

Medina v Stony Brook Emergency Physicians
2017 NY Slip Op 31060(U)
April 24, 2017
Supreme Court, Suffolk County
Docket Number: 12-22922
Judge: W. Gerard Asher
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

PUBLISH

SHORT FORM ORDER

INDEX No. 12-22922CAL. No. 16-00767MMSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE	<u>9-20-16 (008, 009)</u>
MOTION DATE	<u>9-30-16 (006, 007)</u>
MOTION DATE	<u>9-27-16 (010)</u>
ADJ. DATE	<u>2-14-17</u>
Mot. Seq. # 006 - MD	# 009 - MG
# 007 - MotD	# 010 - MG
# 008 - MG	

HELEN MEDINA AND IRWIN MEDINA,
Plaintiffs,
- against -

STONY BROOK EMERGENCY PHYSICIANS,
UNIVERSITY FACILITY PRACTICE
CORPORATION, DAVID COOLING, M.D.,
PECONIC BAY MEDICAL CENTER, SAMIR
BUTE, M.D., JAMES VOSSWINKEL, M.D.,
ABIJEET SINGH, M.D., GEORGE
KECKEISEN, M.D., DHIREN MEHTA, M.D.,
LAWRENCE WALSER, M.D., NATALIE
DIGIOIA, M.D.,

Defendants.

WISELL & McGEE, LLP
Attorney for Plaintiffs
80-02 Kew Gardens Road, Suite 307
Kew Gardens, New York 11415

BREA & YANKOWITZ, P.C.
Attorney for Defendant Mehta
15 Verbena Avenue
Floral Park, New York 11001

LAW OFFICE OF ANTHONY VARDARO, P.C.
Attorney for Defendant Keckeisen
732 Smithtown Bypass, Suite 203
Smithtown, New York 11787

SANTANGELO, BENVENUTO & SLATTERY
Attorney for Defendants Bute and Walser
1800 Northern Blvd.
Roslyn, New York 11576

Upon the following papers numbered 1 to 129 read on these motions for summary judgment and dismissal; Notice of Motion and supporting papers 1 - 22, 23 - 72, 80 - 99, 100 - 117, 118 - 129; Answering Affidavits and supporting papers 73 - 75; Replying Affidavits and supporting papers 76 - 79; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (seq. 006) by defendants Stony Brook Emergency Physicians, University Faculty Practice Corporation, and David Cooling, M.D.; the motion (seq. 007) by defendant Peconic Bay Medical Center; the motion (seq. 008) by defendants Samir Bute, M.D., and Lawrence A. Walser, M.D.; the motion (seq. 009) by defendant Natalie DiGioia, M.D.; and the motion (seq. 010) by defendant Dhiren Mehta, M.D., are consolidated for purposes of this determination; and it is

ORDERED that the unopposed motion by defendants Stony Brook Emergency Physicians, University Faculty Practice Corporation, and David Cooling, M.D., for summary judgment dismissing the complaint against them is denied as moot; and it is

ORDERED that the motion by defendant Peconic Bay Medical Center for summary judgment dismissing the complaint against it is granted to the extent specified herein, and is otherwise denied; and it is

ORDERED that the unopposed motion by defendants Samir Bute, M.D., and Lawrence A. Walser, M.D., for summary judgment dismissing the complaint against them is granted; and it is

ORDERED that the unopposed motion by defendant Natalie DiGioia, M.D., for summary judgment dismissing the complaint against her is granted; and it is further

ORDERED that the unopposed motion by defendant Dhiren Mehta, M.D., for summary judgment dismissing the complaint against him is granted.

Plaintiff Helen Medina commenced this action to recover damages for injuries she allegedly sustained on February 16-18, 2010, stemming from medical malpractice on the part of the various defendants. Her husband, Irwin Medina, asserts a derivative claim for loss of services.

Defendants Stony Brook Emergency Physicians, University Faculty Practice Corporation, David Cooling, M.D., Peconic Bay Medical Center (Peconic Bay), Samir Bute, M.D., Lawrence A. Walser, M.D., Natalie DiGioia, M.D., and Dhiren Mehta, M.D., now move for summary judgment dismissing the complaint against them. Plaintiffs submit opposition only to defendant Peconic Bay Medical Center's motion. Pursuant to a review of the Court's computerized records, a stipulation of discontinuance with prejudice, dated January 3, 2017, was filed on March 20, 2017. That stipulation discontinued the case as against defendants Stony Brook Emergency Physicians, University Faculty Practice Corporation, and David Cooling, M.D., only. Accordingly, their motion for summary judgment (seq. 006) is hereby denied as moot. The Court also notes that on May 17, 2016, it so-ordered a stipulation of discontinuance, with prejudice, as to defendant Abijeet Singh, M.D.

Plaintiff Helen Medina testified that on February 16, 2010, she presented to her primary care physician, Dr. E. Lila Augoustiniatos, complaining of severe pain in her lower back that had become progressively worse after having begun near the end of January 2010. She states that after her examination at Dr. Augoustiniatos's office, she was told to obtain a radiological scan "soon." She indicated that in response to that instruction, she reported to Zwanger-Pesiri Radiology. Despite her pain having subsided

by that point, "some type of scan" was performed. Mrs. Medina testified that the results of that CAT scan were transmitted to Dr. Augoustiniatos, whose office subsequently called her and instructed her to report to Stony Brook University Hospital immediately. She indicated that she was examined in the Stony Brook University Hospital emergency room, then discharged approximately six hours later with instructions to see her primary care physician.

Mrs. Medina testified that when she awoke at approximately 7:00 a.m. on the morning of February 17, 2010, she attempted to eat some chicken broth. She indicated that the moment she put the chicken broth in her mouth, she experienced "a huge amount of pain" in her back and abdominal regions, and passed out. She stated that when she regained consciousness, she was in an ambulance on the way to Peconic Bay Medical Center. She explained that she was "in and out" of consciousness, that she has no memory whatsoever of her time spent at Peconic Bay Medical Center, and that her first memory upon awakening is being at North Shore University Hospital. She further testified that she underwent numerous surgeries at North Shore University Hospital and was later transferred to Mt. Sinai Hospital in Manhattan.

The facts of this case, subject to some dispute, can be summarized as follows: upon her arrival by ambulance to Peconic Bay Medical Center at approximately 2:05 p.m. on February 17, 2010, Mrs. Medina was seen and evaluated by Dr. Natalie DiGioia in the emergency department. At approximately 4:00 p.m., Mrs. Medina was examined by Peconic Bay Medical Center's surgical consultant, defendant George Keckeisen, M.D., who cancelled a CT scan that had been ordered, and referred her to defendant Dr. Samir Bute, who was contacted at 4:30 p.m., and arrived at the hospital at approximately 7:30 p.m. From 6:10 p.m. until 7:15 p.m., defendant Dr. Dhiren Mehta performed an upper endoscopy procedure on Mrs. Medina. Following her endoscopy, it was determined that she likely needed surgical intervention. It was determined, after consultation with Mrs. Medina's husband, that it was preferable to have such surgery performed by a Dr. Gadaleta at North Shore University Hospital, the surgeon who had performed Mrs. Medina's bariatric surgery eight years prior. Dr. Keckeisen allegedly arranged for Mrs. Medina's transfer to North Shore University Hospital and Dr. Bute, upon hearing such news, departed the hospital. The ambulance sent by North Shore University Hospital to retrieve Mrs. Medina did not depart Peconic Bay Medical Center until 6:40 a.m. on February 18, 2010. In the following days and weeks, Mrs. Medina would undergo numerous surgeries. Those surgeries resulted in large portions of her gastrointestinal tract being removed, as they had become necrotic.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 19 NYS3d 488 [2015]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*Nomura*, *supra*; *see also Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*Daliendo v Johnson*, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*Nomura*, *supra*; *see also Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). The failure

to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

It is well settled that “a physician may not be held liable for a mere error in professional judgment . . . it must be demonstrated that the physician’s treatment decisions were something less than a professional medical determination” (*Davis v Patel*, 287 AD2d 479, 480, 731 NYS2d 204 [2d Dept 2001] [internal quotes and citations omitted]). A medical malpractice action, which is type of negligence action, involves three basic duties of care owed to a patient by a professional health care provider: (1) the duty to possess the same knowledge and skill that is possessed by an average member of the medical profession in the locality where the provider practices; (2) the duty to use reasonable care and diligence in the exercise of his or her professional knowledge and skill; and (3) the duty to use best judgment applying his or her knowledge and exercising his or her skill (*see Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668 [2002]; *Pike v Honsinger*, 155 NY 201, 49 NE 760 [1898]). A plaintiff asserting a claim for medical malpractice, therefore, must present proof (1) that the defendant a deviated or departed from accepted standards of medical practice, and (2) that such deviation or departure was a proximate cause of his or her injury or damage (*see Duvidovich v George*, 122 AD3d 666, 995 NYS2d 616 [2d Dept 2014]; *Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]; *Ahmed v Pannone*, 116 AD3d 802, 984 NYS2d 104 [2d Dept 2014], *lv dismissed* 25 NY3d 964, 8 NYS3d 261 [2015]; *Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *DiMitri v Monsouri*, 302 AD2d 420, 754 NYS2d 674 [2d Dept 2003]).

“[A] defendant moving for summary judgment must make a *prima facie* showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the patient’s injuries” (*Elmes v Yelon*, 140 AD3d 1009, 1010, 34 NYS3d 470 [2d Dept 2016] [internal quotation omitted]). And while summary judgment is not appropriate where the parties present conflicting expert opinions, an affidavit of a plaintiff’s expert that is conclusory or speculative is insufficient to defeat a defendant’s *prima facie* showing (*see Senatore v Epstein*, 128 AD3d 794, 9 NYS3d 362 [2d Dept 2015]; *Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; *Gillespie v New York Hosp. Queens*, 96 AD3d 901, 947 NYS2d 148 [2d Dept 2012]).

The Court will first determine the motions to which no opposition has been filed, namely those designated sequences 008, 009, and 010. Regarding defendants Samir Bute, M.D., and Lawrence A. Walser, M.D., plaintiffs allege that each of those physicians, while practicing at Peconic Bay Medical Center on February 17 and 18, 2010, failed to recognize Mrs. Medina’s small bowel obstruction, failed to provide timely treatment for such obstruction, failed to review Mrs. Medina’s CT scan taken on February 16, 2010, and failed to timely transfer Mrs. Medina to a facility where she could receive immediate attention. Drs. Bute and Walser move for summary judgment in their favor, arguing that neither departed from accepted standards of medical practice during the course of their treatment of plaintiff Helen Medina at Peconic Bay. In support of their unopposed motion, defendant Drs. Bute and Walser submit, among other things, an expert affirmation by Douglas Prisco, M.D., copies of the pleadings, various medical records, and transcripts of deposition testimony.

Providing an affirmation on behalf of Drs. Bute and Walser, Dr. Douglas Prisco states that he is licensed to practice medicine in the State of New York; that he is board certified in internal medicine and pulmonary disease; that he has been practicing for 37 years; and that he is familiar with the standards of care applying to gastrointestinal patients in hospital settings. Dr. Prisco indicates that Drs. Bute and Walser are not surgeons, and that each performed supportive duties while surgical options were being considered. Dr. Prisco further states that defendant Dr. Keckiesen, a surgeon, was involved in Mrs. Medina's care before either Dr. Bute or Dr. Walser saw her and they, therefore, cannot be faulted for not independently obtaining a surgical consultation for her. Furthermore, Dr. Prisco states that it was appropriate for Drs. Bute and Walser to defer to the specialists who had already been treating Mrs. Medina, and that it was not their responsibility to expedite any transfer of Mrs. Medina to an alternate facility. In conclusion, Dr. Prisco opines that neither Dr. Bute, nor Dr. Walser, ever departed from accepted standards of care in any aspect of their treatment of Mrs. Medina.

Defendants Bute and Walser having established a *prima facie* case of entitlement to summary judgment through the affirmation of Dr. Prisco, the burden shifted to plaintiffs to raise a triable issue (*see Alvarez v Prospect Hosp., supra*). As no opposition has been filed by plaintiffs to establish such a triable issue, the motion by Drs. Bute and Walser for summary judgment dismissing the complaint against them is granted.

Turning to the unopposed motion by defendant Natalie DiGioia, M.D., plaintiffs allege, among other things, that Dr. DiGioia, having been the first physician to evaluate Mrs. Medina upon her arrival at Peconic Bay Medical Center, failed to contact Stony Brook University Hospital to obtain her recent medical records, failed to appreciate that Mrs. Medina was suffering from a small bowel obstruction, delayed Mrs. Medina's transfer to a medical facility that could appropriately treat her, failed to review Mrs. Medina's February 16, 2010 CT scan, and failed to appropriately treat Mrs. Medina. Dr. DiGioia argues that she stabilized Mrs. Medina, diagnosed her small bowel obstruction, and that Mrs. Medina's care was taken up by other physicians subsequent to Mrs. Medina being moved from Peconic Bay's emergency department. In support of her motion for summary judgment, she submits, among other things, an expert affirmation by Mark Silberman, M.D.

Dr. Mark Silberman states that he is licensed to practice medicine in the State of New York, and that he is board certified in emergency medicine, internal medicine, critical care medicine, and pulmonary medicine. Dr. Silberman states that he reviewed plaintiffs' bill of particulars, various medical records, and deposition transcripts, and opines that Dr. DiGioia's treatment was, at all times, in accordance with good and accepted medical practice. Dr. Silberman notes that Mrs. Medina presented to Peconic Bay Medical Center's emergency department by ambulance at 2:20 p.m. on February 17, 2010. He states that by 2:30 p.m., Mrs. Medina had already been evaluated by the triage nurse and Dr. DiGioia was at her bedside. He further states that, shortly thereafter, Dr. DiGioia diagnosed Mrs. Medina as being in acute hemorrhagic shock, suspected possible small bowel obstruction, ordered blood transfusions, ordered a CT scan, and paged Dr. Keckiesen to conduct a surgical consult. In conclusion, Dr. Silberman opines that Dr. DiGioia properly evaluated the patient and ordered appropriate treatment in a timely fashion.

Medina v Stony Brook Emergency

Index No. 12-22922

Page 6

Defendant Dr. DiGioia having established a *prima facie* case of entitlement to summary judgment through the affirmation of Dr. Silberman, the burden shifted to plaintiffs to raise a triable issue (*see Alvarez v Prospect Hosp., supra*). As no opposition has been filed by plaintiffs to establish such a triable issue, the motion by Dr. DiGioia for summary judgment dismissing the complaint against her is granted.

Next, as to the unopposed motion by defendant Dhiren Mehta, M.D., for summary judgment, plaintiffs allege, among other things, that Dr. Mehta, during his treatment of Mrs. Medina at Peconic Bay Medical Center, failed to contact Stony Brook University Hospital to obtain her recent medical records, failed to appreciate that Mrs. Medina was suffering from a small bowel obstruction, delayed Mrs. Medina's transfer to a medical facility that could appropriately treat her, failed to review Mrs. Medina's February 16, 2010 CT scan, and failed to appropriately treat Mrs. Medina. Dr. Mehta argues that he diagnosed Mrs. Medina's acute anemia, performed an endoscopy of her between 6:00 p.m. and 7:15 p.m. on February 17, 2010, diagnosed Mrs. Medina with a gastrointestinal bleed and, immediately thereafter, consulted with the surgeon on call, Dr. Keckeisen. In support of his motion for summary judgment, he submits, among other things, an expert affirmation by Dr. Perry C. Gould.

Dr. Perry Gould states that he is licensed to practice medicine in the State of New York, that he has been practicing medicine for more than 30 years, and that he is board certified in internal medicine and gastroenterology. Dr. Gould states that he reviewed plaintiffs' bill of particulars, various medical records, and deposition transcripts, and opines that Dr. Mehta's treatment of Mrs. Medina was, at all times, in accordance with good and accepted medical practice. Dr. Gould states that Dr. Mehta properly performed an endoscopy of the patient, as warranted by her symptoms, properly concluded that Mrs. Medina needed a surgical consult, coordinated with Dr. Keckeisen, and consulted with Mrs. Medina's family regarding possible surgery before handing the patient over to Dr. Keckeisen's care. In conclusion, Dr. Gould opines that Dr. Mehta properly evaluated the patient and ordered appropriate treatment in a timely fashion.

Defendant Dr. Mehta having established a *prima facie* case of entitlement to summary judgment through the affirmation of Dr. Gould, the burden shifted to plaintiffs to raise a triable issue (*see Alvarez v Prospect Hosp., supra*). As no opposition has been filed by plaintiffs to establish such a triable issue, the motion by Dr. Mehta for summary judgment dismissing the complaint against him is granted.

Finally, turning to the remaining motion, defendant Peconic Bay Medical Center argues that neither its hospital staff, nor its physicians, departed from the accepted standard of medical care, and were not responsible for the alleged delay in transporting Mrs. Medina to North Shore University Hospital. By way of their bill of particulars, plaintiffs allege, among other things, that Peconic Bay Medical Center failed to respond appropriately when Mrs. Medina's small bowel obstruction was recognized, failed to appreciate the severity of her small bowel obstruction, delayed Mrs. Medina's transfer to a medical facility that could appropriately treat her, failed to review Mrs. Medina's February 16, 2010 CT scan, and failed to appropriately treat Mrs. Medina. In support of its motion, Peconic Bay Medical Center submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, various medical records, and an affirmation of Gregory F. Dakin, M.D.

Generally, a hospital may not be held liable for malpractice committed by a private attending physician not in its employment (see *Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904 [1986]; *Smolian v Port Auth. of New York & N.J.*, 128 AD3d 796, 9 NYS3d 329 [2d Dept 2015]; *Zhuzhingo v Milligan*, 121 AD3d 1103, 995 NYS2d 588 [2d Dept 2014]). However, an exception exists when a patient presents at an emergency department seeking treatment from the hospital and not from a particular physician of the patient's own choosing (see *Smolian v Port Auth. of New York & N.J.*, *supra*; *Muslim v Horizon Med. Group, P.C.*, 118 AD3d 681, 988 NYS2d 628 [2d Dept 2014]; *Giambona v Hines*, 104 AD3d 807, 961 NYS2d 519 [2d Dept 2013]). Under this exception, liability is predicated on the hospital's apparent or ostensible agency over the independent physician (see *Hill v St. Clare's Hosp.*, *supra*; *Diller v Munzer*, 141 AD3d 628, 34 NYS3d 608 [2d Dept 2016]; *Muslim v Horizon Med. Group, P.C.*, *supra*; *Loaiza v Lam*, 107 AD3d 951, 968 NYS2d 548 [2d Dept 2013]). In order to create such apparent agency, "there must be words or conduct of the principal, communicated to a third party, which give rise to the appearance and belief that the agent possesses the authority to act on behalf of the principal" (*Dragotta v Southampton Hosp.*, 39 AD3d 697, 698, 833 NYS2d 638 [2d Dept 2007]). The third party must, then, reasonably rely on the appearance of authority and accept the services of the agent in reliance upon the perceived relationship between the agent and the principal, not in reliance on the agent's skill (*ibid.*). In the context of a medical malpractice action, "the patient must have reasonably believed that the physicians treating him or her were provided by the hospital or acted on the hospital's behalf" (*Dragotta v Southampton Hosp.*, *supra* at 699; see *Keesler v Small*, 140 AD3d 1021, 35 NYS3d 356 [2d Dept 2016]).

In order to establish its entitlement to judgment as a matter of law defeating a claim of vicarious liability, "a hospital must demonstrate that the physician alleged to have committed the malpractice was an independent contractor and not a hospital employee and that the exception to the general rule did not apply" (*Muslim v Horizon Med. Group, P.C.*, *supra* at 683; see also *Dragotta v Southampton Hosp.*, *supra*). A court should consider "all attendant circumstances to determine whether the patient could properly have believed that the physician was provided by the hospital" (*Contu v Albert*, 18 AD3d 692, 693, 795 NYS2d 740 [2d Dept 2005], quoting *Augeri v Massoff*, 134 AD2d 308, 309, 520 NYS2d 787 [2d Dept 1987]). Moreover, a hospital may be held concurrently liable with a private physician if its employees commit independent acts of negligence or fail to inquire about the correctness of a private physician's orders that are contrary to normal practice (see *Doria v Benisch*, 130 AD3d 777, 14 NYS3d 95 [2d Dept 2015]; *Aronov v Soukkary*, 104 AD3d 623, 960 NYS2d 462 [2d Dept 2013]; *Corletta v Fischer*, 101 AD3d 929, 956 NYS2d 163 [2d Dept 2012]).

Dr. Gregory Dakin states that he is licensed to practice medicine in the State of New York, that he is board certified in general surgery with a specialty in laparoscopic abdominal surgery, and that he is fully familiar with the treatment of conditions such as that suffered by Mrs. Medina. He further states that he conducted a thorough review of Mrs. Medina's pertinent medical records, the bill of particulars, and all deposition testimony. Dr. Dakin opines that the care and treatment rendered to Helen Medina by the nursing staff at Peconic Bay Medical Center "was at all times within the confines of good and accepted medical practice and was not the cause of Mrs. Medina's injuries." Dr. Dakin opines that the staff "properly carried out their duties" and that the decision to transfer a patient to another facility is that of the attending physician, not the nursing staff. Further, Dr. Dakin explains that once Dr. Keckeisen conferred with Dr.

Medina v Stony Brook Emergency
Index No. 12-22922
Page 8

Dominick Gadaleta from North Shore University Hospital and Dr. Gadaleta agreed to accept Mrs. Medina's transfer, it was incumbent upon the receiving institution to arrange for her transport there.

Peconic Bay Medical Center established a *prima facie* case of entitlement to summary judgment in its favor as to certain of plaintiffs' claims, and failed as to others. Here, the affirmation of Dr. Dakin demonstrated the treatment provided to Mrs. Medina by the staff of Peconic Bay Medical Center conformed to the accepted standards of medical practice. However, it offers no opinion as to the care provided by Dr. Keckeisen. Therefore, Dr. Dakin's affirmation fails to establish that Dr. Keckeisen did not depart from the accepted standard of medical care. Peconic Bay Medical Center also presented medical evidence that Dr. Keckeisen was not an employee. Specifically, Dr. Keckeisen testified that, at the time in question, he was a member of Peconic Surgical Group, and that, to have admitting privileges at Peconic Bay Medical Center, he was required to be on call at certain times, pursuant to a rotating schedule (*see Dragotta v Southampton Hosp.*, *supra*). However, it is undisputed that Mrs. Medina presented to Peconic Bay Medical Center's emergency department on February 17, 2010, and, therefore, it failed to establish that it did not fall within the exception outlined in *Smolian v Port Auth. of New York & N.J.*, *supra*. Even though Dr. Keckeisen was not its employee, there is a triable issue of fact as to whether Peconic Bay Medical Center is vicariously liable for any departures by him under the theory of ostensible agency (*see Tart v New York Bronx Pediatric Medicine, P.C.*, 116 AD3d 515, 984 NYS2d 19 [1st Dept 2014]; *Loaiza v Lam*, *supra*). Thus, as Peconic Bay Medical Center has not eliminated all triable issues as to its vicarious liability, the Court need not review plaintiffs' opposition to that aspect of its motion (*see Winegrad v New York Univ. Med. Ctr.*, *supra*).

Peconic Bay Medical Center having established a *prima facie* case only as to its own negligence, the burden shifted to plaintiffs to raise triable issues of fact (*see Smith v Watkins*, 145 AD3d 596, 42 NYS3d 797 [1st Dept 2016]; *see generally Vega v Restani Constr. Corp.*, *supra*). Plaintiffs have failed to do so. Plaintiffs fail to submit an expert affirmation to support their contention that Peconic Bay Medical Center's staff departed from the relevant standards of care (*see Duvidovich v George*, *supra*; *Smolian v Port Auth. of New York & N.J.*, *supra*). Accordingly, that branch of the motion by defendant Peconic Bay for summary judgment dismissing the complaint against it as to its own negligence is granted, but is denied in all other respects.

Dated: April 24, 2017

W. Gerard Asher

HON. W. GERARD ASHER

 FINAL DISPOSITION X NON-FINAL DISPOSITION

TO:
YOELI GOTTLIEB & ETRA, LLP
Attorney for Defendant Digioia
260 Madison Avenue, 18th Floor
New York, New York 10016

Medina v Stony Brook Emergency

Index No. 12-22922

Page 9

KAUFMAN BORGEEST AND RYAN

Attorney for Defendants Stonybrook Emergency Physicians,
University Facility Practice Corporation & Cooling
1205 Franklin Avenue, Suite 200
Garden City, New York 11530

FUREY, KERLEY, WALSH, MATERA & CINQUEMANI, P.C.

Attorney for Defendant Peconic Bay Medical Center
2174 Jackson Avenue
Seaford, New York 11783

SILVERSON, PARERES & LOMBARDI

Attorney for Defendant Vosswinkel
192 Lexington Avenue, 17th Floor
New York, New York 10016

ERIC T. SCHNEIDERMAN

Attorney General of the State of New York
Attorney for Defendant Singh
120 Broadway
New York, New York 10271