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SHORT FORM ORDER

INDEX # 25924-06
RETURN DATE:**5-14-08**
MOT. SEQ. #**002 & 003**

PUBLISH

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

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CHRISTOPHER FARETTA and CLAUDIA FARETTA,

Plaintiffs,

-against-

DAVID HECKLER, M.D., MIDDLE COUNTRY MEDICAL CARE, P.C., DARIE J. EHRLICH, N.P., "JANE" DOE, M.D., "JANE" DOE, P.A.,

Defendants.

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CALENDAR DATE: September 10, 2008
MNEMONIC: Mot. D; XMot D.

PLTF'S/PET'S ATTORNEY:

Leahy & Johnson
120 Wall St.
New York, NY 10005

DEFT'S/RESP ATTORNEY:

Geisler & Gabriele
Attys for Ehrlich
100 Quentin Roosevelt Blvd.
Garden City, NY 11530

Lawrence, Worden & Rainis
Attys for Heckler & Middle Country
425 Broad Hollow Road
Melville, NY 11747

Upon the following papers numbered 1 to 42 read on this motion and cros-s motion to dismiss ; Notice of Motion/Order to Show Cause and supporting papers 1- 12 ; Notice of Cross-Motion and supporting papers 13-26 ; Answering Affidavits and supporting papers 27-34 ; Replying Affidavits and supporting papers 35-38;39-42 ; Other ; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the defendant, Darie J. Ehrlich, N.P. (hereinafter Ehrlich) and the cross-motion by co-defendants David Heckler, M.D. (hereinafter Heckler) and Middle Country Medical Care P.C., seeking to dismiss the plaintiffs' causes of action in their complaint pursuant to CPLR §3211 (7) concerning lack of supervision for failure to state a cause of action are hereby denied. However, the alternative requested relief for a protective order pursuant to CPLR §3103(a) to preclude questioning on any personal or romantic relationships of the defendants is granted and the plaintiffs are precluded at this time in their questioning of the defendants during their depositions as to any romantic or personal relationships as those questions are irrelevant to the plaintiffs' medical malpractice claims.

The plaintiffs instituted this medical malpractice action against the defendants claiming a negligent failure to properly and timely diagnose and treat the plaintiff Christopher Faretta (hereinafter plaintiff) for meningitis. The plaintiff went to the Middle Country Medical Care offices at 266 Middle Country Road in Coram, Suffolk County on Long Island, New York on March 25, 2004 complaining of ear pain, a cough and congestion and was seen by the defendant Ehrlich, a nurse practitioner, who examined, treated and took blood work from the plaintiff . The analysis of the blood work on March 26, 2004 showed an elevated white cell count and on March 27, 2004 the plainitff's symptoms worsened and he was admitted to Huntington Hospital and diagnosed with meningitis. This lawsuit thereafter ensued. The

plaintiffs claim that Ehrlich failed to timely diagnose the meningitis and Heckler failed to properly supervise and/or collaborate with his employee Ehrlich with regard to the care and treatment of his patient.

The defendants now move to dismiss the plaintiffs' action pursuant to CPLR §3211 (7) for failure to state a cause of action sounding in medical malpractice claiming that there is no cause of action for malpractice against a physician for failing to supervise his physician's assistant/nurse practitioner since the applicable statute requires only an obligation to "collaborate" and not supervise. While a rather "novel" and narrow interpretation/theory is being expounded by the defendants, the plaintiffs oppose the requested relief arguing that the bill of particulars speaks to Ehrlich's "failing to consult a physician in her treatment of plaintiff" and "failed to collaborate with a supervising physician" as well as "failed to alert a supervising physician of the plaintiff's symptoms" and "deviated materially from the written protocols..." with regard to treating the plaintiff. The defendants also seek a protective order pursuant to CPLR §3103(a) to prevent the plaintiffs from questioning the defendants about personal romantic relationships which the plaintiffs claim are relevant to the issues in this case.

For the following reasons, the defendants' motion to dismiss the plaintiffs' lawsuit for failure to state a cause of action pursuant to CPLR §3211 (7) is denied; however, the requested relief of a protective order to prevent the plaintiffs from delving into the personal, romantic and/or sexual relationships of the defendants between themselves or others is granted and the plaintiffs are precluded from this line of inquiry.

Upon a motion to dismiss a complaint for legal insufficiency, the test to be applied is whether the complaint gives sufficient notice of the transactions, occurrences or series of transactions or occurrences intended to be proven and whether the requisite elements of any cause of action known to our law can be discerned from its averments. ***Frank v. DaimlerChrysler Corp.***, 292 AD2d 118, 741 NYS2d 9 (1st Dept. 2002); ***Gruen v. County of Suffolk***, 187 AD2d 560, 590 NYS2d 217 (2nd Dept. 1992); ***Moore v. Johnson***, 147 AD2d 621, 538 NYS2d 28 (2nd Dept. 1989); ***Conroy v. Cadillac Fairview Shopping Center Properties***, 143 AD2d 726, 533 NYS2d 446 (2nd Dept. 1988). The complaint should be liberally construed in the plaintiffs' favor and the facts alleged in the complaint should be assumed to be true. ***P.T. Bank Central Asai v. ABN Amro Bank N.V.***, 301 AD2d 373, 754 NYS2d 245 (1st Dept. 2003); ***Palazzolo v. Herrick, Feinstein, LLP***, 298 AD2d 372, 751 NYS2d 401 (2nd Dept. 2002); ***Holly v. Pennysaver Corp.***, 98 AD2d 570, 471 NYS2d 611 (2nd Dept. 1984). The nature of the inquiry is whether a cause of action exists and not whether it has been properly stated. ***McGill v. Parker***, 179 AD2d 98, 582 NYS2d 91 (1st Dept. 1992); ***Marini v. D'Atolito***, 162 AD2d 391, 557 NYS2d 45 (1st Dept. 1990).

As noted by the Court in ***Pace v. Perk***, 81 AD2d 444, 440 NYS2d 710 (2nd Dept. 1981) with regard to a motion to dismiss pursuant to CPLR §3211

" Upon such a motion to dismiss a complaint for legal insufficiency,

> ***Enterprises v. O'Dwyer***, 302 NY 451, 458, 99 NE2d 235), and must deem the complaint to allege whatever can be imputed from its statements by fair and reasonable intendment, however imperfectly, informally or illogically facts may be stated therein (***Condon v. Associated Hosp. Service of New York***, 287 NY 411, 40 NE2d 230). In making its analysis, the court is not bound by the constructions and theories of the parties (see, Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 3211:24). The test of the sufficiency of a complaint is whether it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action know to our law can be discerned from its averments (CPLR 3013; ***Foley v. D'Agostino***, 21 AD2d 60, 62-65, 248 NYS2d 121; ***Guggenheimer v. Ginzberg***, 43 NY2d 268, 274-275, 401 NYS2d 182, 372 NE2d 17). Where the motion to dismiss for failure to state a cause of action is made under CPLR 3211, the plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of his complaint (***Rovello v. Orofino Realty Co.***, 40 NY2d 633, 389 NYS2d 314, 357 NE2d 970)."

Pursuant to CPLR §3211 (a)(7), the Court must afford the complaint a liberal construction, accept as true the allegations contained therein, afford plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory. ***Guggenheimer v. Ginzburg***, 43 NY2d 268, 401 NYS2d 182 (1978); ***One Acre Inc. V. Town of Hempstead***, 215 AD2d 359, 626 NYS2d 226 (2nd Dept. 1995). Although as the Court noted the plaintiff need not make an evidentiary showing by submitting affidavits or other documentation in support of the complaint, nevertheless, if submitted by plaintiff, they "may be used freely to preserve inartfully pleaded, but potentially meritorious claims" (***Rovello v. Orofino Realty Co.***, supra, 635, 389 NYS2d 314, 316).

With these general principles in mind, the Court, upon review of the plaintiffs' complaint and the allegations contained in it, finds that it sufficiently states a claim that Ehrlich, working in the co-defendant Heckler's office, failed to diagnose the plaintiff's meningitis and that this failure was directly related to the defendants failure to collaborate and/or supervise and/or to lax practice protocols between the nurse practitioner and the physician in the treatment of the physician's patients resulting in negligence and subsequent injury to the plaintiff. See, ***Martin v. New York Hospital Medical Center of Queens***, 34 AD3d 650, 826 NYS2d 85 (2nd Dept. 2006); ***Quesada v. Global Land Inc.***, 35 AD3d 575, 826 NYS2d 667 (2nd Dept. 2006). The defendants' attempts to narrow the use and meaning of the term "collaboration" between a physician and his nurse practitioner so as to undermine its use as a generic term for supervision is to put form over substance. The term collaboration

as opposed to supervision is peculiarly a matter of interpretation within the jury's purview based upon a studied review of the practice, procedures and protocols established within Heckler's practice and office as established and required by Education Law §6902. In this regard, Education Law §6902 (3)(a) provides in part as to duties of the nurse practitioner

> "...the diagnosis of illness and physical conditions and performance of therapeutic and corrective measures within a specialty area of practice, *in collaboration with a licensed physician* qualified to collaborate in the specialty involved, provided such services are performed in accordance with a written practice agreement and written practice protocols."

This section further provides that in questions of disagreement the collaborating physician's diagnosis and treatment will prevail. The statute fails to define collaboration but its ordinary meaning is based in the Latin word, "*collaborare"* meaning to work together or to cooperate, to work jointly. The term jointly is defined as "a shared achievement or activity" and as an adjective is defined as " shared, held or made by two or more people." Thus the term collaboration defines itself as not some independent thought, act or diagnosis but a collaborative or joint effort between the nurse practitioner and the physician with the physician's judgment the prevailing one.

As noted in ***Quirk v. Zuckerman***, 196 Misc2d 496, 765 NYS2d 440 (2003) the relationship between physician and nurse practitioner was examined and the Court held:

> "The practice of a registered nurse practitioner as defined in the Education Law §6902(3)(a) includes diagnosis of illness and physical conditions and the performance of therapeutic and corrective measures in 'collaboration' with a licensed physician qualified to collaborate in the specialty involved. While the word 'collaborate' is not legally defined by statute, the Court can certainly apply its common ordinary meaning as defined in *Webster's Dictionary*, which is as follows: 'cooperate, join (forces), work together, team up.' The nature of the relationship which constitutes collaboration is rather left to the proviso that all services be performed in accordance with a written practice agreement and written practice protocols which shall contain explicit provisions for the resolution of disputes between the nurse practitioner and the collaborating physician (8 NYCRR 64.5). However, the statute is clear that if

> NYCRR 64.5). However, the statute is clear that if the written agreement does not so provide, then the collaborating physician's diagnosis or treatment shall prevail if there be any conflict in diagnosis (Education Law §6902[3][a]). Therefore, the ultimate responsibility for diagnosis and treatment rests with the physician if the written agreement is silent."

The use of the term supervision, (from the Latin super - over, above and videre - to see), on the other hand, involves the overseeing of, watching or directing (as with a course of action or activity). The attempt to narrow the term collaborate and expand the term supervision requires us, not to look at the actions of the nurse practitioner and the physician in a vacuum but in the context of the realities of the office procedures and protocols established between the defendants. Thus this is a question of fact for the trier of fact and not a question of law for the Court to decide, especially on a motion to dismiss.

Finally, the defendants' argument that there is no private cause of action as the Education Law does not encompass or contemplate such is without legal merit. Education Law §6909 (1) specifically provides in pertinent part:

> "Nothing in this subdivision shall be deemed or construed to relieve a licensed registered professional nurse ... from liability for damages for injuries or death caused *by an act or omission* on the part of such nurse while rendering professional services in the normal and ordinary course of her practice.

Clearly the Legislative intent in enacting the Education Law, Article 139, §6901 et. seq. was that to the extent that it required a nurse practitioner to consult with a physician in the performance of his/her duties as contemplated in Education Law §6902 (3), such non-performance would be actionable. The proscription in Education Law §6909 (1) is clear in that intent. As the plaintiffs properly point out in their papers, the Court of Appeals recognized in ***Sheehy v. Big Flats Community Day, Inc.***, 73 NY2d 629, 543 NYS2d 12 (1989) that in determining whether a private right of action should be recognized;

> Under the test, the essential factors to be considered are: (1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether the recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme."

Here, the Education Law requires that a nurse practitioner collaborate with the physician assigned and qualified "to collaborate in the specialty involved" and a failure to so collaborate as called for within the Education Law is actionable.

Accordingly, the defendants' motion and cross-motion to dismiss the plaintiffs' claim, pursuant to CPLR §3211 (7), as stated in the bill of particulars in so far as it relates to a failure to supervise and a private actionable right of failure to collaborate are hereby denied in their entirety.

Also, the defendants have moved by motion and cross-motion pursuant to CPLR §3103(a) for a protective order to preclude the plaintiffs' request for depositions of the defendants as to their private personal romantic history. The plaintiffs submit that such inquiry is relevant on the issue of the defendants' requirement to collaborate on the plaintiff's case. Trial Courts have broad power to regulate discovery to prevent abuse and when the disclosure process is used to harass or unduly burden a party, a protective order eliminating the abuse is both necessary and proper. ***Cabellero v. City of New York***, 48 AD3d 727, 852 NYS2d 165 (2nd Dept. 2008); ***Seaman v. Wyckoff Heights Medical Center, Inc.***, 25 AD3d 598, 806 NYS2d 888 (2nd Dept. 2006).

The plaintiffs seek to inquire about the romantic relationship of the defendants, it is assumed, between each other as opposed to a general inquiry about their romantic lives. However, the Court does not find any relevant use of such inquiry in the process of the plaintiffs' claims of medical malpractice. It seems irrelevant to suggest, as plaintiffs do, that if the defendants were romantically involved that such fact would in some way affect their judgment and the requirement that they collaborate or jointly work on the plaintiff's medical condition. This Court refuses to subscribe to such a scenario as presented by the plaintiffs. The Court does not consider it relevant that if the defendants are romantically linked, inquiry should be allowed to elicit information about their relationship to see if the possibility exists that they were "on the outs" and thus would not collaborate as required by the Education Law. The plaintiffs' request, if granted, would allow a trier of fact to "assume" the possibility that a disturbance in the defendants' personal relationship would affect their requirement to collaborate under the Education Law.

The proposed line of questioning is likely to elicit "salacious gossip" rather than evidentiary material which would be useful and reasonable. The test to be applied under CPLR §3101 (a) (1) is full disclosure of evidence material, relevant and necessary; however, the Court may deny, limit, condition or regulate such use of a discovery device to prevent annoyance, embarrassment or prejudice to any party. ***Parimist Funding Corp. v. Rydzinski***, 215 AD2d 738, 627 NYS2d 95 (2nd Dept. 1995); ***Glachman v. Perlen***, 159 AD2d 552, 552 NYS2d 416 (2nd Dept. 1990). Here, the defendants' romantic relationships with each other is neither relevant nor useful to any issues raised in this case. To find otherwise, would open the floodgates in every negligence action to similar questioning and raise the specter that because of possible distress in a party's romantic life, the trier of fact should

infer, assume or more likely, speculate, that such fact would cloud judgment or render it "more likely" than not that the action complained of occurred rather than the opposite. In either event, the fact that there was or was not distress of a romantic nature is irrelevant to a careful consideration of the ***facts*** underlining the case at bar. The plaintiffs' request for the information sought amounts to nothing more than a fishing expedition. ***Auerbach v. Klein***, 30 AD3d 451, 816 NYS2d 376 (2nd Dept. 2006).

The alternative relief sought by the defendants in their motion and cross-motion for a protective order against inquiry by plaintiff into the personal, romantic life of the defendants is granted and such inquiry is precluded at this time. Thus, the defendants' motions to dismiss pursuant to CPLR §3211 (a)(7) are denied and the alternative requested relief in the defendants' motion and cross-motion for a protective order pursuant to CPLR §3103 are granted to the extent indicated.

The foregoing constitutes the decision of the Court.

Dated: March 16, 2009

Peter Kloeber
J.S.C.