

**Hashmi v Messiha**

2008 NY Slip Op 31013(U)

April 7, 2008

Supreme Court, Richmond County

Docket Number: 0103062/2007

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND PART DCM 3**

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**Index No.: 103062/07  
Motion No.: 1, 2**

**IMADUDDIN SYED HASHMI, M.D., MEDICAL  
OFFICE P.C., LAFAYETTE MEDICAL OFFICE, P.C.,**

*Plaintiffs*

*against*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

**NABIL MESSIHA, Individually and as Administrator of/for  
SAHAR MESSIHA, deceased, and NABIL MESSIHA,  
as Father and Natural Guardian of CHRISTINE MESSIHA  
and JOSEPH MESSIAH, THE NEW YORK POST,  
JIM HINCH BERNADETTE PANZELLA, P.C., JOHN DOE,  
a fictitious name intended to represent the physician who  
conferred with BERNADETTE PANZELLA, P.C., and  
MORRIS, DUFFY, ALONSO AND FALEY,**

*Defendants.*

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The following items were considered in the review of this motion to dismiss and summary judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Petition and Affidavits Annexed	1, 2
Notice of Cross-Motion and Affidavits Annexed	3
Replying Papers	4, 5
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendants, Morris, Duffy, Alonso and Faley (“Morris, Duffy”) and Bernadette Panzella (“Panzella”), seek an order pursuant to CPLR §3211 for summary judgment dismissing plaintiff’s complaint with prejudice. Plaintiffs make a cross-motion granting the plaintiffs a default judgment pursuant to CPLR §3012 against The New York Post (“Post”), Nabil Messiha, individually, Nabil Messiha, as administrator of/for Sahar Messiha, deceased, Nabil Messiha, as father and natural guardian of Christine Messiha and Joseph Messiha, and Bernadette Panzella, P.C.

## **Background**

In this action, plaintiffs, Imaduddin Syed Hashmi (“Hashmi”), Medical Office, P.C. and Lafayette Medical Office, P.C. (collectively “plaintiffs”) seek damages for libel, slander, defamation of character and legal malpractice. Each of these allegations stem from an underlying medical malpractice lawsuit that was filed against the plaintiffs on behalf of Nabil Messiha (“Messiha”) in his individual capacity as well as in his capacity as the Administrator of the Estate of his deceased wife, Sarah Messiha and also in his capacity as Father and Natural Guardian of Christine and Joseph Messiha. That medical malpractice lawsuit is pending in Kings County and filed on October 5, 2005 alleging that the plaintiff Hashmi was negligent in his care and treatment of Messiha’s wife, Sahar Messiha, on March 7, 2004 at Staten Island University Hospital (“SIUH”).

On or about October 18, 2005, Morris Duffy was retained by Hashmi’s medical malpractice liability carrier to defend Hashmi. Hashmi informed Morris Duffy that he was not the doctor involved in the underlying medical malpractice and that this was a case of “mistaken identity.” Morris Duffy determined that the best plan was to proceed with discovery. In the meantime, Hashmi also hired Steven Salami, Esq. to represent him in this matter.

On November 7, 2005, the New York Post published an article regarding the underlying medical malpractice case which stated that the underlying plaintiff had sued SIUH and Dr. Imaduddin Hashmi for an undisclosed amount of money. It was later disclosed in May 2006, that the actual “Hashmi” involved in the treatment that led to the underlying medical malpractice action was the underlying co-defendant, Kabeeruddin Syed Hasmi, M.D., who is Hashmi’s brother.

By order to show cause dated January 18, 2006, Mr. Salami filed to dismiss on Hashmi’s behalf. On August 29, 2006, Justice Randolph Jackson of the Supreme Court, Kings County, denied the motion to dismiss, made on behalf of Hashmi.

Hashmi then brought the instant action against the defendants for libel, slander, defamation of character and legal malpractice. Defendants, Morris Duffy and Panzella seek an order pursuant to CPLR §3211 for summary judgment dismissing plaintiff’s complaint with prejudice. Plaintiffs make a cross-

motion (1) granting the plaintiffs a default judgment pursuant to CPLR §3012 against The New York Post, Nabil Messiha, individually, Nabil Messiha, as administrator of/for Sahar Messiha, deceased, Nabil Messiha, as father and natural guardian of Christine Messiha and Joseph Messiha, and Bernadette Panzella, P.C. Each motion will be addressed in turn.

### **Discussion**

#### ***Morris Duffy's Motion to Dismiss the Legal Malpractice Claim***

Plaintiffs claim that he explained to his lawyer, Patricia Permakoff, Esq, on behalf of Morris Duffy numerous times that he had never physically worked at SIUH and that plaintiffs in the underlying case sued the wrong person and Morris Duffy elected to proceed with this case ignoring this discrepancy. Furthermore, plaintiffs claim that had Morris Duffy zealously advocated on Hashmi's behalf by filing a motion to dismiss at the onset of the case, the defendant New York Post would not have published the article stating that Hashmi was being sued, which resulted in serious damages to Hashmi's medical practice.

Morris Duffy claims that Hashmi has failed to prove that they were negligent in any way. Morris Duffy claims they were diligent and competent with respect to their representation of Hashmi when they went forward with discovery in the underlying case because Mr. Salami did in fact bring a motion to dismiss on behalf of Hashmi in the underlying matter and the motion was denied. Furthermore, Morris Duffy argues that plaintiffs have failed to establish proximate causation because plaintiffs cannot prove that but for any act by Morris Duffy, the New York Post would not have published the article. In addition, Morris Duffy argues that Hashmi is at fault for not admitting that he knew the identity of the proper defendant. Morris Duffy claims that they did not know the actual "Hashmi" in the underlying claim was Hashmi's brother, Kabeeruddin, until Mr. Salami informed them in May 2006. Lastly, Morris Duffy claims that Hashmi has not established any ascertainable amount in damages.

In order to state a cause of action sounding in legal malpractice, the plaintiff must make a prima facie showing that the defendant failed to exercise that degree of care, skill, and diligence commonly exercised by an ordinary member of the legal community and that "but for" the attorney's negligence,

the plaintiff would have prevailed in the underlying action.<sup>1</sup> The requirement of proving a case within a case. . . is a distinctive feature of legal malpractice actions arising from an attorney's alleged negligence in preparing or conducting litigation. It adds an additional layer to the element of proximate cause, requiring the jury to find the hypothetical outcome of other litigation before finding the attorney's liability in the litigation before it."<sup>2</sup>

Morris Duffy's motion for summary judgment is denied. There are issues of fact as to Morris Duffy's actions during its representation of plaintiff Hashmi. Morris Duffy concedes that Hashmi did inform them that he was not a properly named defendant from the onset of litigation even though they did not learn until later that the actual doctor on duty was Hashmi's brother, Kabeeruddin Syed Hashmi. Morris Duffy's argument that its failure to make the motion to dismiss on Hashmi's behalf is insignificant because the motion was brought by Steven Salami, Esq. and denied does not defeat plaintiff Hashmi's claim for legal malpractice at this stage. Plaintiff sufficiently set forth issues of fact as to whether Morris Duffy's delay in bringing forth the motion to dismiss was a proximate cause to plaintiff's alleged damages.

#### ***Panzella's Motion to Dismiss for Libel and Slander***

Plaintiffs claim that based upon the defamatory and slanderous statements contained in the *Messiha* complaint (i.e., the underlying case), which were relied upon by the defendant, The New York Post ("Post"), in the publication of the newspaper article, the plaintiffs' reputations were damaged resulting in pecuniary damages.

The defendant Panzella moves for summary judgment based on the affirmative defense of absolute privilege and requests that financial sanctions be imposed on both plaintiffs and their attorney

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<sup>1</sup>*Kozmol v Law Firm of Allen L. Rothenberg*, 241 AD2d 484 [2d Dept 1997], citing *Platt v Portnoy*, 220 AD2d 652; *Andrews Beverage Distrib. v Stern*, 215 AD2d 706.

<sup>2</sup>*McKenna v Forsyth & Forsyth, Kaufman*, 280 AD2d 79 [4<sup>th</sup> Dept 2001], citing *Kituskie v Corbman*, 552 Pa 271, 281, *Titsworth v Mondo*, 95 Misc 2d 233, 242.

pursuant to The Rules of the Chief Administrator.<sup>3</sup> Panzella claims that the allegedly false statements were made in a complaint in a judicial proceeding, and thus, they are privileged and cannot be the basis of a lawsuit. In opposition, plaintiffs claim that absolute privilege was lost in this case because the language used was clearly impertinent or beyond the scope of the issues involved. Plaintiffs' attorney also seeks sanctions against Panzella for filing the lawsuit against his client.

In New York, it is well settled that absolute privilege attaches to an oral or written statement made in a judicial proceeding which is pertinent to the proceeding and the term "pertinent" has been liberally construed by the courts to attach to any statement that may possibly be or become material or pertinent.<sup>4</sup> Here, the Messiha complaint states that plaintiff Hashmi was being sued for medical malpractice. Although it was later revealed that the "K. Hashmi" on the medical records was Kabeeruddin Hashmi and not the plaintiff Hashmi, the "barest rationality, divorced from any palpable or pragmatic degree of probability, suffices, and that any doubt should be resolved in favor of upholding the privilege."<sup>5</sup> Therefore, under this rationale, the statements made in the complaint filed on behalf of Nabil Messiha are deemed pertinent to that action, and defendant Panzella's motion for judgment is granted.

As to the relief for sanctions filed by both plaintiffs and defendant, Messiha, the request is denied as they are not warranted in this case.

### ***Plaintiffs' Cross Motion***

Plaintiffs make a cross-motion granting the plaintiffs a default judgment pursuant to CPLR §3012 against Nabil Messiha, individually, Nabil Messiha, as administrator of/for Sahar Messiha, deceased, Nabil Messiha, as father and natural guardian of Christine Messiha and Joseph Messiha, and

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<sup>3</sup>22 NYCRR 130-1.1[a]

<sup>4</sup>*Dachowitz v Kranis*, 61 AD2d 783 [2d Dept 1978], citing *Andrews v Gardiner*, 224 NY 440, 441, *People ex rel. Bensky v Warden*, 258 NY 55, 59, *Martirano v Frost*, 25 NY2d 505, 507.

<sup>5</sup>*Id.*, citing *Seltzer v Fields*, 20 AD2d 60, 62-63, *Klein v Walston & Co.*, 41 Misc2d 379.

Bernadette Panzella, P.C.

As to the motion for default judgment against Nabil Messhia, it is denied. The plaintiffs' affidavit of service for Nabil Messiha indicates that he was served by delivery to a person of suitable age at Bernadette Panzella, P.C.'s law office on January 5, 2007, and by mail to that office which is identified in the affidavit of service as Nabil Messiha's last known "residence/place of business." Since Nabil Messiha neither resides or has a place of business at this law office, he was never properly served pursuant to CPLR §308.

The motion for default judgment against Panzella is also denied. By Order to Show Cause, dated January 22, 2007 (J. McMahon), the defendant Panzella's time to answer was stayed pending determination of an application to change of this action from Kings County to Richmond County.

This court notes that the motion for default judgment against the defendants, The New York Post and Hinch, has been voluntarily withdrawn by Plaintiff.

Accordingly, it is hereby:

ORDERED that the Defendants Morris, Duffy, Alonso and Faley's motion for summary judgment dismissing plaintiff's complaint with prejudice, is denied; and it is further

ORDERED that Bernadette Panzella's motion for summary for summary judgment is granted and plaintiff's claims are dismissed against her; and it is further

ORDERED that plaintiffs and defendant Bernadette Panzella's request for sanctions is denied; and it is further

ORDERED that Plaintiffs' cross motion granting the plaintiffs a default judgment against Nabil Messiha, individually, Nabil Messiha, as administrator of/for Sahar Messiha, deceased, Nabil Messiha,

as father and natural guardian of Christine Messiha and Joseph Messiha, and Bernadette Panzella, P.C.,  
is denied; and it is further

ORDERED, that all remaining parties appear at DCM Part 3 on **Tuesday, May 6, 2007** at  
9:30AM for a conference.

ENTER,

DATED: April 7, 2008

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Joseph J. Maltese  
Justice of the Supreme Court