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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Joan B. Lobis PART 6

Index Number : 115111/2007
SULJIC, SENKA
VS.
LEVEY, KENNETH A.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 1/7/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-14
Answering Affidavits — Exhibits _____	15-16A
Replying Affidavits _____	17

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 4/7/10

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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SENKA SULJIC,

Plaintiff,

Index No. 115111/07

-against-

Decision and Order

KENNETH A. LEVEY, M.D., NEW YORK PELVIC PAIN AND MINIMALLY INVASIVE GYNECOLOGIC SURGERY, P.C. and NYU MEDICAL CENTER

Defendants.

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JOAN B. LOBIS, J.S.C.:

Motion Sequence Numbers 001 and 002 are consolidated for disposition. In Motion Sequence Number 001, defendant NYU Hospitals Center s/h/a NYU Medical Center ("NYU") moves, pursuant to C.P.L.R. Rule 3212(b), for an order granting it summary judgment and dismissing this matter in its entirety as to NYU. In Motion Sequence Number 002, defendants Kenneth A. Levey, M.D., and New York Pelvic Pain and Minimally Invasive Gynecologic Surgery, P.C. ("Dr. Levey") move for similar relief.

This action, sounding in medical malpractice and lack of informed consent[1], arises out of Dr. Levey's performance of an abdominal myomectomy on plaintiff, Senka Suljic, at NYU. Plaintiff developed a post-surgical infection. She claims that alleged departures of defendants caused a delay in treating the infection and subsequent complications. On April 24, 2007, plaintiff, complaining of cramping, abnormal menstruation periods, and fibroids, sought treatment from Dr. Levey. Dr. Levey informed plaintiff that an abdominal myomectomy was warranted, because,

[1] The verified complaint does not assert a separate cause of action for lack of informed consent, but failure to obtain informed consent is asserted as a departure in the bill of particulars.

according to his notes dated April 24, 2007, "medical management [is] not really a viable option for [plaintiff] and she wants to say away from hormonal management." On May 9, 2007, after referring plaintiff for pre-operative clearance, Dr. Levey, at NYU, performed the myomectomy, removing twenty-four (24) myomas. After surgery, plaintiff was taken to an NYU recovery room in stable condition. On May 10, 2007, plaintiff was seen intermittently by NYU staff. According to medical records dated May 10, 2007, in the morning, she had a temperature of around 98°[2] and was experiencing moderate pain. At 5:24 p.m. on May 10, Dr. Levey examined plaintiff. He noted that plaintiff's labium was swelling and that she had a low hematocrit (red blood cell) count. He recommended that she be watched closely. According to plaintiff's testimony at her examination before trial ("EBT"), Dr. Levey told her that she did not look good and had "either internal bleeding or an infection[.]" According to Dr. Levey's EBT testimony, plaintiff was in the "broad range of normal" for recovering patients. At 5:30 p.m. on May 10, plaintiff had a temperature of 97.7°. At 10:01 p.m., she was given acetaminophen, and, at 10:31 p.m., her temperature rose to 98.8°. At 3:22 a.m. on May 11, plaintiff's temperature remained at 98.8°. Later that day, at approximately 6:43 a.m, plaintiff's temperature was measured at 99.2° and her abdomen was soft with mild tenderness. That same morning, plaintiff was seen by an obstetrics and gynecology resident, Jacqueline Coletta, M.D., of NYU. Plaintiff's temperature around that time was 98°. Dr. Coletta noted that her hemocrit was stable and ended her notes by writing "discharge planning per attending." According to plaintiff's EBT testimony, at around 9:00 a.m. on May 11, a young female resident told plaintiff that she could go home. The resident told plaintiff that Dr. Levey had authorized the discharge. Plaintiff then spoke with the main nurse on the floor. Plaintiff told the nurse that she did not feel

[2]All temperatures are listed on the Fahrenheit scale.

well, had a fever, and was experiencing pain. At approximately 9:49 a.m., a discharge disposition note was written by a nurse on staff at NYU. In the note, plaintiff's temperature was listed at 100.2° and her pain level was documented at 2/10, although she was taking medication for the pain.

At approximately 11:30 a.m., on May 11, Dr. Levey went to plaintiff's recovery room and discovered that she had been discharged. According to his notes on that day, the discharge occurred without his authorization or consultation. Dr. Levey called plaintiff at her home at noon. According to plaintiff's EBT testimony, Dr. Levey told her that she was not supposed to be home. She told him that she had a fever and was in pain. According to Dr. Levey's EBT testimony, plaintiff told him she was feeling well. In response, Dr. Levey told plaintiff to call him if her temperature rose to 100.4°, if her pain increased, or if she became lightheaded or dizzy; if Dr. Levey was unavailable, she was to go to the emergency room. Dr. Levey planned to follow-up with plaintiff in two to three days. On May 12, 2007, in the middle of the day, plaintiff called and informed Dr. Levey that her temperature had reached 100.8°. She was experiencing pain and abdominal distention. Dr. Levey told her to go to the emergency room at NYU. Plaintiff was evaluated at the emergency room at approximately 6:00 p.m. It was noted in plaintiff's admission evaluation that her blood pressure and heart rate were elevated and her abdomen was distended. There was also a significant amount of erythema (redness of the skin) and induration (hardness) at the incision site. Plaintiff was diagnosed with celluitis and given antibiotics intravenously. She was then readmitted to NYU. On May 13, plaintiff remained in the hospital. On that day, fluid collected near her incision site, requiring Dr. Levey to perform an operative debridement. On May 14, plaintiff was afebrile and no longer had an infection. The following day, May 15, intravenous

antibiotics were discontinued and plaintiff was given Keflex, an oral antibiotic. On May 16, plaintiff was discharged. She was instructed to continuing taking Keflex along with Percocet and Motrin. Dr. Levey scheduled a follow-up with plaintiff for the following week in order to perform a secondary closure of the incision. Plaintiff was further told that if she experienced pain, bleeding, or fever, she was to call Dr. Levey immediately.

On May 17, Dr. Levey examined plaintiff at his office. The incision site had increased necrotic tissue and the fascia of the incision had opened. Dr. Levey sent plaintiff to the emergency room and referred her to Dr. Jamie Levine, a plastic surgeon. Plaintiff was given Unasyn IV upon admission at the emergency room. On May 18, Dr. Levine performed surgery to repair the fascia and close the incision. Plaintiff remained in NYU until May 21, 2007. Dr. Levey monitored her recovery. On May 29, 2007, Dr. Levey examined plaintiff in his office. She was doing well. Plaintiff visited with Dr. Levey on July 15, 2007. According to the medical records, she was experiencing soreness at the superior aspect of incision, but "no pain per - se [*sic*]." On August 23, 2007, plaintiff again saw Dr. Levey and, according to the medical records, she was "essentially pain free and completely back to normal function."

Plaintiff commenced this action against Dr. Levey and NYU. As is relevant, the pleadings allege that NYU and Dr. Levey inappropriately discharged plaintiff from the hospital on May 11, failed to properly appreciate or heed symptoms of post-operative infection, failed to timely intervene and prescribe antibiotics, and failed to render appropriate follow-up care. As a result, plaintiff claims that her infection was allowed to fulminate, requiring two subsequent hospital admissions and operative repairs.

NYU and Dr. Levey now seek an order granting them summary judgment dismissing the action. NYU asserts that it is unclear if NYU was responsible in plaintiff's discharge on May 11 and that Dr. Levey authorized the discharge when he called plaintiff an hour after the discharge and did not re-admit her. NYU also relies on the affidavit of its expert in obstetrics and gynecology, Michael Nimaroff, M.D. Dr. Nimaroff opines that NYU was only responsible, if responsible at all, for the one hour that plaintiff was home; that the one hour away from NYU did not contribute to plaintiff's infection; and that infections and wound dehiscence (reopening) are normal risks of myomectomy surgery. Dr. Nimaroff further asserts that plaintiff was Dr. Levey's private patient, therefore, NYU was not responsible for obtaining informed consent.

Dr. Levey relies on affirmations by two experts. Irwin Ingwer, M.D., an expert in internal medicine and infectious disease, opines that there was no requirement, under relevant medical guidelines, that Dr. Levey administer antibiotic propylaxis. Dr. Ingwer further asserts that plaintiff was not exhibiting signs of a post-operative fever while at NYU, which would have been a sign of infection. Dr. Ingwer opines that it was entirely proper for Dr. Levey to do an assessment over the phone, once plaintiff was discharged from NYU. Dr. Ingwer asserts that plaintiff told Dr. Levey that she was recovering well and had no fever, therefore, Dr. Levey had no reason to readmit her to NYU. Dr. Ingwer asserts that it was proper for Dr. Levey to advise plaintiff that if she experienced a temperature increase to 100.4°, increased pain, lightheadedness or dizziness, she should call him and admit herself to the emergency room if she could not reach him. Dr. Levey's second expert is Howard G. Nathanson, M.D., an expert in Obstetrics and Gynecology. Dr. Nathanson agrees with Dr. Ingwer that there was no requirement that Dr. Levey administer antibiotic

propylaxis (preventative antibiotics). Dr. Nathanson further opines that plaintiff exhibited no signs of a post-operative fever prior to her readmission, which would have been evidence of an infection.

Plaintiff does not oppose the motions as to the claim for lack of informed consent. She relies on the affirmation of Douglas Phillips, M.D., an expert in obstetrics and gynecology. Dr. Phillips notes that plaintiff was afebrile with temperature at 97.7° on the early evening of May 10 and that her temperature increased to 98.8° at approximately 10:31 p.m and remained there at 3:22 a.m. on May 10. He opines that this temperature was an indication that she was mildly febrile, because her baseline temperature was at 97.7°. Dr. Phillips opines that plaintiff remained febrile at 6:43 a.m., when her temperature was measured at 99.2°. Dr. Phillips notes that Dr. Levey claimed that he did not authorize plaintiff's discharge and opines that, therefore, the discharge by NYU was a departure from accepted medical practice. Dr. Phillips further opines that it was improper for Dr. Levey to evaluate plaintiff over the phone, since she had a rising fever that was kept stable by fever reducers, complaints of pain, and tenderness at the surgical site. Dr. Phillips opines that Dr. Levey should have readmitted her immediately and examined plaintiff in person upon reviewing the medical records detailed above. Dr. Phillips opines that the actions of Dr. Levey and NYU resulted in a delay of therapeutic treatment for plaintiff's infection and that this delay "caused additional complications."

Dr. Levey argues in reply that the plaintiff's opposition papers are untimely. According to a stipulation, signed by all parties and dated September 1, 2009, plaintiff agreed to

serve her opposition no later than September 14, 2009. The affidavit of service annexed to her papers indicate that it was served on September 16 and her expert's affidavit is dated September 16. While there is conclusive evidence that plaintiff's opposition was untimely, Dr. Levey and NYU have not suffered nor alleged any prejudice from a mere two day delay in service of the opposition. Therefore, this court will accept the opposition. See Morgan v. Candia, 69 A.D.3d 500 (1st Dep't 2010) (citations omitted).

The law is well settled that the movants on a summary judgment application bear the initial burden of prima facie establishing their entitlement to the requested relief, by eliminating all material allegations raised by the pleadings. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Winegrad v. New York University Medical Center, 64 N.Y.2d 851 (1985); Kuri v. Bhattacharya, 44 A.D.3d 718 (2d Dep't 2007). In a malpractice case, a physician would have to establish that he did not depart from accepted standards of practice, or that, even if he did, he did not proximately cause injury to the patient. Lowhar v. Eva Stern 500, LLC, 70 A.D.3d 654 (2d Dep't 2010). The failure to meet one's burden mandates the denial of the application, "regardless of the sufficiency of the opposing papers." Winegrad, 64 N.Y.2d at 853. However, where the movant demonstrates its prima facie entitlement to summary judgment, the burden shifts to the other side to raise a *material triable* issue of fact warranting the motion's denial. Alvarez, 68 N.Y.2d at 324. Summary judgment is a drastic remedy, "which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court." Gibson v. American Export Isbrandtsen Lines, Inc., 125 A.D.2d 65, 74 (1st Dep't 1987) (internal citations omitted).

Medical records indicate that NYU staff was involved in the discharge and Dr. Levey has stated, in records contemporaneous with the discharge date and in his EBT, that he did not authorize the discharge. Therefore, issues of material fact as to NYU's departure exist. NYU has demonstrated, and it is conceded by all sides, that Dr. Levey told plaintiff to stay home around one hour after her discharge. However, this fact would not relieve NYU of liability if Dr. Levey departed from the standard of care by failing to readmit plaintiff. Hill v. St. Clare's Hosp., 67 N.Y.2d 72, 82-83 (1986). NYU is responsible for injuries caused by its departure as well "any aggravation of the injuries inflicted by it through the malpractice of [the subsequent tortfeasor]. Such liability is, however, successive rather than joint and the injured plaintiff cannot recover the same damages twice." Id. (citation omitted).

Dr. Levey has not demonstrated a prima facie entitlement to summary judgment. His experts offer no explanation on why any temperature above 100.4° would be problematic for plaintiff as opposed to a temperature below 100.4°. Furthermore, despite Dr. Levey experts' contentions that plaintiff was not febrile post-operatively, plaintiff disputes this conclusion and argues that plaintiff's temperature was indicative of a fever and, therefore, an infection. Both Dr. Levey's and plaintiff's experts rely on their credentials and expertise in the field, their review of plaintiff's records, and the deposition transcripts. Yet, the experts' opinions differ significantly. In view of the experts' conflicting opinions, summary judgment must be denied as to the departure. See Cruz v. St. Barnabus Hosp., 50 A.D.3d 382 (1st Dep't 2008). It cannot be concluded as a matter of law that defendant did not depart from the prevailing standard of care by failing to readmit plaintiff to NYU. Issues of the expert's credibility as to the standard of care, and defendant's departure from such, if

any, are issues for the trier of fact.

NYU and Dr. Levey have also failed to demonstrate that their alleged negligence could not have caused injuries to plaintiff. Dr. Levey's experts' affirmations fail to address causation. This failure requires a denial of Dr. Levey's instant motion. Mathis v. Central Park Conservancy, Inc., 51 A.D.2d 171, 172 (1st Dep't 1998). NYU deals with causation in a conclusory manner. As such, NYU is not entitled to summary judgment. See Winegrad v. New York University Medical Ctr., 64 N.Y.2d 851, 853 (1985).

Accordingly, it is

ORDERED that those branches of the motions seeking summary judgment as to the claim for failure to obtain informed consent are granted and the cause of action for lack of informed consent is severed and dismissed as to all defendants; and it is further

ORDERED that the branches of the motions seeking summary judgment as to the cause of action sounding in medical malpractice are denied, and the remainder of the action shall continue.

The parties shall appear for a pre-trial conference on April 27, 2010, at 9:30 a.m. This constitutes the decision and order of the court.

Dated: April 7, 2010

JOAN B. LOBIS, J.S.C.