

**Coleman v Xonophontos**

2009 NY Slip Op 32449(U)

October 6, 2009

Supreme Court, Nassau County

Docket Number: 600001/07

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

SCAN

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EVELA COLEMAN, as Administratrix of the Estate  
of LEOLA COLEMAN,

Plaintiff,

-against-

**MICHELE M. WOODARD  
J.S.C.**  
TRIAL/IAS Part 14  
Index No. 600001/07  
Motion Seq. Nos.: 02 & 03

XENOPHON P. XONOPHONTOS, M.D., ALAN  
MORTAZAVI, M.D., VIKTOR B. SMIRNOV, M.D.,  
ERIC R. BARTH, M.D., WANTAGH INTERNAL  
MEDICINE, P.C., MICHAEL BARTH, M.D., MICHAEL  
BARTH, M.D., P.C., H. BIANCA JAPAL, M.D., REISA  
F. ULLMAN, M.D. and MERCY MEDICAL CENTER,

Defendants.

**DECISION AND ORDER**

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**Papers Read on this Motion:**

Defendants Eric Barth, Wantagh Internal Medicine, and Michael Barth's Notice of Motion	02
Plaintiff's Notice of Cross-Motion	03
Plaintiff's Reply Affirmation	xx
Defendant Reisa Ullman's Affirmation in Reply	xx
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Defendant Xenophon Xenophontos's Affirmation in Partial Opposition	xx
Defendants Eric Barth, Wantagh Internal Medicine, and Michael Barth's Affirmation in Opposition	xx

In motion sequence number two, Defendants Eric R. Barth, M.D., Wantagh Internal Medicine, P.C., Michael Barth, M.D. and Michael C. Barth, P.C. s/h/a Michael Barth, M.D., P.C. move for an order pursuant to CPLR §3212 for Summary Judgment dismissing all claims of the Plaintiff's Complaint, directing the clerk to enter judgment in favor of Defendants, on the merits, removing their names from the caption or in the alternative, for an order pursuant to CPLR §214(a) granting partial Summary Judgment to Michael Barth, M.D. and Michael C. Barth, P.C. s/h/a Michael Barth, M.D.,

P.C. dismissing all claims prior to July 22, 2004 based on the failure to satisfy the Applicable Statutes of Limitations.

In motion sequence number three, the Plaintiff moves for the following:

1. An order deeming that if any Defendant obtains summary judgment and dismissal of Plaintiff's claims against her/him/it, then any remaining Defendant should be precluded from obtaining, or should be deemed to have waived or forfeited, the limited liability benefits of CPLR Article 16 in relation to the acts or omissions of said Defendant who is granted summary judgment and dismissal of Plaintiff's claims against her/him/it:
2. Deeming that if any Defendant obtains summary judgement and dismissal of Plaintiff's claims against her/him/it, then such should become the "law of the case" as to any remaining Defendant so as to preclude the application of CPLR §16 concerning the acts or omissions of said Defendant who is granted summary judgment and dismissal of Plaintiff's claims against him/her/it.

In this action, the Plaintiff seeks to recover damages for lack of informed consent, medical malpractice and wrongful death. She alleges that the Defendants negligently failed to properly diagnose and treat a gastrointestinal bleed. Drs. Eric Barth, Michael Barth, Reisa F. Ullman and Wantagh Internal Medicine, P.C. seek summary judgment dismissing the complaint and any and all cross-claims against them.

"On a motion for summary judgment pursuant to CPLR §3212, the proponent 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." *Sheppard-Mobley v King*, 10 AD3d 70, 74 (2d Dept 2004), *aff'd. as mod.*, 4 NY3d 627 (2005), *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Sheppard-Mobley v King*, *supra*, at p. 74, *citing Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*. If the movant meets his burden, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v Prospect Hosp.*, *supra*, at p. 324. The

evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See, Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521 (2d Dept 2006), citing *Secof v Greens Condominium*, 158 AD2d 591 (2d Dept 1990).

“To establish a *prima facie* case of liability in a medical malpractice action, a Plaintiff must prove (1) the standard of care in the locality where the treatment occurred, (2) that the Defendant breached that standard of care, and (3) that the breach of the standard was the proximate cause of injury (quotations omitted).” *Sampson v Contillo*, 55 AD3d 588 (2d Dept 2008), quoting *Nichols v Stamer*, 49 AD3d 832 (2d Dept 2008) and *Berger v Becker*, 272 AD2d 565, 565 (2d Dept 2000). In a medical malpractice action, a moving Defendant doctor and/or hospital has “the initial burden of establishing the absence of any departure from good and accepted medical malpractice or that the Plaintiff was not injured thereby (quotations omitted).” *Chance v Felder*, 33 AD3d 645 (2d Dept 2006), quoting *Williams v Sahay*, 12 AD3d 366, 368 (2d Dept 2004), and citing *Alvarez v Prospect Hosp.*, *supra*; *Johnson v Queens-Long Island Medical Group, P.C.*, 23 AD3d 525, 526 (2d Dept 2005); *Taylor v Nyack Hospital*, 18 AD3d 537, 538 (2d Dept 2005); *see also, Flanagan v Catskill Regional Medical Center*, 65 AD3d 563 (2d Dept 2009); *Thompson v Orner*, 36 AD3d 791 (2d Dept 2007). If the moving Defendant meets his burden in a medical malpractice action, in opposition, “a Plaintiff must submit a physician’s affidavit of merit attesting to a departure from accepted practice containing the attesting doctor’s opinion that the Defendant’s omissions or departures were a competent producing cause of the injury.” *Domaradzki v Glen Cove Ob/Gyn Assocs.*, 242 AD2d 282 (2d Dept 1997), citing *Cerkvenik by Cerkvenik v County of Westchester*, 200 AD2d 703 (2d Dept 1994); *Caggiano v Ross*, 130 AD2d 538 (2d Dept 1987); *Amsler v Verrilli*, 119 AD2d 786 (2d Dept 1986); *see also, Flanagan v Catskill Regional Medical Center, supra; Mosezhnik v Berenstein*, 33 AD3d 895 (2d Dept 2006). “General

allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment (quotations omitted).” *Flanagan v Catskill Regional Medical Center, supra*, at p. 565, quoting *Rebozo v Wilen*, 41 AD3d 457, 458 (2d Dept 2007), and citing *Alvarez v Prospect Hosp., supra*, at p. 324-325; *Sheenan-Conrades v Winifred Masterson Burke Rehabilitation Hosp.*, 51 AD3d 769, 770 (2d Dept 2008); *Thompson v Orner, supra*, at p. 792; *DiMitri v Monsouri*, 302 AD2d 420 (2d Dept 2003). An expert must set forth both the medically accepted standards of care and explain how they were departed from. *Geffner v North Shore University Hospital*, 57 AD3d 839, 842 (2d Dept 2008), citing *Mustello v Berg, supra*; *Behar v Cohen*, 21 AD3d 1045, 1047 (2d Dept 2005); *LaMarque v North Shore Univ. Hosp.*, 227 AD2d 594, 594-595 (2d Dept 1996). Furthermore, the Plaintiff’s expert must address all of the pivotal facts relied on by the Defendants’ experts. *See, Kaplan v Hamilton Medical Associates, P.C.*, 262 AD2d 609 (2d Dept 1999); *Geffner v North Shore University Hospital, supra*, at p. 842; *see also, Rebozo v Williams, supra*, at p. 459 (2d Dept 2007); *Slone v Salzer*, 7 AD3d 609 (2d Dept 2004); *Ventura v Beth Israel Medical Center*, 297 AD2d 801 (2d Dept 2002), *lv den.* 99 NY2d 510 (2003); *Fhima v Maimonides Medical Center*, 269 AD2d 559 (2d Dept 2000).

“To establish proximate cause, the Plaintiff must present ‘sufficient evidence from which a reasonable person might conclude that it was more probable than not that’ the Defendant’s deviation was a substantial factor in causing the injury.” *Alicea v Liguori*, 54 AD3d 784, 785 (2d Dept 2008), quoting *Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881, 883 (2d Dept 2005); citing *Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852 (2d Dept 1998), *lv to app den.* 92 NY2d 818 (1999). “ ‘The Plaintiff’s evidence may be deemed legally sufficient even if his expert cannot quantify the extent to which the Defendant’s act or omission decreased the Plaintiff’s chance of a better outcome or increased [the] injury, as long as evidence is presented from which the jury may infer that the

Defendant's conduct diminished the Plaintiff's chance of a better outcome or increased [the] injury.' ”  
*Alicea v Liguori, supra*, at p. 786, quoting *Flaherty v Fromberg*, 46 AD3d 743, 743 (2d Dept 2007);  
 citing *Barbuto v Winthrop University Hosp.*, 305 AD2d 623, 624 (2d Dept 2003); *Wong v Tang*, 2  
 AD3d 840, 841 (2d Dept 2003); *Jump v Facelle*, 275 AD2d 345, 346 (2d Dept 2000), *lv disp.*, 95  
 NY2d 931 (2000), *lv den.*, 98 NY2d 612 (2002).

“Summary judgment is not appropriate in a medical malpractice action where the parties adduce  
 conflicting medical expert opinions . . . . Such credibility issues can only be resolved by a jury.”  
*Feinberg v Feit*, 23 AD3d 517, 519 (2d Dept 2005), citing *Shields v Baktidy*, 11 AD3d 671 (2d Dept  
 2004); *Barbuto v Winthrop University Hosp., supra*; *Halkias v Otolaryngology-Facial Plastic Surgery  
 Assoc.*, 282 AD2d 650 (2d Dept 2001); *see also, Roca v Perel*, 51 AD3d 757, 759 (2d Dept 2008);  
*Graham v Mitchell*, 37 AD3d 408 (2d Dept 2007).

Through the affirmations of Dr. Robert Anthony Klein, a Board Certified Internist and  
 Gastroenterologist, Dr. Eric Barth, Dr. Michael Barth and Wantagh Internal Medicine, P.C. have  
 established their entitlement to summary judgment dismissing the compliant and any and all cross-  
 claims against them.

Having reviewed the Bills of Particulars, the pertinent medical records as well as the parties'  
 deposition transcripts, Dr. Klein opines to a reasonable degree of medical certainty that Dr. Michael  
 Barth's care and treatment of the decedent Ms. Leola Coleman was in accord with the applicable  
 standards of medical care. He opines that upon finding gastritis and esophagitis during the endoscopies  
 that he performed on Mrs. Coleman in 1997, Dr. Michael Barth properly prescribed a proton pump  
 inhibitor. He further opines that in 1997 after Ms. Coleman was found to have H.pylori bacteria in her  
 gastrointestinal tract, which is a bacteria that can cause ulcers, Dr. Michael Barth properly prescribed a  
 course of antibiotics. As a result of that endoscopy, Dr. Barth noted the presence of a deformity of the

duodenal bulb (the first section of the duodenum) which he felt may have been due to prior duodenal ulcer disease. Mrs. Coleman did not have an ulcer at that time. Dr. Klein further notes that Ms. Coleman tested negative for the presence of H.pylori bacteria during the second endoscopy by Dr. Michael Barth in May 2000 which was done as a follow-up to a colonoscopy performed by Dr. Eric Barth in April 2000; The endoscopy revealed mild to moderate gastritis. Dr. Klein notes that Ms. Coleman also tested negative for the presence of H.pylori after the endoscopy which was performed in November, 2004. Dr. Klein opines that given the lack of complaints as well as the lack of other findings during the endoscopies, there was nothing more for Dr. Michael Barth to do other than manage Ms. Coleman's treatment with medications. He notes that Ms. Coleman was supposed to return to see Michael Barth and was repeatedly instructed to do so, however, she declined to follow these instructions. Nevertheless, given the fact that there were no complaints of heartburn, reflux or epigastric and abdominal pain between the years 2000 and 2004, there is no evidence that would establish that Ms. Coleman had developed an ulcer during this interval of time.

It is also Dr. Klein's opinion that Dr. Michael Barth appropriately assessed Ms. Coleman when he saw her in the Emergency Room of Mercy Hospital on November 23, 2004 and that his performance of the endoscopy on November 24, 2004 was in accord with accepted medical practice. It is Dr. Klein's opinion to a reasonable degree of medical certainty that the perforation seen in the duodenum by Dr. Michael Barth during his endoscopy of November 24, 2004 was not as a result of a duodenal ulcer; Ms. Coleman had not experienced any gastrointestinal symptoms for years and ulcers of the duodenum usually occur in the proximal part of the duodenum. Dr. Klein notes that the perforation was found in a distal section in an area that was previously devoid of any inflammation. Dr. Klein notes that Dr. Xenophonos testified at his deposition, a known complication of an aortic bypass graft is that it can cause an erosion into the duodenum and it is his opinion that this was the case with respect to Ms.

Coleman. It is also Dr. Klein's opinion that Dr. Barth made the proper referrals and recommendations after he visualized Ms. Coleman's perforation, which required surgical intervention and care.

Having reviewed the Bills of Particulars, the pertinent medical records as well as the parties' deposition transcripts, Dr. Klein also opines to a reasonable degree of medical certainty that Dr. Eric Barth's treatment of the decedent Ms. Leola Coleman was in accord with the applicable standards of medical care. Dr. Klein notes that during the time from 1995 to 2004 Dr. Eric Barth treated Ms. Coleman, he monitored her blood and pressure and prescribed appropriate referrals to specialists for further evaluation. More specifically, Dr. Klein notes that when Dr. Eric Barth saw Ms. Coleman from July 1995 to March 1998 for pain in her abdominal or epigastric region after she saw Dr. Michael Barth who properly prescribed antibiotics for the H.pylori infection as well as proton pump inhibitors and/or H2 blockers, Dr. Eric Barth continued prescriptions as indicated, relieving her of her discomfort. In fact, Ms. Coleman made no complaints of that nature after March 1998. Dr. Klein notes that none of the endoscopic studies for that time period revealed anything other than gastritis and esophagitis for which again, the appropriate medication was prescribed. In addition, Dr. Klein opines that Dr. Eric Barth appropriately treated Ms. Coleman for her anemia. Dr. Klein finds that there is no evidence that Ms. Coleman had a duodenal ulcer or an impending duodenal ulcer during the time Dr. Eric Barth treated her.

Dr. Eric Barth, Dr. Michael Barth, and Wantagh Internal Medicine, P.C. have established their entitlement to summary judgment dismissing the complaint and any and all cross-claims against them thereby shifting the burden to the Plaintiffs and/or the remaining Defendants to establish the existence of a material issue of fact. Neither the Plaintiffs nor the other Defendants have substantively opposed the moving Defendants' motions for summary judgment. They are **granted** and the complaint and any and all cross-claims against Dr. Eric Barth, Dr. Michael Barth and Wantagh Internal Medicine, P.C. are

dismissed.

The Plaintiff's cross-motion is **granted** and the remaining Defendants are barred from obtaining the limited liability benefits of Article 16 of the CPLR in relation to the acts or omissions of Dr. Eric Barth, Dr. Michael Barth, Wantagh Internal Medicine, P.C. and Dr. Ullman.<sup>1</sup>

In opposing that relief, the parties rely on Article 14 of the CPLR, § 15-108 of the General Obligations Law and Article 16 of the CPLR. Article 14 addresses contribution amongst joint tortfeasors and does not apply here. General Obligations Law § 15-108 addresses set-offs where settlements have been entered and also does not apply here. As for the application of Article 16 of the CPLR, Defendants seek to adjudicate this issue at trial. The Defendants, however, fail to recognize the function of a motion pursuant to CPLR §3212. *Drooker v South Nassau Communities Hospital*, 175 Misc2d 181, 183 (Supreme Court Nassau County 1998). "Since a motion for summary judgment is the functional equivalent of a trial, it follows therefrom that any Defendant intending to obtain the limited liability benefits of Article 16 of the CPLR *based on the movant's purported professional negligence* must, under penalty of forfeiture, adduce proof on point in admissible form in response to the prima facie case presented." *Drooker v South Nassau Communities Hospital, supra*, at p. 183-184. "[T]he establishment of prima facie entitlement to summary relief by one of the Defendants in this litigation alters the equation, and . . . serves to require a contrary evidentiary showing if a grant of the relief sought, together with all attendant ramifications, is to be avoided." *Drooker v South Nassau Communities Hospital, supra*, at p. 184.

Again, Dr. Eric Barth, Dr. Michael Barth, and Wantagh Internal Medicine, P.C. have established their entitlement to summary judgment. No meaningful opposition has been interposed, even by the Defendants who seek to preserve their rights under Article 16 of the CPLR. For the reasons stated

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<sup>1</sup>The case against Dr. Ulman has been discontinued by stipulation so-ordered by this court on October 5, 2009.

alters the equation, and . . . serves to require a contrary evidentiary showing if a grant of the relief sought, together with all attendant ramifications, is to be avoided.” *Drooker v South Nassau Communities Hospital, supra*, at p. 184.

Again, Dr. Eric Barth, Dr. Michael Barth, and Wantagh Internal Medicine, P.C. have established their entitlement to summary judgment. No meaningful opposition has been interposed, even by the Defendants who seek to preserve their rights under Article 16 of the CPLR. For the reasons stated herein, the motion by Plaintiff for an order declaring that the Defendants are barred from obtaining the limited liability benefits of Article 16 of the CPLR in relation to the acts or omissions of Dr. Eric Barth, Dr. Michael Barth, and Wantagh Internal Medicine, P.C. is **granted**. *Drooker v South Nassau Communities Hospital, supra*; *See also*, New York Practice, New York Law of Torts § 10:9, Modified Joint and Several Liability Under CPLR Article 16 (2009); Siegel’s New York Practice § 168DF, “Joint” Tort Liability Adjustments: Burden of Proof (2009). It is hereby

**ORDERED**, that the remaining parties are directed to appear in DCM for trial on November 5, 2009 at 9:30 a.m.

This constitutes the Decision and Order of the Court.

**DATED:** October 6, 2009  
Mineola, N.Y. 11501

**ENTER:**

  
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**HON. MICHELE M. WOODARD**  
J.S.C.

H:\DECISION - SUMMARY JUDGMENT\Coleman v Xenophontos - MedMal.wpd

**ENTERED**  
OCT 15 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE