SHORT FORM ORDER **INDEX NO.: 602454/2017**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

x

BARBARA L. HALPERN, as the Administratrix of the Estate of Norman J. Halpern, decedent,

Plaintiff,

-against-

ROSALIND & JOSEPH GURWIN JEWISH GERIATRIC CENTER OF LONG ISLAND, INC. & ELLIOTT GROSSMAN, M.D.,

Defendants.

x

Motions Submit Date: 08/23/18
Mots Conf Date: 08/16/18
Mot Seq 001 MG
Mot Seqs 002 &003 MD; RTC
Mot Seq 004 MG

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In this electronically filed medical malpractice action, concerning the various motions pending before the Court: defendant's motion to strike plaintiff's notice to admit & for a protective order pursuant to CPLR 3103 & 3123(a); plaintiff's motion & cross-motion for partial summary judgment on liability pursuant to CPLR 3212(a); and defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(5) & 3211(a)(7), the following papers were considered: NYSCEF Docket Entries ## 17 – 21; 23 – 33; 34 – 47; 50 – 62; 64 – 71; 72 – 75; and upon due deliberation and full consideration consideration of all of the foregoing, it is

ORDERED that the parties' various motions are hereby consolidated for the purposes of judicial economy; and it is further

ORDERED that defendant's motion pursuant to CPLR 3103 & 3123 for a protective order and order to strike plaintiff's notice to admit is **granted** for the following reasons; and it is further

ORDERED that plaintiff's motion & cross-motion pursuant to CPLR 3212 for partial summary judgment on liability on her third cause of action for medical malpractice/lack of informed consent are **denied** as set forth below; and it is further

ORDERED that defendant's motion to dismiss plaintiff's complaint, hereby deemed to be a motion to dismiss the complaint for failure to state a claim pursuant to CLR 3211(a)(7) for reasons more fully explained below and for untimeliness under CPLR 3211(a)(5), is **granted** as

follows; and it is further accordingly

ORDERED that the third cause of action in plaintiff's complaint is hereby **dismissed**; and it is further

ORDERED that plaintiff's counsel serve a copy of this decision and order with notice of entry on counsel for plaintiff by electronic filing forthwith; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required; and it is further

ORDERED that counsel for the parties are hereby directed to appear for a discovery compliance conference before this Court for purposes of entering into a new binding discovery schedule for the completion of all pretrial disclosure on **May 30, 2019** at 10:00 a.m.

BACKGROUND

As relevant to the pending applications, this action can be summarized in the follow fashion. Plaintiff Barbara Halpern by her complaint brought this action against defendants Gurwin Nursing Home and surgeon Elliott Grossman, M.D. alleging wrongful death of their patient, her husband Norman Halpern, as well as seeking recovery for medical malpractice premised on lack of informed consent for a bedside surgical debridement of a decubitus ulcer, and nursing home negligence violative of Public Health Law.

This action arises out of plaintiff's decedent's death on November 3, 2015. Prior to his passing, since December 19, 2012, decedent was a resident patient in defendant's skilled nursing facility and in their hospice protocol with diagnoses of diabetes, congestive heart disease and failure, pneumonia, and dementia. Due to his dementia, decedent had in place healthcare proxies naming *inter alia* plaintiff his wife and his daughter Debra Votta.

On or around October 27, 2015, while residing at defendant's facility, decedent developed a bedsore on his right buttock which became infected and required treatment and care by his primary care physician and defendant's nursing staff. During the course of their topical wound care treatment regimen of decedent's wound, chemical enzymatic debriding agents were applied until such time that decedent's wound became infected, with nursing staff observing a foul odor emanating from decedent's wound. Decedent was then prescribed a course of antibiotics to deal with the infection due to a suspected MRSA infection without success. Due to decedent's infection, the nursing home sought a surgical consult with defendant Grossman. At this time, it was clear to defendant's that decedent's healthcare proxies, plaintiff and his daughter Votta, had expressly declined and refused consent for any surgical procedure such as a debridement. This appears partly due to the fact that the proxies both sought conservative treatment for decedent who was at that time prescribed Coumadin, a blood thinner.

Despite noting and acknowledging the proxies wishes for decedent's care, on November 3, 2015, after conducting a surgical consult on decedent, Grossman performed a bedside debridement of decedent's wound, described as removal of necrotic eschar covering the wound.

After the procedure, decedent's plan of care was updated to hold off his Coumadin prescription for 3 days and to receive vitamin K as a countermeasure. Subsequently, defendant's staff made mixed observations with doctors and staff making varying observations of oozing or bleeding from decedent's wound. At some point thereafter, it became obvious to staff that decedent had been suffering persistent bleeding from the wound. Additional to observation of bleeding, defendant's staff also noticed decedent appeared blotchy and mottled on his stomach and legs. Defendants then sought consent, which was obtained from the proxies for a hospitalization at St. Catherine's Hospital. Shortly after his presentation to the emergency room, decedent was found to have no electrical activity in his heart and was pronounced dead, as a DNR was present in his medical chart.

SUMMARY OF THE ARGUMENTS

As plead in the complaint and implicated in the motions presently pending, plaintiff seeks recovery and now judgment as a matter of law on the third cause of action for lack of informed consent for the bedside debridement. Plaintiff's theory is that defendants noted and acknowledged that decedent's proxies expressly rejected consent for the procedure, and further that it was contraindicated for a patient like the decedent on Coumadin. Thus, plaintiff argues that proceeding with the procedure absent informed consent constituted medical malpractice, a departure from good and accepted medical practice, which proximately caused decedent's death. On this point, plaintiff alleges that Grossman's debridement of the defendant resulted in persistent bleeding with caused cardiac arrest and death.

DISCUSSION

I. The Parties' Various Applications

A. Plaintiff's Notice to Admit

Taking each motion in turn, first comes defendant's motion for a protective order and to strike a notice to admit dated July 13, 2017 wherein plaintiff seeks admissions or concession by defendants that no surgical consent for decedent's bedside debridement existed in the chart or file. Relying on CPLR 3103 and 3123(a), defendant seeks to strike the notice to admit as improper, seeking an admission on a material or significant ultimate issue of fact for the factfinder's determination in this matter. Further, defendants oppose the discovery demand arguing that pretrial disclosure, to include depositions, has not yet completed. Defendants then contend that under the law plaintiff cannot pick and choose to substitute routine and ordinary discovery via the notice to admit. Plaintiff opposes the motion denying that it seeks a concession of an ultimate fact. Here, plaintiff claims that while the presence or absence of the consent may be significant or outcome determinative on the lack of consent claim, it merely seeks confirmation of a plain fact. Both parties agree that the record evidence produced thus far in discovery include defendant's progress notes which appear to acknowledge that decedent's proxies declined consent for the bedside debridement.

Generally, under CPLR § 3103(a) court may issue a protective order " 'denying, limiting, conditioning or regulating the use of any disclosure device' to 'prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts' "(***Nimkoff v Cent. Park Plaza Assoc., LLC***, 123 AD3d 679, 680–81, 997 NYS2d 698, 699 [2d Dept 2014]).

Further, it is settled that a court has discretion to limit disclosure and issue a protective order (***Accent Collections, Inc. v Cappelli Enters., Inc.***, 84 AD3d 1283, 924 NYS2d 545 [2d Dept 2011]). The burden of showing that discovery is improper is upon the party asserting it (***Koump v Smith***, 25 NY2d 297 [1969]; ***Bombard v Amica Mut. Ins. Co.***, 11 AD3d 647, 783 NYS2d 85 [2d Dept 2004]).

CPLR 3123(a) authorizes the service of a notice to admit upon a party, and provides that if a timely response thereto is not served, the contents of the notice are deemed admitted . However, the purpose of a notice to admit is only to eliminate from contention those matters which are not in dispute in the litigation and which may be readily disposed of. Further, a notice to admit is not to be employed to obtain information in lieu of other disclosure devices, or to compel admissions of fundamental and material issues or contested ultimate facts (***32nd Ave. LLC v Angelo Holding Corp.***, 134 AD3d 696, 698, 20 NYS3d 420, 422 [2d Dept 2015]; *see also* ***Ramcharran v New York Airport Services, LLC***, 108 AD3d 610, 611, 969 NYS2d 497, 498 [2d Dept 2013][holding motion court should have granted motion for protective order where plaintiff's notice to admit improperly sought the defendant's admission concerning a matter that went to the heart of the controversy of the litigation]).

Here, the Court finds some agreement in both parties' contentions. On the firsthand, plaintiff is correct that the mere fact that defendants may have conceded that consent was declined and thus no specific consent existed for decedent's debridement as of record being prejudicial, does not alone warrant preclusion of those admissions from this case. But on the other hand, defendants have argued, and the current posture of this case is clear, that discovery of defendants has yet to begin in earnest at the time of the parties' applications. Since precedent clearly holds that a litigant cannot circumvent ordinary discovery devices in favor of the notice to admit, this Court holds that plaintiff's notice is inappropriate at this time for two reasons. First, the factual premise of the sought admissions in the notice can easily be obtained at deposition or document demand or interrogatory. Second and perhaps more important, the motion record presently before the Court contains defendants' admission that decedent's proxies expressly denied consent for the procedure at issue. Separately defendants argue that consent may not have been necessary or was provided in separate form, those arguments are addressed below. But for the time being, movant defendant is correct that procedurally plaintiff's notice to admit is improper. Accordingly, defendant's motion for a protective order pursuant to CPLR 3103 and related motion to strike under CPLR 3123(a) is **granted** to the extent that the plaintiff's notice to admit dated July 13, 2017 is **stricken** at this juncture.

B. Partial Summary Judgment on Liability on Lack of Informed Consent

Also, before the Court are motions by plaintiff for partial summary judgment pursuant to CPLR 3212 for judgment as a matter of law against both defendants on liability for lack of informed consent. In support of her motion, plaintiff annexes a copy of decedent's death certificate, copies of plaintiff's and Votta's affidavits as decedent's healthcare proxies; a copy of a notice to admit seeking admissions that no surgical consent existed in decedent's medical chart or defendant's medical records, an expert medical affidavit sworn by Dr. Ravindra Kota, and a copy of a New York State Department of Health nursing home deficiency and investigative report related to decedent's care.

Defendants both oppose the application in its entirety on a variety of bases. The nursing

home defendant at the outset opposes the application as premature since pretrial disclosure has yet to complete, and that triable questions of fact concerning vicarious liability exists because defendant Grossman, by his own admission as argued to the Court, was a voluntary, independent contractor not directly employed by Gurwin Nursing Home. Defendants thereafter generally argue that plaintiff fails to make out a *prima facie* case for entry of judgment as a matter or law for lack of informed consent. Defendant Grossman separately moves to dismiss the complaint on the law arguing the complaint, properly plead and construed, is time-barred, or in the alternative fails to state a claim by not making out all the relevant elements.1 The nursing home defendant offers a conflicting and contrasting expert medical affirmation sworn by Dr. Karen Kuo concerning the absence of a medical departure and alternative cause for decedent's injuries and death. Last, but not least, defendants both argue that plaintiff cannot rely on the NYS DoH investigative report's substance and conclusions as evidence in support of summary judgment, contending it is uncertified and thus not in admissible form; constituted of inadmissible hearsay; violates nursing home privilege and confidentiality sourced in the Public Health Law.

Arguing in reply and fully support of her motion, plaintiff quizzically and somewhat paradoxically argues that any determination concerning the admissibility of the nursing home investigative report should be deferred to time of trial, characterizing defendants' arguments as those *in limine*. Otherwise, plaintiff maintains that she makes out a *prima facie* case for recovery on the informed consent theory.

Standard of Review for Summary Judgment

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of 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 (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985];]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman,*** *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

1 This motion is addressed below separately.

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

Substantive Medical Malpractice Law

The law in New York holds that for plaintiff to establish a prima facie case of medical malpractice, a plaintiff must prove " '(1) the standard of care in the locality where the treatment occurred, (2) that the defendant[s] breached that standard of care, and (3) that the breach of the standard was the proximate cause of injury' " (***Pieter v Polin***, 148 AD3d 1193, 1194, 50 NYS3d 509, 510 [2d Dept 2017]). "Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause" (***Novick v S. Nassau Communities Hosp.***, 136 AD3d 999, 1000, 26 NYS3d 182, 184 [2d Dept 2016]).

Plaintiff's motions center on a single cause of action: lack of informed consent. Here the law is murky as addressed under this point and one below pertaining specifically to the nursing home defendant's separate motion to dismiss. Public Health Law § 2805–d(1) defines lack of informed consent as "the failure of the person providing the professional treatment ... to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation." (***Johnson v Staten Is. Med. Group***, 82 AD3d 708, 709, 918 NYS2d 132, 133 [2d Dept 2011]; construing Pub. Health L. § 2805–d[3]).

Generally, the law holds that lack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence." For plaintiff to make out the *prima face* case, she must prove "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" (***Figueroa-Burgos v Bieniewicz***, 135 AD3d 810, 811, 23 NYS3d 369, 371 [2d Dept 2016]). The courts construe the third prong to require proof that the actual procedure performed for which there was no informed consent must have been a proximate cause of the injury (***Trabal v Queens Surgi-Ctr.***, 8 AD3d 555, 556-57, 779 NYS2d 504, 507 [2d Dept 2004]). The policy behind the cause of action "is meant to redress a 'failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical ... practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation' " (***Walker v St. Vincent Catholic Med. Centers***, 114 AD3d 669, 670, 979 NYS2d 697, 698 [2d Dept 2014]).

Squarely before the Court at this point is the issue of whether plaintiff has met her burden of establishing a *prima facie* entitlement to judgment as a matter of law on lack of informed consent. As explained below, this Court finds that plaintiff has not dispensed with all triable questions of fact with her proof and thus summary judgment is both premature and inappropriate at time (*see e.g.* ***Dyckes v Stabile***, 153 AD3d 783, 785, 61 NYS3d 110, 113 [2d Dept 2017][holding that where movant failed to eliminate all triable issues of fact, denial of summary judgment dismissing the cause of action for lack of informed consent proper]). Thus, plaintiff's motion and cross-motion under CPLR 3212 for partial summary judgment and entry of judgment as a matter of law on liability against defendants for lack of informed consent is accordingly **denied**.

In terms of a medical malpractice claim predicated on lack of informed consent, where a private physician attends his or her patient at the facilities of a hospital, it is the duty of the physician, not the hospital, to obtain the patient's informed consent. Further, the mere recording or witnessing of a consent by a hospital employee is a ministerial task that does not subject the hospital to liability Although however, the hospital may be liable where it knew or should have known that the private physician using its facilities was acting or would act without the patient's informed consent (***Salandy v Bryk***, 55 AD3d 147, 152, 864 NYS2d 46, 49-50 [2d Dept 2008][construing Public Health Law § 2805–d[1]]).

Deficiency of Plaintiff's Summary Judgment Motions

1. **Failure to Meet the Requisite Elements *Prima Facie***

Plaintiff commits three distinct and fatal errors which doom her application. The first is a plain failure to establish the *prima facie* case of informed consent. Consistent with defendants' opposition, plaintiff readily concedes a failure of proof. Plaintiff emphasizes that this case is not the ordinary lack of informed consent claim, since both parties essentially agree no written consent existed for the debridement procedure. Movant then takes this to mean that plaintiff is thus saved from having to demonstrate the first two prongs of the analysis. She is mistaken. The motion and cross-motion taken together rely on an expert medical opinion by affidavit which in conclusory fashion argues that Grossman and the nursing home separately departed from good and accepted medical practice by failing to elicit consent from decedent's healthcare proxies. Having established that, plaintiff's expert then without addressing what the good and proper practice would be, commits a logical leap that the unconsented to debridement was the proximate cause of decedent's persistent bleeding. The expert affidavit places great reliance on the fact that decedent was taking prescription Coumadin preceding his procedure and that his INR, an accepted medical measurement of blood clotting time, was elevated. However, the affidavit fails to explain the significance of the Coumadin and blood clotting levels and how it factored into decedent's eventual injury and death. Moreover, and perhaps more significant is the fact that the affidavit relies upon the conclusions of the State Health Department's investigative report, and indeed, incorporates them.

However, defendant has correctly noted under Public Health Law Article 28, the statute confers certain privilege and confidentiality on the peer review process concerning nursing home complaints and deficiencies, mandating cooperation with regulatory authorities, in exchange for full, frank and free discussion and disclosure without penalty of those disclosures being invoked in litigation. Thus, the Second Department particularly has remarked that the Public Health

Law confers confidentiality, as relevant here, on records relating to the performance of medical review and quality assurance functions and reports required by the New York State Department of Health pursuant to Public Health Law § 2805–l (***Daly v Brunswick Nursing Home, Inc.***, 95 AD3d 1262, 1263, 945 NYS2d 181, 182–83 [2d Dept 2012]; ***Katherine F. ex rel. Perez v State***, 94 NY2d 200, 204, 723 NE2d 1016, 1017 [1999]). The motion record before the Court in its present form is deficient on the question under what precise authority the nursing home defendants were called upon to produce witnesses for interview with State Health Department investigators, resulting in the deficiency and investigative report. Plaintiff has alleged that plaintiff and her daughter made an official complaint resulting in the opening of the investigation. Suffice it to say however, an open question remains as to whether privilege or confidentiality has attached to the report in total, or in part, and whether the report should be redacted in some form or fashion. The Court believes that these questions sufficiently cast into doubt whether the report in the form it takes as an exhibit to the moving papers can be considered.

2. Reliance on Incompetent or Inadmissible Evidence

Secondly and separately, the report is not in admissible form lacking a certification as called for by CPLR 4540. Nor does the report appear to be in final form, lacking attestation or a signature by any identifiable official. This Court leaves to another day the question of whether it may be properly admitted into evidence in support of plaintiff's claims, as the Court agrees with plaintiff that the brunt of defendants' arguments sound *in limine*. That notwithstanding however, plaintiff cannot rely on the report in support of summary judgment as judgment as a matter of law may not entered in reliance on incompetent or inadmissible proof. Thus, further would call into question that aspect of plaintiff's expert medical affidavit incorporating findings from that report. Accordingly, plaintiff's motion for summary judgment must be **denied** for failure to demonstrate *prima facie* entitlement to judgment on liability.

Additionally, both plaintiff and defendants have submitted evidence taking the form of expert medical affidavit, differing and opining on lack of informed consent and proximate cause. Since these contrasting affidavits raise credibility assessment concerns, they by their very nature raise triable questions of fact for the factfinder meriting denial of plaintiff's motions (*see* ***Feinberg v Feit***, 23 AD3d 517, 519, 806 NYS2d 661, 662 [2d Dept 2005][summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions]).

3. Prematurity of the Application

Lastly, plaintiff's motions are premature as defendants raise viable questions regarding vicarious liability here.

Under CPLR 3212(f), "where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied.... This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" (***Juseinoski v. New York Hosp. Med. Ctr. of Queens***, 29 AD3d 636, 637, 815 NYS2d 183, 184-85 [2d Dept 2006]; ***Baron v. Inc. Vil. of Freeport,*** 143 AD2d 792, 92-93; 533 NYS2d 143, 148 [2d Dept 1998]). Case law therefore requires that a party opposing summary judgment is entitled to obtain further

discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated (***Chmelovsky v. Country Club Homes, Inc.***, 106 AD3d 684, 964 NYS2d 245, 246 [2d Dept 2013]; ***Martinez v. 305 W. 52 Condo.***, 128 AD3d 912, 914, 9 NYS3d 375, 377 [2d Dept 2015]["a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment"]). Generally speaking then a non-movant should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment (*see* ***Video Voice, Inc. v. Local T.V., Inc.,*** 114 AD3d 935, 980 NYS2d 828; ***Bank of Am., N.A. v. Hillside Cycles, Inc.,*** 89 AD3d 653, 932 NYS2d 128; ***Venables v. Sagona,*** 46 AD3d 672, 673, 848 NYS2d 238). Further, non-movant is also entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated (*see* CPLR 3212[f]; ***Nicholson v. Bader,*** 83 AD3d 802, 920 NYS2d 682; ***Family-Friendly Media, Inc. v. Recorder Tel. Network,*** 74 AD3d 738, 739, 903 NYS2d 80; ***Juseinoski v. New York Hosp. Med. Ctr. of Queens,*** 29 AD3d 636, 637, 815 NYS2d 183). ***Malester v. Rampil***, 118 A.D.3d 855, 856, 988 N.Y.S.2d 226, 227-28 [2d Dept 2014]).

Accordingly, a party seeking to preclude summary judgment may argue prematurity in light of incomplete discovery (*see e.g.* ***Adrianis v Fox***, 30 AD3d 550, 550–51, 817 NYS2d 374, 375 [2d Dept 2006][holding that a motion court properly denies a summary judgment motion as premature where at least one party's deposition was still outstanding and the parties had previously stipulated to hold that deposition only seven days after the motion was made, or in other words accepting non-movant's argument that they were unfairly deprived the opportunity to fully probe availability of a defense to liability in the case, not having the benefit of party depositions]; *see also* ***Amico v Melville Volunteer Fire Co., Inc.***, 39 AD3d 784, 785, 832 NYS2d 813 [2d Dept 2007][resolving that a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment]).

By the same token however, the Second Department has also clearly ruled that non-movant's mere hope or speculation that additional discovery might lead to or create a triable fact issue is insufficient to preclude the entry of summary judgment on liability in this negligence motor vehicle action (*see e.g.* ***Rodriguez v Farrell***, 115 AD3d 929, 931, 983 NYS2d 68, 70 [2d Dept 2014][appellate court determining that summary judgment not premature where defendant failed to demonstrate that discovery would lead to relevant evidence or that facts essential to justify opposition to the motions were exclusively within the knowledge and control of the plaintiffs]; ***Medina v Rodriguez***, 92 AD3d 850, 851, 939 NYS2d 514, 515 [2d Dept 2012]; ***Kimyagarov v Nixon Taxi Corp.***, 45 AD3d 736, 737, 846 NYS2d 309, 310–11 [2d Dept 2007]; ***Hill v Ackall***, 71 AD3d 829, 829–30, 895 NYS2d 837, 838 [2d Dept 2010]).

Grossman described himself as a voluntary surgeon, independent from the nursing home with privileges to practice surgery and see patients on premises. The nursing home defendants have not disputed this. However, Grossman goes further arguing that by virtue of his independent contractor status, he has no access to or responsibility for patient electronic medical records. Obviously, this has significance as the law of informed consent shifts the responsibility to obtain informed consent for patient procedures onto the treatment care providers and not the facility, unless it is reasonable for the facility to take note of the practitioner's practice in absence of consent, as alleged here. The courts hold as much remarking that generally "under the doctrine of *respondeat superior*, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but

not for negligent treatment provided by an independent physician, as when the physician is retained by the patient." Thus, where hospital staff, such as resident physicians and nurses, have participated in the treatment of the patient, the hospital may not be held vicariously liable for resulting injuries where the hospital employees merely carried out the private attending physician's orders. But, these rules shielding a hospital from liability do not apply when (1) "the staff follows orders despite knowing 'that the doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders' "; (2) the hospital's employees have committed independent acts of negligence (***Cynamon v Mount Sinai Hosp.***, 163 AD3d 923, 924-25, 81 NYS3d 520, 522 [2d Dept 2018]).

The motion record is deficient in its current form to resolve this issue in either party's favor and thus defendants correctly note that additional discovery is necessary on this question. Thus, the motion must be **denied** on this separate and independent ground as well.

C. Timeliness of the Informed Consent Claim

The nursing home defendant moving separately seeks dismissal of plaintiff's complaint at the most, or at the least the third cause of action, making arguments sounding in failure to state a cause of action and expiration of the applicable statute of limitations. Relying on the common law, defendant argues that although plaintiff pleads medical malpractice by lack of informed consent, that this is mistaken and fails to state a claim. Rather, defendant contends plaintiff's true claim sounds in intentional tort, to wit a battery, since the essence of the claim is that defendants committed a harmful and offensive bodily touching on the decedent having effectuated a procedure in absence of informed consent. This appears to the Court to be more than semantics. In other words, the Court construes defendant's argument to be this case is not one of consent at all, somewhat consistent with plaintiff's arguments previously cited, since it is undisputed no consent was ever elicited by Grossman, and the nursing home's records reflect a refusal to grant consent on decedent's behalf by his proxies. Defendant continues arguing that since battery has a 1-year statute of limitations per CPLR 215, the complaint is untimely.2

Standard of Review

When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, a court must "give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference" (***Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, N.A. v Nomura Credit & Capital, Inc.***, 30 NY3d 572, 582 [2017]; ***Nonnon v. City of New York***, 9 NY3d 825, 827; ***Leon v. Martinez***, 84 NY2d 83, 87–88; ***Paolicelli v. Fieldbridge Assoc., LLC***, 120 AD3d 643, 644; ***Wallkill Med. Dev., LLC v Catskill Orange Orthopaedics, P.C.***, 131 AD3d 601, 603 [2d Dept 2015]).

2 Here, the Court believes there may be some confusion on defendant's part. It is clear that if defendant is successful in its motion, the third cause of action would be dismissed as time-barred. Plaintiff plead medical malpractice by lack of informed consent and further sought the benefit of the 2 ½ statute of limitations, while defendant seeks dismissal under the 1-year intentional tort statute. However, the remaining balance of the pleadings seeks recovery for wrongful death and statutory nursing home negligence. The motion papers do not address whether or not a wrongful death claim would be viable or not, thus those arguments are not before the Court. Further, the motion record before the Court is not read to make any argument whatsoever concerning negligence which would be viewed under a 3-year statute. At any rate, where plaintiff would be timely under the 2 ½ year period, it is obvious the complaint would then be timely under the more generous 3-year statute.

Nonetheless, the courts are reminded that on a motion to dismiss the facts pleaded are presumed to be true and are to be accorded every favorable inference, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration" (***Intl. Fid. Ins. Co. v Quenzer Elec. Sys., Inc.***, 132 AD3d 811, 812 [2d Dept 2015]). "At the same time, however, allegations consisting of bare legal conclusions ... are not entitled to any such consideration." Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery (***Connaughton v Chipotle Mexican Grill, Inc.***, 29 NY3d 137, 141-42 [2017]).

Furthermore, "[a] court may consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7). Thus, "[w]here evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (***Lubonty v U.S. Bank N.A.***, 159 AD3d 962, 963, 74 NYS3d 279, 281 [2d Dept 2018], *lv to appeal granted,* 32 NY3d 903 [2018]).

To dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired." "If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period (***Campone v Panos***, 142 AD3d 1126, 1127, 38 NYS3d 226, 227 [2d Dept 2016]).

Substantively speaking, plaintiff's burden on the law for recovery for battery is to generally demonstrate are bodily contact, made with intent, and offensive in nature' " (***Siegell v Herricks Union Free School Dist.***, 7 AD3d 607, 609, 777 NYS2d 148, 151 [2d Dept 2004]). The intent required for battery is "intent to cause a bodily contact that a reasonable person would find offensive," but however "[t]here is no requirement that the contact be intended to cause harm" (***Cerilli v Kezis***, 16 AD3d 363, 364, 790 NYS2d 714, 715 [2d Dept 2005]).

As aforementioned, the applicable law governing the true nature of plaintiff's claim is murky and grey. The different departments of the Appellate Division have noted tension and accordingly struggled on the question of discerning whether an unconsented to surgical procedure constitutes medical malpractice by lack of informed consent or a common law battery (*compare* ***Messina v Matarasso***, 284 AD2d 32, 34, 729 NYS2d 4, 6 [1st Dept 2001][examining the common law approach followed in the Second Department and rejecting it adopting the modern view, holding that "[u]nder traditional tort law, medical treatment beyond the scope of a patient's consent was considered an intentional tort or a species of assault and battery, whereas under [t]he modern approach, however, the failure to obtain the informed consent of a patient [viewed] as "a form of medical malpractice based on negligence."]; *with* ***Rigie v Goldman***, 148 AD2d 23, 28-29, 543 NYS2d 983, 986 [2d Dept 1989][examining prior precedent and reasoning that "[a]n action to recover damages for lack of informed consent was traditionally viewed as

constituting the common-law tort of assault and battery," but under the modern view, however, "except in nonexigent situations involving no consent at all the failure of a doctor to properly inform his patient of the risks of an operation is to be regarded as a species of malpractice based upon negligence"]; *accord* ***VanBrocklen v Erie County Med. Ctr.***, 96 AD3d 1394, 1394, 949 NYS2d 300, 301 [4th Dept 2012][ruling that "[c]ontrary to defendant's contention, claims asserting the complete absence of consent, as opposed to those asserting that defendant exceeded the scope of plaintiff's consent, properly may be treated as claims for battery rather than for medical malpractice" recognizing it "well settled that a medical professional may be deemed to have committed battery, rather than malpractice, if he or she carries out a procedure or treatment to which the patient has provided 'no consent at all' "]).

Here, plaintiff argued as outlined previously, and defendants in varying degrees concede, that no consent to the bedside debridement was elicited. Defendants have argued that the debridement itself may not have constituted "surgery" with no corroborating evidence. They have also argued that a more blanket and generalized consent may have existed in the form of decedent's original admission into the nursing home facility, or later in the form of a New York State hospice Medical Order on Life Sustaining Treatment form ("MOLST"). But at the same time, arguing in the alternative, defendants in opposition to summary judgment and in support of dismissal, have contended that plaintiff's case presents a scenario where no consent existed, rather than the medical malpractice case where defendant-surgeon or provider performed a procedure with a failure to reasonable or completely explain all attendant risks. Thus, the Court finds defendant-movant's argument compelling here, particularly where, plaintiff albeit in a misguided attempt on its motion and cross-motion, argued that consent was not at play in its case.

In resolving defendant's application then, the Court is guided by recent Second Department precedent which holds "[i]n determining which limitations period is applicable to a given cause of action, the court must look to the substance of the allegations rather than to the characterization of those allegations by the parties. Thus, where defendants established that the one-year statute of limitations for intentional torts applied in the face of plaintiff's allegation that the defendants performed an unauthorized procedure upon her, constituted an allegation of intentional conduct rather than conduct that can be construed as a deviation from a reasonable standard of care. Resolving the matter then, the Court held that plaintiff could not avoid the running of the limitations period by attempting to couch the claim as one sounding in negligence, medical malpractice, or lack of informed consent (***Dray v Staten Is. Univ. Hosp.***, 160 AD3d 614, 617-18, 75 NYS3d 59, 63 [2d Dept 2018]).

Here, the central thrust of plaintiff's complaint is that defendants went ahead with the bedside debride, despite acknowledging and noting in progress notes, that both plaintiff and her daughter, explicitly refused to consent to such a procedure. Fact questions may remain on both defendant's part as to who knew what and when, and/or whose responsibility it was to check decedent's chart and acknowledge the lack of consent and endeavor to obtain it. Defendants have put some reliance on the idea that the reasonable and prudent patient would have consented to the procedure given decedent's multiple comorbidities and diagnoses, and on speculation that absent the debridement, decedent presented at an elevated risk for sepsis which alone may have precipitated his death. Those questions remain unanswered here as at the present the Court's role is to determine which cause of action the plaintiff advances and which limitations period applies. Because the brunt of plaintiff's third cause of action complains of an unconsented to

determine that that aspect of the complaint sounds in the intentional tort of battery. Accordingly, then, it is incumbent on plaintiff to demonstrate that the claim is untimely.

Here, decedent expired on at 11:50 p.m. on November 3, 2015, the same day of the bedside debridement performed by Grossman. This action was electronically commenced via NYSCEF by plaintiff on February 7, 2017, well outside the 1-year statute of limitations for intentional torts set out in CPLR 215. Thus, defendant is correct that plaintiff's third cause of action is time-barred. As a result, defendant's motion to dismiss is **granted** and the third cause of action in plaintiff's complaint is hereby **dismissed**.

The foregoing constitutes the decision and order of this Court.

Dated: April 15, 2019
Riverhead, New York

WILLIAM G. FORD, J.S.C.

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