[* 1]

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

PRESENT: LOBIS Justice PART 6

Robert J. Kolakjian

-v-

Mt. Sinai Hospital

INDEX NO. 107623/10

MOTION DATE 12-18-12

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 13 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-8
Replying Affidavits	9-11
sur-reply	12-13

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

MAR 28 2013

COUNTY CLERK'S OFFICE NEW YORK

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

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

Dated: 3/27/13

JOAN B. LOBIS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

----------X

ROBERT J. KOULAKJIAN, as Executor of the Estate of KATHERINE STALTARE, deceased, and ROBERT J. KOULAKJIAN, Individually,

Plaintiffs,

Index No. 107621/10

-against-

Decision and Order

THE MOUNT SINAI HOSPITAL and "JOHN DOE ," the name "John Doe" being fictitious, as the true name is presently unknown to the Plaintiff,

Defendants.

----------X

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

Plaintiff Robert J. Koulakjian, individually and as Executor of the Estate of his deceased wife, Katherine Staltare, moves, by order to show cause, pursuant to Rule 3212 of the Civil Practice Law and Rules for an order granting him partial summary judgment. Defendant The Mount Sinai Hospital ("Mount Sinai") opposes the motion. For the reasons set forth below, the motion is denied.

This medical malpractice action involves a fall sustained by Plaintiff-decedent Katherine Staltare at Mount Sinai. On April 30, 2008, Ms. Staltare presented at Mount Sinai with a malignant brain tumor, and on May 5, 2008, she underwent a craniotomy to remove the tumor. Approximately three weeks later, on June 1, 2008, in preparation for a bilateral rib x-ray examination, Ms. Staltare fell while transferring from her stretcher to the x-ray examination table. Plaintiff contends that Ms. Staltare struck her head during the fall, sustaining significant personal injuries. Subsequently, Ms. Staltare underwent various surgeries and experienced a recurrence of

her tumor. She died on April 11, 2009.

Mohammed J. Hossain, a radiologic technician and an employee of Mount Sinai at that time, was assigned to inpatient duty on June 1, 2008, and was directed to execute Ms. Staltare's x-ray procedure. In his deposition, Mr. Hossain states that upon receiving his assignment, he reviewed Ms. Staltare's requisition slip, which recited the patient's information and the procedure to be performed. Typically, patients with a fall precaution would have a marker indicating that they are at a high risk of falling, such as a sticker or a colored arm band. Mr. Hossain testified that Ms. Staltare's requisition slip contained no precautions for falling. He testified that he spoke with her and assessed her functional ability and mental capabilities prior to bringing her to the examination room. When he first met Ms. Staltare, she was on a stretcher. Mr. Hossain states that he was familiar with the braking system on that particular stretcher. There are four wheels on the stretcher, and the red brakes locked all the wheels, while the green brakes allowed for some movement. Upon arrival at the examination room, he informed her that the procedure can be accomplished in a standing position or while lying down. While Ms. Staltare elected to stand, Mr. Hossain believed that standing would be a risk, and he suggested that the exam be done on a table. He states that he pushed her stretcher adjacent to the examination table, which was at a comparable height to the stretcher. He asked the patient whether she could transfer herself from the stretcher to the table, and she responded that she could do so and required no assistance. He states that he locked the red locks and relocated to the opposite side of the examination table, so the he could assist her unto the table if necessary. At that point, while holding Mr. Hossain's hand, Ms. Staltare attempted to "scoop herself on the table" in a crooked manner. While her chest was almost on the table, her legs

remained on the stretcher. Mr. Hossain observed the stretcher move and instructed Ms. Staltare to stay put and not to move. Mr. Hossain did not observe any contact between the brakes and Ms. Staltare. Ms. Staltare continued to move and she slid down until she was in a seated position on the ground. Mr. Hossain called for help, and his supervisor, Mark Smith, came to assist Ms. Staltare. Mr. Smith tested the stretcher brakes and found that they had unlocked after a few moments.

Mr. Koulakjian brought this action on his wife's behalf on June 9, 2010, alleging among others that Mount Sinai was negligent in not providing properly functioning equipment for his wife and that Mr. Hossain failed to transfer his wife in accordance with good and accepted standards in the field of radiologic technology. Plaintiff alleges that as a result of her fall, Ms. Staltare was diagnosed with injuries that did not exist prior to her fall, such as swelling and bruising to her right arm, injury to left wrist, displacement of the craniotomy bone flap, cerebral spinal fluid ("CSF") leak, need for additional surgeries, and shortening of her life span.

Plaintiff seeks partial summary judgment on these issues of liability based on the theory of res ipsa loquitur. Plaintiff argues that Mount Sinai failed to provide a functioning stretcher, which is a duty it must fulfill for its patients. Plaintiff argues that in the absence of negligence, patients being moved from a stretcher to an adjacent, parallel, level examining table do not fall between the two structures, that defendant was in the exclusive control of the stretcher, and that there is no evidence that Ms. Staltare caused the stretcher to move away from the examining table. Plaintiff further states that Mr. Hossain should have heeded Ms. Staltare's compromised health, recent surgery, complaints of pain, and high risk of falling.

In support of his motion, plaintiff submits the affidavit of TerriAnn Linn-Watson.[1] Ms. Linn-Watson states that she is a radiologic technologist, licensed to practice in Montana and California and certified by the American Registry of Radiologic Technologists. She states that she is familiar with the standards of professional care and skill applicable to certified radiologic technologists, and that she reviewed the relevant deposition transcripts and the documents submitted with the motion in forming her opinion. She opines that Mr. Hossain departed from good and accepted standards of professional care in the field of radiologic technology in his care and treatment of Ms. Staltare. She states that Mr. Hossain should not have relied on Ms. Staltare's representation of her capability of transferring herself, and that he should have independently assessed her mobility. She also states that Mr. Hossain should have requested assistance from other staff members and used assistive devices, such as sheets and sliding boards, which could have aided in bridging the gap between the stretcher and examination table.

To establish that Ms. Staltare's fall proximately caused the injuries alleged, plaintiff submits the affirmation of Robert D. Aiken, M.D., a physician licensed to practice in Illinois and board-certified in neurology. He states that he admitted Ms. Staltare to Mount Sinai on April 30, 2008, and was her treating neuro-oncologist until her death on April 11, 2009, at Calvary Hospital in Bronx, New York. He opines that "[a]s a direct result of this fall, she developed a traumatic

---

[1] The Court notes that, after filing the motion by order to show cause on October 2, 2012, plaintiff submitted an "Affirmation in Further Support" on October 10, 2012, which contains the affidavit of Ms. Linn-Watson. Although this second affirmation comes eight days after the 60-day deadline to file summary judgment motions had expired, this delay is de minimus. Defendant articulates no prejudice from the delay. The Court also notes that the submission date for the motion was extended approximately 35 days, permitting defendant sufficient time to oppose the motion.

displacement of her cranial bone flap." He avers that she developed an intractable spinal fluid leak, which resulted in the need for two additional cranial surgeries and placement of lumbar-peritoneal shunt that was installed to lower her elevated intracranial pressure. He further states that due to the CSF leak and delayed wound healing, Ms. Staltare was unable to receive the "appropriate antineoplastic therapy" and that the therapy given to her was "adulterated/altered."

In opposition, defendant argues that plaintiff fails to establish that Ms. Staltare did not contribute to her fall, precluding him from summary judgment. Defendant also argues that there exist multiple issues of fact regarding the securing of the stretcher brakes and proximate cause. Defendant avers that plaintiff's experts' opinions are speculative and unsupported by the record. In further support of its opposition, defendant submits the expert affirmation of Isabelle Germano, M.D. Dr. Germano treated Ms. Staltare from April 30, 2008, through March 12, 2009, and is licensed to practice in New York. After reviewing the relevant records in the matter, she opines to a reasonable degree of medical certainty that Ms. Staltare's fall on June 1, 2008, did not proximately cause of any of her alleged injuries, nor did the fall hasten her death. She states that a pathology report from the craniotomy indicated that Ms. Staltare's tumor was highly aggressive, and that any injuries that were observed after her June 1 fall were either pre-existing or a foreseeable consequence of the treatment of her brain tumor. Defendants also argue that they had no prior notice of the defective stretcher and submit the affidavit of Mark Arcieri, who has been the Director of Support Services at Mount Sinai since June 2011. Mr. Arcieri states that his duties include overseeing the maintenance of the stretchers and that no repair logs of any written complaints exist regarding Ms. Staltare's stretcher. In reply, plaintiff reiterates his argument in support of partial summary judgment. He advances a

number of arguments with regard to whether defendants had notice of the defective stretcher, and takes issue with the admissibility of Mr. Arcieri's affidavit.

Res ipsa loquitur is "an evidentiary rule allowing the jury to infer negligence from circumstances when the event would not ordinarily occur in the absence of negligence." Nesbit v. New York City Transit Auth., 170 A.D.2d 92, 99 (1st Dep't 1991) (citation omitted). To rely on the doctrine of res ipsa loquitur in a medical malpractice case, a plaintiff must show that "(1) the injury does not ordinarily occur in the absence of negligence, (2) the instrumentality that caused the injury is within the defendant[s'] exclusive control, and (3) the injury is not the result of any voluntary action by the plaintiff." Antoniato v. Long Island Jewish Med. Ctr., 58 A.D.3d 652, 654 (2d Dep't 2009). Res ipsa loquitur evidence "does not ordinarily or automatically entitle the plaintiff to summary judgment . . . , even if the plaintiff's circumstantial evidence is unrefuted." Morejon v. Rais Constr. Co., 7 N.Y.3d 203, 209 (2006). "[O]nly in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict. That would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable." Id.

After considering all arguments, the Court finds that nothing in plaintiff's arguments entitles him to summary judgment. Plaintiff fails to eliminate all issues of fact as to each prong: (1) it is unclear whether the fall Ms. Staltare experienced occurs only in the absence of negligence; (2) it is unclear whether defendants were in the exclusive control of the stretcher at the time of Ms. Staltare's fall; and (3) it is possible that Ms. Staltare contributed to her own fall. Plaintiff puts forth

testimony from Mr. Hossain stating that Ms. Staltare attempted to transfer herself to the examination table, which necessitated her to voluntarily maneuver her body while in the stretcher, which in turn may have possibly maneuvered the stretcher. Mr. Hossain also states that Ms. Staltare's chest was on the examination table and her legs were on the stretcher when the stretcher started to move. It is only logical that Ms. Staltare exerted force on the stretcher to relocate a portion of her body onto the examination table. The cases that plaintiff cite are distinguishable, as here, Ms. Staltare was not anaesthetized or otherwise immobile, was not situated in a highly complicated instrumentality whose mechanics are not easily manipulable, and there has yet to be a determination of the facts by a jury. C.f. Holtfoth v. Rochester Gen. Hosp., 304 N.Y. 27 (1952); Thomas v. New York Univ. Med. Ctr., 283 A.D.2d 316 (1st Dep't 2001); Ladd v. Hudson val. Ambulance Serv., 142 A.D.2d 17 (3d Dep't 1988); Notice v. Regent Hotel Corp., 76 A.D.2d 820 (1st Dep't 1980); Swertsen v. State of N.Y., 28 A.D.2d 571 (3d Dep't 1967); Davison v. Bernarr MacFadden Found., 4 A.D.2d 978 (3d Dep't 1957).

Even assuming arguendo that the brakes dislodged, this mere possibility does not satisfy the high burden of res ipsa, as it is unclear whether Ms. Staltare's fall was attributed solely to the allegedly faulty brakes. Furthermore, plaintiff and his expert refer to medical charts and test results that are not contained in the record to establish proximate cause and injuries sustained. Consequently, issues of fact, as well as competing expert opinions with particular regard to proximate cause, preclude summary judgment. Due to plaintiff's failure to establish his entitlement to summary judgment, the Court need not consider the sufficiency of defendant's opposition. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986). Accordingly, it is

ORDERED that plaintiff's motion for an order granting him partial summary judgment it denied; and it is further

ORDERED that the parties shall appear for a pretrial conference on Tuesday, May 14, 2013, at 9:30 a.m.

Dated: Mar 27, 2013

ENTER:

JOAN B. LOBIS, J.S.C.