Ortiz v Caplin
2018 NY Slip Op 33133(U)
November 16, 2018
Supreme Court, Suffolk County
Docket Number: 37976/2008
Judge: William B. Rebolini

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Ricardo Ortiz,

Plaintiff,

-against-

Mitchell Caplin, Alan Gandolfi, Angela Soteriou, Charles G. Arcoleo, Southampton Hospital and Westhampton Primary Care

Defendants.

Index No.: 37976/2008

[Attorneys See Rider Annexed]

Motion Sequence No.: 002; MD
Motion Date: 5/11/18
Submitted: 8/8/18

Motion Sequence No.: 003; MD
Motion Date: 5/23/18
Submitted: 8/8/18

Motion Sequence No.: 004; MD
Motion Date: 5/23/18
Submitted: 8/8/18

Upon the Notice of Motion and supporting papers of defendants Southampton Hospital and Westhampton Primary Care dated March 30, 2018 (Exhibits A through Q attached thereto) and the affidavit of Timothy G. Haydock, M.D., sworn to on April 19, 2018 on their application for an order granting summary judgment dismissing the plaintiff's complaint as against them pursuant to CPLR 3212; upon the Notice of Motion and supporting papers of defendant Mitchell Caplin dated April 11, 2018 (Exhibits A through H attached thereto, including the Affirmation of Gregory I. Mazarin, M.D. dated April 9, 2018) on his application for an order granting summary judgment dismissing the plaintiff's complaint as against him pursuant to CPLR 3212; the Notice of Motion and supporting papers of defendants Angela Soterious and Charles Arcoleo dated April 20, 2018 (Exhibits A through S attached thereto including the affidavit of Joseph S. Jeret, M.D. sworn to on April 19, 2018) on their application for an order granting summary judgment dismissing the plaintiff's complaint as against them pursuant to CPLR 3212, the Answering Affidavits and supporting papers of plaintiff dated July 5, 2018 (Exhibits A through U attached thereto, including the affidavit of plaintiff Ricardo Ortiz sworn to on July 2, 2018 and the affirmation of David Halpert dated July 2, 2018), the Replying affidavits and supporting papers of defendants Southampton Hospital and

Westhampton Primary Care dated May 1, 2018 and July 24, 2018, the Replying affidavits and supporting papers of defendant Mitchell Caplin dated July 16, 2018 (Exhibits A and B attached thereto), and the Replying affidavits and supporting papers of defendants Angela Soterious and Charles Arcoleo dated July 25, 2018 (Exhibits A and B attached thereto); it is

ORDERED that the motions of the respective defendants (Motion Sequences 002, 003 and 004) are being consolidated for purposes of a determination herein; and it is further

ORDERED that the motion by defendants Southampton Hospital and Westhampton Primary Care Center for summary judgment dismissing the complaint as against them is denied; and it is further

ORDERED that the motion by defendant Charles Arcoleo for summary judgment dismissing the complaint as against him is denied; and it is further

ORDERED that the motions by defendants Angela Soteriou and Mitchell Caplin for summary judgment dismissing the complaint as against them are denied as moot, inasmuch as plaintiff has discontinued the actions against the said defendants.

This is a medical malpractice action commenced on October 11, 2008 by the filing of a summons and complaint. Plaintiff seeks damages for alleged departures in medical care in failing to diagnose plaintiff as a patient at risk for stroke and/or at the onset of stroke, in failing to treat and administer necessary care, therapy, tests, and medications to prevent the onset of a stroke and/or the worsening of a stroke and/or the symptoms of a stroke on March 22, March 23, and from March 25, to March 27, 2007. Issue was joined on November 17, 2008 by defendants Southampton Hospital ("SHH") and Westhampton Primary Care ("WPC") by the service of an answer. Issue was joined by Angela Soteriou ("Dr. Soteriou") by answer dated November 17, 2008, by defendant Mitchell Caplin ("Dr. Caplin") by answer dated December 3, 2008 and by Charles Arcoleo ("Dr. Arcoleo") by answer dated December 5, 2008. Plaintiff served a verified bill of particulars dated February 2, 2009 upon each of the defendants. At the conclusion of discovery and upon the case being certified for trial on September 13, 2017, a note of issue and certificate of readiness for trial was served by plaintiff and filed with the Court on October 26, 2017. Pursuant to order of the Court dated November 15, 2017, defendants' time to move for summary judgment was extended 180 days from the date of the filing of the note of issue. On April 17, 2018 Dr. Caplin filed his motion for summary judgment, on April 20, 2018, defendants SHH and WPC filed their motion for summary judgment, and on April 23, 2018, Dr. Arcoleo and Dr. Soterious filed their motion for summary judgment. A stipulation of discontinuance was executed by counsel for plaintiff and defendant Hans D. Schwinn, M.D. ("Dr. Schwinn"), and by order of this Court dated December 6, 2017, the claims against Dr. Schwinn were dismissed. A stipulation of discontinuance has been given by plaintiff to defendant Alan Gandolfi dated May 10, 2018, a stipulation of discontinuance dated July 9, 2018 was executed by counsel for plaintiff and counsel for defendant Dr. Caplin and a stipulation of discontinuance was executed by counsel for plaintiff and counsel for defendant Dr. Soteriou. The only remaining claims are those against defendants Southampton Hospital, Westhampton Primary Care, and Dr. Arcoleo.

In support of their motion for summary judgment defendants SHH and WPC provide an affirmation of counsel, an expert affidavit of Timothy Haydock, M.D. ("Dr. Haydock"), a copy of the pleadings, the verified bill of particulars, the note of issue, the prior orders of the Court, the transcripts of the deposition testimony of plaintiff, defendants Dr. Caplin, Dr. Gandalfi, Dr. Arcoleo, and Dr. Schwinn, the transcripts of the deposition testimony of non-party witnesses Amelia Spoerri, Myrna Alers, Dawn Roehrig Martinez and Robert Lemp, P.A., a certified copy of the records of Southampton Hospital concerning two emergency room presentations on March 22, 2007 and an admission from March 25, 2007 to March 26, 2007, and a certified copy of the records of Westhampton Primary Care Center regarding a presentation on March 23, 2007. In support of his motion for summary judgment, defendant Dr. Arcoleo submits an affirmation of counsel, an expert affidavit of Joseph S. Jeret, M.D.("Dr. Jeret"), copies of the pleadings, plaintiff's verified bill of particulars to both defendants, the note of issue, the court order extending the time to file summary judgment motions, the Southampton Hospital chart admission morning of March 22, 2007, Southampton Hospital chart admission evening of March 22, 2007, records of Westhampton Primary Care, Southampton Hospital chart admission of March 25, 2007 to March 26, 2007, deposition transcripts of plaintiff, defendants Dr. Caplin, Dr. Gandolfi, Dr. Arcoleo and non-party witnesses Emilia Spoerri and Myrna Alers.

The record reveals that plaintiff Richard Ortiz ("Ortiz") was 47 years of age at the time of his initial presentation at the emergency room of defendant SHH on March 22, 2007 at approximately 9:09 a.m. SHH emergency room notes indicate plaintiff as a noncompliant diabetic with a history of uncontrolled diabetes dating back to 2004, the last insulin having been administered three months prior to his arrival at SHH on March 22, 2007. Plaintiff was brought to the SHH emergency room by his spouse claiming he was having dizziness and blurry vision, "nausea joint pain x 3 days" and experiencing "distress breathing." An EKG revealed sinus bradycardia, meaning an abnormally slow heart rate. The impression/plan was hyperglycemia and general malaise. Plaintiff was released from SHH on March 22, 2007 at 1:00 p.m. with instructions to follow-up with his primary care physician. That same evening, plaintiff presented again to SHH at approximately 6:58 p.m. The chief complaint documented by the SHH records was patient "feels like he is having a stroke." Another indicated notation was that patient states "he is catching a stroke-losing his mind." During the second SHH emergency room treatment, a portable X-ray of plaintiff's chest was taken and a notation was made on the SHH radiology report "possible CVA" meaning possible cerebrovascular accident. The emergency room report note indicated "EKG Sinus Bradycardia" (abnormally slow heart rate) with the impression plan as anxiety disorder/palpitations with a prescription for Ativan and a referral to a Dr. Oppenheimer, an adolescent specialist. The plaintiff was then released and discharged at 9:50 p.m. with instructions consistent with the impression plan. The next day, on March 23, 2007, plaintiff presented to defendant Westhampton Primary Care Center, an affiliate of defendant SHH. The notes indicate the prior visits to SHH emergency room for chest pain, lightheadedness, numbness in hands and the indication of anxiety and to monitor blood sugar. Plaintiff was given a referral to Eastern Suffolk Cardiology, an ophthalmologist, and to "see a dentist, check your feet every month, follow-up here schedule complete physical 2-3 weeks, for anxiety take lexapro...xanax, 1 aspirin...each day." On March 25, 2007, plaintiff was taken by ambulance to SHH and hospital records note he had a seizure at his home at 8:45 a.m. Plaintiff was

admitted to SHH at 9:20 a.m. on that day with admission notes indicating a diagnosis of DKA, (or diabetic ketoacidosis) Seizure, Hypocalcemia. A neurological report indicated that in the emergency room plaintiff had a recurrent seizure and then again in the ICU. Plaintiff "was noted to have right sided weakness-impression: new onset seizure, possible left cerebral infarction, rule out tumor or other etiology, possible hypocalcemia..."An EKG was performed at 9:22 a.m., a chest x-ray performed at 10:34, and a CT scan of the brain at 10:35 which noted "question of a 10 mm hyperdensity in the subcortical white matter of the left front lobe versus volume averaging" and "further evaluation with MRI is recommended." Plaintiff was then admitted to ICU at 1:15 p.m. with a diagnosis noted to be seizures with an indication of a CT scan positive for left hemispheric lesion. After admission to the ICU there was an impression of new onset of seizure. Another consultation report was generated by Dr. Sklarek which indicated plaintiff "was loaded with Dilantin in the emergency room" and received some Ativan, that repeat CT performed, which "questioned left parietal sulcus infarct, therefore possible MCA (middle cerebral artery) infarction. Thrombolytics were contraindicated with seizures." The report notes for plaintiff on March 26, 2007 indicate the impression of new onset of grand mal seizures times two, and probably MCA infarct. Another CT scan was completed on March 26, 2007 at 12:45 p.m. which notes an evolving infarction in the left frontal parietal region and a carotid artery ultrasound revealed a noncalcified thrombus in the proximal left internal carotid causing at least a 75% stenosis and 50% stenosis in the right and left external carotid artery. SHH records indicate that at 4:20 p.m. Heparin is administered to the plaintiff. An addendum to the progress record at 5:00 p.m. on March 26, 2007 indicated the plaintiff had "at least a 75% thrombus in the [left] internal carotid artery as well as an evolving CVA in the MCA/watershed area. Family requests [patient] to be transferred to Stony Brook which will benefit patient because they have a stroke unit. [Patient] started on IV Heparin per [neurology] protocol." At 9:45 p.m. plaintiff was taken to Stony Brook Hospital by ambulance. At Stony Brook Hospital a left carotid endarterectomy was performed to remove or clear a blood clot in plaintiff's neck. According to the Stony Brook Hospital operative report, plaintiff's preoperative diagnosis was symptomatic left carotid stenosis status post stroke unstable plaque and indicates plaintiff "presented with left hemisphere stroke with hemiparesis primarily in his right upper extremity, some right lower extremity weakness and some expressive aphasia."

To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from good and accepted medical practice in defendant's treatment of the patient or that defendant's care was not the proximate cause of plaintiff's injuries (*see* ***Vidito v. Hugelmeyer,*** 150 AD3d 1309, 55 NYS3d 413 [2d Dept. 2017]; ***Leavy v. Merriam,*** 133 AD3d 636, 20 NYS3d 117 [2d Dept. 2015]; ***Mitchell v. Grace Plaza of Great Neck, Inc.***, 115 AD3d 819, 982 NYS2d 361 [2d Dept 2014]; ***Castro v. New York City Health & Hosps. Corp.***, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; ***Deutsch v. Chaglassian***, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]). 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* ***Spensieri v. Lasky***, 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]).

Where the defendant has met that burden, the plaintiff, in opposition, must submit a physician's affidavit of merit attesting to a departure or deviation from acceptable medical practice and attesting to the fact that the departure or deviation was a competent cause of the injuries sustained by the plaintiff (*see* ***Williams v. Bayley Seton Hosp.***, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]; ***Makinen v. Torelli***, 106 AD3d 782, 965 NYS2d 529 [2d Dept 2013]; ***Stukas v. Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; ***Arkin v. Resnick***, 68 AD3d 692, 890 NYS2d 95 [2d Dept 2009]). However, 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***, 117 AD3d 774, 985 NYS2d 709 [2d Dept 2014]; ***Arkin v. Resnick***, *supra*; ***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 at 936, 957 NYS2d 167 [2d Dept 2012]).

Submitted by defendants SHH and WPC in support of their motion for summary judgment is the affidavit of Dr. Haydock, who is board certified in Emergency Medicine and licensed to practice medicine in New York. Dr. Haydock opines that the doctors, nurses, and staff of at Southampton Hospital and Westhampton Primary Care did not deviate from the accepted standard of care in the field of medicine in connection with the care and treatment rendered to Ortiz. Dr. Haydock further opines that "the care and treatment rendered by the doctors, nurses, and staff at Southampton Hospital and Westhampton Primary Care Center was not the proximate cause of the plaintiff's alleged injuries which include seizures exhibited by violent shaking, foaming at the mouth, eyes rolling back into the head, heavy breathing, become limp, severe debilitating stroke with cognitive deficits, short-term and long-term memory deficits, dysarthria, non-fluent aphasia, slurred speech, tingling of the hands, right facial droop, right-sided weaknesses, aphasia, right hemiparesis, focal weakness, focal numbness, loss of consciousness, left MCA infarct, neural deficits in left hemisphere, difficulty ambulating, and deficits in fine motor skills." With respect to the emergency room visit on March 22, 2007 at 9:08 a.m., Dr. Haydock opines "a review of the EKG notes that it was appropriately interpreted and timely done." Further, "the patient did not present any neurological symptoms consistent with a stroke or any findings of neurological injury, or any concern which would have warranted a CT scan." Dr. Haydock indicated that the "patient did not present any signs, symptoms, or complaints consistent with a stroke or a harbinger of a future stroke...[r]ather, the complaints made by Mr. Ortiz were very generalized and nonspecific and were consistent with the

patient's long-standing uncontrolled diabetic condition and his refusal to take the medications to control the same. Further his complaints improved with the administration of IV fluids and insulin. The patient did not have the hallmark signs of a stroke such as facial droop, numbness or weakness in one side of the body...did not demonstrate any confusion or trouble understanding...had no vision problems other than blurry vision, which is not consistent with a stroke but is consistent with hyperglycemia." Dr. Haydock further opined that based on the "blood pressures that were appreciated and the lack of a history of high blood pressure, "there was no reason to prescribe prescription medication or provide any other treatment for high blood pressure...[and] no further testing was warranted to rule in or rule out a stroke nor was any type of surgical intervention of consultation warranted...there [was] no evidence of a clot or other obstruction of the carotid arteries...[and no] evidence of a stroke or TIA or evidence of the potential for a TIA or stroke." Dr. Haydock further indicated that "there is no empirical evidence that the administration of hyperbaric oxygen serves to improve the outcome of a stroke...notwithstanding...it was not needed as the patient did not have a stroke prior to [or] in the hospital and was not presenting with symptoms of a potential or future TIA or stroke."

In regards to the emergency visit of March 22, 2008 at 6:58 p.m., Dr. Haydock noted that Robert Lemp, P.A. ("PA Lemp"), who attended to plaintiff for that SHH visit, "expressly considered the possibility of a stroke or cardiac event though ruled out a stroke based upon the patient's physical examination and in particular, the neurological examination, which revealed no evidence of stroke. PA Lemp found that the patient had no mental status changes, no sensory deficits, no motor deficits, no gait abnormalities and no visual disturbances. The CBC, prothrombin time, PPT, and INR were within the normal range....His glucose was markedly elevated at 232, which prompted the administration of insulin, the various cardiac tests served to rule out an MI, including the troponin levels and cardiac enzyme testing, which were all negative. His blood work was consistent with his diabetic condition...chest x-ray was negative for any cardiac or pulmonary issues, [the] EKG...noted sinus bradycardia with possible premature atrial complexes with aberrant conduction." Dr. Haydock opined that "this is a common finding and not a hallmark of or relating in any fashion to the potential for a stroke or TIA." Dr. Haydock indicated that after PA Lemp provided the plaintiff with medications and fluids he performed a second examination which revealed an improvement in his symptoms. Dr. Haydock opined that based on the "absence of any motor deficits, sensory deficits, no gait abnormalities, no visual disturbance, no mental status changes, and the lack of garbled speech or any of the other symptoms associated with a TIA or stroke...the patient did not present with any signs or symptoms of a stroke on the evening of March 22, 2007." Dr. Haydock further opined that the plaintiff's palpitations were "consistent with his anxiety...[and]...there was no basis or need to order a CT scan or to admit the patient to the hospital....[or to administer] aspirin or, clot dissolving medications....[or to] call for a surgical consultation, nor was there any need to perform a carotid endarterectomy....[a]dditionally there was no need based on the patient's symptoms to perform a Doppler ultrasound or other ultrasound imaging or to perform an angiogram."

With respect to the Westhampton Primary Care Center presentation on March 23, 2007, Dr. Haydock notes in his affidavit that Dawn Roehrig Martinez, P.A. ("PA Martinez") attended to the plaintiff's complaints of palpitations, chest pain, panicked feelings, decreased concentration and

decreased sleep. Dr. Haydock further notes that PA Martinez performed a full-body physical examination of the plaintiff, which included "listening to the vasculature in his neck with a stethoscope to make sure there was no carotid bruit." Dr. Haydock opined that the "patient did not present with any signs, symptoms, or complaints consistent with a TIA or stroke or the potential for a future onset of TIA or stroke. PA Martinez specifically ruled out a stroke through the performance of a motor examination, sensory century examination, cranial nerve examination, and from her examination of the patient in total." Dr. Haydock further opined that the patient did not present with any findings or complaints that required a repeat EKG, hyperbaric oxygen, a CT scan, doppler ultrasound, other ultrasound testing or angiogram, administration of aspirin or clot-dissolving medications (although the patient was placed on aspirin 325 mg by PA Martinez), or high blood pressure medication (although the patient was referred to a cardiologist) nor was a referral to the hospital or call for an ambulance for admittance to the hospital or for a surgical consult for a possible carotid endarterectomy required.

In regards to the Southampton Hospital emergency room and hospital admission on March 26, 2007, Dr. Haydock indicates in his affidavit that the emergency room physician noted two acute seizures and plaintiff was given various medications to address the seizures and a series of tests, cultures, x-rays, an EKG, and a CT scan were ordered and an MRI was recommended. Dr. Haydock notes that the initial CT scan revealed a 10 mm hyperdensity of the left frontal lobe vs. volume averaging. Dr. Haydock notes that Dr. Arcoleo ordered the patient to be admitted to the ICU, and ordered additional IV fluids, blood work, insulin, a neurology consult, an MRI, EEG, echocardiogram, and added Dilantin and Ativan as needed. After admission to the ICU, Dr. Haydock notes that the "patient developed altered mental status and was determined to have an evolving CVA (stroke) with right upper and right lower extremity paralysis, [and] decreased respiration." Dr. Haydock further notes the patient was intubated, given versed 5 mg IV, 4 mg of Ativan and 10 mg of Norcuron, a repeat CT scan was performed which showed possible left frontal parietal area infarction in the middle cerebral artery distribution and the ICU doctor recommended to continue Dilantin and aspirin suppository, arranged for further CT to check for evolving CVA, a carotid doppler/ultrasound to evaluate carotid artery caliber and blood flow and considered IV heparin should the patient develop atrial fibrillation. On March 26, the patient was diagnosed with right-sided paresis/plegia, probable left hemispheric stroke, seizure, and noncompliant diabetic. Dr. Haydock further states the "repeat CT scan noted evolving infarction in the left frontal parietal region, which appears to be the watershed zone...[and an] ultrasound of the carotid arteries...revealed a noncalcified thrombus in the left internal carotid causing at least a 75% stenosis and 50% stenosis in the right and left external carotid artery." Dr. Haydock notes the patient was then placed on IV heparin. Dr. Haydock opined that due to the fact that the patient was having a seizure upon presentment to the hospital, "clot busting medications were contraindicated....since the patient was postictal served to mask and/or prevent from detection during such time periods any neurological symptomatology...he was receiving an aspirin suppository, which is an antiplatelet medication that assists in the prevention of clot formation. Once the patient was notes to have clots in the carotid arteries, the patient was promptly started on IV heparin, which serves to dissolve existing clots and/or prevent further clot formation." Dr. Haydock stated that it was his opinion, to a reasonable degree of medical certainty that all of the care, testing, scans, x-rays, medications, and examinations

administered by defendant Southampton Hospital, its doctors and staff and by defendant Westhampton Primary Care, its doctors and staff, were appropriate, timely, and prudent. Dr. Haydock further opined that to a reasonable degree of medical certainty, no other care, tests, scans, x-rays, ultrasounds, procedures, or medications were warranted during any of the visits by plaintiff to Southampton Hospital or Westhampton Primary Care.

The expert report of Joseph S. Jeret, M.D. ("Dr. Jeret"), a practicing neurologist, was submitted in support of the motion for summary judgment of defendant Dr. Arcoleo, in regards to the care and treatment rendered by Dr. Arcoleo at Southampton Hospital from March 25 through March 26, 2007. Dr. Jeret opines, with a reasonable degree of medical certainty, that a thorough and proper evaluation and assessment of the plaintiff was performed based upon his presenting history, complaints, signs and symptoms during his admission to Southampton Hospital from March 25, 2007 to March 26, 2007 and that the care and treatment received by plaintiff "conformed with good and accepted medical practices" and "was not a substantial factor in causing any injury to the plaintiff." Dr. Jeret further opined, within a reasonable degree of medical certainty that any injuries sustained by plaintiff "were not the proximate cause by any action or inaction of defendant" Dr. Arcoleo. Dr. Jeret noted it "is significant to point out that in the setting of a stroke or stroke in evolution there are three possible treatments available; (1) Antiplatelet therapy with aspirin, Plavix or Aggrenox. In this case, plaintiff was appropriately treated with aspirin during his visit to Westhampton Primary Care and in the hospital setting on March 25, 2007" while under the care of defendant Dr. Arcoleo. Dr. Jeret indicated two other possible treatments for a stroke patient, one being anticoagulation therapy with Coumadin and/or Heparin and the other being intravenous tPA therapy or clot busting medications. Dr. Jeret stated that the former would not be given where, as here, the patient had no history of atrial fibrillation or clotting disorders and "in 2007, tPA therapy would be contraindicated" as the plaintiff presented to Southampton Hospital with seizure activity and "the exact timing and onset of the stroke could not be accurately ascertained." Dr. Jeret further opined that "antiplatelet therapy with aspirin was the only therapy available to treat the plaintiff under the circumstances...[and] this aspirin therapy, within a reasonable degree of medical certainty, prevented the worsening of his symptoms." Dr. Jeret further opined that the management of plaintiff's blood pressure conformed to good and accepted medical practices in that the "systolic blood pressure remained between 120 and 200 which is acceptable under the plaintiff's medical circumstances. In fact, in the management of acute stroke, mildly elevated blood pressure should not be treated and in the setting with carotid stenosis it is contraindicated. The reason behind this is that if the blood pressure drops too significantly, the brain would then be deprived of the blood supply necessary for proper function and may result in further neurological damage." Dr. Jeret further opined that the Doppler ultrasound imaging performed on March 26, 2007 was timely and appropriate, and could not have done sooner (March 25, 2007) as the patient was being intubated, making it difficult to perform a carotid Doppler and places a patient at risk for an incomplete or suboptimal study. Dr. Jeret further opined that an angiogram was not necessary and there was no indication for Dr. Arcoleo to consider hyperbaric therapy.

Based upon the foregoing expert affidavits and opinions rendered therein, defendants SHH, WPC, and Dr. Arcoleo have demonstrated *prima facie* their entitlement to summary judgment, in

that they have established that they did not depart from good and accepted standards of medical care, shifting the burden to plaintiff to demonstrate a triable issue of fact (*see* ***Alvarez v. Prospect Hospital,*** 68 NY2d 320, 325, 508 NYS2d 923 [1986]; ***Baez v. Lockridge,*** 259 AD2d 573, 686 NYS2d 496 [2d Dept. 1999]).

In opposition, plaintiff submits the affirmation of David Halpert, M.D. ("Dr. Halpert"), a Board Certified Neurologist. Dr. Halpert notes that on the Southampton Hospital radiology report of March 22, 2007, the diagnostic impression reads "possible CVA" and he indicates further it was relevant that the systems record indicates the patient's speech was abnormal. Dr. Halpert opines that SHH doctors and staff should have responded timely to the diagnostic impression of "possible CVA" by the attending radiologist and "CT [scans], MRI, carotid imaging, fasting lipid studies, routine chemistries and ongoing measurements of blood pressure and vital signs were indicated and necessary to minimize the devastating neurological deficits that ultimately resulted...." Dr. Halpert further opined that the plaintiff's "chief complaints of speech problems, confusion and feeling like he was having a stroke...warranted a hospital admission for closer observation and further evaluation and treatment for acute TIA or stroke." Dr. Halpert indicates that "a TIA may have no findings on a physical exam...since the symptoms of the onset of a stroke (consistent with a TIA) may come and go....With Mr. Ortiz's abnormal history that day of speech problems, confusion and feeling like he was having a stroke, but with a normal neurological exam at this point, he was having a TIA. Optimal care could have minimized the subsequent brain damage." Dr. Halpert further opines that if defendant WPC staff reviewed the patient's history and exam from March 22, 2007, they would have ascertained the new symptoms relative to his confusion and speech problems and "any reasonable medical practitioner would have admitted the patient for further observation and testing and treatment." Dr. Halpert opines that further evaluation may have led to treatment with "anti-thrombotics such as aspirin and possibly other blood thinning medications....[and] a statin." Dr. Halpert further opines that if the plaintiff had CT scans and MRI imaging studies on March 22, 2007 "showing his symptoms at that point was a TIA his significant carotid stenosis would have been found...before the ...permanent hemiparesis and speech difficulties occurred. If his exam changed like it did and he developed word finding difficulties and confusion on exam then he would have been a candidate for TPA which dissolves clots quickly and restores blood flow to the brain and likely a more timely carotid endarterectomy which would have limited the extension of the stroke." Earlier CT scans of the head would have confirmed the presence of stroke earlier and a timely diagnosis of carotid stenosis would have led to consideration of heparin as treatment sooner, according to Dr. Halpert. Dr. Halpert states it is his "medical opinion with a reasonable degree of medical certainty that SHH and [WPC] and the physicians and other medical personnel deviated from accepted standards of medical practice and procedure in the care and treatment rendered to the plaintiff when the patient was prematurely released without further tests and observation and subsequent treatment. It is highly likely this patient on the 22nd and 23rd was presenting with acute symptomatic carotid stenosis and TIA and then stroke. If his carotid stenosis and cerebral ischemia was identified and treated promptly with the appropriate interventions such as blood thinners like Heparin, statins, meticulous fluid and diabetic management would have been beneficial in preventing early stroke. Prompter surgical intervention was delayed because of a failure to diagnosis as well. This delay also contributed to his resultant deficits."

Plaintiff's expert's opinion, which is contrary to defendants' experts' opinions, raises an issue of credibility, which should not be determined by the Court (*see* ***Wexelbaum v. Jean,*** 80 AD3d 756, 915 NYS2d 161 [2d Dept. 2011]; ***Combs v. Freeport,*** 139 AD2d 688, 527 NYS2d 443 [2d Dept. 1988]). In particular, Dr. Halpert notes the change in plaintiff's condition on the second emergency visit to Southampton Hospital and the radiology report indication of "possible CVA," the combination of which should have resulted in further testing and treatment at Southampton Hospital and Westhampton Primary Care. In addition, Dr. Halpert opines that had there been the diagnosis of carotid stenonsis while plaintiff was a patient at Southampton Hospital on March 25, 2007, as opposed to the diagnosis of gran mal seizure, heparin would have been administered sooner and minimized the brain damage or increased the prospect that the damage and its sequela would have been minimized. Based upon the foregoing, plaintiff has rebutted defendants' prima facie showing (*see* ***Vedito v. Hugelmeyer,*** 150 AD3d 1309, 55 NYS3d 413 [2d Dept. 2017]; ***Cummings v. Brooklyn Hospital Center,*** 147 AD3d 902, 48 NYS3d 420 [2d Dept. 2017]). As such, summary judgment in favor of defendants SHH, WPC, and Dr. Arcoleo is not appropriate, where, as here, there are conflicting medical expert opinions (***Schwartzberg v. Huntington Hospital,***163 AD3d 736, 81 NYS3d 118 [2d Dept. 2018]; ***Vedito v. Hugelmeyer,*** 150 AD3d 1309, 55 NYS3d 413 [2d Dept. 2017]; ***Fink v. DeAngelis***, 117 AD3d 894, 986 NYS2d 212 [2d Dept 2014]; ***Feinberg v. Feit***, 23 AD3d 517, 806 NYS2d 661 [2d Dept 2005]). The Court has considered the defendants' remaining contentions and finds that they are without merit (*see* ***Dragotta v. Southampton Hospital,*** 39 AD3d 697, 833 NYS2d 638 [2d Dept. 2007]).

Accordingly, the motions by defendants SHH, WPC, and Dr. Arcoleo for summary judgment dismissing the plaintiff's claims as against them is denied.

Dated: 11/16/2018

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**

RIDER

Attorney for Plaintiff:

Law Offices of Joseph R. Bongiorno & Associates, LLC
250 Mineola Boulevard
Mineola, NY 11501

Clerk of the Court

Attorney for Defendant Mitchell Caplin:

Wagner, Doman & Leto, P.C.
227 Mineola Boulevard
Mineola, NY 11501

Attorney for Defendant Alan Gandolfi, M.D.:

Aaronson, Rappaport, Feinstein & Deutsch, LLP
600 3rd Avenue, 5th Floor
New York, NY 10016

Attorney for Defendants
Angela Soteriou and Charles G. Arcoleo:

Benvenuto & Slattery
1800 Northern Boulevard
Roslyn, NY 11576

Attorney for Defendants Southampton Hospital
and Westhampton Primary Care:

Bartlett, McDonough & Monaghan, LLP
320 Carleton Avenue, Suite 7500
Central Islip, NY 11722