

**Gamza v Kancherla**

2010 NY Slip Op 31116(U)

May 5, 2010

Sup Ct, NY County

Docket Number: 100328/07

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SCHLESINGER  
ALICE SCHLESINGER  
Justice

IA PART 16  
PART 16

GANZA, JONATHAN

INDEX NO.

100328/07

MOTION DATE

PUSHPA LATHA KANCHARLA, M.D.,  
ET AL.

MOTION SEQ. NO.

05

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

by plaintiff to strike the affirmative defense of culpable conduct is granted, and defendant's cross-motion to add a counterclaim is denied, in accordance with the accompanying memorandum decision.

**FILED**  
MAY 10 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: MAY 05 2010

Alice Schlesinger

**ALICE SCHLESINGER** S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X  
JONATHAN GAMZA and DEBRA GAMZA,

Plaintiffs,

-against-

Index No. 100328/07  
Motion Seq. No. 005

PUSHPA LATHA KANCHERLA, M.D., ELIZABETH  
EAPEN, M.D., HAROLD P. GAETZ, M.D., ST. LUKE'S  
ROOSEVELT HOSPITAL CENTER-ROOSEVELT  
HOSPITAL DIVISION, CONTINUUM HEALTH PARTNERS,  
INC., ST. LUKE'S/ROOSEVELT HOSPITAL PHYSICIAN  
ORGANIZATION, INC., ST. LUKE'S-ROOSEVELT  
INDEPENDENT PRACTICE ASSOCIATION, INC.,

Defendants.

-----X  
SCHLESINGER, J.

**FILED**  
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This is an action that is scheduled to be tried in the near future; thus, these motions are being made on the eve of the trial. In the first instance, plaintiffs are moving to strike the defendants' affirmative defense, specifically their third affirmative defense wherein they claim that both plaintiffs were themselves culpable and that their own culpability lead to Mr. Gamza's injuries.

Defense counsel elaborated on this claim in the Bill of Particulars. In essence, what the claim gets down to is that Mrs. Gamza's alleged failure to follow the recommendation of neuroncologist Dr. Robert Aiken, to take a cut of slides of tissues from mass excised from her husband's brain to Dr. Mark Rosenbloom, a neuropathologist at Sloan Kettering Hospital, for another opinion, caused injury to Jonathan Gamza.

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~~Some background as to the facts should be given here.~~ For purposes of this decision, I am assuming the facts as alleged by the defense.

Mr. Gamza had a brain scan which caused concern. He then went to see non-defendant neurosurgeon Dr. DiGiacinto, connected to St. Luke's Roosevelt Hospital. The Hospital is a defendant in this case. The neurosurgeon met with the Gamza's on July 6, 2004 and suggested, based on the imaging studies, that Mr. Gamza undergo a craniectomy. There was a suspicion of a mass in the left temple lobe and Dr. DiGiacinto believed that part of it should be resected and analyzed. This was agreed to, and on July 8, 2004 the procedure was done.

Since the Hospital did not have a Department of Neuropathology, the tissues were instead read by doctors assigned to their Pathology Department. In the first instance, the slides were read by defendant Dr. Elizabeth Eapen, a pathologist at the Hospital. Since she had never seen a Grade II gemistocytic astrocytoma before, she first researched this condition in a textbook. Then she asked for and received an informal second opinion from another pathologist in the Department, defendant Dr. Pushpa Latha Kancherla. He agreed with Dr. Eapen's opinion and both signed a July 16, 2004 report where this diagnosis of a Grade II gemistocytic astrocytoma was given. Soon thereafter, the Gamza's met with Dr. DiGiacinto, who referred them to Dr. Robert Aiken, a neurooncologist at Beth Israel. On July 19, 2004, Dr. Aiken wrote to Dr. DiGiacinto that at the minimum conformal brain radiation therapy to the multicentric tumors was needed.

What is critical here is the conversation that Dr. Aiken had with the Gamza's. I am accepting for the purpose of this motion that Dr. Aiken made a recommendation to the Gamza's that they get a cut of these tissues and take them to Dr. Rosenbloom at Sloan Kettering for another opinion as to the diagnosis. I am also accepting that, at some time later in July after several phone calls were made by Mrs. Gamza to Dr. DiGiacinto, a cut

of the slides was obtained which Mrs. Gamza picked up from Dr. DiGiacinto's office. However, for whatever reasons which are ultimately irrelevant to this Court's opinion, Mrs. Gamza never took the slides to Dr. Rosenbloom or anybody else.

It is important to note here that at the deposition, the two defendant pathologists and the two non-defendant doctors, Dr. DiGiacinto and Dr. Aiken, all testified that they had no doubt at the time, in July 2004, that the diagnosis was a correct one. Also, Dr. Aiken testified that he had no intention of having Mr. Gamza wait before he was to begin the radiation therapy in August 2004.

To conclude what happened, Mr. Gamza did submit to radiation in August and September of 2004. Later on in February 2005, more tests were done and it was determined that this original diagnosis was incorrect and that Mr. Gamza never suffered from this gemistocytic astrocytoma, but rather was suffering from multiple sclerosis. Defendants do not today dispute the inaccuracy of their diagnosis.

It is defendants' position in their opposition to plaintiffs' motion to strike their affirmative defense, as well as in their own cross-motion to add a counterclaim against Mrs. Gamza for contribution based on her alleged negligence, that Mrs. Gamza had an independent duty to get this opinion from Dr. Rosenbloom and by not doing so, she breached that duty and it was then foreseeable that injury to her husband would occur as a result.

Giving the defense the benefit of their factual recital, I still find absolutely no merit to their position that Mrs. Gamza was legally culpable in any way in these circumstances. Before one can be charged with negligence, the Court must make a legal finding as to whether that individual, in the first instance, had a legal duty to act in a certain manner.

Here, I find no such duty existed. While Dr. Aiken may have made a suggestion for the couple to obtain another opinion, that suggestion did not give Mrs. Gamza an obligation or a legal responsibility to participate in the diagnosis or treatment of her husband. I find the argument completely unconvincing to suggest that the defendants here, who acknowledge that their diagnosis was wrong, can turn to a third party, the patient's wife, and suggest that she had an obligation to make sure that they had been correct in their initial diagnosis. I also find that, as demonstrated by the testimony given by Dr. Aiken and DiGiacinto, nobody relied on Mrs. Gamza's getting that third opinion before starting radiation.

Therefore, plaintiffs' motion to strike the affirmative defense is granted, and defendants' cross-motion to add a counterclaim against Mrs. Gamza is denied.

This constitutes the decision and order of the Court.

Dated: May 5, 2010

**MAY 05 2010**

*Alice Sch*  
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 J.S.C.

**ALICE SCHLESINGER**  
**J.S.C.**

**FILED**  
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