

**Volk v Stamatos**

2011 NY Slip Op 30606(U)

March 1, 2011

Supreme Court, Suffolk County

Docket Number: 09-18762

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. ARTHUR PITTS  
Justice of the Supreme Court

MOTION DATE 11/18/10 (#001)  
MOTION DATE 12/2/10 (#002)  
ADJ. DATE 1/20/11  
Mot. Seq. # 001 - MD  
Mot. Seq. # 002 - MG

-----X  
KERRY VOLK and MICHAEL SMITH,

Plaintiffs,

- against -

JOHN STAMATOS, M.D., NORTH AMERICAN  
PARTNERS IN PAIN MANAGEMENT, LLP,  
NORTH SHORE ANESTHESIA ASSOCIATES,  
DANIEL BOSSHART, M.D., and  
NORTH SHORE UNIVERSITY HOSPITAL  
AT SYOSSET,

Defendants.

-----X

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Upon the following papers numbered 1 to 37 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-6; Notice of Cross Motion and supporting papers (002) 17-30; Answering Affidavits and supporting papers 31-35; Replying Affidavits and supporting papers 36-37; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (001) by the defendant Daniel Bosshart, M.D., and this motion (002) by the defendant North Shore University Hospital at Syosset are consolidated for purposes of this determination; and it is further

**ORDERED** that this motion (001) by defendant Daniel Bosshart, M.D., for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint is denied; and it is further

*BW*

**ORDERED** that this cross motion (00) by defendant North Shore University Hospital at Syosset for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint is granted and the complaint as asserted against it is dismissed with prejudice.

This medical malpractice action commenced on behalf of the plaintiff Kerry Volk is premised upon the alleged negligence of defendants in the placement of spinal cord stimulator leads, and the alleged departures from good and accepted standards of care relative thereto, causing Kerry Volk to suffer a spinal cord injury, loss of motor function bilaterally, the inability to walk requiring the use of a wheelchair, loss of sensation and reflexes, hypersensitivity, incontinence of bowel and bladder, exacerbation of prior conditions, diminution of a chance of recovery, inability to work, conscious pain and suffering, and loss of enjoyment of life. A derivative claim has been set forth on behalf of the plaintiff's spouse, Michael Smith. It is undisputed that on January 26, 2007, the plaintiff came under the care and treatment of an anesthesiologist, John Stamatos, M.D., for pain management relative to a history of leg pain and pain in her right upper extremity. Implantation of a spinal cord stimulator was recommended for which she was admitted to North Shore University Hospital at Syosset on February 27, 2007. Dr. Bosshart was the anesthesiologist for the procedure which was performed by John Stamatos, M.D.

The defendants Daniel Bosshart, M.D. (Dr. Bosshart) and North Shore University Hospital at Syosset (North Shore Hospital) seek summary judgment dismissing the complaint on the bases that they fully complied with the standard of care during the care and treatment of Kerry Volk and that they did not cause or contribute to the plaintiff's injuries. North Shore Hospital further contends that it is not responsible for the actions of the private attending physicians rendering care to Ms. Volk.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2<sup>nd</sup> Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2<sup>nd</sup> Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503[2<sup>nd</sup> Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420 [1999]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see, Derdiarian v Felix Contracting Corp.*, 51

NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2<sup>nd</sup> Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (see, *Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 675 NYS2d 375[2d Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2<sup>nd</sup> Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (see, *Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2<sup>nd</sup> Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2<sup>nd</sup> Dept 1997]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (*Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2<sup>nd</sup> Dept 2007]).

In support of motion (001), Dr. Bosshart has submitted, inter alia, an attorney's affidavit, copies of the summons and complaint, his answer and the plaintiff's verified bill of particulars; certified copy of the plaintiff's medical records; the unnotarized affidavit of the defendant's expert Dr. Warren Greenspan; and the unsigned transcripts of the examinations before trial of John Stamatou, M.D. dated March 5, 2010, Daniel Bosshart, M.D. dated May 25, 2010, and Kerry Volk dated January 5, 2010. The unsigned copies of the transcripts of the examinations before trial are not in admissible form as required by CPLR 3212 (see, *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2<sup>nd</sup> Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2<sup>nd</sup> Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2<sup>nd</sup> Dept 2006]), nor are they accompanied by an affidavit pursuant to CPLR 3116, and, therefore, are not considered on this motion. The affidavit of Dr. Greenspan is not notarized and therefore is not in admissible form to be considered on a motion for summary judgment.

In cross motion (002), North Shore Hospital has submitted, inter alia, an attorney's affirmation; the expert affirmation of Christopher Gharibo, M.D.; the affidavit of Dahyl Oetting dated October 29, 2010; the moving defendants' answers, plaintiff's verified bill of particulars; a partial and uncertified copy of the plaintiff's hospital record which is not in admissible form to be considered on a motion for summary judgment; unsigned copies of the transcripts of the examinations before trial of John Stamatou, M.D. dated March 5, 2010 and Daniel Bosshart, M.D. dated May 25, 2010 which are not in admissible form as required by CPLR 3212 (see, *Martinez v 123-16 Liberty Ave. Realty Corp.*, *supra*; *McDonald v Maus*, *supra*; *Pina v Flik Intl. Corp.*, *supra*), nor are they accompanied by an affidavit pursuant to CPLR 3116, and, therefore, are not considered on this motion. An expert's opinion must be based on facts in evidence (*Hunting Ridge Motor Sports v County of Westchester*, 2011 NY Slip Op 189 [Sup. Ct. App. Div. 2<sup>nd</sup> Dept]).

Warren Greenspan, M.D., has submitted an expert affidavit on behalf of the defendant Daniel Bosshart, M.D. This affidavit has not been notarized and is, therefore, not in admissible form to be considered by this court. Dr. Greenspan has set forth that he is a physician licensed to practice medicine in the State of New York and specializes in the field of anesthesiology. Dr. Greenspan does not set forth that he is board certified in any field of medicine, including anesthesiology, thus the qualifications of Dr. Greenspan to testify as an expert cannot be determined. Dr. Greenspan further sets forth that he has reviewed the records from North Shore University Hospital at Syosset and states he has been told about the claims the plaintiff is alleging and was further told what the plaintiff's testimony

was, leaving this court to speculate as to what portions of his opinions are predicated on hearsay. It is determined that even if Dr. Greenspan's affidavit were in admissible form, there are factual issues raised by the plaintiff's expert which preclude summary judgment from being granted to Dr. Bosshart, as will be discussed below.

Dahlys Oetting, Corporate Director of Human Resources at North Shore Long Island Jewish Health System, of which North Shore University Hospital at Syosset is a member, sets forth in the supporting affidavit that at the time Kerry Volk was treated in February 2007, Certified Registered Nurse Anesthetist Donald Robilatta, and anesthesiologist Lisa Phillips, M.D., John Stamatos, M.D., and Daniel Bosshart, M.D., were not employees of North Shore University Hospital at Syosset.

Christopher Gharibo, M.D., sets forth in his affirmation dated October 20, 2010, submitted on behalf of North Shore Hospital, that he is a physician licensed to practice medicine in the State of New York and is board certified in anesthesiology and pain medicine. Dr. Gharibo sets forth that his affirmation is based upon his review of pertinent medical records, pleadings and portions of the testimonial evidence pertaining to the action, although he does not specify upon what he bases his affirmation. It is Dr. Gharibo's opinion with a reasonable degree of medical certainty that the treatment provided to Kerry Volk by the defendant hospital comported with the accepted standards of medical practice as it existed in 2007, and that no alleged negligent act or omission by the defendant hospital caused or contributed to the plaintiff's alleged injuries and/or conditions.

Dr. Gharibo sets forth that Kerry Volk was admitted to the defendant hospital on February 27, 2007 by Dr. John Stamatos for placement of spinal cord stimulator leads. He states that the anesthesiologists for the procedure were Dr. Bosshart as well as Certified Registered Nurse Anesthetist Donald Robilatta, both of whom are employees of North American Partners in Anesthesia. He continues that post-operatively, Ms. Volk was received in the PACU at 10:15 a.m. complaining of severe bilateral leg pain on a scale of 10/10 for which she was medicated with intravenous Dilaudid. She continued to complain of severe bilateral leg pain of 10/10 and administration of Dilaudid intravenously was continued. From 10:15 to 10:50 a.m., she was administered Dilaudid 0.5 mg every five minutes, and from 10:45 a.m. through 12:05 p.m., she was administered Dilaudid 2.0 mg every five minutes. At 11:10 a.m., Dr. Bosshart saw the plaintiff and ordered Demerol 50 mg and at 12:55 p.m. she was additionally administered Toradol 30 mg IV (also a pain medication). At 1:30 p.m. she was administered Dilaudid 8 mg orally, and despite administration of these pain medications, she still complained of pain on a scale of 9/10 at 1:45 p.m. and at 3:00 p.m. when she was discharged. She was seen later that day in the emergency room at Good Samaritan Hospital with continued complaints of leg pain and was administered Dilaudid. She returned to Syosset Hospital on February 28, 2007 with complaints of intractable leg pain. On March 1, 2007, the spinal cord stimulator leads were removed.

Dr. Gharibo opines that at on February 27, 2007, that the care and treatment rendered by the defendant hospital was at all times in accordance with accepted standards of practice. He states that discharging the plaintiff was not done on the authority of the hospital staff and that Dr. Bosshart testified that the decision to discharge a patient is made by the covering anesthesiologist and surgeon. He continues that based upon the plaintiff's complaints of intractable pain, that Ms. Volk was appropriately administered pain medications in a timely manner, and the administration of the medication was not the proximate cause of her claimed injuries. Dr. Gharibo states that three physicians saw Ms. Volk after the procedure, Dr. Stamatos, Dr. Bosshart, and Dr. Phillips, none of whom are employees of the hospital, and that they monitored her condition.

In opposing these applications, the plaintiff has submitted an expert affirmation. The plaintiff's expert, a physician duly licensed to practice medicine in the State of New York, is board certificate in anesthesiology with a sub-specialty in pain medicine, and sets forth that the relevant records were reviewed. The plaintiff's expert sets

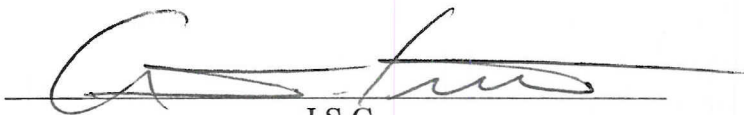
forth opinions with a reasonable degree of medical certainty that it was a departure from good and accepted medical practice to discharge Ms. Volk from the hospital, and further departure to have discharged her without having her evaluated by a neurosurgeon and neurologist prior to that discharge. The plaintiff's expert opines that these departures were a substantial factor in causing injury to Ms. Volk.

Here, the evidentiary submissions establish that Dr. Bosshart provided care and treatment to Ms. Volk and monitored her condition during insertion of the spinal cord stimulator leads and prior to her discharge. Dr. Gharibo opined that discharging the plaintiff was not done on the authority of the hospital staff and that Dr. Bosshart testified that the decision to discharge a patient is made by the covering anesthesiologist and surgeon. There is no admissible evidentiary proof that Dr. Bosshart consulted with the attending physician about Ms. Volk's severe pain and otherwise considered having her seen by a neurologist and neurosurgeon prior to discharge. Based upon the foregoing, motion (001) by Dr. Bosshart for dismissal of the complaint as asserted against him is denied.

A hospital cannot be held vicariously liable for the malpractice of a treating physician who is not an employee of the hospital (*see, Ryan v New York City Health and Hospitals Corporation*, 220 AD2d 734, 633 NYS2d 500 [2<sup>nd</sup> Dept 1995]; *Nagengast v Samaritan Hospital*, 211 AD2d 878, 621 NYS2d 217 [3<sup>rd</sup> Dept 1995]; *Noble v Porter*, 188 AD1066, 591 NYS2d 669 [4<sup>th</sup> Dept 1992]). Here, the unrefuted admissible evidence establishes that the defendant physicians were private attending physicians who were not employees of North Shore Hospital; and, therefore, North Shore Hospital is not vicariously liable for their actions or omissions. The unrefuted admissible evidence does not establish that employees of defendant North Shore Hospital departed from good and accepted standards of care in their care and treatment of Ms. Volk. Based upon the foregoing, North Shore Hospital has demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against it, and the plaintiff has not raised a factual issue to preclude summary judgment being granted to North Shore Hospital.

Accordingly, motion (002) is granted and the complaint of this action as asserted against North Shore Hospital is dismissed with prejudice.

Dated: March 1, 2011

  
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J.S.C.

\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION