the Clerk of the County of Suffolk, within thirty days of the date of this order.

In this medical malpractice action, the plaintiff, Alaina Tomeo, alleges that she underwent removal of a kidney stone by defendant Dr. Beccia at Southside Hospital, after which she developed a hernia and sought treatment relative thereto with Dr. Jason Schneider and Island Surgical and Vascular Group, P.C. The hernia repair was performed on March 31, 2006 at Good Samaritan Hospital. The plaintiff subsequently developed an infection caused by MRSA (Methicillin Resistant Staphyloccus Aura) which she alleges was improperly and untimely diagnosed and treated, resulting in her sustaining unnecessary, multiple hospital admissions, surgical procedures, and various related treatment.

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]).

MOTION (004)

In motions (004) defendants, Jason L. Schneider, M.D. and Island Surgical and Vascular Group, P.C. have submitted, inter alia, an attorney's affirmation, copies of the summons and complaints, answers, and plaintiff's bills of particulars; the signed and certified transcripts of the examination before trial and continuances of Jason Schneider, M.D.; certified copy of the Island Surgical and Vascular Group P.C. records; uncertified Good Samaritan Hospital records; the affidavit of their expert, Robert Ward, M.D.; and unidentified and uncertified medical records from Catholic Services and North Shore University

Hospital which are not in admissible form to be considered on a motion for summary judgment (CPLR 3212).

Dr. Ward averred that he is a physician licensed to practice medicine in New York State and board certified in surgery since 1984. He opined within a reasonable degree of medical certainty that Jason Schneider, M.D. and Island Surgical & Vascular Group, P.C. did not depart from the good and accepted practice in the "collective care and treatment" rendered to the plaintiff from March 15, 2006 through December 11, 2007.

Dr. Ward continued that Alaina Tomeo first sought treatment with Dr. Schneider, a surgeon, concerning a 20 x 8 cm left flank hernia. He discussed the risks, benefits, and options prior to surgery to reduce the left flank hernia with mesh on March 31, 2006. In that infection was a commonly known risk, she was administered pre-surgical antibiotics, the surgery was properly performed, and she was discharged home on April 4, 2006. On April 21, 2006, while continuing care with Dr. Schneider, the plaintiff had a CT scan of her abdomen and pelvis performed which revealed inflammation of the muscles that were imbricated during three layer closure during surgery, which Dr. Ward stated was a normal finding given the surgery. There was no recurrence of the hernia noted and "no significant evidence of infections." She was taking Keflex, prescribed by Dr. LaRosa, who saw her on April 20, 2006. On May 5, 2006, a culture was obtained from the left abdomen which was positive for "light growth MRSA." Dr. Schneider discussed this finding with the plaintiff, including the possibility of removal of the mesh.

On May 17, 2006, Dr. Schneider drained two pustules and referred the plaintiff to Good Samaritan Hospital to further investigate the possibility of toxicity and septicemia. On May 18, 2006, the CT scan of the abdomen revealed no discrete abscess. On May 19, 2006, Dr. Schneider explored the left herniorraphy wound of the left flank, and debrided infected tissue and obtained intraoperative cultures from the left chest wall which revealed MRSA. An infectious disease consult was obtained and the plaintiff was started on intravenous Vancomycin. Dr. Ward continued that Dr. Schneider properly relied upon the plan of the infectious disease physician. Dr. Schneider inserted a dual lumen Groshung catheter for intravenous antibiotic administration on May 26, 2006. The wound was permitted to heal by secondary intention. On June 12, 2006, the plaintiff was readmitted to Good Samaritan Hospital and another infectious disease consult was obtained with Dr. Samuels who advised removal of the mesh, which Dr. Ward stated would cause return of the plaintiff's hernia. Dr. Ward stated that the plaintiff and Dr. Schneider discussed this situation, and that the plaintiff did not want to have the mesh removed and wished to treat the infection conservatively with antibiotics with the understanding that, if the wound opened, or if there was purulent discharge, the mesh would need to be taken out. It is noted that the plaintiff's deposition transcript has not been provided to confirm this hearsay information.

Dr. Ward continued that on July 19, 2006, the plaintiff saw Dr. Schneider with complaints of discomfort and controlled drainage, for which a CT scan was performed at Good Samaritan Hospital on July 20, 2006. The next day, the mesh was removed, the culture was positive for MRSA, and antibiotics were administered. By September 2006, the plaintiff decided to have the hernia repaired again. Dr. Nash, of infectious disease, provided a consult. On October 6, 2006, the plaintiff was discharged from Good Samaritan Hospital following the hernia repair with mesh by laparoscopic surgery which was performed on September 29, 2006. She continued to treat with Dr. Nash and Dr. Samuels, and on February 15, 2007, the plaintiff presented to Dr. Schneider with purulent drainage from her umbilicus, confirmed as MRSA. A CT scan demonstrated no focal collection. On February 28, 2007, Dr. Schneider discussed the

plaintiff's options with her, including risks and benefits. On March 9, 2007, the mesh was removed by Dr. Schneider. She was thereafter maintained on her antibiotic regime and followed by Dr. Schneider.

It is Dr. Ward's opinion that although the plaintiff's hernia returned, she was in no worse a condition than she was when she first presented to Dr. Schneider, who then properly referred the plaintiff to a plastic surgeon to repair the hernia with a muscle flap. He further opined that Dr. Schneider and the staff and employees of Island Surgical & Vascular acted in accord with the standard of care and did not proximately cause the injuries complained of by the plaintiff, and acted with proper judgment in that when the plaintiff tested positive for MRSA, she was provided infectious disease consults with physicians who followed her antibiotic regimen; her complaints were appropriately monitored and noted, and orders were timely made; and she was continually reevaluated, reexamined and treated based upon the indications at the time. Dr. Ward concluded that the moving defendants did not injure the plaintiff so as to cause her to undergo surgery on March 31, 2006, May 19, 2006, May 26, 2006, July 20, 2006, September 29, 2006, October 3, 2006, March 9, 2007, or October 17, 2008.

It is determined that Dr. Ward's opinion are conclusory and unsupported, as he had not set forth the proper standard of care for the plaintiff's condition and presentation by Dr. Schneider. It is additionally determined that the plaintiff's expert has raised factual issues which preclude summary judgment from being granted to defendants Dr. Schneider and Island Surgical & Vascular.

The plaintiff's expert opined that he is a physician licensed to practice medicine in Connecticut and did his post-doctoral fellowship in infectious disease at Yale-New Haven Hospital, Connecticut. It is the plaintiff's expert opinion to a reasonable degree of medical certainty that Dr. Schneider and Island Surgical & Vascular and Good Samaritan Hospital deviated from the good and accepted standards of medical practice in their care and treatment of the plaintiff which departures were a substantial factor in bringing about, causing and /or increasing the size of the MRSA infection, sepsis, and subsequent surgeries and/hospitalizations of the plaintiff.

The plaintiff's expert set forth the bases for his opinions, including that the moving defendants repeatedly failed to test the plaintiff for MRSA infection and failed to order blood work, and/or culture the wound, or culture the drainage from her incisions on multiple occasions, despite her presentation with fever, fullness of the wound, and purulent drainage at the site of the infection and mesh, signs of infection. Thus, opined plaintiff's expert, the defendants failed to diagnose and promptly treat the plaintiff's Methicillin-Resistant Staphyloccus Aura (MRSA infection). On April 14, 2006, Dr. Schneider did not culture the site of the mesh that was used to correct the incisional hernia. Only Levaquin was ordered, an antibiotic which is not effective against MRSA. This was a departure from the standard of care in that the causative organism was not identified and treated with the appropriate medication, causing the infection to spread and increase in size, causing injury to the plaintiff and worsening of the infection. On April 19, 2006 when the plaintiff was treated for a seroma, she was treated with Keflex, but the seroma was not cultured and the Keflex has no antimicrobial activity against MRSA. Eight days later, all antibiotics were discontinued without ever ascertaining what type of infection the plaintiff had.

The plaintiff's expert continued that on May 5, 2006, a wound culture was obtained due to swelling and drainage at the site of the hernia repair. On May 11, 2006, the culture came back positive for MRSA, and she was placed on Bactrim without referring her to an infectious disease physician. On May 17, 2006, she was treated again for wound drainage, and no culture was taken. On May 18-26, 2006,

when the plaintiff was at Good Samaritan Hospital for drainage of two pustules, the infectious disease physician ordered 6 weeks of intravenous antibiotics for the MRSA infection and "immediate" removal of the mesh on May 25, 2006. However, this advice was not followed by the defendants, who deviated from the standard of care by not removing the mesh. Once the MRSA infection was diagnosed, it could not be treated with antibiotics alone, causing a spread of the MRSA infection resulting in pain, suffering, and the need for more complicated surgery, and eventually resulting in sepsis and toxemia to the plaintiff.

The plaintiff's expert set forth the subsequent departures from the standard of care, including the failure to order a culture, blood work, or antibiotics for a painful wound with drainage on July 6, 2006, resulting in plaintiff becoming toxic with septicemia, and further that no infectious disease consult was ordered. Thereafter, mesh was replaced without ascertaining the status of the MRSA infection, and the mesh had to be removed. Finally, concludes the plaintiff's expert, the plaintiff was then sent to a tertiary care doctor to correct the problems caused by Dr. Schneider and his group.

Based upon the foregoing, it is determined that the plaintiff's expert has raised factual issues which preclude summary judgment from being granted to the defendants Dr. Schneider and Island Surgical & Vascular.

Accordingly, motion (004) is denied.

Although the plaintiff has submitted opposition papers in response to defendants' motions, she has also set forth in her opposing papers that she seeks summary judgment, but has failed to proceed by the required notice of motion (*see* CPLR 2215 and 2103; ***Morabito v Champion Swimming Pool Corp.***, 18 AD2d 706,236 NYS2d 130 [2d Dept 1992]; ***Tulchin v Vignola***, 186 AD2d 183, 587 NYS2d 761 [2d Dept 1992]), rendering said application jurisdictionally void. Additionally, plaintiff's opposition and application for summary judgment was not served until October 11, 2012. The note of issue was filed on February 1, 2012. Thus, the plaintiff's application for summary judgment contained in her opposition papers was filed well beyond the statutory 120 days from filing of the note of issue. The plaintiff has made no application for leave of court on good cause shown to file this cross motion beyond the statutory 120 days, and, in fact, has not submitted any reason for the delay (*see* ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). Thus, said application for summary judgment is deemed untimely. It is additionally noted that the plaintiff has not submitted copies of the pleadings, answers, or bills of particulars, or any medical records, or complete copies thereof, of certified supporting medical records which would support her application for summary judgment as required pursuant to CPLR 3212. Thus, the plaintiff's application for summary judgment in the opposing papers, in addition to being untimely and jurisdictionally void, is deemed to be insufficient as a matter of law pursuant to CPLR 3212.

MOTION (005)

In motion (005) defendant Good Samaritan Hospital seeks summary judgment dismissing the complaint. In support of this application, Good Samaritan Hospital has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answers, amended verified bill of particulars; copies of the certified office records of defendants Dr. Schneider and Island Surgical & Vascular; double sided transcript of the examination before trial of Dr. Jason Schneider which is not in admissible form as it fails to comport with 22 NYCRR 202.5; Good Samaritan Hospital records which are not certified pursuant to CPLR 4518 (c) by the keeper of the records (but instead by counsel) and are thus not in admissible form; and the affirmation of Irwin Ingwer, M.D.

It is determined that motion (005) is not supported by certified copies of the hospital record upon which the defendant's expert, Irwin Ingwer, M.D., relies in part in forming his opinion. Expert testimony is limited to facts in evidence. (*see also* ***Allen v Uh***, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]); ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]), and said records are not properly certified and thus inadmissible. The deposition transcript of Dr. Schneider is also not in admissible form, and the defendant's expert also relies upon the same.

It is determined that even if the defendant Good Samaritan Hospital's moving papers were sufficient as a matter of law, that there are factual issues which preclude summary judgment. Although Dr. Irwin Ingwer set forth that the hospital staff properly followed doctor's orders and that at all times the plaintiff was under the care and treatment of her attending physicians, Dr. Ingwer has not set forth any hospital protocol or the standard of care for treating MRSA infections and the hospital's staff's compliance with such protocol, procedure, and standard of care. His opinion is conclusory. He has not set forth what actions, if any, the hospital staff undertook upon learning that the plaintiff was infected with MRSA. Dr. Ingwer does not indicate that the nurses appropriately reviewed and reported, or acted upon, the culture reports to determine that the antibiotics which they were administering, and which were ordered by the physicians, were effective and appropriate in treating MRSA. Such factual issues preclude summary judgment.

Accordingly, motion (005) by Good Samaritan Hospital for summary dismissal of the complaint as asserted against it is denied.

MOTION (006)

In motion (006), defendant Southside Hospital seeks dismissal of the complaint and all cross claims asserted against it pursuant to the Stipulation of Discontinuance, dated June 21, 2012, in favor of defendant Southside Hospital, which has been signed by defendant Southside Hospital and the plaintiff, but not by all parties as required pursuant to CPLR 3117 (b). A Stipulation of Discontinuance signed by all parties acts as a release within the meaning of GOL §15-108 (see ***Dembitzer v Broadwall Management Corp***, 2005 NY Slip Op 50303U, 6 Misc 3d 1035A, 800 NYS2d 345, 2005NY Misc LEXIS 420; citing ***Hanna v Ford Motor Co.***, 252 AD2d 478, 479, 675 NYS2d 125 [2d Dept [1998]). None of the co-defendants has opposed Southside's application by submitting an expert opinion demonstrating liability as to Southside Hospital. Dr. Schneider and Island Surgical & Vascular do not oppose such application, and set forth that they support it. The remainder of the co-defendants have offered no opposition to this application. Thus defendants have waived their rights at the time of trial to proffer proof as to liability by Southside Hospital. As the Court stated in ***Dembitzer,*** supra, "[T]he release would be of cold comfort...if defendants could still sue [on] it." The statute says they cannot, and thus the co-defendants are precluded from asserting liability or cross claims against Southside Hospital at trial.

Accordingly, motion (006) which seeks to have the Stipulation of Discontinuance "So Ordered" as to defendant Southside Hospital only is granted with prejudice to the remaining defendants, and dismissal of the complaint and any cross claims asserted against it is granted in that the defendants have submitted no evidentiary proof as to any liability on behalf of Southside Hospital and have further consented to discontinuance by failure to oppose said application as to Southside Hospital as set forth.

Accordingly, motion (006) by defendant Southside Hospital for an order discontinuing the action as asserted against it is granted.

Dated: 1/29/13

PETER H. MAYER, J.S.C.