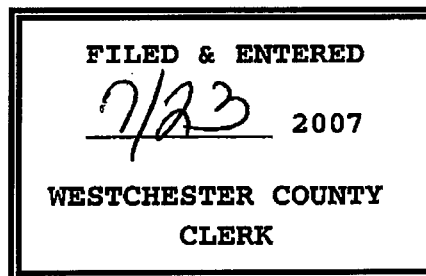


SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period 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.

P R E S E N T:

HON. ORAZIO R. BELLANTONI
JUSTICE OF THE SUPREME COURT



SHANIA-GAY FFRENCH,

Plaintiff,

- against -

MONTEFIORE MEDICAL CENTER, STEPHEN T. ONESTI, M.D., GUIRLAINE AGNANT, M.D., MOUNT VERNON OB/GYN ASSOCIATES, KEITH S. EDWARDS, M.D., GARY C. GUERRINO, M.D., THE MOUNT VERNON HOSPITAL, and CRAIG BAUER, D.C.,

Defendants.

SHORT FORM ORDER

Index No. 14401/02

Motion Date: 2/21/07

~~FILED~~
JUL 23 2007

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Defendant Keith S. Edwards, M.D. ("Edwards") moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint against him.

Defendants Montefiore Medical Center ("Montefiore") and Stephen T. Onesti, M.D. ("Onesti") cross-move for an order, pursuant to CPLR 3212, dismissing the verified complaint and all cross-claims against them.

Defendant Craig Bauer, D.C. ("Bauer") moves for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the complaint against him.

Defendant Mount Vernon Hospital ("Mt. Vernon") cross-moves for an order, pursuant to CPLR 3025, granting leave to amend its answer to include a statute of limitations affirmative defense; and pursuant to CPLR 3212, granting summary judgment on the grounds that (1) plaintiff's claim that cross-movant was negligent on February 3, 2000 is time barred pursuant to CPLR 214(a); and (2) plaintiff was under the care and treatment of a private attending physician during her subsequent admission to cross-movant beginning on or about March 2, 2000 and thereafter.

Defendant Gary C. Guerrino, M.D. ("Guerrino") moves for an order, pursuant to CPLR 3212, granting summary judgment

dismissing the action against him.

Plaintiff cross-moves for an order granting spoliation sanctions against defendant Bauer, and granting leave to amend the complaint to include dates of alleged malpractice against defendant Mt. Vernon based upon the theories of continuing treatment, such dates to include February 3, 2000.

The following papers were read:

Notice of Motion - Affirmation in Support of Christopher A. Terzian, Esq. - Memorandum of Law - Annexed Exhibits A-R	1-21
Notice of Cross-Motion - Affirmation in Support of James Sarno, M.D. - Affirmation in Support of Andrew D. Heath, Esq. - Memorandum of Law in Support - Annexed Exhibits A-L	22-37
Affirmation in Opposition of Merryl F. Weiner, Esq. - Annexed Exhibits A-J	38-48
Reply Affirmation of Christopher A. Terzian, Esq. - Annexed Exhibits A-D	49-53
Notice of Motion - Affirmation in Support of Victor C. Piacentile, Esq. - Annexed Exhibits A-F	54-61
Notice of Cross-Motion - Affirmation in Support of Allison R. Graffeo, Esq. - Annexed Exhibits A-I	62-72
Notice of Motion - Affirmation in Support of Lloyd B. Cohen, Esq. - Affirmation of Reed E. Phillips, M.D. - Annexed Exhibits A-G	73-82
Exhibits H-R	83-93
Exhibits S-KK	94-112
Memorandum of Law	113
Affirmation in Opposition of Merryl F. Weiner, Esq. - Annexed Exhibit A	114-115
Affirmation in Opposition of Merryl F. Weiner, Esq. - Annexed Exhibits A-E	116-121
Affirmation in Opposition of Merryl F. Weiner, Esq. - Annexed Exhibits A-G	122-129
Notice of Cross-Motion - Affirmation in Support of Merryl F. Weiner, Esq. - Annexed Exhibits A-F	130-137
Affirmation of Allison R. Graffeo, Esq.	138
Affirmation in Partial Opposition of Lloyd B. Cohen, Esq.	139
Reply Affirmation of Lloyd B. Cohen, Esq.	140
Affirmation in Opposition of Victor C. Piacentile, Esq. - Annexed Exhibit A	141-142
Reply Affirmation in Further Support of Merryl F. Weiner, Esq.	143

Upon the foregoing papers it is hereby ORDERED that defendants Montefiore and Onesti's cross-motion for summary judgment is granted, there being no opposition. Accordingly, the verified complaint and all cross-claims are dismissed as against them. However, since said defendants have not cross-claimed

against defendant Guerrino or vice versa, the latter's CPLR Article 16 rights against same are preserved for the time of trial.

Submit order on ten (10) days notice within thirty (30) days hereof.

It is hereby further ORDERED that defendant Mt. Vernon's cross-motion to amend its answer to include a statute of limitations affirmative defense is denied.

CPLR 3211(e) states, in relevant part: "Number, time and waiver of objections At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a) Any objection or defense based upon a ground set forth in paragraph . . . five . . . of subdivision (a) [statute of limitations] is waived unless raised either by such motion or in the responsive pleading."

In the case at bar, defendant Mt. Vernon did not raise said affirmative defense in either a motion to dismiss or its answer. Accordingly, same is waived. See Matter of Augenblick, 66 NY2d 775 (1985); see also In re Hughes, 9 AD3d 327 (1st Dept 2004).

It is hereby further ORDERED that plaintiff's cross-motion to amend the complaint to include the February 3, 2000 emergency room visit as part of the dates of alleged malpractice against defendant Mt. Vernon based upon the theory of continuing treatment is granted.

CPLR 3025(b) states, in relevant part, that "[a] party may amend [her] pleading . . . at any time by leave of court Leave shall be freely given"

Defendant Mt. Vernon has failed to demonstrate, or even allege, "significant prejudice" which would serve to justify denial of the instant application. See Edenwald Contracting v City of New York, 60 NY2d 957, 958 (1983); see also Fick v LaGuardia Medical Group, P.C., 208 AD2d 800 (2nd Dept 1994).

Accordingly, plaintiff is granted leave to file and serve an amended verified complaint within twenty (20) days after entry of the instant order.

It is hereby further ORDERED that plaintiff's cross-motion for spoliation sanctions against defendant Bauer is decided in accordance with the following.

Defendant Bauer took an anterior to posterior lumbar pelvic x-ray of plaintiff, made grease pencil markings on it to determine for himself the severity of plaintiff's scoliosis, and

then erased said markings when he copied the x-ray during the discovery process. Defendant Bauer testified that he did not make any other notations relative to those markings anywhere else in his chart and that he could not recall the exact range of degrees so noted. See the examination before trial transcript of Craig Bauer, D.C. at 58-63 annexed as Exhibit A to the affirmation in opposition of Victor C. Piacentile, Esq.

This Court notes that all discovery has been completed and that the original x-ray (sans markings) is in the possession of all parties. Moreover, plaintiff has failed to demonstrate that said erasures impeded the prosecution of its lawsuit. "[W]here the plaintiffs and defendants are equally affected by the loss of the items in their investigation of the accident and neither have reaped an unfair advantage in the litigation, it is improper to dismiss a pleading on the basis of spoliation of evidence (citations omitted)." De Los Santos v Polanco, 21 AD3d 397, 398 (2nd Dept 2005).

Nevertheless, nothing prevents plaintiff from having her experts examine the original x-ray and make whatever measurements and/or calculations they deem supported by the evidence, and/or having her attorneys argue to the jury on summation whatever adverse inference is reasonable from the circumstances. However, this Court will leave to the sound discretion of the trial judge whether to give the jury the missing evidence charge promulgated at PJI 1:77.

It is hereby further ORDERED that defendants Edwards, Bauer, and Guerrino's motion and defendant Mt. Vernon's cross-motion for summary judgment dismissing plaintiff's complaint against them is denied.

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law. See Andre v Pomeroy, 35 NY2d 361 (1974). The movant must set forth a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986). Once the movant sets forth a prima facie case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact. See Zuckerman v City of New York, 49 NY2d 557 (1980). However, the failure to meet the initial burden of persuasion requires that the application be denied regardless of the sufficiency of the opposing papers. See Torres v Industrial Container, 305 AD2d 136 (1st Dept 2003).

The instant medical malpractice action arose in or about

October 1998 through January 2002 when defendants allegedly failed to timely refer plaintiff for a neurological evaluation and/or timely diagnose and treat an intra-medullary spinal cord tumor, to wit: an astrocytoma of the T8-T10 region, which rendered plaintiff confined to a wheelchair. The claims against defendants Guirlaine Agnant, M.D. ("Agnant") and Mount Vernon OB/GYN Associates ("OB/GYN") revolve around the time frame of October 1998 through July 6, 2000 and include failure to determine the cause of plaintiff's lower back pain and lower extremity weakness, failure to order radiological testing of the spine, and failure to follow up with specialists seen by plaintiff. The claims against defendant Mt. Vernon revolve around the time frame of February 3, 2000 through July 2000 and include delaying the diagnosis of plaintiff's tumor. The claims against defendant Edwards revolve around the time frame of February 7, 2000 through July 6, 2000 and include failure to investigate the cause of plaintiff's complaints, failure to follow up with plaintiff after an emergency room visit of February 3, 2000, and failure to maintain accurate medical records. The claims against defendant Bauer revolve around the time frame of November 2000 through May 2001 and include failure to make a proper diagnosis and delaying the diagnosis of said tumor. The claims against defendant Guerrino revolve around the time frame of January 10, 2001 through May 20, 2001 and include failure to refer her to a neurologist and to communicate with physicians previously seen by plaintiff, thereby delaying the diagnosis, as well as failure to maintain complete medical records. Finally, the claims against defendants Montefiore and Onesti revolve around the time frame of January 2001 through January 2002 and include performing improper surgery by causing damage to surrounding structures outside the intended surgical area and failure to conduct physical examinations intra-operatively and post-operatively.

Where conflicting affidavits and other contradictory testimony are submitted, as here, judgment as a matter of law should not be granted. See Webar, Inc v Capra, 212 AD2d 594 (2nd Dept 1995). "The court, on a motion for summary judgment, should not determine issues of credibility." See Venetal v City of New York, 21 AD3d 1087 (2nd Dept 2005).


Moreover, defendant Mt. Vernon has not set forth a prima facie showing of entitlement to judgment as a matter of law. See Weingrad v New York University Medical Center, 64 NY2d 851, 853 (1985); see also Coley v Michelin Tire Corp., 99 AD2d 795, 796 (2nd Dept 1984). Counsel's affirmations alone, with no sworn affidavit from someone with personal knowledge of the facts to substantiate its claims, is insufficient. See Menzel v Plotnick, 202 AD2d 558 (2nd Dept 1994).

Accordingly, judgment as a matter of law is inappropriate,

as genuine triable issues of material fact exist as to whether defendants departed from accepted standards of medical care in the treatment rendered to plaintiff. See Youthkins v Cascio, 99 NY2d 638 (2003) and Scola v Sun International North America, 279 AD2d 466 (2nd Dept 2001); see also CPLR 3212(b).

The remaining parties are to appear on September 10, 2007 at 9:30 A.M. in the Central Calendar Part, courtroom 800, at the Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York.

Dated: *July 23, 2007*
White Plains, New York


HON. GRAZIO R. BELLANTONI
Justice of the Supreme Court

Bartlett, McDonough, Bastone & Monaghan, LLP
Attorneys for Defendant Keith S. Edwards, M.D.
81 Main Street, Suite 400
White Plains, New York 10601

Sedgwick, Detert, Moran & Arnold, LLP
Attorneys for Defendants Montefiore Medical Center and Stephen T. Onesti, M.D.
125 Broad Street, 39th Floor
New York, New York 10038

Quaranta & Associates
Attorneys for Plaintiff
121 Smith Avenue
Mount Kisco, New York 10549

Kopff, Nardelli & Dopf LLP
Attorneys for Defendant Craig Bauer, D.C.
440 Ninth Avenue, 15th Floor
New York, New York 10001-1688

Wilson, Elser, Moskowitz, Edelman & Dicker LLP
Attorneys for Defendant Mount Vernon Hospital
150 East 42nd Street
New York, New York 10017-5639

Law Offices of Benvenuto, Arciero & McAndrew
Attorneys for Defendant Gary C. Guerrino, M.D.
67 North Main Street, 2nd Floor
New City, New York 10956

Rende, Ryan & Downes, LLP
Attorneys for Defendants Guirlaine Agnant, M.D. and Mount Vernon
OB/GYN Associates
202 Mamaroneck Avenue
White Plains, New York 10601