

<b>Casola v Northern Westchester Hosp. Assn.</b>
2019 NY Slip Op 34199(U)
April 25, 2019
Supreme Court, Westchester County
Docket Number: 65996/16
Judge: Linda S. Jamieson
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Disp \_\_\_ Dec\_x\_\_\_ Seq. No. 5 Type\_reargue\_\_\_

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF WESTCHESTER

**PRESENT: HON. LINDA S. JAMIESON**  
 -----X  
 JAMES CASOLA,

Plaintiff,

-against-

Index No. 65996/16

DECISION AND ORDER

NORTHERN WESTCHESTER HOSPITAL  
 ASSOCIATION, EVAN KARAS, M.D., MARK  
 BRAUNING, M.D., MICHAEL ROSEN, M.D.,  
 DANIEL A. LEONARD, M.D.,

Defendants.

-----X

The following papers numbered 1 to 5 were read on this motion:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmation and Exhibits	1
Original Motion Papers	2
Affirmation and Exhibits in Opposition	3
Reply Affirmation	4
Original Reply Affirmation	5

The Court has defendant Dr. Karas' motion to reargue this Court's January 7, 2019 Decision and Order, which denied summary judgment to Dr. Karas. The basis for the denial was that Dr. Karas failed to submit Working Copies to the Court of his motion papers. In his present motion, counsel for Dr. Karas claims that he never received the Court's December 17, 2018 email asking for

Working Copies, but only the Part Clerk's email from October 16, 2018 (also seeking Working Copies). The copy of the email retained by the Court shows that the email from the Principal Court Attorney, sent on December 17, 2018 at 3:43 p.m., went to nine different counsel, including Mr. Romano, all from the e-filing system's email. Nonetheless, the Court grants the motion to reargue to the extent of considering the motion for summary judgment on the merits, pursuant to CPLR § 2001.

It is well-settled that "A defendant seeking summary judgment in a medical malpractice action must make a prima facie showing either that he or she did not depart from the accepted standard of care or that any departure was not a proximate cause of the plaintiff's injuries." *Aliosha v. Ostad*, 153 A.D.3d 591, 592, 61 N.Y.S.3d 55, 56-57 (2d Dept. 2017). Dr. Karas has made such a showing here. His expert, Dr. Kavanagh, stated that the assessment of a post-operative patient for the likelihood of developing pressure ulcers is a nursing function; the use of the CPM machine was a nursing function; and the monitoring of the CPM machine was a nursing function. Dr. Kavanagh stated that when plaintiff complained to Dr. Karas about heel pain, Dr. Karas noted the heel sores and "ordered heel precautions and then deferred to the nurses and the wound care providers for treatment." Dr. Kavanagh determined that all of the malpractice

alleged is a nursing function, and that it was perfectly appropriate for Dr. Karas to rely on the nursing staff.

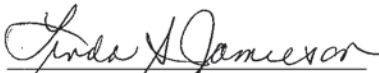
In response to this prima facie showing, plaintiff's expert, Dr. Brenner, states that the day after the injury to plaintiff's heel began, Dr. Karas' notes "state no risk for skin breakdown." The next day, although plaintiff complained of heel pain, and Dr. Karas noted pressure sores there, he "continued to note no risk for skin breakdown." He did not order a wound consult, but left it up to the nursing staff. Dr. Brenner concludes that as plaintiff's treating orthopedist, Dr. Karas was responsible for monitoring plaintiff's care during the admission, particularly the leg on which he had done the knee replacement. He states that "the development of a deep tissue injury and pressure ulcer does not fall solely on the responsibility of the nursing staff of the hospital. Dr. Karas had the responsibility to inspect Mr. Casola's heels and order wound consult's [sic] if needed." It is thus clear that the experts differ on whether Dr. Karas was required to oversee the heel care, or whether it was something that was appropriately designated entirely to the nursing staff. As the Second Department has stated, "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions." *Henry v. Sunrise Manor Ctr. for Nursing & Rehab.*, 147 A.D.3d 739, 740-41, 46 N.Y.S.3d 649, 651 (2d Dept. 2017). "Such conflicting expert

opinions will raise credibility issues which can only be resolved by a jury." *Fink v. DeAngelis*, 117 A.D.3d 894, 896, 986 N.Y.S.2d 212, 214 (2d Dept. 2014).

The motion is thus denied.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York  
April 25, 2019

  
HON. LINDA S. JAMIESON  
Justice of the Supreme Court

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