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Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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ZACHARY GRUMET,

Plaintiff,

-against-

DANIEL STEWART SCHWARTZ, COLLEEN FEE, LISA MORRIS, ELISA CUSATI HERNANDEZ, RAJA VARMA, JALIL ANWAR, JOHN ANDERSON, HUNTINGTON HOSPITAL and NORTH SHORE LONG ISLAND JEWISH HEALTH SYSTEM,

Defendants.

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PLAINTIFF'S ATTORNEY:
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Garden City, New York 11530

INDEX NO.: 06217/2012
CALENDAR NO.: 201700716MM
MOTION DATE: 11/2/17
MOTION SEQ. NO.: 002 MOT D; 003 MG, 004 MG, 005 MD and 006 - XMOT D

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Upon the following papers read on these e-filed motions and cross motion for summary judgment and for preclusion : Notice of Motions/Order to Show Cause and supporting papers dated July 26, 2017, August 21, 2017, August 18, 2017, and August 24, 2017 ; Notice of Cross-Motion and supporting papers dated October 19, 2017 ; Answering Affidavits and supporting papers__; Replying Affidavits and supporting papers dated November 1, 2017, November 1, 2017 and November 2, 2017; Other; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the following motions and cross motion are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion (motion sequence no. 002) of defendants Colleen Fee, P.A., Lisa Morris, John Anderson, D.O., Huntington Hospital Association, and North Shore Long Island Jewish Health System for summary judgment in their favor dismissing the complaint is decided as follows; and it is further

ORDERED that the motion (motion sequence no. 003) of defendant Raja Varma, M.D., for summary judgment in his favor dismissing the complaint is granted; and it is further

ORDERED that the motion (motion sequence no. 004) of defendant Jalil Anwar, M.D., for summary judgment in his favor dismissing the complaint is granted; and it is further

ORDERED that the motion (motion sequence no. 005) of defendant Daniel Schwartz, M.D., for summary judgment in his favor dismissing the complaint is denied; and it is further

ORDERED that the cross motion (motion sequence no. 006) of plaintiff for an order precluding defendants from limiting their liability at the time of trial pursuant to Article 16 of the CPLR is decided as follows.

As relevant to the instant motions, on November 10, 2009, at 11:12 p.m., plaintiff was taken by ambulance to the emergency room at Huntington Hospital Association ("Huntington Hospital") with complaints of abdominal pain and admitted under the care of defendant Daniel Schwartz, M.D. Plaintiff was diagnosed with acute appendicitis. An open appendectomy was performed by Dr. Schwartz with the assistance of defendant Colleen Fee, a physician assistant, in the early morning of November 11, 2009. Following the appendectomy, plaintiff had decreased bowel sounds and developed a fever with a complaint of abdominal pain. He also was tachycardic with a heart rate of 150 beats per minute. Defendant John Anderson, D.O., admitted plaintiff to the ICU and ordered a CT angiogram of the chest at 11:00 p.m., which was negative for a pulmonary embolism but revealed significant atelectasis. On November 12, plaintiff had a fever, increased heart rate, difficulty breathing, and complaints of abdominal pain. Upon a request of Dr. Schwartz, defendant Raja Varma, M.D., a cardiologist, and defendant Jalil Anwar, M.D., a pulmonologist, saw and evaluated plaintiff. On November 13, at 8:40 p.m., Dr. Anderson was called by a radiologist who found free air on a chest x-ray. Dr. Anderson ordered a CT angiogram of the abdomen/pelvis. On November 14, at 12:40 a.m., Dr. Anderson discussed with a radiologist the results of the CT angiogram, which revealed free air and indicated an appendiceal stump leak. Dr. Anderson discussed these findings with Dr. Schwartz, who stated that he would review the CT with a radiologist in the morning. An exploratory laparotomy was performed by Dr. Schwartz at 8:51 a.m. on November 14. Plaintiff was treated at the hospital and was discharged on December 18, 2009. Subsequently, plaintiff commenced this medical malpractice action against the defendants. In the bill of particulars, plaintiff alleges, *inter alia*, that Dr. Schwartz inadvertently perforated plaintiff's ileum during the appendectomy, and Dr. Schwartz and Dr. Anderson failed to recognize the signs and symptoms of the perforation which resulted in postoperative infection and further surgery.

Defendants Colleen Fee, Lisa Morris, Dr. Anderson, Huntington Hospital and North Shore Long Island Jewish Health System ("hospital defendants") move for summary judgment in

their favor dismissing the complaint against them, arguing that they did not depart or deviate from good and accepted medical practice in their treatment of plaintiff. In support of their motion, the hospital defendants submit, *inter alia*, an affidavit of David Nierman, M.D., who is board certified in internal medicine, pulmonary medicine, and critical care medicine, medical records purportedly related to the injuries related to this action, and transcripts of the parties' deposition testimony. In opposition, plaintiff submits, *inter alia,* an expert affirmation from a physician who is board certified in surgery.

At her deposition, Fee testified that she is a physician assistant in the department of surgery at Huntington Hospital. Fee was involved, as the assistant, in plaintiff's emergency appendectomy which was performed by Dr. Schwartz on November 11, 2009. Fee testified that in general, she would assist in prepping the patient, hold retractors, and perform suturing during surgery. Fee had no independent recollection as to plaintiff's surgery.

At her deposition, Morris testified that in November 2009, she was a physician assistant at Huntington Hospital. She testified that she was involved in the postoperative care of plaintiff, and that her responsibility was to address any issues that may have been arisen with the patient. According to the note she made on November 11, 2009, at 10:30 pm., plaintiff had abdominal pain, dyspnea, and tachycardia. Morris ordered an EKG and several blood tests, including CBC, SMA-7, PT and PTT. Morris had no independent recollection as to plaintiff's treatment.

At his deposition, Dr. Anderson testified that he is an intensivist in the department of medicine under critical care at Huntington Hospital. He testified that on November 11, 2009, at 11:00 p.m., when admitted to the ICU, plaintiff was hypoxic, was on escalating concentrations of oxygen, and had an increased respiratory rate with a temperature of 103 degrees. Dr. Anderson had a differential diagnosis of pulmonary embolism for plaintiff. He ordered a CT angiogram to rule out pulmonary embolism, which revealed no central pulmonary embolism at 11:50 p.m. on November 11. On November 12, due to his concern that plaintiff had pneumonia based on his smoking history, Dr. Anderson ordered a chest x-ray and consulted with Dr. Anwar. Approximately at 8:00 p.m. on November 12, Dr. Anderson made a note stating that plaintiff was tachycardic, had a tender abdomen, and had atelectasis. At that time, Dr. Anderson did not suspect that plaintiff may have been suffering from a bowel perforation. On November 13, Dr. Anderson was called by a radiologist, who found free air from plaintiff's chest x-ray. Dr. Anderson noted that since plaintiff's abdomen was still tender and he was still tachycardic, he was concerned that there was something wrong in plaintiff's abdomen. After Dr. Anderson discussed plaintiff's condition with Dr. Schwartz, they jointly ordered a CT scan, because the free air could be secondary to a perforation. At that time, plaintiff, having an elevated heart rate and low-grade temperature, was already septic. On November 14, at 12:40 a.m., a CT angiogram was performed on plaintiff's abdomen, pelvis and chest and revealed free air.

Generally, a hospital or medical corporation may be held vicariously liable for the wrongful acts of its employees (*see Doe v Guthrie Clinic, Ltd.*, 22 NY3d 480, 982 NYS2d 431

[2014]; *Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904 [1986]). A physician owes a duty of reasonable care to his patients and will generally be insulated from liability where there is evidence that he conformed to the acceptable standard of care and practice (*see Spencer v Lanky*, 94 NY2d 231, 701 NYS2d 689 [1999]; *Barrett v Hudson Valley Cardiovascular Assoc., P.C.*, 91 AD3d 691, 936 NYS2d 304 [2d Dept 2012]; *Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]). A doctor is not a guarantor of a correct diagnosis or a successful treatment, nor is a doctor liable for a mere error in judgment if he or she has considered the patient's best interest after careful evaluation (*see Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668 [2002]; *Oelsner v State of New York*, 66 NY2d 636, 495 NYS2d 359 [1985]; *Park v Kovachevich*, 116 AD3d 182, 982 NYS2d 75 [1st Dept 2014]; *Wulbrecht v Jehle*, 89 AD3d 1470, 933 NYS2d 467 [4th Dept 2011]). A defendant seeking summary judgment in a medical malpractice action bears the initial burden of establishing, *prima facie*, either that there was no departure from the applicable standard of care, or that any alleged departure did not proximately cause the plaintiff's injuries (*see Nidre v Mt. Sinai Hosp.*, 129 AD3d 801, 11 NYS3d 636 [2d Dept 2015]; *Michel v Long Is. Jewish Med. Ctr.*, 125 AD3d 945, 5 NYS3d 162 [2d Dept 2015]; *Barricades v New York Methodist Hosp.*, 122 AD3d 648, 996 NYS2d 155 [2d Dept 2014]; *Matos v Khan*, 119 AD3d 909, 910, 991 NYS2d 83 [2d Dept 2014]).

Where the defendant has met that burden, the plaintiff, in opposition, must demonstrate the existence of a triable issue of fact as to the elements with respect to which the defendant has met its initial burden (*see Michel v Long Is. Jewish Med. Ctr., supra*; *DeLaurentis v Orange Regional Med. Ctr.-Horton Campus*, 117 AD3d 774, 775, 985 NYS2d 709 [2d Dept 2014]; *Rivers v Birnbaum*, 102 AD3d 26, 43, 953 NYS2d 232 [2d Dept 2012]). General allegations of medical malpractice, merely conclusory in nature and unsupported by competent evidence establishing the essential elements of the claim, are insufficient to defeat a motion for summary judgment (*see DeLaurentis v Orange Regional Med. Ctr.-Horton Campus, supra*; *Arkin v Resnick*, 68 AD3d 692, 890 NYS2d 95 [2d Dept 2009]; *Flanagan v Catskill Regional Med. Ctr.*, 65 AD3d 563, 884 NYS2d 131 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Fink v DeAngelis*, 117 AD3d 894, 986 NYS2d 212 [2d Dept 2014]; *Feinberg v Feit*, 23 AD3d 517, 806 NYS2d 661 [2d Dept 2005]), as "such conflicting medical opinions will raise credibility issues, which can only be resolved by a jury" (*Fink v DeAngelis, supra*; *see DeGeronimo v Fuchs*, 101 AD3d 933, 957 NYS2d 167 [2d Dept 2012]).

Here, Fee and Morris have established a *prima facie* case of entitlement to summary judgment. Their expert, Dr. Nierman, opines within a reasonable degree of medical certainty that the medical treatments provided by Fee and Morris to plaintiff were appropriate and in accordance with the accepted standards of care. Dr. Nierman opines that Fee did not deviate from the accepted standard of care in the care and treatment of plaintiff because, as a physician assistant, she was only involved in plaintiff's emergency appendectomy by assisting in surgery to aid in retraction and closure. Dr. Nierman opines that Fee's surgical assistance was performed

under the instruction of Dr. Schwartz during the surgery. Dr. Nierman also opines that Morris did not deviate from the accepted standard of care in the care and treatment of plaintiff because she properly monitored and evaluated plaintiff in the postoperative period. When Morris learned of plaintiff's abdominal pain, she promptly ordered an EKG, various blood tests, and a CT angiogram of the chest. Dr. Nierman opines that Morris's treatment of plaintiff exceeded the standard of care for a physician assistant. Since no party opposes Fee's and Morris's motion for summary judgment dismissing the complaint against them, the branch of their motion is granted, and plaintiff's complaint and all cross claims asserted against them are severed as well as dismissed.

Dr. Anderson also has established a *prima facie* case of entitlement to summary judgment. His expert, Dr. Nierman, opines within a reasonable degree of medical certainty that the medical treatments provided by Dr. Anderson to plaintiff were appropriate and in accordance with the accepted standards of care. Dr. Nierman opines that Dr. Anderson did not deviate from the accepted standard of care in the care and treatment of plaintiff because, as a intensivist, he closely monitored plaintiff while staying in the ICU between November 11 and November 13 and reported any significant findings to Dr. Schwartz. Dr. Anderson was diligently following plaintiff for his complaints of labored breathing and abdominal pain. When free air was found via an x-ray on November 13, at 8:40 p.m., Dr. Anderson timely communicated with Dr. Schwartz and ordered a CT scan at approximately 9:20 p.m. Dr. Nierman opines that there was no evidence to clearly suggest a perforation of the bowels until free air was found by the November 13 x-ray examination.

In opposition, plaintiff relies on his expert's affidavit, who opines that Dr. Anderson departed from the standards of care in his treatment of plaintiff in failing to diagnose a bowel perforation despite plaintiff's symptoms, including complaints of abdominal pain, distention, a high fever, decreased bowel sounds, and increased heart and respiratory rates, and in failing to order a timely CT to rule out an abdominal pathology. The expert opines that a pulmonary embolism does not present with a fever but a bowel perforation does. As the expert describes the applicable standard of care under the circumstances, how Dr. Anderson departed or deviated from such standard, and that these departures were competent causes of the plaintiff's injuries, his affidavit is sufficient to raise triable issues of fact (*see Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]; *Williams v Bayley Seton Hosp.*, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]; *Stukas v Streiter*, 83 AD3d 18, 23, 918 NYS2d 176 [2d Dept 2011]). As the parties have presented conflicting opinions by medical experts as to whether a departure from good and accepted medical practice occurred, an order granting summary judgment is not appropriate (*see Leto v Feld*, 131 AD3d 590, 15 NYS3d 208 [2d Dept 2015]; *Gressman v Stephen-Johnson*, 122 AD3d 904, 998 NYS2d 104 [2d Dept 2014]; *Moray v City of Yonkers*, 95 AD3d 968, 944 NYS2d 210 [2d Dept 2012]). Thus, the branch of the motion by Dr. Anderson for summary judgment in his favor dismissing the complaint against him is denied. Accordingly, since the hospital is vicariously liable for the alleged medical malpractice of Dr.

Anderson, the branch of the motion by Huntington Hospital and North Shore Long Island Jewish Health System for summary judgment in their favor dismissing the complaint against them is denied.

Dr. Varma moves for summary judgment in his favor dismissing the complaint against him arguing that he did not depart or deviate from good and accepted medical practice in his treatment of plaintiff. In support of his motion, Dr. Varma submits, *inter alia*, an affidavit of Stanley Shanies, M.D., who is board certified in internal medicine, medical records purportedly related to the injuries related to this action, and transcripts of the parties' deposition testimony.

At his deposition, Dr. Varma, a cardiologist, testified that upon a request of Dr. Schwartz, he consulted on plaintiff's care and treatment. Dr. Varma examined plaintiff in the ICU on November 12, 2009. He found plaintiff had an increased heart rate but no obvious cardiac pathology and recommended continued antibiotic therapy for infectious process. Dr. Varma discussed his findings and recommendations with Dr. Schwartz. On the next day, Dr. Varma followed up with plaintiff to see the progress and found that plaintiff's heart rate had improved. Since there were no active cardiac issues, he signed off on plaintiff.

Here, Dr. Varma has established a *prima facie* case of entitlement to summary judgment. His expert, Dr. Shanies, opines within a reasonable degree of medical certainty that the medical treatments provided by Dr. Varma to plaintiff were appropriate and in accordance with the accepted standards of care. Dr. Shanies opines that Dr. Varma did not deviate from the accepted standard of care in the care and treatment of plaintiff. Dr. Shanies opines that Dr. Varma's cardiac evaluation was appropriate, his recommendation to treat with antibiotic therapy was proper, and he timely communicated his findings to Dr. Schwartz. Since no party opposes Dr. Varma's motion for summary judgment dismissing the complaint against him, his motion is granted, and plaintiff's complaint and all cross claims asserted against him are severed as well as dismissed.

Dr. Anwar moves for summary judgment in his favor dismissing the complaint against him, arguing that he did not depart or deviate from good and accepted medical practice in his treatment of plaintiff. In support of his motion, Dr. Anwar submits, *inter alia*, an affidavit of Jodilyn Gingold, M.D. (who is board certified in internal medicine), medical records purportedly related to the injuries related to this action, and transcripts of the parties' deposition testimony.

At his deposition, Dr. Anwar, a pulmonologist, testified that upon Dr. Schwartz's request to render a pulmonary consult on plaintiff, he first evaluated plaintiff on November 12, 2009. At that time, plaintiff had respiratory distress and was on 100 percent oxygen through his mouth. Dr. Anwar found that plaintiff had an elevated pulse, a high temperature, and an elevated white blood count cell. Dr. Anwar was concerned that plaintiff had pneumonia. Dr. Anwar's differential diagnosis included acute respiratory failure with hypoxemia, bilateral atelectasis, rule

out pneumonia, status post appendectomy, bipolar, and possible obstructive sleep apnea. Dr. Anwar saw plaintiff again on November 20, 2009, and treated him thereafter.

Here, Dr. Anwar has established a *prima facie* case of entitlement to summary judgment. His expert, Dr. Gingold, opines within a reasonable degree of medical certainty that the medical treatments provided by Dr. Anwar to plaintiff were appropriate and in accordance with the accepted standards of care. Dr. Gingold opines that Dr. Anwar did not deviate from the accepted standard of care in the care and treatment of plaintiff because, as a pulmonary specialist, he closely monitored plaintiff, appropriately documented his care and treatment, and timely communicated his findings to plaintiff's other physicians. Dr. Gingold opines that when Dr. Anwar performed his initial consult of plaintiff, there was no sign or symptom of a perforation. Since no party opposes Dr. Anwar's motion for summary judgment dismissing the complaint against him, his motion is granted, and plaintiff's complaint and all cross claims asserted against him are severed as well as dismissed.

Dr. Schwartz moves for summary judgment in his favor dismissing the complaint against him, arguing that he did not depart or deviate from good and accepted medical practice in his treatment of plaintiff. In support of his motion, Dr. Schwartz submits, *inter alia*, an affirmation of his attorney, which incorporates by reference arguments and exhibits, including transcripts of the parties' deposition testimony, the medical records from Huntington Hospital, and Dr. Nierman's affidavit, submitted in support of the motion by the hospital defendants.

At his November 6, 2015 deposition, Dr. Schwartz testified that he was responsible for the care of plaintiff. During the open appendectomy he performed on plaintiff on November 11, 2009, surgical instruments would come into contact with the ileum, which is next to the cecum. Dr. Schwartz testified that the standard of care requires him to inspect the organs adjacent to an open appendectomy after the appendix was removed. Dr. Schwartz testified that he did not perform any inspection of the intra-abdominal organs after the surgery, and that he wrote in the operative report that there were no apparent complications. The CT angiogram of plaintiff's abdomen and pelvis, performed on November 14, 2009, indicated a leak from the small bowel. Dr. Schwartz testified the November 14, 2009 CT test results and plaintiff's conditions led him to perform the second surgery on plaintiff.

Here, Dr. Schwartz failed to establish his *prima facie* entitlement to summary judgment with respect to his treatment rendered from November 11, 2009 to December 18, 2009. Dr. Schwartz's motion is not supported by an affidavit of his own medical expert but relies on the affidavit of Dr. Nierman submitted by the hospital defendants. Although Dr. Nierman's affidavit makes some references to the treatment provided to plaintiff by Dr. Schwartz, the affidavit does not address the standard of care rendered by Dr. Schwartz for that time frame (*see Vera v Soohoo*, 41 AD3d 586, 588, 838 NYS2d 154 [2d Dept 2007]; *Savage v Franco*, 35 AD3d 581, 827 NYS2d 210 [2d Dept 2006]; *Guerin v North Shore Univ. Hosp.*, 13 AD3d 481, 787 NYS2d

349 [2d Dept 2004]). Dr. Schwartz failed to establish, *prima facie*, that his treatment of plaintiff was not a departure from good and accepted medical practice (*see Guerin v North Shore Univ. Hosp.*, *supra*; *Christiana v Benedictine Hospital*, 248 AD2d 910, 670 NYS2d 263 [2d Dept 1998]). The Court has considered Dr. Schwartz's remaining contentions and finds them without merit. Thus, the motion by Dr. Schwartz for summary judgment in his favor dismissing the complaint against him is denied.

Plaintiff cross-moves for an order precluding the remaining defendants from limiting their liability at the time of trial pursuant to Article 16 of the CPLR. Inasmuch as granting a motion for summary judgment is the functional equivalent of a trial and the remaining defendants failed to satisfy the evidentiary burden that shifted upon the movants' *prima facie* showing, the opportunity to limit liability under Article 16 with respect to the movants' acts or omissions has been forfeited (*see Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 955 NYS2d 384 [2d Dept 2012]). Since no party opposes plaintiff's cross motion, the branch of the cross motion for an order precluding the remaining defendants from limiting their liability pursuant to Article 16 of the CPLR is granted. As discussed above, the branch of plaintiff's cross motion for an order denying the motion for summary judgment by Dr. Schwartz, Dr. Anderson, and the hospitals is denied, as moot.

Dated: September 10, 2018

J.S.C.