To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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DALE WALSH,

Plaintiff,

-against-

EPHRAIM RESNICK, M.D., HIGHLAND MEDICAL, P.C., ROBERT FISHER, M.D., JAMES RIELLY, M.D., and MONTEFIORE NYACK HOSPITAL,

Defendants.

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DECISION AND ORDER
INDEX NO.: EF004132-2019
Motion Date: 3/25/21
Sequence Nos. 1 - 2

SCIORTINO, J.

The following papers numbered 1 to 18 were considered in connection with the motion of defendant ROBERT FISHER, M.D. (Seq. #1); and the cross-motion of defendants EPHRAIM RESNICK, M.D., HIGHLAND MEDICAL, P.C. and MONTEFIORE NYACK HOSPITAL (Seq. #2) for leave to amend the pleadings to preserve the CPLR Article 16 rights of those defendants:

PAPERS	NUMBERED
Notice of Motion (Seq. #1)/Affirmation (Morales)/Affidavit (Fisher)/ Affirmation (Smiley)/Exhibits C-H	1 - 10
Notice of Cross-Motion (Seq. #2)/Affirmation in Support and in Limited Opposition (Arciero)/Exhibits A-D	11 - 16
Plaintiff's Affirmation in Reply to Cross-Motion (Kobin)	17
Affirmation in Reply and in Opposition to Cross-Motion (Morales)	18

Conference of the matter was held on May 12, 2021 and the issues presented in these motions were addressed.

After considering submissions and statements of counsel during court conferences, defendant Fisher's motion for summary judgment is granted and defendants Resnick, Highland

Medical and Nyack is granted with limitations.

Background

This action for medical malpractice arises out of a medical procedure performed on March 14, 2018 at Montefiore Nyack Hospital (Nyack). That day, defendant EPHRAIM RESNICK, M.D. (Resnick) was to perform a total laparascopic hysterectomy, bilateral salpingo-oopherectomy and right pelvic node dissection for treatment of plaintiff's well-differentiated endometrial cancer. Defendant ROBERT FISHER, M.D. (Fisher) was the anesthesiologist for the procedure. Plaintiff received intravenous pre-operative sedation, which ended at 11:37 a.m. Plaintiff was brought to the operating room at 11:38 a.m. Plaintiff was supine for the induction of anesthesia. At 11:50 a.m., Fisher administered an intravenous antibiotic and completed that process at 11:55 a.m. Thereafter, Resnick directed the surgical positioning of the plaintiff. Plaintiff was placed in a modified dorsal lithotomy position, with her head below her hips and her legs in stirrups. The incision was begun at 12:01 (Exhibit F at 102) and was converted to an open exploratory procedure at 1:35 p.m.

Plaintiff experienced an intraoperative bleed in the well of the dissection. (Exhibit F at 101) Resnick converted the procedure to a laparotomy to find the source of the bleeding. To perform the laparotomy incision, he changed plaintiff's position to supine, in order to access the area where he needed to make the surgical cut. (Exhibit H at 84) Unable to stop the bleeding, Resnick called for a vascular surgeon. While waiting for him to arrive, plaintiff received a unit of packed red blood cells. Defendant vascular surgeon JAMES RIELLY (Rielly) arrived at about 2:00 p.m. Rielly noted that plaintiff's blood pressure was within normal limits and her bleeding was under control with stick sponges. He found a small laceration of the right internal iliac just

distal to its confluence with the external iliac vein. He sutured the laceration, and placed a Surgicel cigar in the cavity to provide gentle compression. Thereafter, and after confirmation of the diagnosis from Pathology, Resnick completed the converted procedure, and plaintiff was transferred to SICU at 3:41 p.m.

The next day, March 15, 2018, at approximately 8:00 a.m., the plaintiff complained to Nurse Thomas about numbness. (Exhibit F at 320) That note, entered by the nurse at approximately 10:58 a.m., documents the plaintiff's first complaint of numbness in her right lower extremity. Resnick's progress note, at 9:27 a.m., documents plaintiff's complaint of incisional pain and "tingling in the right foot." Noting right lower leg paresthesia, Resnick asked vascular surgery to evaluate plaintiff. (Exhibit F at 187) Plaintiff's hospital record documents further complaints of right lower extremity numbness and weakness on March 15 (Exhibit F at 128). A neurology consult that day notes "right leg weakness" as plaintiff's chief complaint, and plaintiff's report that when she tried to stand earlier in the day, her leg "gave way." (Exhibit F at 217) A CT scan showed no hematoma or other pathology. (Exhibit F at 223)

On March 16, plaintiff's weakness was described as "improved." (Exhibit F at 131) and on March 17, she was noted to have begun to work with physical therapy. (Exhibit F at 140) On March 18, Resnick's notes reflect that plaintiff was ambulating with a walker. (Exhibit F at 200) On March 19, he noted that plaintiff had walked on the stairs and had made a good post-operative recovery. (Exhibit F at 205) She was discharged that day with visiting nurse care.

Procedural History

This matter was commenced by the filing of a Summons and Verified Complaint on May 23, 2019. The Answers of Rielly, Resnick and Nyack were filed on June 25, 2019, together with

various discovery demands. The Fischer Answer was filed on July 25, 2019, with his discovery demands. As is relevant to the instant motion, plaintiff's Verified Bill of Particulars was served on Fisher on August 21, 2019. (Exhibit E) There, plaintiff alleges, *inter alia*, that Fisher was careless, negligent, unskillful and departed from accepted standards of medical practice in failing to use due care; in failing to appreciate the medical significance of the extended duration of plaintiff's surgery, resulting in an increase in the time she spent in the dorsolithotomy position, thereby significantly increasing the risk of positional injury; in failing to appreciate the medical significance of surgeries lasting in excess of two (2) hours with a patient in the dorsolithotomy position and the resulting significant increased risk of positional injury; in failing to appreciate the medical significance of plaintiff's obesity and short stature as it relates to her increased risk of positional injuries while in the dorsolithotomy position during surgery in excess of two (2) hours; in failing to appreciate the medical significance of extended durations of time in the dorsolithotomy position and its association with significant increased risk of positional injury; in failing to recognize the need to reposition plaintiff after the conversion to laparotomy; in failing to recognize the inherent risk of positioning injuries to plaintiff's peroneal nerve; in failing to appreciate the medical significance of anesthesia related muscle relaxation and its association with positional related injury concerns; in failing to recognize the need to safeguard against positional injury during laparotomy; in failing to properly place padding in the stirrups; in failing to properly use the stirrups to prevent positional injury; and failing to prevent positional injury to plaintiff's right common peroneal nerve.

Plaintiff alleged that, as a result of Fisher's negligence, she was caused to suffer injuries including a compression lesion to her right common peroneal nerve, severe right lower extremity

weakness, right foot drop, difficulty with ambulation, diminished light touch and paresthesia over calf and dorsal foot, etc. (Exhibit E)

On July 21, 2020, plaintiff was deposed. (Exhibit G) On September 11, 2020, Resnick was deposed. (Exhibit H) Plaintiff waived the depositions of both Fisher and Rielly.

The Note of Issue has not yet been filed.

Resnick Deposition

In relevant part, Resnick testified that it was his decision to place plaintiff in the modified dorsal lithotomy position for the laparascopic procedure. (Exhibit H at 36) Specifically, Resnick stated that "once the anesthesia finishes with their part and gives me a go ahead then I start positioning the patient for my surgery." (Exhibit H at 39)

"There are two positionings that take place. The first one is for the induction of anesthesia, it's done by the nurses and anesthesiologist and the patient is completely supine position... Once the anesthesia is finished then I take-over and I do the entire positioning myself with assistance from the circulating nurse." (Exhibit H at 41-42)

Fisher's Motion for Summary Judgment (Sequence #1)

By Notice of Motion filed February 3, 2021, Fisher moves for summary judgment, asserting that there is no triable issue of fact with respect to his care of plaintiff. Acknowledging that as the movant, he has the burden to establish the absence of a departure from good and accepted medical practice, or that plaintiff was not injured thereby, Fisher argues that he met that burden.

In support, Fisher offers his own affidavit, in which he avers that he reviewed the deposition testimony of Resnick and agrees that, after his administration of anesthesia, Resnick

made the decision to place plaintiff into the modified dorsal lithotomy position for the laparascopic procedure. He further agrees that Resnick directed the positioning with the assistance of the circulating nurse and any repositioning of plaintiff performed after the decision to convert the laparascopic procedure into an open procedure was also performed by Resnick. Resnick also repositioned the Allen stirrups used to support plaintiff's legs to a position he preferred for the laparotomy.

Fisher avers that, after the induction of anesthesia, he had no role or input into positioning or repositioning of plaintiff. After the conclusion of the March 14, 2018 surgery, Fisher had no role in plaintiff's medical care.

In further support, Fisher appends the affirmation of Richard Smiley, M.D., a board-certified anesthesiologist since 1986. In connection with this matter, Dr. Smiley reviewed the Fisher Affidavit, the pleadings and Bills of Particulars, plaintiff's hospital records and the depositions of plaintiff and Resnick. Dr. Smiley opines, to a reasonable degree of medical certainty, that Fisher acted within the accepted standards of medical care at all times during his involvement with plaintiff's March 14, 2018 surgery. He further opines that Fisher did not proximately cause plaintiff's alleged injuries. He notes Resnick's testimony that it was his (Resnick's) decision to place the plaintiff in the modified dorsal lithotomy position for the laparascopic procedure, which he did after Fisher finished the anesthesia induction process. He notes it was Resnick alone who performed any repositioning of the plaintiff once he decided to convert the surgery to laparotomy and that Fisher had no input or role in positioning or repositioning plaintiff during the surgical procedures. Resnick directed Fisher to call the blood bank to have blood sent after the surgeon decided to convert the procedure.

Dr. Smiley avers that, as the anesthesiologist, Fisher had no input into surgical positioning of the plaintiff's lower extremities during the procedures, or any changes in positioning for and during the laparotomy. This is generally determined by surgeons, as Resnick's testimony confirms. The anesthesiologist directs the patient's positioning for the induction of anesthesia, once completed, the surgeon has control over positioning, unless a position affects the anesthetic, respiratory or cardiovascular status of the patient. In this matter, as in most, positioning was within the sole and exclusive control and judgment of the surgeon.

All of plaintiff's claims as to Fisher that reference positioning and repositioning are irrelevant to anesthesiology care. It is Dr. Smiley's additional opinion that risks associated with surgical positioning are neither relevant nor applicable to the anesthesiologist; nor are risks of blood loss. In this matter, Fisher properly recognized and administered blood as needed. The duration of the surgeries and risks associated with that duration are not in the province of the anesthesiologist, but are within the exclusive control and discretion of the surgeon.

Dr. Smiley concluded that Resnick's deposition testimony confirms his opinions that Fisher's care was not a proximate cause of the injury to plaintiff's internal iliac vein, or the alleged sequelae. In short, Fisher acted in accordance with applicable standards of care at all times during his care and treatment of plaintiff, and no acts or omissions on Fisher's part were a proximate cause of plaintiff's alleged injuries.

Fisher asserts that based on the deposition and affidavit testimony and the opinions of Dr. Smiley, he is entitled to summary judgment.

Cross-Motion and Limited Opposition (Sequence #2)

By Notice of Cross-Motion filed March 9, 2021, Resnick, Highland Medical and Nyack

seek to amend their Verified Answers to include CPLR Article 16 as an affirmative defense. Defendants begin by stating that they object only to certain statements made in Fisher's Statement of Material Facts. The cross-moving defendants object to the inclusion of Fisher's and Smiley's opinions in the Statement of Material Facts (although not in their sworn statements), as they are opinions and not factual in nature. Otherwise, they do not oppose Fisher's motion for summary judgment.

CPLR Article 16 is intended to remedy inequities created by joint and several liability against low-fault defendants and to protect against their payment of disproportionate shares of awards. If defendants' culpability is 50% or less, their exposure should be limited to their share of fault.

Plaintiff's Opposition to Cross-Motion

Plaintiff argues that the cross-moving defendants' failure to oppose Fisher's motion operates as a forfeit of their right to assert Article 16 defenses against Fisher. Since summary judgment is the functional equivalent of trial, the limit of liability afforded by Article 16 is not available as to a co-defendant who has been awarded summary judgment.

Reply

Fisher points out that neither plaintiff nor co-defendants oppose the granting of summary judgment to him. He agrees with plaintiff's assertion that the co-defendants' failure to oppose his motion forfeits their rights under Article 16.

At the May 12, 2021 conference, plaintiff counsel voiced concern that, if the cross-motion were granted, defendant Resnick would then "point to an empty chair" at the time of trial. Counsel for defendant Resnick stated that she would not do so.

The Court has fully considered the submissions of the parties.

Discussion

Summary Judgment

Summary judgment is a drastic remedy, and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact. (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]) The function of the Court on such a motion is issue finding, and not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) The Court is not to resolve issues of fact or to determine credibility, but merely to determine whether such issues exist. (*Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005]) The Court must draw all reasonable inferences in favor of the non-moving party. (*Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 1995]) Where there is any doubt about the existence of a material and triable issue of fact, summary judgment must not be granted. (*Anyanwu v. Johnson*, 276 AD2d 572 [2d Dept 2000])

However, summary judgment shall be granted where, upon all the papers and proofs, the cause of action or defense is sufficiently established to warrant the court as a matter of law, in directing judgment in favor of any party. (*Zuckerman v. City of New York*, 49 NY 2d 557 [1980])

In a medical malpractice action, plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that this departure was the proximate cause of plaintiff's injuries. (*Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]) A defendant seeking summary judgment in a medical malpractice action bears the burden of making a *prima facie* showing that there was no departure from good and accepted medical practice, or that the plaintiff was not injured thereby. (*Id.* at 24) A doctor or hospital establishes entitlement to judgment by submitting the

affidavit of a medical expert who opines, to a reasonable degree of medical certainty, that the doctor's examination and treatment of the plaintiff did not depart from accepted standards of medical practice; or that the plaintiff was not injured thereby. (*Poter v. Adams,* 104 AD3d 925 [2d Dept 2013]; *Shahid v. New York City Health & Hosps. Corp.*, 47 AD3d 800 [2d Dept 2008])

In the instant matter, defendant Fisher has made such a *prima facie* showing. Fisher presented the affidavit of Dr. Smiley regarding his pre-operative and intra-operative care of plaintiff, as well as the affidavit of Fisher himself regarding his role and the performance of his duties. Fisher's sworn statement, combined with the affidavit of his expert, who opined, to a reasonable degree of medical certainty, that Fisher's care of plaintiff fell within the applicable standards of care at all times, and that no act or omission on Fisher's part contributed to plaintiff's alleged injuries, sufficiently demonstrate that Fisher was not negligent in treating plaintiff. This is bolstered by the testimony of Resnick, who repeatedly stated that the decisions to position and reposition plaintiff were his alone, and that Fisher had no role.

Neither plaintiff nor the co-defendants have raised any issues of fact in opposition to Fisher's position. On the basis of the foregoing, Fisher's motion for summary judgment is granted.

Motion to Amend

It is well-established that leave to amend a pleading should be freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit and will not prejudice or surprise the opposing party. CPLR 3025(b) (*Rodriguez v. Paramount Development Associates, LLC,* 67 AD3d 767 [2d Dept 2009]) No party has suggested that any prejudice will inure should co-defendants amend their Answers to assert the protections of CPLR Article 16. Plaintiff, in fact, suggests that she would not oppose the motion, but for co-defendants' failure to oppose Fisher's

motion for summary judgment.

It is well established that summary judgment is the procedural equivalent of trial. (*Capelin Assocs. v. Globe Mfg. Corp.*, 34 NY 2d 338 [1974]) "Since a motion for summary judgment is the functional equivalent of a trial, it follows therefrom that any defendant intending to obtain the limited liability benefits of CPLR article 16 *based on the movant's purported professional negligence* must, under penalty of forfeiture, adduce proof on point in admissible form in response to the *prima facie* case presented." (*Drooker v. South Nassau Communities Hosp.*, 175 Misc. 2d 181, 184 [Nassau Co. 1998]) (emphasis in original)

The only opposition to this application has been by defendant Resnick is for a limited purpose. Defendant Resnick preserves objections to specific statements placed in the Statement of Facts portion of defendant Fisher's submission arguing such statements are not fact, but opinion. Other than that objection, defendant Resnick offers no opposition warranting denial of the application.

For that reason, the motion of defendants Resnick, Highland Medical and Nyack is granted to the extent that their answer may be amended to assert an Article 16 affirmative defense. However, having failed to raise, or even submit, triable issues of fact in response to the instant application, and upon agreement of counsel for the defendants, defendants Resnick, Highland Medical and Nyack are precluded from asserting any claims against defendant Fischer at the time of trial.

This decision shall constitute the order of the Court.

Dated: May 14, 2021
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*