

**Bach v Jaber**

2007 NY Slip Op 34345(U)

December 24, 2007

Supreme Court, Kings County

Docket Number: 0032757/2001

Judge: Gerard H. Rosenberg

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At an I.A.S. Term, Part MMTRP, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24<sup>th</sup> day of December, 2007.

P R E S E N T:

HON. GERARD H. ROSENBERG,

Justice.

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JOHN E. BACH, JR., as Temporary Guardian of the Person and Property of JUDITH TOTILLO-BRIER, and GERTRUDE M. BRIER, as the Administrator of the Estate of RONALD J. BRIER,

*Plaintiffs,*

*-against-*

AHMAD M. JABER, M.D., AHMAD M. JABER, M.D., P.C., NAJIA SHAHIN, M.D., LUTHERAN MEDICAL CENTER, LEON ROSENKRANZ, M.D., ADVANCED CARE, INC. and ST. LUKE'S CORNWALL HOSPITAL,

*Defendants.*

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**DECISION & ORDER**

Index No. 32757/01

Cal. No. 2007-001844T

Motion Seq. Nos. 003, 004

The following papers num'bered 1 to 8 read on this motion.

	Papers Numbered
Notice of Motion, Affirmation(s)/Affidavit(s) and Exhibits Annexed _____	1- 2
Notice of Cross-Motion, Affirmation(s)/Affidavit(s) and Exhibits Annexed _____	4-5
Affirmation(s) in Opposition and Exhibits Annexed _____	3, 6, 7
Reply Affirmation(s)and Exhibits Annexed _____	8

Upon the foregoing papers, and upon oral argument, defendant Advanced Care, Inc. (Advanced Care) moves pursuant to CPLR 3212 for an order granting summary judgment and dismissing the complaint (Motion Seq. No. 003). Plaintiffs cross-move for a special

preference pursuant to CPLR 3403(a) (Motion Seq. No. 004).

This is an action alleging medical malpractice. With respect to the moving defendant, plaintiffs allege that Advanced Care “was negligent in failing to properly attend and treat the (then 48 year-old) plaintiff (Judith Totillo-Brier [hereinafter “plaintiff”])<sup>1</sup>; in failing to remove the PICC<sup>2</sup> line after being unable to get a blood return on December 2, 2003; in failing to insert a new PICC line after failing to obtain a blood return; in failing to refer plaintiff for treatment of the PICC line; in failing to refer the plaintiff for an infectious disease consult; in failing to arrange for antibiotic treatment for the plaintiff; in failing to protect the plaintiff from infection of the PICC line; in failing to properly notify appropriate physicians and medical personnel of the problem with the plaintiff’s PICC line” (Verified Bill of Particulars ¶5 [material in parentheses added]).

As a result plaintiff alleges to have suffered line sepsis, staphylococcus sepsis, endocarditis, brain abscess secondary to infected PICC line, dementia, hemiplegia and hemiparesis, aphasia, cerebral infarction, encephalitis, lung abscess, intestinal fistula, repair of small bowel fistula and urethral dilation (Verified Bill of Particulars ¶12).

### ***Background***

Plaintiff was admitted to co-defendant Lutheran Medical Center on September 5, 2000 with a complaint of a lump in her left lower abdomen, which she had felt for several months.

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<sup>1</sup> Ronald J. Brier, now deceased, was the spouse of Judith Totillo-Brier when this action was commenced. He asserted only a derivative cause of action, so references to “plaintiff” from this point forward refer only to Judith Totillo-Brier.

<sup>2</sup> A peripherally inserted central catheter.

She had previously been treated for this condition by co-defendant Ahmed Jaber, M.D., and on September 5, 2000 Dr. Jaber performed a total abdominal hysterectomy (TAH), bilateral salpingo oophorectomy and removal of a benign stromal tumor. This began an extended post-surgical course with multiple re-admissions to the hospital and surgeries to address numerous conditions, commencing on September 12, 2000 and running through October of 2003.<sup>3</sup>

After a surgery in October of 2003 plaintiff suffered a recurrence of a small bowel fistula and the development of fevers. Plaintiff was placed on antibiotics and total parenteral nutrition (TPN). On October 30, 2003 the PICC line was inserted for the administration of antibiotics and TPN. By November 5, 2003 the fistula drainage had decreased, but an abscess above the fistula had developed which was incised, drained and dressed. Plaintiff was discharged home on November 6, 2003 and Advanced Care was retained to provide home care.

Advanced Care claims that its function was to monitor and care for the plaintiff's PICC line, draw blood for blood tests and perform wound care. Nursing visits were made on

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<sup>3</sup> Specifically, plaintiff's extensive medical history and hospitalizations include, inter alia, a sigmoid colon resection with Hartmann's pouch with extensive peritoneal lavage and end colostomy on September 12, 2000; a repair of the rectosigmoid strump, closure of the abdominal evisceration with composix mesh and insertion of a central venous line on September 20, 2000; debridement of the abdominal wound, removal of infected mesh and marsupialization on January 5, 2001; excision of enterocutaneous fistula and enterraphy on January 25, 2001; closure of the colostomy and abdominal wound, and removal of mesh on April 18, 2001; drainage of an intra-abdominal abscess and a descending colostomy on April 28, 2001; a hospitalization for fever, ventral hernia and upper respiratory infection on November 20-27, 2001; excision of mesh from the abdominal wall and debridement of the abdominal wall on January 24, 2002; and removal of infected abdominal mesh and excision of an enterocutaneous fistula and enterorrhaphy on October 21, 2003.

November 7, 8, 10, 13, 18, 20, 22 and 25, 2003, and December 2, 2003. Marguerite Kelly, R.N. was the visiting nurse on each of these visits, with the exception of the December 2, 2003 visit, which was performed by Lorilee Herdman, R.N.

On December 7, 2003 plaintiff was brought by ambulance to St. Luke's Cornwall Hospital with complaints of abdominal pain and vomiting. The PICC line was removed and the catheter tip, which had been situated inside plaintiff's distal superior vena cava, was cultured and grew methicillin resistant staphylococcus aureus (MRSA). After a ten-day stay at St. Luke's Cornwall Hospital plaintiff was transferred to Vassar Brothers Medical Center for further management. Her discharge diagnoses were MRSA sepsis with endocarditis and a probable brain abscess secondary to an infected PICC line. Plaintiff treated at Vassar Brothers Medical Center until her discharge on January 21, 2004. She then was provided home care by Advanced Care through February 29, 2004. Plaintiff does not assert that Advanced Care was negligent on these latter visits.

### ***Summary Judgment***

The burden on a motion for summary judgment rests initially upon the moving party to come forward with sufficient proof in admissible form to enable a court to determine that it is entitled to judgment as a matter of law. If this burden cannot be met, the court must deny the relief sought (CPLR 3212; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). However, once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the

action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]; *see also Zuckerman*, 49 NY2d at 562). The essential elements of a medical malpractice claim are a departure from good and accepted medical practice and evidence that such departure was a proximate cause of the plaintiff’s injury (*see DiMitri v Monsouri*, 302 AD2d 420, 421 [2003]). Therefore, on a motion for summary judgment, a defendant has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

In support of the motion Advanced Care submits the affirmation of Barry Hartman, M.D. a physician board certified in Internal Medicine and Infectious Diseases. After review of the bill of particulars and medical records Dr. Hartman opines within a reasonable degree of medical certainty that Advanced Care committed no departures in plaintiff’s care.

He explains that a PICC line is inserted through a peripheral vein in the left arm and pushed toward the heart. The tip is typically placed in the distal superior vena cava, and most of the length of a PICC is situated inside the plaintiff’s body. Dr. Hartman explains that while Advanced Care provided care for the plaintiff from November 7, 2003 through February 29, 2004, the nursing visit at issue in this case took place on December 2, 2003.

On that date Nurse Lorilee Herdman noted that plaintiff’s vital signs were stable and that there were no signs of infection at the PICC line site such as redness, swelling, oozing, tenderness or irritation around the PICC line site, as well as fever or an increased arm circumference due to swelling. Dr. Hartman therefore opines that there was no reason to

remove the line to check for infection, which is the only other way to check. Moreover, Nurse Herdman's notes are thorough and reflect that vital signs were checked and were stable, and that there were no deficits in such things as ventilation, circulation and elimination. The patient was compliant with food and fluids and neurologically alert and oriented.

Nurse Herdman changed the PICC line cap, dressing and extension tube. The PICC line flushed without resistance with heparin and saline. Dr. Hartman opines that when Nurse Herdman was unable to get a blood return from the PICC line she appropriately performed a venipuncture in the right antecubital vein and obtained blood for lab tests. Dr. Hartman disagrees with plaintiff's claim that the absence of a blood return was a sign of infection that mandated replacement of the PICC line. Rather, the absence of a blood return is usually not a sign of infection, and it is usually because there is a clot on the end of the PICC line or the end of the PICC line is resting on the wall of a vein.

Dr. Hartman opines that there was no indication on December 2, 2003 to remove or replace the PICC line, or to refer the plaintiff to a physician or infectious disease specialist for further PICC line care, or to notify any other physician, because there was no sign of infection and the PICC line was working. In addition, Advanced Care had no reason to arrange for additional antibiotic care at that time. Plaintiff was already receiving the antibiotics ordered by her physician, Dr. Shahin, and any adjustment of her antibiotic regimen would be his responsibility. Finally, Dr. Hartman opines that plaintiff had no signs of infection on December 2, 2003 and the infection which she had when she presented to St. Luke's Cornwall Hospital on December 7, 2003 probably developed between December 2 and

December 7, 2003.

Advanced Care additionally submits the affidavit of Barbara Ann Messina, R.N, a registered nurse and nurse practitioner and a Clinical Associate Professor of Nursing at Stony Brook University School of Nursing, who opines within a reasonable degree of nursing certainty that Advanced Care acted within accepted standards of nursing care. Nurse Messina opines that since there were no external signs of infection on December 2, 2003 Advanced Care could not have reasonably known of a PICC line infection inside the patient's body, if such an infection even existed on that date.

She states that no blood return frequently occurs with a PICC line, so that Nurse Herdman appropriately performed the venipuncture in the right antecubital vein to obtain blood for the lab tests. Nurse Messina further opines that the absence of a blood return is not a sign of infection, does not mean that the PICC line should be removed or replaced and does not warrant contacting the plaintiff's physician, particularly given the absence of any symptoms of infection and the continued functioning of the PICC line.

Nurse Messina opines that there are risks in replacing a PICC line, such as an air embolism or an infection caused by the insertion of a new line. Further, it was not Advanced Care's duty to remove or replace the PICC line; rather that would be the duty of one of the plaintiff's physicians. Nurse Messina opines that there is no indication that Advanced Care caused the PICC line to become infected, and Advanced Care nurses properly engaged in infection control procedures, such as washing, using gloves, and discarding used materials.

Advanced Care further seeks dismissal of plaintiff's cause of action against Advanced

Care based on lack of informed consent. Advanced Care claims that there is no claim that it performed an invasive treatment of procedure to the plaintiff, and that therefore plaintiff cannot allege an injury resulting from some affirmative violation of plaintiff's physical integrity, citing *Jaycox v Reid*, 5 AD3d 994 (2004). Advanced Care asserts that rather than performing an invasive procedure without consent, plaintiff's allegation against it centers around the failure to remove the PICC line and insert a new PICC line.

### ***Opposition to the Motion***

Advanced Care's motion is opposed by co-defendants Ahmad M. Jaber, M.D. and Ahmad M. Jaber, M.D., P.C. (collectively "Dr. Jaber") and by the plaintiff. Dr. Jaber submits the affirmation of Bruce F. Farber, M.D., a physician board certified in Infectious Disease, who after review of the relevant medical records, pleadings and deposition transcripts, states the following with a reasonable degree of medical certainty.

With respect to the visit of November 22, 2003 Nurse Kelly reported that there were no signs of infection, and next to comments she reported that one suture was out, the line was out, and it was repositioned. She noted that the PICC line was patent, secured with steri-strips, had one suture out and the other remained intact. The Director of Nursing, Lisa Kot, R.N. was aware, but there is no documentation that any physician was called with respect to the suture and line being out, nor of plaintiff having been advised to seek the attention of her physicians Dr. Shahin or Dr. Rosenkranz or emergency room services.

On November 23, 2003 the plaintiff reported to the Emergency Department at St. Luke's Cornwall Hospital, indicating to the triage nurse that the PICC line had come out

partially and that the visiting nurse had reinserted it the day before. Plaintiff complained of redness to the site, that the suture pulled out and that the catheter was sliding out. While the Emergency Department physician applied a new anchoring suture and the dressing was changed, there is no documentation of any contact with plaintiff's treating physician and/or Advanced Care.

On December 2, 2003 Nurse Herdman indicated that the extension tubing, cap and dressing were changed, and that the site was without signs of infection or irritation. This was the last visit by Advanced Care until January 22, 2004. In the interim, on December 7, 2003 plaintiff was brought by ambulance to St. Luke's Cornwall Hospital Emergency Department with complaints of abdominal pain and fevers for one week with nausea and vomiting. Her temperature was 103.3, she was in sinus tachycardia and she was confused. The PICC line was removed and the catheter tip was sent for culture, and pan cultures were performed in the ER as well. These cultures grew MRSA. Plaintiff continued to have mental status changes, and a brain CT was suspicious for brain abscesses. In addition, additional testing demonstrated vegetations on the aortic valve consistent with endocarditis.

Dr. Farber opines that Advanced Care departed from good and accepted nursing practice with respect to the care and treatment of the plaintiff's PICC line. Specifically, the repositioning/reinsertion of plaintiff's PICC line on November 22, 2003 by Nurse Kelly was a departure from accepted practice. Repositioning/reinsertion of a PICC line after it has partially come out can introduce bacteria back into the vein which can lead to serious infection. When a PICC line comes out partially, the portion out of the patient's vein may

never be reinserted or repositioned. Sterile technique must be used at all times when procedures such as dressing change, removal of the line, repair of the line and line insertion are performed. When a PICC becomes displaced, the line should be secured with steri-strips and the patient's physician contacted immediately.

Dr. Farber opines that when Nurse Kelly repositioned/reinserted the line she introduced bacteria into the vein. While the plaintiff did go to the ER at St. Luke's the following day, the line was not removed, and the portion which Nurse Kelly had repositioned/reinserted remained inside the plaintiff until her admission to St. Luke's on December 7, 2003. The repositioning/reinsertion of the line, the lack of contact with plaintiff's physicians Dr. Shahin or Dr. Rosenkranz with regard to the suture coming out, and allowing the PICC line to remain inside the plaintiff once it had been reinserted on November 22, 2003, predisposed the plaintiff to line sepsis which ultimately caused her endocarditis and brain abscess, among other sequellae.

In opposing the motion by Advanced Care, plaintiff relies upon the opposition submitted by Dr. Ahmed, including the expert affirmation of Dr. Farber, and also submits an affidavit from Anne H. Dalton, R.N., who opines with a reasonable degree of nursing certainty that there were numerous departures from the standard of proper and accepted nursing care in the management of the patient's PICC line. Specifically Nurse Dalton cites the failure of Advanced Care to give proper instruction to the patient for protection from infection and failing to properly document and describe the instructions given to the patient in this regard; in failing to monitor the exact location of the PICC line and in failing to

thoroughly document the condition of the PICC line site. Nurse Dalton further opines that it was a departure for the Advanced Care nurse to have repositioned the PICC line on November 22, 2003 and to have failed to notify the patient's physician that she had done so. Nurse Dalton states that to reposition or reinsert a PICC line which has partially come out can introduce bacteria into the vein, which can lead to infection, which is what took place in this case.

In reply Advanced Care complains that the codefendant Dr. Jaber and the plaintiff are now alleging that Advanced Care was negligent on November 22, 2003, whereas in the Verified Bill of Particulars plaintiff had specifically claimed that Advanced Care was negligent on the December 2, 2003 home care visit. Advanced Care asserts that plaintiff has not served an amended complaint or amended bill of particulars, nor moved to do so, to assert such claim. Advanced Care also contends that there is no evidence that the PICC line was reinserted, and that the opinions of co-defendant's and plaintiff's experts to that effect are conclusory and speculative.

### *Analysis*

What is apparent from these submissions is that plaintiff has raised an alternative cause of action relating to the nursing care rendered on November 22, 2003 for the first time in opposition to defendant's summary judgment motion. Advanced Care's argument in its reply papers that the opposition by the co-defendant and the plaintiff is insufficient because it sets forth alleged departures not contained in the Bill of Particulars is therefore well-founded. The departures listed in the Verified Bill of Particulars (quoted in full at page 5, supra) are

specifically addressed to the December 2, 2003 visit. In addition, in ¶6 of the Bill of Particulars plaintiff alleges that “[u]pon information and belief the plaintiff was attended to by Lorilee Herdman, RN on December 2, 2003 and the results were reported to Lisa Kot, RN.” In reliance upon these pleadings, Advanced Care’s experts addressed the December 2, 2003 visit exclusively in the summary judgment motion.

In opposition, co-defendant Dr. Jaber and plaintiff raised departures which allegedly occurred on November 22, 2003. The court notes that the nurse who performed the November 22, 2003 visit upon the plaintiff, Nurse Kelly, has never been deposed and has therefore never been questioned on this issue. An Advanced Care supervisor, Lisa Kot, R.N., was deposed on behalf of Advanced Care, but the court has not found, and counsel do not cite, any testimony in her deposition specifically relevant to the alleged departures on November 22, 2003. Lastly, Nurse Herdman was deposed, but understandably only as to the December 2, 2003 visit, since that was her only contact with the plaintiff.

This action was commenced in August 2001 against Dr. Jaber and Lutheran Medical Center (LMC). After the action was discontinued against LMC plaintiffs commenced a second action against LMC as well as Naji A. Shahin, M.D. and these actions were consolidated in January 2005. Plaintiff’s motion to amend the complaint to add Advanced Care, Leon Rosenkranz, M.D. and St. Luke’s Cornwall Hospital as additional defendants was granted on April 10, 2006. Issue was joined as to Advanced Care on May 17, 2006. The Verified Bill of Particulars as to Advanced Care was served in June of 2006. Nurse Herdman was deposed on September 27, 2006, Nurse Kot was deposed on December 8, 2006, and plaintiff filed the

Note of Issue on January 18, 2007.

While plaintiff moved to amend the complaint in April 2006, plaintiff has never attempted to supplement or amend the Bill of Particulars to assert her theory of departures as to the November 22, 2003 visit, and did not do so even in response to Advanced Care's motion. Plaintiff and co-defendant have chosen to oppose the motion for summary judgment by ignoring Advanced Care's focus on the December 2, 2003 visit and by introducing expert affirmations focusing instead on the November 22, 2003 visit.

This is improper. While a court may properly look beyond the allegations in the pleadings and deny summary judgment where a party's papers in opposition to the motion raise triable issues of fact (*Gold Connection Discount Jewelers v American Dist. Tel. Co.*, 212 AD2d 577, 578 [1995]), delay in presenting the alternative cause of action is a basis for its rejection (*Comsewogue USFD v Allied-Trent Roofing Systems, Inc.*, 15 AD3d 523, 524 [2005]). Moreover, it has been held that raising an alternative cause of action for the first time in opposition to defendant's summary judgment motion warrants denial of the motion, where a plaintiff served a supplemental bill of particulars without leave of the court after the filing of the note of issue (*Medina v Sears, Roebuck & Co.*, 41 AD3d 798 [2007]). In the case at bar, plaintiff has not even taken that step to amend her pleadings.

### ***Special Preference***

The plaintiff seeks a special preference, citing her physical condition and a dire financial situation. CPLR 3403 (a) provides that civil cases shall be tried in the order in which notes of issue have been filed, but that certain cases will be will be entitled to a

preference, among them “an action to recover damages for medical, dental or podiatric malpractice” (CPLR 3403 [a][5]).

This motion is untimely, as it was not served within ten days of the filing of the note of issue, as required by CPLR 3403(b). More importantly, this case already has been given a trial preference by reason of it being an action for medical malpractice, and plaintiff is not entitled to multiple preferences (*Green v Vogel*, 144 AD2d 66 [1989]). Finally, the court does not find that plaintiff has exhibited such exceptional circumstances as to warrant an additional preference.

### ***Conclusion***

Accordingly, the motion by Advanced Care, Inc. for summary judgment is granted, the complaint is severed, and Advanced Care, Inc. may enter judgment accordingly. The cross-motion by the plaintiff for a special preference is denied.

This constitutes the decision and order of the court.

ENTER 

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HON. GERARD H. ROSENBERG

J. S. C.