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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE FREDERICK D. SCHMIDT IA Part 16
Justice

	x	Index Number <u>28461</u> 1999
SUSAN FEUERWERKER, et al		
- against -		Motion Date <u>December 11, 2001</u>
LON S. WEINER, M.D., et al.		
	x	Motion Cal. Number <u>17</u>

The following papers numbered 1 to 12 read on this motion by defendants Lon S. Weiner, M.D., Srino Bharam, M.D., s/h/a Sprino Bharam, M.D., and Lenox Hill Hospital for summary judgment dismissing the complaint asserted against them with prejudice.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1 - 5
Answering Affidavits - Exhibits	6 - 10
Reply Affidavits	11 - 12

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiffs commenced this action to recover damages for personal injuries suffered by plaintiff Susan Feuerwerker as a consequence of the alleged medical and podiatric malpractice committed by defendants. Plaintiff Anton Feuerwerker, the husband of plaintiff Susan Feuerwerker, asserts a separate derivative claim for loss of services and society. Plaintiff Susan Feuerwerker sought medical attention from defendant Weiner, an orthopedic surgeon, complaining of pain due to swelling and a bunion (hallux valgus) on her left foot near her big toe. Plaintiffs further allege that upon defendant Weiner's recommendation, plaintiff Susan Feuerwerker underwent surgery to correct the bunion at Lenox Hill Hospital on June 27, 1997. Plaintiffs also allege that defendant Weiner, assisted by defendant Bharam, committed medical malpractice by negligently performing a bunionectomy only, and by failing to perform a chevron osteotomy, thereby causing plaintiff Susan Feuerwerker to suffer the regrowth of the bunion, and the growth of an additional bunion (digitii mini varus) on the smaller toe of the same foot. On October 19, 1999, plaintiff Susan Feuerwerker underwent more extensive surgery, performed by a different surgeon, who allegedly removed both bunions and corrected the underlying

condition. According to plaintiffs, the second surgery was necessitated by the purported malpractice committed during the first surgery. Plaintiffs also allege that plaintiff Susan Feuerwerker was not properly informed by defendants of the risks of certain complications of the first surgery, i.e. that the hallux valgus could grow back, and that the other side of her foot could become impaired due to the biomechanical effect the surgery and the regrowth of the hallux valgus would have on her walking.

Defendants each served answers denying the material allegations of the complaint and raising various affirmative defenses.

Defendants seek summary judgment dismissing the complaint on the ground that no triable issue of fact exists.

On a motion for summary judgment, the proponent of the motion must make 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 (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853; Zuckerman v City of New York, 49 NY2d 557, 562; Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404).

With respect to the causes of action based upon medical and podiatric malpractice, defendants offer an affidavit of a licensed physician who is an expert in orthopedic surgery. The physician states that upon his review of the hospital chart, pre-operative X-rays and the operative report of defendant Weiner, he is of the opinion, based upon a reasonable degree of medical certainty, that the care and surgical treatment rendered to plaintiff Susan Feuerwerker by defendants was technically appropriate, in all respects, including the surgical approach, the post-surgical management, and the post-operative dressings and after care, and was in accordance with good and accepted medical practice. In addition, defendants offer copies of the deposition transcripts of defendant Weiner, Bharam and plaintiff Susan Feuerwerker. Defendant Weiner testified that he informed plaintiff Susan Feuerwerker of her treatment options, including conservative care with special shoes, and surgical correction, via either a basal osteotomy or a chevron osteotomy, and the risks and benefits of each option. Defendant Weiner further testified that he performed the surgery, and defendant Bharam, a first-year orthopedic resident, assisted him by holding retractors. Defendant Bharam testified to a complete lack of any specific recollection of plaintiff Susan Feuerwerker, or the surgery at issue. Plaintiff Susan Feuerwerker admitted during her testimony that she signed, without reading, a form consenting to surgery.¹

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The consent form was not presented in support of the motion.

Defendants' submissions suffice to make out a prima facie showing that defendants were not negligent in treating plaintiff Susan Feuerwerker. Such showing shifts the burden to plaintiffs to come forward with evidentiary proof sufficient to establish the existence of a material issue of fact relative to defendants (see, Alvarez v Prospect Hosp., 68 NY2d 320, 324; Zuckerman v City of New York, 49 NY2d 557, 562; Santilli v CHP Inc., 274 AD2d 905, 907; Wahila v Kerr, 204 AD2d 935).

Plaintiffs offer the affidavit of a licensed physician, who is an expert in orthopedic medicine. In his affidavit, he states that upon his review of the pre-operative and post-operative X-rays and the operative report of defendant Weiner, and the post-operative report of the second surgeon, he is of the opinion, based upon a reasonable degree of medical certainty, that defendant Weiner failed to perform a chevron osteotomy, and failed to properly realign the first metatarsal bone and reduce the intermetatarsal angle. According to the expert witness, these failures deviated from accepted medical practice, thereby causing the necessity for the subsequent surgery.

Plaintiffs also offer the affidavit of a licensed podiatrist, who is an expert in podiatric medicine, wherein he states that he reviewed the hospital chart, pre-operative X-rays and the operative report of defendant Weiner. He opines, that based upon a reasonable degree of podiatric medical and surgical certainty, the care and treatment rendered to plaintiff Susan Feuerwerker by defendant Weiner was ineffective, incorrect and a deviation from accepted medical, podiatric and surgical practice, insofar as defendant Weiner failed to realign the head of the first metatarsal over the sesamoid bones, failed to stabilize the metatarsophalangeal bone, and failed to repair the capsule on the medial side of the metatarsophalangeal joint. He further opines that defendant Bharam failed to recognize the surgical deviations committed by defendant Weiner, and therefore, failed to ensure that corrective steps were taken by defendant Weiner prior to the conclusion of surgery.

Plaintiff Susan Feuerwerker avers that prior to her consenting to surgery, defendant Weiner informed her only that the surgery involved the breaking of her big toe and the shaving of the bunion. She testified that no one else, prior to surgery, discussed any treatment or its risks with her, and she did not recall defendant Weiner mentioning any alternatives to surgery. According to plaintiff Susan Feuerwerker, she would not have consented to the first surgery if she had been informed of the potential complications, but rather, would have explored other possible methods of treatment.

That branch of the motion seeking summary judgment dismissing the causes of action asserted against defendant Bharam is granted. The record reveals that the function of defendant Bharam, as the

surgical assistant, consisted of holding retractors for defendant Weiner, and plaintiffs have failed to raise a triable issue of fact suggesting that defendant Bharam performed this limited duty negligently (see, Spinosa v Weinstein, 168 AD2d 32). In addition, under these circumstances, where defendant Weiner was to perform the surgical procedure, and did so, defendant Bharam had no duty to inform plaintiff Susan Feuerwerker of the risks and complications relative to the surgical treatment (see, Spinosa v Weinstein, supra).

That branch of the motion seeking summary judgment dismissing the complaint against defendant Weiner is denied. Plaintiffs' submissions raise triable issues of fact as to whether defendant Weiner was negligent in performing the surgery, and if so, whether that negligence was a proximate cause of her injury (see, Alvarez v Prospect Hosp., supra; Fileccia v Massapequa Gen. Hosp., 63 NY2d 639). They also raise a question of fact as to whether defendant Weiner properly informed plaintiff Susan Feuerwerker of all reasonably foreseeable risks of, and alternatives to, surgical treatment (see, Rotuba Extruders v Ceppos, 46 NY2d 223, 231; Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404; Pollatos v Glasser, 255 AD2d 305).

That branch of the motion seeking summary judgment dismissing the complaint against defendant Lenox Hill Hospital is granted. The claims by plaintiffs against the hospital are premised upon a theory of vicarious liability for the actions of defendants Weiner and Bharam. In the absence of proof that defendant Bharam committed malpractice, there is no basis for the imposition of vicarious liability against the hospital based upon his alleged acts (see, Perrone v Grover, 272 AD2d 312). The submissions, furthermore, reveal that defendant Weiner was acting as a private attending surgeon at Lenox Hill Hospital, when he allegedly committed the malpractice, rather than as an employee of the hospital. Plaintiffs have failed to come forward with evidentiary proof demonstrating a relationship of control between the hospital and defendant Weiner (see, Alvarez v Prospect Hosp., 68 NY2d 320; Zuckerman v City of New York, 49 NY2d 557; Ryan v New York City Health and Hospitals Corp., 220 AD2d 734; Sledziewski v Cioffi, 137 AD2d 186). Under such circumstance, defendant Lenox Hill Hospital may not be held vicariously liable for the alleged acts of defendant Weiner (see, Sledziewski v Cioffi, supra).

Dated: April 19, 2002

J.S.C.