Momah v Huntington Hosp.
2020 NY Slip Op 33397(U)
October 15, 2020
Supreme Court, Suffolk County
Docket Number: 35712/2012
Judge: Martha L. Luft

[* 1]

SHORT FORM ORDER

INDEX No. 35712/2012
CAL. No. 201901082MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 9/10/19 (002)
MOTION DATE 10/8/19 (003)
MOTION DATE 10/24/19 (004)
MOTION DATE 11/12/19 (005)
MOTION DATE 11/26/19 (006)
ADJ. DATE 6/30/20
Mot. Seq. # 002 MD # 003 MD
004 MotD # 005 MD
006 MG

NATHAN MOMAH,

Plaintiff,

- against-

HUNTINGTON HOSPITAL, NORTH SHORE UNIVERSITY HOSPITAL MANHASSET, MICHELLE BROSNAN, M.D., MUSARAT SHAREEFF, M.D., JEFFREY M. KATZ, M.D. and MANAGUAS RICARDO,

Defendants.

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HUNTINGTON HOSPITAL, NORTH SHORE UNIVERSITY HOSPITAL, MANHASSET, MICHELLE BROSNAN, M.D., and JEFFREY M. KATZ, M.D,

Third-Party Plaintiffs,

- against-

CROSS COUNTRY TRAVCORPS, INC., CROSS COUNTRY STAFFING, and NIGHTINGALE NURSES, LLC,

Third-Party Defendants.

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Upon the following papers numbered 1 to 145 read on these motions for summary judgment, to discontinue : Notice of Motion/ Order to Show Cause and supporting papers 1-26; 27-42; 43-70; 71-95; 96-104 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 105-116; 117-143 ; Replying Affidavits and supporting papers 144-145 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#002) by defendant Musarat Shareeff, M.D., the motion (#003) by third-party defendant Nightingale Nurses, LLC, the motion (#004) by defendants Michelle Brosnan, M.D., Jeffrey M. Katz, M.D., Huntington Hospital, and North Shore University Hospital, s/h/a North Shore University Hospital, Manhasset, the motion (#005) by defendants Cross Country Travcorps., Inc. and Cross Country Staffing, and the motion (#006) by defendant Musarat Shareeff, M.D., are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendant Musarat Shareeff, M.D. for summary judgment dismissing the complaint as asserted against him is denied, as moot; and it is further

ORDERED that the motion by third-party defendant Nightingale Nurses, LLC for summary judgment dismissing the third-party complaint as asserted against it is denied;

ORDERED that the motion by defendants Michelle Brosnan, M.D., Jeffrey M. Katz, M.D., Huntington Hospital and North Shore University Hospital, s/h/a North Shore University Hospital, Manhasset, for summary judgment dismissing the complaint as asserted them is granted in part, and denied in part; and it is further

ORDERED that the motion by defendants Cross Country Travcorps., Inc. and Cross Country Staffing, Inc., s/h/a Cross Country Staffing, for summary judgment dismissing the third-party complaint as asserted against them is denied; and it is further

ORDERED that the unopposed motion by defendant Musarat Shareeff, M.D., to discontinue the action as asserted against him is granted.

This is a medical malpractice action brought to recover damages for injuries allegedly arising from the treatment of plaintiff Nathan Momah by defendants Musarat Shareeff, M.D., Michelle Bronson, M.D., Huntington Hospital, Jeffrey M. Katz, M.D., Ricardo Managuas, s/h/a Managuas Ricardo, and North Shore University Hospital Manhasset (NSUH). Plaintiff alleges that defendants were negligent in, inter alia, failing to diagnose and properly treat his cerebrovascular accident (CVA). Dr. Bronson, Dr. Katz, Huntington Hospital and NSUH subsequently brought a third-party action against defendants Nightingale Nurses, LLC (Nightingale), Cross Country Travcorps, Inc. and Cross Country Staffing, Inc. (Cross Country) for the alleged negligence of Mr. Managuas and for contribution and indemnification.

The facts, subject to some dispute, can be summarized as follows: at the time of the incidents giving rise to this action,plaintiff was a 61-year-old man with a past history of cerebrovascular accident (CVA), hypertension and sarcoidosis. On April 20, 2011, plaintiff testified that he went to work as usual, and reported feeling normal during the day. Plaintiff testified that when he returned home at approximately 4:00 p.m., he felt tired and lay down to take a nap. Plaintiff's wife, Gloria Momah, testified that she observed him stagger and fall as he attempted to get out of his bed at approximately 6:00 p.m., and that she and their son encouraged him to go to the hospital.

At 8:35 p.m., plaintiff presented to the emergency department at Huntington Hospital. Plaintiff testified that he did not have any numbness, and was not experiencing any difficulty moving, speaking, or with his vision. At 8:52 p.m., plaintiff was triaged by defendant Richard Managuas, R.N. Mr. Managuas documented plaintiff's chief complaints as dizziness and weakness of the left leg, and recorded plaintiff's blood pressure at 162/102. Mr. Managuas triaged plaintiff as "ESI 3." An intravenous line was placed at 9:05 p.m.

At 9:15 p.m., plaintiff was evaluated by Dr. Brosnan, who was assigned as attending physician. Dr. Bronson testified that she was not alerted to plaintiff's stroke-like symptoms upon his arrival, but immediately became concerned for stroke when she reviewed the triage notes on his chart. Dr. Brosnan testified that she performed a physical examination and noted that plaintiff was alert and oriented, but that his neurological exam was significant for "some sort of neurological event," as he was observed with flattening of his left nasolabial fold and was displaying a slight left pronar drift. Dr. Bronson testified that she implemented stroke protocols at this time.

At 9:30 p.m., Dr. Bronson testified that she placed orders for a STAT CT scan, blood work, and a neurology consultation. Dr. Bronson testified that the purpose of these orders were to evaluate whether plaintiff was a candidate for tPA therapy for stroke. Dr. Bronson testified that she did not order tPA immediately upon suspicion of a stroke, because testing needed to be completed and a neurologist needed to be consulted. At the same time, Dr. Bronson testified that she directly contacted Dr. Shareeff, a neurologist, and noted plaintiff's blood pressure to be 188/112.

At 9:33 p.m., plaintiff was taken to radiology for a STAT CT scan of his brain. The CT scan was interpreted by radiologist Mohuchy, who reported "moderate periventricular and deep white matter ischemia,

faint hypodensity involving the posterior left front gyri, which may reflect early infarction." These results were discussed with Dr. Shareeff.

At 9:45 p.m., Dr. Shareeff testified that she provided a neurology consultation. Dr. Shareeff noted plaintiff's blood pressure to be 170/110, and considered that to be "borderline" for the administration of tPA. She testified that she reviewed plaintiff's laboratory results, and noted his creatinine level to be elevated, signaling renal dysfunction. Dr. Shareeff testified that the elevated creatinine meant that plaintiff could not undergo a CT angiogram to evaluate for stroke, as his kidneys would not be able to clear the contrast, which could result in kidney injury. Dr. Shareeff testified that she obtained a history from Ms. Momah, who stated that plaintiff's symptoms began at 6:00 p.m., that they initially improved, but became worse, which prompted her to take plaintiff to the hospital. Dr. Shareeff calculated plaintiff to have an NIH stroke score of 4, which is mild stroke. She further testified that the plan of care at that time included consideration of tPA, if his blood pressure stabilized. Dr. Shareeff testified that tPA must be given within three hours of stroke symptom onset, but that tPA could be given "off-label" at a maximum of four and a half hours, if certain criteria are met.

At 9:55 p.m., intravenous labetalol was administered in an effort to lower plaintiff's blood pressure, as Dr. Bronson testified that a blood pressure at or above 185/110 can result in bleeding in the brain if tPA is administered. At 10:10 p.m., plaintiff's blood pressure was 150/115, and Dr. Bronson administered a second dose of labetalol. At 10:15 p.m., Dr. Shareeff testified that she had a conversation with Ms. Momah with respect to the administration of tPA outside of the three hour window, but that Ms. Momah was hesitant about consenting without first speaking to another family member, who was a physician.

At 10:20 p.m., plaintiff's blood pressure was noted to be 188/112, despite two doses of IV medication. Dr. Shareeff testified that at this time, given his high blood pressure, she contacted Dr. Katz on his cell phone to discuss plaintiff's plan of care. Dr. Shareeff testified that she reached out to Dr. Katz because he was the vascular director at NSUH. Dr. Shareeff testified that based on his consult, the decision was made not to administer tPA within the 4½-hour window, and because any attempt to further lower his blood pressure with medication would result in extending past the window. At 10:25 p.m., Dr. Shareeff noted plaintiff's blood pressure to be 183/112, and the decision was made not to administer tPA, and to transfer plaintiff to North Shore University Hospital for stroke rescue, evaluation and management. Dr. Katz accepted the transfer request.

At 11:52 p.m., plaintiff presented to NSUH via ambulance transfer and was admitted to the ICU and Dr. Katz's service, but was cared for throughout his admission by Dr. Adrian Marchidann, a neurologist. On April 21, plaintiff was evaluated by Dr. Marchidann, who observed dysarthria, left facial weakness, and a drift of the left arm and leg. The plan of care was to perform a stroke work-up. At 10:20 p.m., an MRI was performed, which revealed an acute right basal ganglia infarct, and immediately thereafter, an MRA was performed, which revealed a tortuous right supraclinoid internal carotid artery. Immediately after the imaging, plaintiff complained of worsening weakness in his left leg. Dr. Marchidann performed a neurological examination, which revealed a marked decrease in motor strength. At 1:23 a.m. on April 22, a repeat non-contrast head CT was performed, which revealed a "subtly evident" acute right posterior radiate infarct and moderate white matter microvascular ischemic disease.

On April 23, Dr. Marchidann performed a neurological examination, which revealed improvement in plaintiff's left sided weakness. On April 24, Dr. Marchidann recommended a lumbar puncture to evaluate for evidence of inflammation consistent with neurosarcoidosis or vasulitis, as a possible cause of plaintiff's symptoms, but plaintiff refused. On April 25, at 3:30 a.m., plaintiff complained of increased weakness to his left arm. At 3:54 a.m., a STAT non-contrast CT scan was performed, which showed findings consistent with the evolution of the acute infarct in the area of the right basal ganglia. A rheumatology consult and lumbar puncture was recommended, to evaluate for potential vasculitis. Plaintiff again refused the lumbar puncture. At 11:00 a.m., a rheumatology consult was performed by Dr. Horowitz, who noted a moderate suspicion for vasculitis. Dr. Horowitz recommended a lumbar puncture and a renal artery doppler, but plaintiff refused these tests.

On April 27, Dr. Katz evaluated plaintiff for the first time. Dr. Katz noted plaintiff's blood pressure to be 164/98, and that he had weakness in his left arm and leg. Plaintiff was subsequently discharged to Southside Hospital for rehabilitation the same day.

Dr. Brosnan, Huntington Hospital, Dr. Katz, and NSUH (collectively North Shore defendants) now move for summary judgment. Dr. Brosnan, Dr. Katz and NSUH move to dismiss the complaint as asserted against them, and Huntington Hospital moves to dismiss any independent claims as asserted against it, as well as vicarious liability on behalf of Mr. Managuas. Dr. Brosnan and Huntington Hospital argue that the care and treatment provided by them was in accordance with the standard of care, and that the care provided was not the proximate cause of plaintiff's alleged injuries. Further, Huntington Hospital argues that Ricardo Managuas was a non-employee agency nurse provided by third-party defendant Nightingale, and, as such, it cannot be vicariously liable for his alleged negligence. In support of its motion, the North Shore defendants submit, inter alia, the affirmations of James Bopp, M.D., Joseph Jaret, M.D., copies of plaintiff's certified medical records from Huntington Hospital and NSUH, and the transcripts of the deposition testimony of plaintiff, Dr. Brosnan, Dr. Katz, Dr. Shareeff, and of non-party, Gloria Momah. Plaintiff opposes the branch of the motion by Dr. Brosnan and Huntington Hospital, arguing that the emergency department staff of Huntington Hospital failed to properly triage, monitor and treat plaintiff's stroke-like symptoms, that questions of fact exist with respect to whether these failures were a departure from good and accepted medical practice, and as to whether these departures were proximate causes of his injuries. With respect to Dr. Brosnan, plaintiff argues that questions of fact exist with respect to whether her failure to administer tPA in a timely manner was a deviation from good and accepted medical practice, and that questions of fact exist with respect to whether this deviation was a proximate cause of his injuries. Plaintiff submits, inter alia, a copy of the contract that exists between Cross Country and Nightingale, which includes an attachment which references North Shore Long Island Jewish Health System, the affirmation of Richard Lechtenberg, M.D., and the affidavit of Evamaria Breslin, R.N.

Nightingale also moves for summary judgment dismissing the third-party complaint as asserted against it, arguing that its employee, Mr. Managuas, did not deviate or depart from the applicable standard of nursing care, and that if there was a deviation or departure, this was not a proximate cause of plaintiff's alleged injuries. Nightingale submits, inter alia, the affirmation of John C. Rohe, M.D., a portion of plaintiff's certified medical records from Huntington Hospital, and the transcripts of the deposition testimony of plaintiff, Gloria Momah and Ony Momah. Plaintiff opposes the motion, arguing that questions of fact exist with respect to whether Mr. Managuas deviated or departed from the applicable standard of nursing care in his treatment of plaintiff. Plaintiff submits, inter alia, a copy of the contract that exists

between Cross Country and Nightingale, which includes an attachment referencing North Shore Long Island Jewish Health System, the affirmation of Richard Lechtenberg, M.D., and the affidavit of Evamaria Breslin, R.N. The North Shore defendants also oppose the motion, arguing that issues of fact exist with respect to the negligence of Mr. Managuas. The North Shore defendants submit, inter alia, the affirmation of James Bopp, M.D.

Cross Country also moves for summary judgment dismissing the third-party complaint as asserted against it, arguing that it did not directly employ Mr. Managuas, or, in the alternative, that Mr. Managuas did not depart from good and accepted medical practice in his treatment of plaintiff, and that his actions or omissions were not a proximate cause of plaintiff's alleged injuries. In support of its motion, Cross Country submits, inter alia, the affirmation of Stanley Tuhrim, M.D., a copy of the agreement between Cross Country and Nightingale, and the affirmation of Steven Rudolph, M.D., submitted on behalf of Dr. Shareeff. Plaintiff opposes the motion, arguing that questions of fact exist with respect to whether Mr. Managuas deviated or departed from the applicable standard of nursing care in his treatment of plaintiff. Plaintiff submits, inter alia, a copy of the contract that exists between Cross Country and Nightingale, which includes an attachment referencing North Shore Long Island Jewish Health System, the affirmation of Richard Lechtenberg, M.D., and the affidavit of Evamaria Breslin, R.N. The North Shore defendants also oppose the motion, arguing that issues of fact exist with respect to the negligence of Mr. Managuas. The North Shore defendants submit, inter alia, the affirmation of James Bopp, M.D.

A medical malpractice action, which is a type of negligence action, involves three basic duties of care owed to a patient by a professional health care provider and hospital: (1) the duty to possess the same knowledge and skill that is possessed by an average member of the medical profession in the locality where the provider practices; (2) the duty to use reasonable care and diligence in the exercise of his or her professional knowledge and skill; and (3) the duty to use best judgment applying his or her knowledge and exercising his or her skill (*see* ***Nestorowich v Ricotta***, 97 NY2d 393, 740 NYS2d 668 [2002]; ***Pike v Honsinger***, 155 NY 201, 49 NE 760 [1898]). As healthcare providers, doctors and hospitals owe a duty of reasonable care to their patients while rendering medical treatment; a breach of this duty constitutes medical malpractice (*see* ***Dupree v Giugliano***, 20 NY3d 921, 924, 958 NYS2d 312, 314 [2012]; ***Tracy v Vassar Bros. Hosp.***, 130 AD3d 713, 715, 13 NYS3d 226, 288 [2d Dept 2015], *quoting* ***Scott v Uljanov***, 74 NY2d 673, 675, 543 NYS2d 369 [1989]). A plaintiff asserting a claim for medical malpractice, therefore, must present proof (1) that the defendant deviated or departed from accepted standards of medical practice, and (2) that such deviation or departure was a proximate cause of his or her injury or damage (*see* ***Lowe v Japal***, 170 AD3d 701, 95 NYS3d 363 [2d Dept 2019]; ***Gullo v Bellhaven Ctr. for Geriatric & Rehabilitative Care, Inc.***, 157 AD3d 773, 69 NYS3d 108 [2d Dept 2018]; ***Duvidovich v George***, 122 AD3d 666, 995 NYS2d 616 [2d Dept 2014]; ***Schmitt v Medford Kidney Ctr.***, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]). A plaintiff must also present proof that the defendant's deviation of care was a substantial factor in bringing about his or her injury (*see* ***Wild v Catholic Health Sys.***, 21 NY3d 951, 969 NYS2d 846 [2013]; ***Zak v Brookhaven Memorial Hosp. Med. Ctr.***, 54 AD3d 852, 863 NYS2d 821 [2d Dept 2008]; ***Lyons v McCauley***, 252 AD2d 516, 675 NYS2d 375 [2d Dept 1998]).

It is fundamental that the primary duty of a hospital's staff is to follow the physician's orders, and that a hospital, generally, will be protected from tort liability if its staff follows the orders (***Toth v Community Hosp. at Glen Cove***, 22 NY2d 255, 265, 292 NYS2d 440 [1968]; *see* ***Sledziewski v Cioffi***, 137 AD2d 186, 538 NYS2d 913 [3d Dept 1988]). "A hospital may not be held vicariously liable for the

malpractice of a private attending physician who is not an employee and may not be held concurrently liable unless its employees committed independent acts of negligence or the attending physician's orders were contraindicated by normal practice such that ordinary prudence required inquiry into the correctness of the same" (***Toth v Bloshinsky***, 39 AD3d 848, 850, 835 NYS2d 301 [2d Dept 2007]; *see* ***Sela v Katz***, 78 AD3d 681, 911 NYS2d 112 [2d Dept 2010]; ***Cerny v Williams***, 32 AD3d 881, 882 NYS2d 548 [2d Dept 2006]). "A hospital may also be held liable on a negligent hiring and/or retention theory to the extent that its employee committed an independent act of negligence outside the scope of employment, where the hospital was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act" (***Doe v Gutherie Clinic, Ltd.***, 22 NY3d 480, 485, 982 NYS2d 431 [2014]; *see* ***Sieden v Sonstein***, 127 AD3d 1158, 7 NYS3d 565 [2015]). Furthermore, a hospital will not be found liable for damages caused by an employee's negligence under a theory of negligent hiring, supervision and retention, where the employee is acting within the scope of his or her employment (*see* ***Simpson v Edghill***, 169 AD3d 737, 93 NYS3d 399 [2d Dept 2019]; ***Henry v Sunrise Manor Ctr. for Nursing & Rehabilitation***, 147 AD3d 739, 46 NYS3d 649 [2d Dept 2017]).

A defendant seeking summary judgment on a medical malpractice claim has the initial burden of establishing, through medical records and competent expert affidavits, the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured thereby (*see* ***Gullo v Bellhaven Ctr. for Geriatric Rehabilitative Care, Inc.***, *supra*; ***Stucchio v Bikvan***, 155 AD3d 666, 63 NYS3d 498 [2d Dept 2017]; ***Mackauer v Parikh***, 148 AD3d 873, 49 NYS3d 488 [2d Dept 2017]; ***Feuer v Ng***, 136 AD3d 704, 24 NYS3d 198 [2d Dept 2016]). The defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see* ***Sheppard v Brookhaven Mem. Hosp. Ctr.***, 171 AD3d 1234, 98 NYS3d 629 [2d Dept 2019]; ***Mackauer v Parikh***, *supra*; ***Wall v Flushing Hosp. Med. Ctr.***, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]). The burden is not met "if defendant's expert renders an opinion that is conclusory in nature or unsupported by competent evidence" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]; *see* ***Smarkucki v Kleinman***, 171 AD3d 1118, 98 NYS3d 232 [2d Dept 2019]; ***Bongiovanni v Cavagnuolo***, 138 AD3d 12, 24 NYS3d 689 [2d Dept 2016]; ***Duvidovich v George***, *supra*). Once this burden is satisfied, in opposition, a plaintiff must submit evidentiary proof "to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact" (***Stukas v Streiter***, 83 AD3d 18, 24, 918 NYS2d 176 [2d Dept 2011], quoting ***Deutsch v Claglassian***, 71 AD3d 718, 719, 896 NYS2d 431 [2d Dept 2010]; *see* ***Wagner v Parker***, 172 AD3d 954, 100 NYS3d 280 [2d Dept 2019]; ***Gray v Patel***, 171 AD3d 1141, 99 NYS3d 76 [2d Dept 2019]). The burden on the plaintiff is not to prove his or her entire case, but "merely to raise a triable issue of fact with respect to the elements or theories established by the moving party (***Stukas v Streiter***, *supra* at 25). Summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (*see* ***Lefkowitz v Kelly***, 170 AD3d 1148, 96 NYS3d 642 [2d Dept 2019]; ***Jagenburg v Chen-Stiebel***, 165 AD3d 1239, 85 NYS3d 558 [2d Dept 2018]; ***Leto v Feld***, 131 AD3d 590, 15 NYS3d 208 [2d Dept 2015]).

With respect to the motion by the North Shore defendants, each has established, prima facie, entitlement to summary judgment to the relief requested. The North Shore defendants submit the affirmation of James Bopp, M.D., who avers that he is licensed to practice medicine in New York State and that he is board certified in internal medicine and emergency medicine. With respect to Dr. Brosnan, Dr. Bopp opines, within a reasonable degree of medical certainty, that the care and treatment provided to plaintiff by Dr. Brosnan on April 20, 2011 was in accord with the appropriate standard of care, and that the care and treatment she provided did not cause or contribute to plaintiff's alleged injuries. Dr. Bopp notes that Dr.

Brosnan was not immediately notified of plaintiff's presence in the emergency department, that plaintiff was triaged as an ESI 3 priority, and that she was not involved in his triage. Dr. Bopp opines that Dr. Brosnan timely evaluated plaintiff at 9:15 p.m., within 22 minutes of his triage, considering the fact that she did not have prior knowledge of his stroke-like symptoms. Dr. Bopp opines that Dr. Bronson's evaluation of plaintiff was appropriate, and that she did not fail to appreciate his medical history. Dr. Bopp further opines that after Dr. Brosnan recognized plaintiff's symptoms, she acted within the standard of care and appropriately ordered a STAT non-contrast head CT and a neurology consult. With respect to the decision to not administer tPA, Dr. Bopp opines, within a reasonable degree of medical certainty, that plaintiff was not a candidate for tPA during his presentation to Huntington Hospital given the timing of the onset of his symptoms and his high and unstable blood pressure. Dr. Bopp explains that, with respect to the use of tPA, both the standard of care in 2011 and the FDA guidelines required a patient's blood pressure to be maintained below 180/105 in the 24-hours following any administration of tPA, and that the purpose of this guideline was to avoid the potentially fatal complication of intracranial hemorrhage. Dr. Bopp opines that it was appropriate for Dr. Bronson to administer labetalol in an attempt to lower and stabilize plaintiff's blood pressure so that he could be considered a candidate for tPA. Dr. Bopp opines that plaintiff's blood pressure was too high, despite administration of labetalol, to be a candidate for tPA by the end of the 4½-hour window. Finally, Dr. Bopp opines that it was appropriate for Dr. Shareeff, in consultation with Dr. Brosnan, to communicate with Dr. Katz and NSUH with respect to plaintiff's transfer and that it was not a deviation from the standard of care for Dr. Shareeff, not Dr. Bronson, to have this communication.

With respect to Huntington Hospital, Dr. Bopp opines, within a reasonable degree of medical certainty, plaintiff was appropriately monitored by the Huntington Hospital nursing staff, not including Mr. Managuas, his vital signs were taken at appropriate intervals, diagnostic studies were performed timely, a neurology consult was timely provided, and his was timely and appropriately transferred to NSUH. Dr. Bopp further opines that Huntington Hospital's stroke protocols were in accord with the standards of care in emergency medicine as they existed in 2011.

The North Shore defendants also submit the affirmation of Joseph Jeret, M.D., who avers that he is licensed to practice medicine in New York State and that he is board certified in neurology. With respect to Dr. Katz and NSUH, Dr. Jeret opines, within a reasonable degree of medical certainty, that the care and treatment provided by him was at all times in accord with appropriate standards of care as they existed in 2011, and that the care and treatment provided by him did not cause or contribute to plaintiff's alleged injuries. Dr. Jeret notes that while plaintiff was admitted to the service of Dr. Katz on April 20, 2011, plaintiff was primarily cared for by Dr. Katz's colleague, non-party Dr. Adrian Marchidann. However, with respect to plaintiff's allegation that Dr. Katz failed to administer tPA, Dr. Jeret states that the standard of care in 2011 was for tPA to be administered to patients within three hours of symptoms of stroke,and to allow for the "off-label use" of tPA within a 4½-hour window. Dr. Jeret notes that plaintiff arrived to NSUH and was admitted to Dr. Katz's service at 11:52 p.m. on April 20, approximately six hours after plaintiff's reported onset of symptoms. Dr. Jeret opines that it was not a deviation or departure from the standard of care for Dr. Katz not to administer tPA six hours after the onset of stroke symptoms. Dr. Jeret also opines that Dr. Katz and the staff at NSUH appropriately considered plaintiff's medical history and that the plan of care that was developed appropriately considered same and appropriately treated plaintiff's CVA. Dr. Jeret further opines that plaintiff received the appropriate diagnostic tests and interdisciplinary consultations throughout his admission to NSUH.

The North Shore defendants having met their prima facie burden on the motion, the burden now shifts to plaintiff to raise a triable issue of fact necessitating a trial (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Stiso v Berlin***, 176 AD3d 888, 110 NYS3d 139 [2d Dept 2019]; ***Stukas v Streiter***, *supra*). Plaintiff has failed to oppose the branch of the motion by Dr. Katz and NSUH. As plaintiff fails to oppose this branch of the motion which, in effect, is a concession that no question of fact exists, and the facts as alleged in the moving papers may be deemed admitted (*see* ***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; ***114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC***, 178 AD3d 757, 114 NYS3d 100 [2d Dept 2019]). Accordingly, the branch of the motion by Dr. Katz and NSUH is granted and the complaint is dismissed as against them.

With respect to Dr. Brosnan and Huntington Hospital, plaintiff has submitted evidence, in admissible form, sufficient to raise triable issues of fact, as the opinion of his experts describes the applicable standards of care under the circumstances, explains how Dr. Brosnan and Huntington Hospital deviated or departed from such standards, and concludes that these departures were competent causes of plaintiff's alleged injuries (*see* ***Smith v Mollica***, 158 AD3d 656, 70 NYS3d 234 [2d Dept 2018]; ***Omane v Sambaziotis***, 150 AD3d 1126, 55 NYS3d 345 [2d Dept 2017]; ***Williams v Bayley Seton Hosp.***, *supra*; ***Stukas v Streiter***, *supra*). Plaintiff submits the affirmation of Richard Lechtenberg, M.D., who avers that he is licensed to practice medicine in New York State and that he is board certified in neurology. Dr. Lechtenberg opines, within a reasonable degree of medical certainty, that the care and treatment provided to plaintiff by Dr. Brosnan and Huntington Hospital staff deviated from the acceptable standard of care, and that the care and treatment provided, or withheld, proximately caused plaintiff's alleged injuries. Dr. Lechtenberg opines that it was a deviation from the standard of care and a deviation from Huntington Hospital's stroke protocols for hospital staff to fail to appreciate plaintiff's stroke symptoms on triage, to fail to call a stroke code, and to fail to notify Dr. Bronson immediately. Further, Dr. Lechtenberg opines that it was a deviation for Dr. Bronson to delay administration of tPA to wait for the results of a CT angiogram that was, in his opinion, unnecessary and never performed. Dr. Lectenberg opines that Dr. Bronson should have administered tPA within the three-hour window when the CT scan revealed no intracranial bleed, and that cardiac monitoring revealed no evidence of a cardiac event. Dr. Lectenberg notes that plaintiff's blood pressure began to rise after 9:45 p.m., but that he was still a candidate for tPA at that time. Dr. Lechtenberg opines that all of the requisite tests that needed to be administered prior to the administration of tPA should have been completed within 30 to 45 minutes of his arrival, and that the delays caused by Dr. Bronson and the staff at Huntington Hospital resulted in plaintiff not receiving tPA. Dr. Lechtenberg opines that if plaintiff was administered tPA in a timely manner, he would have experienced a full or near full recovery of his neurological function.

As plaintiff, Dr. Bronson and Huntington Hospital have presented conflicting opinions by medical experts as to whether a departure from good and accepted medical practice occurred, and as to the proximate cause of plaintiff's alleged injuries, an order granting summary judgment is not appropriate (*see* ***Lefkowitz v Kelly***, *supra*; ***Jagenburg v Chen-Stiebel***, *supra*; ***Leto v Feld***, *supra*).

With respect to Nightingale and its employee, Mr. Managuas, it has failed to establish, prima facie, entitlement to summary judgment on the medical malpractice cause of action. Nightingale submits the affirmation of John Rohe, M.D., who avers that he is licensed to practice medicine in New York State and that he is board certified in emergency medicine. Dr. Rohe opines that there were no departures from accepted standards of medical care on the part of "anyone at Huntington Hospital Emergency Department," that plaintiff was "managed, evaluated, tested, examined and assessed in an expeditious manner by all health

care providers," and that plaintiff was not denied an opportunity for tPA administration. However, the affirmation of Dr. Rohe fails to address all of the allegations in the bill of particulars and his opinions with respect to proximate cause are conclusory (*see* ***Kogan v Bizekis***, 180 AD3d 659, 115 NYS3d 690 [2d Dept 2020]; ***Macias v Ferzli***, 131 AD3d 673, 15 NYS3d 466 [2d Dept 2015]; ***Wall v Flushing Hosp. Med. Ctr.***, *supra*; ***Terranova v Finklea***, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]). Further, Dr. Rohe's opinion itself is conclusory and relies on speculation (*see* ***Alvarez v Prospect Hosp.***, *supra* at 324; *see* ***Smarkucki v Kleinman***, 171 AD3d 1118, 98 NYS3d 232 [2d Dept 2019]; ***Bongiovanni v Cavagnuolo***, 138 AD3d 12, 24 NYS3d 689 [2d Dept 2016]; ***Duvidovich v George***, *supra*). As Nightingale has failed to meet its prima facie burden on the motion, the Court need not consider the sufficiency of plaintiff's opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

With respect to the motion by Cross Country, it has failed to eliminate all triable issues of fact. Cross Country submits the affirmation of Stanley Tuhrim, M.D., who avers that he is licensed to practice medicine in New York and that he is board certified in psychiatry and neurology. Dr. Tuhrim opines, within a reasonable degree of medical certainty, that there was no delay on the part of Mr. Managuas that proximately caused plaintiff's injuries. Dr. Turhim explains that Mr. Momah's symptoms began at 4:00 p.m., more than 4½ hours before he arrived in the emergency department at Huntington Hospital and, therefore, he was already out of the window to administer tPA when Mr. Managuas assessed him. However, Dr. Turhim fails to define the standard of care or explain how Mr. Managuas comported with the standard of care in his treatment and assessment of plaintiff (***Gullo v Bellhaven Ctr. for Geriatric Rehabilitative Care, Inc.***, *supra*; ***Stucchio v Bikvan***, *supra*). Further, Cross Country has failed to eliminate all triable issues of fact with respect to the employment relationship between Mr. Managuas and Cross Country (*see* ***Carrion v Orbit Messenger***, 82 NY2d 742, 602 NYS2d 325 [1993]; ***Singh v Sukhu***, 180 AD3d 834, 119 NYS3d 218 [2d Dept 2020]; ***Cioffi v S.M. Foods, Inc.***, 178 AD3d 1006, 116 NYS3d 306 [2d Dept 2019]). As Cross Country has failed to meet its prima facie burden on the motion, the Court need not consider the sufficiency of plaintiff's opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

With respect to Dr. Shareeff's motion to discontinue, on September 13, 2019, plaintiff's counsel executed a stipulation of discontinuance as against Dr.Shareeff. However, the remaining defendants have failed to execute the stipulation. Dr. Shareeff now moves for an order discontinuing the action as against himself. No papers were submitted in opposition.

Pursuant to CPLR 3217 (a), a plaintiff may voluntarily discontinue an action against a party by filing with the Clerk of the Court a written stipulation signed by the attorneys of record for all of the parties. The Court, as a matter of discretion, also has the authority under CPLR 3217 (b), which provides that "an action shall not be discontinued by a party asserting a claim except under order of the court and upon terms and conditions, as the court deems proper. After the cause of action has been submitted to the court or jury to determine the facts the court may not order an action discontinued except upon the stipulation of all the parties appearing in the action." Although CPLR 3217 (b) authorizes the court to voluntarily discontinue an action upon a motion by "a party asserting a claim," this provision may not be the basis for a dismissal by a party defending a claim unless the party asserting the claim consents or joins the motion (*see* CPLR 3217 [b]; ***Shamley v ITT Corp.***, 67 NY2d 910, 501 NYS2d 810 [1986]; ***Rivera v Albany Med. Ctr. Hosp.***, 119 AD3d 1135, 990 NYS2d 310 [3d Dept 2014]). "[O]rdinarily[,] a party cannot be compelled to litigate and, absent special circumstances, discontinuance [under CPLR 3217] should be granted" (***Tucker v Tucker***, 55 NY2d 378, 383, 449 NYS2d 683 [1982]; *see* ***Federal National Mortgage Assn. v Biggs***, 172 AD3d

1322, 99 NYS3d 667 [2d Dept 2019]; ***Kondaur Capital Corp. v Reilly***, 162 AD3d 998, 79 NYS3d 632 [2d Dept 2018]; ***Turco v Turco***, 117 AD3d 719, 985 NYS2d 261 [2d Dept 2014]).

Here, as plaintiff's counsel executed the stipulation of discontinuance, and there is no opposition to the motion, the Court concludes that all parties consent to the discontinuance. Absent evidence that voluntary discontinuance will cause prejudice or other improper consequences, the motion for an order discontinuing the action as against Dr. Shareeff is granted.

As the action has been discontinued, with prejudice, as against Dr. Shareeff, his motion (#002) for summary judgment dismissing the complaint as asserted against him is denied, as moot.

Accordingly, the motion by defendant Musarat Shareeff, M.D., for summary judgment dismissing the complaint as asserted against him is denied, as moot, the motion by third-party defendant Nightingale Nurses, LLC for summary judgment dismissing the third-party complaint as asserted against it is denied, the branch of motion by defendants Michelle Brosnan, M.D., Jeffrey M. Katz, M.D., Huntington Hospital and North Shore University Hospital, for summary judgment dismissing the complaint as asserted them is granted as to Dr. Katz and NSUH, and is otherwise denied, the motion by defendants Cross Country Travcorps., Inc. and Cross Country Staffing, Inc., for summary judgment dismissing the third-party complaint as asserted against them is denied, and the unopposed motion by defendant Musarat Shareeff, M.D. to discontinue the action as asserted against him is granted.

Dated: 10/15/20

Martha L. Luft
A.J.S.C.

HON. MARTHA L. LUFT

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**