SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X

JERLENE CRAYTON, as Administratrix of the goods, chattels and credits which were of SALLY L. JONES, deceased,

Plaintiff,

-against -

NANCY EPSTEIN, SAUL M. MODLIN, JEFFREY LIU, MELISSA COHEN, FRED GLASSER, RICHARD FUSS, GARY SHER, ADVANCED PULMONARY DIAGNOSTICS, LONG ISLAND NEUROLOGICAL ASSOCIATES, P.C. and WINTHROP UNIVERSITY HOSPITAL,

Defendants.

----------X

TRIAL/IAS PART 17

Index No. 600123/09
Mot. Seq. # 1
Mot. Date 12.9.11
Submit Date 1.12.12

The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1,2
Answering Affidavit 3
Reply Affidavit..... 4

Motion by defendant Winthrop University Hospital ("Winthrop") for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the plaintiff's complaint as against it is **DENIED**.

Plaintiff commenced this action to recover money damages for medical malpractice allegedly committed on the decedent Sally L. Jones on March 30, 2007 at approximately 10:35 p.m.

In the bill of particulars, plaintiff alleges, *inter alia*, that defendant negligently and carelessly failed to examine the patient's tracheostomy site, failed to recognize that swelling had dissipated around the tracheostomy site, failed to recognize that the patient was breathing around the tracheostomy tube, failed to recognize that the patient was using the Passy-Muir valve, failed to remove the tracheostomy in a timely manner, allowed secretions to form around the tube, failed to change the tracheostomy in a timely manner, failed to find the mucus plug, failed to clear the mucus plug, failed to suction the patient, failed to ventilate the patient, failed to prevent cardiac arrest, failed to call an anesthesia resident in a timely manner, and failed to call a respiratory resident in a timely manner. As a result of the alleged negligence, it is alleged that the defendant carelessly allowed the patient to die on March 30, 2007 at approximately 10:35 p.m. at Winthrop University Hospital.

Facts

On March 22, 2007, the decedent was admitted to Winthrop under the service of private attending neurosurgeon, co-defendant Nancy Epstein, M.D., for an elective cervical discectomy and posterior cervical fusion. It was noted that the decedent suffered a fall at church on January 28, 2007 and continued to complain of pain in her right shoulder and across her chest, bilateral upper extremity weakness, bilateral numbness and tingling in her hands, and a shocking feeling down both arms.

The plaintiff's decedent underwent the above referenced procedures on March 22, 2007. On March 23, 2007, the decedent was transferred to the Neurosurgical Intensive Care Unit where she remained intubated and on ventilation. Between March 23, 2007 and March 26, 2007, the plaintiff's decedent was treated and evaluated by various specialists at Winthrop while in the Neurosurgical ICU, including co-defendants Dr. Epstein (neurosurgery), Drs. Liu and Glasser (pulmonologists) Drs. Fuss and Sher (anesthesiologists), Dr. Modlin (ENT), and Noto (Physician's Assistant).

On March 27, 2007, the decedent underwent a tracheostomy procedure by defendant Modlin with the assistance of defendant Epstein and the hospital's physician assistant Hollingsworth (P.A.). Thereafter, the decedent remained in Winthrop's Neurosurgical ICU where follow up by the multiple defendants continued between March 27, 2007 and March 30, 2007.

On March 30, 2007, the decedent's oxygen saturation level began to drop, and the respiratory therapist attempted to Ambu Bag the patient. Anesthesiologist Dr. Sher was called to the bedside and neurosurgery P.A. Noto was present.

Defendant Modlin testified that he received a phone call at home and was advised of a mucus plug. Defendant Epstein was also present. Plaintiff became bradycardic and then asystolic. A code was called at 10:37 p.m. and ACLS protocol was initiated. Despite resuscitative efforts, plaintiff was pronounced dead at 11:17 p.m.

Winthrop now moves for summary judgment dismissing the complaint as against it.

The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice and evidence that such departure was a

proximate cause of injury or damage. (*Garbowski v Hudson Valley Hosp. Center*, 85 AD3d 724, 726 [2nd Dept 2011]; *Stukas v Streiter*, 83 AD3d 18, 24-26 [2nd Dept 2011].)

On a motion for summary judgment dismissing the complaint in a medical malpractice action, a defendant must make a *prima facing* showing that there was no departure from good and accepted medical practice, or that the plaintiff was not injured by any such departure (*see Upshur v Staten Island Medical Group*, 88 AD3d 785 [2nd Dept 2011]; *Salvia v St. Catherine of Sienna Med. Ctr.*, 84 AD3d 1053 [2nd Dept 2011]; *Ahmed v New York City Health & Hosps. Corp.*, 84 AD3d 709, 710 [2nd Dep. 2011]; *Stukas v Streiter, supra*). To sustain the burden, defendant must address and rebut any specific allegations of malpractice set forth in plaintiff's Bill of Particulars. *Koi Hou Chan v Yeung,* 66 AD3d 642, 643 [2nd Dept 2009]. Once a defendant physician has made such a showing, the burden shifts to the plaintiff to "submit evidentiary facts or materials to rebut the *prima facie* showing by the defendant . . . so as to demonstrate the existence of a triable issue of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Stukas v Streiter, supra* at p. 24). To defeat summary judgment, the non-moving party need only raise a triable issue of fact as to the element of the cause of action or theory of non-liability that is the subject of the movant's *prima facie* showing. (*Orsi v Haralabatos*, 89 AD3d 997, 998 [2nd Dept 2011]). General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a defendant's motion for summary judgment (*see Salvia v St. Catherine of Sienna Med. Ctr., supra* at 1054; *Ahmed v New York City Health & Hosps. Corp., supra* at p. 711).

Winthrop met its *prima facie* burden of establishing the absence of any departure from good and accepted medical practice (*see Arkin v Resnick*, 68 AD3d 692, 694 [2nd Dept 2009]).

In support of its motion, Winthrop has submitted the expert affirmation of Dr. Howard D. Koff, Board Certified in Anesthesiology. Dr. Koff opines,

> "[W]ithin a reasonable degree of medical certainty, that the care and treatment rendered to the patient by the medical personnel of defendant WINTHROP UNIVERSITY HOSPITAL was at all times within good and accepted medical practice and did not proximately cause plaintiff's death. It is my further opinion, within a reasonable degree of medical certainty, that the Hospital staff timely and appropriately monitored the patient, performed all necessary assessments, instituted appropriate trach care, and suctioned the patient when necessary. It is my opinion, within a reasonable degree of medical certainty, that the alleged actions and/or omissions of the Hospital staff did not proximately cause any injury to Ms. Jones." (Exhibit Q, ¶ 33).
>
> "It is my opinion, within a reasonable degree of medical certainty, "that the medical care and treatment rendered by co-defendant anesthesiologist Dr. Sher comported with good and accepted medical practice. It is my further opinion, within a reasonable degree of medical certainty, that Dr. Sher exercised reasonable medical judgment in his attempts to maintain and preserve the patient's airway. Specifically, Dr. Sher timely and appropriately ventilated the patient by suctioning the tracheostomy, instilling Albuterol, intubating from above and ultimately removing the tracheostomy. Dr. Sher further appropriately managed the patient's Code and timely initiated ACLS protocol. Despite the best resuscitative efforts, the patient ultimately expired." (*Id.*, at ¶ 34).

In response, plaintiff has submitted an affirmation of a New York State Licensed and Board Certified Anesthesiologist who provides an opinion based on his/her review of the relevant records, pleadings and testimony that:

"It is my opinion within a reasonable degree of medical certainty that the care and treatment to the patient by the medical personnel, staff and assigned doctors of defendant Winthrop University Hospital departed from good and accepted medical practice and that said departures were substantial factors and proximate causes of Sally Jones' death. It is further my opinion within a reasonable degree of medical certainty that the hospital personnel and/or staff failed to timely diagnose and/or definitively treat the mucous plug/blockage and that this failure was a substantial factor and a proximate cause of Sally Jones' progression to cardiac arrest and subsequent death.

"As well it is my opinion within a reasonable degree of medical certainty that there was a delay by the anesthesiologist, Dr. Sher, and the hospital staff and personnel in the failure to insure the timely removal of the mucous plug-occluded tracheostomy tube, as well as the prompt and immediate replacement of the occluded tube with a brand new patent trachestomy tube. Said delay in responding to the blockage and total airway obstruction in a timely manner led to respiratory distress, arterial hemoglobin oxygen desaturation/hypoxemia, as evidenced by the development of life threatening, real time oxygen saturation (SaO2) data. These departures were also a substantial factor and proximate cause in producing Sally Jones' cardiac arrest and subsequent demise.

"It is my opinion within a reasonable degree of medical certainty that the defendant hospital by its staff and/or other personnel including respiratory therapy and assigned physician(s) departed from good and accepted medical practice in failing to properly provide humidified oxygen to Sally Jones for inspiration via her tracheostomy collar and tracheostomy, so as to provide necessary humidification of the otherwise anhydrous gases she breathed, thereby reducing the chance for the development of life threatening-airway obstructing mucous plugs, and that this departure was a substantial factor in causing the plaintiff decedent's ultimate demise."

On this record, plaintiff has raised a triable issue of fact through the opinion of her expert that there was a consequence to the delay by defendant anesthesiologist Sher. (*Motto v Beirouti,* 90 AD3d 723 [2nd Dept 2011]).

Where, as here, the parties offer conflicting expert opinions, issues of credibility arise requiring resolution by the by the trier of fact. (*Deutsch v Chaglassin*, 71 AD3d 718, 719 [2nd Dept 2010]; *Colaco v St. Vincent's Med. Ctr.*, 65 AD3d 660, 661 [2nd Dept 2009]).

Dismissal of the informed consent claim is granted, there being no opposition thereto.

In view of the foregoing, the motion is **DENIED** as to the malpractice cause of action and **GRANTED** as to the informed consent claim.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
February 21, 2012

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

Attorney for Plaintiff
Goldfarb & Gerzog, Esqs.
233 Broadway, Ste. 2220
New York, NY 10279

Attorney for Defendant Modlin
Kelly Rode & Kelly, LLP
330 Old Country Road, Ste. 305
Mineola, NY 11501

Attorney for Defendant Winthrop
Martin Clearwater & Bell, LLP
90 Merrick Avenue
East Meadow, NY 11554-1576

Attorney for Defendants Fuss & Sher
Shaub Ahmuty Citrin & Spratt, LLP
1983 Marcus Avenue
Lake Success, NY 11042-2324

Attorney for Defendant Epstein
Bartlett McDonough Bastone & Monaghan, LLP
300 Old Country Road
Mineola, NY 11501