

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

JAMES G. COURTNEY, JR. and ANGELA COURTNEY,

Plaintiff(s),

INDEX No. 15328/02

-against-

MOTION DATE: 1/11/05

THE PORT AUTHORITY OF NEW YORK & NEW
JERSEY, JOHN T. MATHER MEMORIAL HOSPITAL,
ROBERT M. POLLINA, M.D., NESTOR D. BLYZNAK,
M.D., THOMAS E. ARNOLD, M.D., DANIEL M. KASS,
M.D., JOSEPH M. CARRUCCIU, M.D. and KENNETH A.
HIRSCH, M.D.,

MOTION SEQ. No. 8-MD, 9-MD,
10-MD, 11-MD,
12-MD, 13-MG,
14-MG, 15-MG,
16-MG, 17-MG,
18-MG

Defendant(s).

The following papers read on this motion:

- Pollina Notice of Motion/Affirmations/Memorandum of Law/Exhibits
- Mather Cross Motion/Affirmations/Exhibits
- Arnold Notice of Cross Motion/Affirmation/Exhibits
- Kass Cross Motion/Affirmation/Exhibits
- Blyznak/Carrucciu Notice of Cross Motion/Affirmation/Exhibits
- Pollina Reply Affirmations
- Kass Reply Affirmation
- Arnold Reply Affirmations
- Mather Reply Affirmations/Exhibits
- Kass Notice of Motion/Affirmation/Exhibits
- Arnold Notice of Motion/Affirmation/Exhibits
- Pollina Notice of Motion/Affirmation/Exhibits/Memorandum of Law
- Blyznak Notice of Cross Motion/Affirmation/Exhibits
- Mather Notice of Motion/Affirmation/Exhibits
- Carrucciu Notice of Cross Motion/Affirmation/Exhibits
- Plaintiff Affirmations in Opposition/Affidavits/Exhibits/Memorandum of Law
- Port Authority Affirmation in Opposition

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In this action plaintiff, an air traffic controller, seeks damages allegedly sustained when he was injured on property owned and maintained by defendant PORT AUTHORITY of NEW YORK & NEW JERSEY, and allegedly complicated and worsened by medical malpractice committed by the defendant doctors at defendant hospital. The action against Dr. KENNETH HIRSCH was discontinued.

All of the defendants seek Orders dismissing the case pursuant to CPLR § 3216 for plaintiff's failure to file a Note of Issue within 90 days of the Certification Order issued in this action.

Those applications are Denied. While the defendants correctly note that the plaintiff neither filed the Note of Issue within the 90 days of this Court's Certification Order as directed, nor did he move for an extension of time to do so, his failure to do so will not warrant dismissal under the specific circumstances of this case.

The Nassau County Supreme Court issued a Notice to the plaintiff directing him to file his Note of Issue as specified, or have the case dismissed pursuant to CPLR § 3216. Plaintiff's reliance on this Notice from the Court, believing that the time to file the Note was extended by its terms, is reasonable under the circumstances. Counsel for the plaintiff undisputedly complied with the terms of this judicial Notice of Dismissal. Further, none of the defendants moved for dismissal prior to the issuance of the Notice, and only moved for dismissal after the plaintiff filed the Note of Issue. The record presented demonstrates no prejudice to any of the movants by the short delay. Thus based on the foregoing, the Court finds dismissal pursuant to CPLR § 3216, is not warranted, and the applications for dismissal are Denied. *Katina v. Town of Hempstead*, 13 AD3d 343 (2nd Dept 2004); CPLR § 3216©.

The defendants named in the medical malpractice causes of action also seek summary judgment pursuant to CPLR § 3212 dismissing all claims and cross claims asserted against them.

Plaintiff was allegedly injured on November 21, 1998 at approximately 8:00 p.m., when he slipped on a wet spot and fell down a stairway at his workplace, while walking from the air traffic control tower cabin. Plaintiff claims that he landed awkwardly on his left leg, injuring his left calf.

Plaintiff was admitted to MATHER HOSPITAL on November 23, 1998 where he was seen in the Emergency Department and thereafter admitted to the hospital until his discharge on November 30, 1998.

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In his Complaint, plaintiff alleges three causes of action subject to these motions to dismiss; (1) medical malpractice; (2) lack of informed consent; and (3) loss of services. The plaintiff is essentially claiming that the named defendants JOHN T. MATHER HOSPITAL, ROBERT M. POLLINA, M.D., NESTOR D. BLYZNAK, M.D., THOMAS ARNOLD, M.D., DANIEL M. KASS, M.D., and JOSEPH M. CARRUCCI, M.D. failed to diagnose and treat a compartment syndrome to his lower left leg.

Plaintiff claims that after his fall, his left calf became progressively more painful and swollen, forcing him to miss work the next day, November 22, 1998. Sometime around midnight or the early hours of November 23, 1998 plaintiff's wife, a nurse at MATHER HOSPITAL, called the office of defendant NESTOR BLYZNAK, an orthopedist who apparently treated plaintiff in the past. She spoke with Dr. Durow, BLYZNAK's associate, detailing plaintiff's pain, the swelling and discoloration to his leg. Plaintiff's wife related her concerns that the plaintiff may be suffering from a "deep vein thrombosis" or DVT, or that it may just be a pulled muscle. Dr. Dubrow advised that the plaintiff be brought to the hospital the following morning.

The plaintiff arrived at MATHER HOSPITAL between nine and ten o'clock, on November 23, 1998. Plaintiff's wife told the triage nurse of her concern of a DVT and requested it be ruled out. The doctors in the MATHER Emergency Room area ordered an ultrasound, blood work and other diagnostic tests. The Emergency Room doctor, Dr. Hirsch told the plaintiffs that he wanted to call a vascular surgeon for a consult.

Defendant ROBERT POLLINA, a vascular surgeon, examined the plaintiff in the Emergency Room. He noted the plaintiff complained of severe pain in his left calf. Dr. POLLINA informed the plaintiff and his wife that the ultrasound was negative, but that he wanted a venogram to diagnose what was causing plaintiff's symptoms. Plaintiff was then examined by Dr. KASS, an internist, who was the admitting physician.

Dr. BLYZNAK also met with plaintiff and his wife at approximately 10:00 a.m. on November 24, 1998. Plaintiff's wife claims that BLYZNAK stated that if the tests ruled out DVT, then heparin was not necessary. Dr. BLYZNAK ordered a CT scan to determine whether there was a bleed or a clot, and ordered a tonometer from St. Charles Hospital in order to test for compartment syndrome, as MATHER HOSPITAL did not have this equipment.

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Dr. CARRUCCIU, a radiologist performed venogram study of plaintiff's leg, and found no evidence of DVT. Dr. CARRUCCIU recommended a CT Scan of plaintiff's leg to rule out a hemotoma.

There is no claim in plaintiff's Bill of Particulars that CARRUCCIU improperly interpreted the venogram.

The CT scan apparently did not reveal a DVT, but revealed a bleed. After being notified of these results, plaintiff's claim that Dr. POLLINA still directed that heparin treatment should be continued to prevent clots. The records indicate that POLLINA was concerned that a DVT would develop due to compression, and wanted it continued until swelling was reduced. He also directed a recheck.

On November 25, 1998 Dr. BLYZNAK performed a test of plaintiff's leg with the tonometer and found that there was an excess of 80 mm Hg in his left calf, some 40 mm higher than an onset of compartment syndrome. He performed a fasciotomy, which relieved plaintiff's pain and pressure in his leg.

Plaintiff commenced this action contending that the defendants failed to properly diagnose that he was suffering from compartment syndrome in a timely fashion, resulting in him suffering unnecessary pain and discomfort.

MATHER HOSPITAL, the vascular surgeons, Drs. ARNOLD and POLLINA, the orthopedist, Dr. BLYZNAK, as well as Drs. KASS and CARRUCCIU all seek summary judgment dismissing the claims against them. They all claim that there is no evidence that their treatment and care of the plaintiff deviated from accepted medical standards of care, or resulted in any injury to plaintiff.

With respect to the motions of defendants Dr. BLYZNAK, Dr. KASS and Dr. CARRUCCIU, these defendants all offer expert medical affidavits which attest to the fact that none of these physicians deviated from accepted medical standards of care in their treatment of the plaintiff. In opposing the summary judgment motions of these defendants, the plaintiff offers no expert affidavit refuting these affidavits. Plaintiff's only expert, a vascular surgeon, makes no statement or opinion that any of these defendants deviated from acceptable standards in their field of expertise.

Thus the causes of action and cross claims alleged against these defendants Dr. BLYZNAK, Dr. KASS and Dr. CARRUCCIU are dismissed, pursuant to CPLR § 3212.

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With respect to MATHER, plaintiff alleges that the hospital is responsible for the actions of its staff. There is no expert affidavit to support plaintiff's claims that the staff of MATHER failed to act in accordance with acceptable standards of care.

It is uncontested that plaintiff was admitted by attending internist, Dr. KASS. From that moment, the decisions regarding his care were made by private attending physicians, Dr. KASS, Dr. POLLINA, Dr. BLYZNAK, Dr. ARNOLD and Dr. CARRUCCIU.

The uncontested evidence demonstrates that the hospital staff acted at all times within the standard of care and carried out all physicians orders. The primary duty of the hospital staff is to follow the orders of the attending physicians who directed the course of treatment. *Rodrigo v. Brookdale Hospital*, 194 AD2d 774 (2nd Dept. 1993). A hospital cannot be held liable for carrying out the direct orders of plaintiff's physicians. *Toth v. New York Hospital at Glen Cove*, 22 NY2d 255 (1968).

MATHER HOSPITAL is not liable for the actions of private attending physicians not in its employ. Thus, its motion for summary judgment is also Granted. CPLR § 3212; *Cirella v. Central General Hospital*, 217 AD2d 680 (2nd Dept. 1995); *Boone v. North Shore Univ. Hosp.*, 12 AD3d 338 (2nd Dept. 2004).

Thus the only remaining claims are those alleged against the vascular surgeons who examined and treated the plaintiff, Dr. ARNOLD and Dr. POLLINA.

With respect to Dr. ARNOLD, this defendant came in contact with the plaintiff during his hospital stay on two occasions, November 24, 1998 and November 27, 1998. It is apparently undisputed that Dr. ARNOLD was advised of the results of plaintiff's CT scan in the evening of November 24, 1998. The plaintiff had been admitted to the hospital by Dr. KASS and had already been seen by Dr. POLLINA, who provided a vascular/surgical consultation. As a result of the initial work-up the patient, anticoagulation therapy was commenced due to the possibility of a deep vein thrombosis. As of the evening of November 24th, Dr. ARNOLD was aware of the prior treatment in the hospital and concerns for a DVT. In addition, there was a notation in the chart of the results of a venogram, demonstrating severe compression of the popliteal vein.

Dr. ARNOLD contends that, as set forth in his entry, he was advised a DVT was not specifically demonstrated on the CT scan, but Dr. ARNOLD states that continued compression was noted due to his

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concern that the likelihood of a DVT would occur, he recommended that continued anticoagulation therapy was necessary. This apparently was discussed with both Dr. POLLINA and Dr. CARRUCCI.

On November 24, 1998 plaintiff was also seen by Dr. BLYZNAK, an orthopedic surgeon who continued to follow the patient. As set forth in plaintiff's chart, Dr. BLYZNAK continued the anticoagulation therapy as COURTNEY's diagnosis was still in doubt. He also noted the plaintiff was neurologically intact. An MRI taken on November 25, 1998 led to the determination that a surgical exploration of the lower extremity was necessary and anticoagulation was halted. (Blyznak, EBT)

On November 27, 1998 Dr. BLYZNAK performed additional surgery on the plaintiff. Dr. BLYZNAK, who had previously performed surgery to evacuate a hematoma, requested an intra-operative consult to determine whether there was any continued bleeding. No active bleeding was noted by Dr. ARNOLD at this time.

Dr. ARNOLD and Dr. POLLINA both rely upon medical expert affidavits from Dr. Steven G. Friedman, a board certified vascular surgeon licenced in the State of New York, who states that he reviewed plaintiff's medical records and the parties' deposition opines that the care and treatment provided by Dr. ARNOLD and Dr. POLLINA as indicated above, was appropriate and conformed with the standards of medical care and practice.

Dr. Friedman opines that there was need for continued anticoagulation therapy due to the possibility of DVT formation. He notes that the plaintiff presented signs of suffering DVT and pulmonary embolus. He notes that the venogram indicated that the plaintiff was suffering from compression of the left popliteal vein, which can also cause a DVT and pulmonary embolus. He notes that the hospital's records indicate that while in the hospital the plaintiff later developed symptoms of increased compartment pressures, which he states were timely diagnosed and treated by defendant BLYZNAK, and caused by a torn gastrocnemius muscle.

Dr. Friedman opines that Dr. POLLINA's continued treatment of plaintiff for prevention of a DVT, pulmonary embolus and/or possible stroke, was proper under the circumstances, including the cause of the underlying injury. He states that Dr. POLLINA properly ruled out a DVT and continued the Heparin treatment to prevent one once finding a compression, as there is a danger of formation of DVT due to compression.

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To support his conclusions, Dr. Friedman recites the pertinent portions of plaintiff's medical records. Dr. Friedman notes that the last time Dr. POLLINA saw the plaintiff, on November 24, 1998, he recommended a choice between two acts which were available to plaintiff's treating physician, either continued use of Heparin or surgical evacuation of the hematoma which was causing the compression. The treating physicians chose the continued use of Heparin with monitoring. He notes that Dr. ARNOLD who saw plaintiff after this, chose to continue the Heparin and keep plaintiff's leg elevated.

Dr. Friedman specifically notes that defendant Dr. BLYZNAK, who examine the plaintiff later that evening, noted "no evidence clinically of compartment syndrome" and sought an urgent MRI and possible evacuation. He further notes the records which demonstrate that Dr. BLYZNAK specifically stated that he was following the plaintiff neurovascularly for signs of compartment syndrome through November 24 and November 25, 1998, which was not symptomatic until later on November 25, 1998, which resulted in timely surgery to evacuate the hematoma.

This expert states that the chronology as related by the medical records show timely diagnosis of increased compartment pressures and treatment. Dr. Friedman also states that plaintiff's continued medical condition is from his muscle tear, not increased compartment pressures. He notes that the patient's muscle damage described in the operative reports is from the muscle tear. He notes that there are three operative reports for November 25, 1998 and November 27, 1998 by Dr. BLYZNAK and on November 29, 1998 by Dr. Coccaro, a plastic surgeon. This last operative report notes that there was an area of superficial necrosis which was described as 10% on visualization. Dr. Friedman states that this describes the injury from the tear itself, not an injury from compartment syndrome. The report states that the muscle damage was localized.

Dr. Friedman states that muscle damage from compartment syndrome compromise follows signs of nerve compromise and is diffuse in the compartment. He states that nerve compromise generally occurs within two hours of compartment syndrome onset, and that muscle damage happens later on. He states that it is usual for the patient with compartment syndrome to have neurological findings and in this case the plaintiff had no such changes prior to the surgery of November 15, 1998. Dr. Friedman concluded that the surgery, the fasciotomy, performed on November 25, 1998, was performed before the elevated compartment pressures

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caused neurological or muscle damage. He states that the fasciotomy prevented neurological defects and did not cause the later diffused muscle damage.

Dr. Friedman also states that the Heparin treatment continued to prevent DVT and pulmonary embolus was correct in light of plaintiff's symptoms, including how the injury occurred and later, the compression of the vasculature. He states that the determination to continue this treatment is in accordance with good and accepted medical practice, and that it was not unnecessary under these circumstances.

Dr. Friedman also states that the vascular surgeon, Dr. POLLINA acted in accordance with good and accepted standards with respect to the CT Order. He states that Dr. POLLINA's ordering of the CT scan with IV contrast was proper. He opines that defendant Dr. ARNOLD's vascular surgical evaluation of the patient without such contrast with his recommendation that Heparin be continued was not a departure from acceptable diagnosis and treatment.

Finally, Dr. Friedman states that there is no medical evidence that the continuation of Heparin to the plaintiff caused any increased bleeding which led to compartment syndrome, as there is no evidence of continued bleeding during the anticoagulation administration.

In his opposition to the defendants' motions for summary judgment, plaintiff provides an affirmation from Dr. Norman M. Finkelstein, a vascular surgeon licensed to practice medicine in New Jersey. Again, this expert states no opinion of any departure by defendants BLYZNAK, KASS, CARRUCCIU or MATHER HOSPITAL. Dr. Finkelstein offers his expert opinion only as to defendants ARNOLD and POLLINA.

Procedurally, the moving defendants argue that the expert testimony from this out-of-state physician is insufficient to defeat their motions for a dismissal of medical malpractice claims. The defendants argue the qualifications of the plaintiffs' physician are insufficient to find that he is an expert with respect to the hospital and specialized medical care in dispute. *McDonnell v. County of Nassau*, 129 Misc.2d 228 (1985).

The plaintiff's doctor is not a licensed physician within the State of New York, but in the State of New Jersey, and therefore is not qualified to provide an affirmation pursuant to CPLR § 2106. *Palo v. Latt*, 270 AD2d 323 (2nd Dept 2000). Some three weeks after the submission date for these applications, plaintiffs' counsel sought to submit an affidavit from this individual. He neither sought nor obtained to the Court's

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permission to submit untimely documents, nor did he obtain consent of other counsel to submit such papers, thus, this document is not properly considered by the Court as part of the application.

However, even if this affidavit were to be considered part of the record, it does not defeat the motions by ARNOLD and POLLINA seeking dismissal of the claims against them.

In a medical malpractice action a plaintiff opposing a motion for a dismissal through summary judgment must submit evidentiary facts or materials to rebut the prima facie showing by defendant that there was no negligence in the treatment rendered. *Alvarez v. Prospect Hospital*, 68 NY 320 (1986); *Fileccia v. Massapequa General Hospital*, 63 NY2d 639 (1986).

The plaintiff must submit an affidavit of a medical expert setting forth that expert's opinion that the defendant did not, in fact, follow good and accepted medical practice. The plaintiff must demonstrate not only a deviation or departure from accepted practice by defendants, but also evidence that such departure was a proximate cause of the injury. *Ansler v. Verrilli*, 119 AD2d 786 (2nd Dept. 1986).

An affidavit of a medical expert stating an opinion that defendant was negligent and that negligence harmed plaintiff, when accompanied by the specific factors used as the basis of that opinion, is sufficient to raise a triable issue of fact. *Menzel v. Plotnick*, 202 AD2d 558 (2nd Dept. 1994). Absent any indicia of such proof of medical malpractice in the opposing papers, defendant's motion should be granted. *Fileccia v. Massapequa Gen. Hosp.*, 63 NY2d 639 affd 99 AD2d 796 (N.Y. 1984). The expert witness must possess the requisite skill, training, knowledge, or experience to ensure that an opinion rendered is reliable. *Matott v Ward*, 48 NY2d 455 (1979).

Plaintiff's expert, Dr. Finklestein opines that Dr. POLLINA and Dr. ARNOLD deviated from accepted medical standards of care of vascular surgeons in continuing anticoagulation treatment after the diagnostic tests performed on November 24, 1998. He opines that this "undoubtedly contributed" to the progression of early compartment syndrome. He does not say how it did so, nor does he state that the alleged deviations were a substantial factor in causing the injury sustained.

The Court finds that the medical proof offered by plaintiff does not state that any alleged failures of Dr. ARNOLD and Dr. POLLINA with respect to plaintiff's treatment actually caused an injury. The expert is not sufficiently specific with respect to causation.

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While the physician speaks of what is generally accepted practice, he does not address the specifics of this situation, including plaintiff's trauma which precipitated his hospitalization and his risk of developing a DVT. While he opines that the plaintiff was not suffering from the DVT he does not discuss the risk of developing one under these circumstances as presented at the time of plaintiff's admission to MATHER HOSPITAL in November 1998.

The fact that Dr. Finklestein is not licensed to practice in the State of New York causes the Court to scrutinize his opinion more carefully. *Corsetti v. Koppers Co. Inc.*, 226 AD2d 205 (1st Dept. 1996). He does not state that the alleged failures caused plaintiff's injury. *Falotico v. Frankel*, 232 AD2d 607 (2nd Dept. 1996). There is no statement from the expert as to what kinds of action would have prevented plaintiff's injuries under the circumstances presented, or that if the Heparin was not administered, the injury would not have occurred. *Tucker v. Elinelech*, 184 AD2d 636 (2nd Dept. 1992); *Lee v. Shields*, 188 AD2d 637 (2nd Dept. 1992).


Based on the proof presented, the Court cannot find that plaintiff's expert has established what actions of Dr. ARNOLD or Dr. POLLINA caused plaintiff's injuries.

Based on the proof presented, the Court finds that there are no triable issues of fact in dispute which preclude summary judgment on the claims against Dr. ARNOLD, Dr. POLLINA or MATHER HOSPITAL. The motion of these defendants for Orders granting them summary judgment are Granted.

It is, SO ORDERED.

Dated:

Apr 1, 2005


HON. GEOFFREY J. O'CONNELL, J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE