

**Nix v Bolognese**

2010 NY Slip Op 32777(U)

October 4, 2010

Supreme Court, New York County

Docket Number: 101787/2010

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER  
Justice

~~PART~~ PART 16

Index Number : 101787/2010

**NIX, LORI**

vs.

**BOLOGNESE, PAOLO A. M.D**

SEQUENCE NUMBER : 001

DISM ACTION/INCONVENIENT FORUM

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

1 this motion to/for \_\_\_\_\_

PAPERS NUMBERED

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

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

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and cross-motion by the various defendants and the cross-motion by the plaintiff, are all granted to the extent provided in the accompanying memorandum decision.

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

**FILED**  
OCT 07 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

OCT 04 2010  
Dated: October 4, 2010

*Alice Schlesinger*  
ALICE SCHLESINGER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

-----X  
LORI NIX,

Plaintiff,

-against-

Index No. 101787/10  
Motion Seq. No. 001

PAOLO A. BOLOGNESE, M.D., THOMAS H.  
MILHORAT, M.D., LUDMIO REMY, M.D., CHAN  
ROONPRAPUNT, M.D., JIA-RHON CHEN, M.D.,  
THE CHIARI INSTITUTE, NORTH SHORE  
UNIVERSITY HOSPITAL AND NORTH SHORE  
LONG ISLAND JEWISH HEALTH SYSTEM, INC.,

Defendants.

-----X  
SCHLESINGER, J.:

**FILED**

OCT 07 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Before this Court is a pre-answer motion by the various defendants and a cross-motion by Dr. Chanland Roonprapunt, the only defendant represented by separate counsel, to dismiss the Third Cause of Action in the complaint which sounds in fraud. The plaintiff opposes these motions and also cross-moves to amend the complaint. Presumably, the amendment is an attempt to remedy the deficiencies of the original complaint. However, it does not.

This action sounds in medical malpractice and lack of informed consent, the first and second causes of action in of the Amended Complaint. However, pursuant to well-known legal principles, the complaint does not sound in fraud as well.

The circumstances giving rise to this action concern treatment by some or all of the defendants between April 10, 2006 and October 17, 2007. Specifically, they concern a certain diagnosis and plans given to Lori Nix, the plaintiff, before three neurosurgeries that took place on June 29, 2006 and October 3 and 4 of 2006. Plaintiff claims that all of these

surgeries were contraindicated, unnecessary, and negligently performed. Ms. Nix also claims that certain representations were made to her before the surgeries, suggesting that they were well-accepted procedures. Based on these representations, she went ahead with the procedures to her harm, she contends.

After the surgeries, Ms. Nix claims, the defendants concealed their malpractice and failed to tell her the true status of her cervical and lumbar discs and spinal cord. This failure to reveal to her the true state of affairs deprived her of an opportunity to have timely corrective surgery and a relief from her pain.

However, as various courts have found in similar cases against the same defendants, the pleadings here (¶¶149-172 of the Amended Complaint) merely restate the same allegations enumerated in counts one and two of the complaint. Moreover, plaintiff alleges the same damages in all her counts.<sup>1</sup>

Therefore, I am dismissing the Third Cause of Action of the Amended Complaint. As mentioned at the outset, this is a pre-answer motion and cross-motion by the defendants. They have not answered and no discovery has occurred. When the discovery phase has been completed, if the plaintiff honestly believes she can show post-surgical fraud and/or concealment leading to damages distinct and apart from those being claimed as a result of alleged malpractice and/or a lack of informed consent, she can then move to reinstate this cause of action.

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<sup>1</sup>The other decisions alluded to are *Bryant et al. v Thomas Milhorat and Chanland Roonprapunt, et al.*, decided June 7, 2010 by Judge Feurerstein in the United States District Court, Eastern District of New York, and *Schafer-Schiavone v Thomas Milhorat, Paolo Bolognese, Chanland Roonprapunt, et al.*, Index No. 024254/09, decided on June 20, 2010 by Justice Anthony Parga in New York State Supreme Court, Nassau County.

Defendants are also moving to dismiss the request for punitive damages. Ordinarily, punitive damages are not recoverable in a fraud case. What is more, I have now dismissed that claim. However, there are those rare instances when such a claim can be sustained in a case sounding in medical malpractice. The predicate conduct, of course, must be so outrageous and shocking as to verge on the criminal. Again, no discovery has yet occurred here as issue has not even been joined. Therefore, I am not dismissing this claim now. When discovery is over, the defendants can again move for this relief. At that time, the Court will have a clear picture of what the precise allegations are after all documents have been exchanged and all depositions have been completed.

As for plaintiff's cross-motion for leave to serve and file an Amended Complaint, defendants object only insofar as they seek to strike the fraud claim and the request for punitive damages. Thus, the Amended Complaint is permitted, as modified by this decision.

Accordingly, it is hereby

ORDERED that the motion and the cross-motion by the various defendants to dismiss the Third Cause of Action sounding in fraud is granted to the extent provided herein; and it is further

ORDERED that the motion and the cross-motion by the various defendants to dismiss the request for punitive damages is denied to the extent provided herein; and it is further

ORDERED that the cross-motion by the plaintiff to serve and file an Amended Complaint is granted to the extent provided herein, and the Amended Complaint is deemed served in the form attached to plaintiff's moving papers, with the modifications determined

herein; and it is further

ORDERED that defendants shall serve and file their answers to the Amended Complaint within thirty days of the date of this order; and it is further

ORDERED that all counsel shall appear in Room 222 to complete a preliminary conference order on December 1, 2010 at 9:30 a.m. Plaintiff shall respond to any demand for a bill of particulars before that date.

This constitutes the decision and order of this Court.

Dated: October 4, 2010

**OCT 04 2010**



A handwritten signature in cursive script, appearing to read "Alice Schlesinger", is written over a horizontal line.

J.S.C.

**ALICE SCHLESINGER**

**FILED**  
**OCT 07 2010**  
NEW YORK  
COUNTY CLERK'S OFFICE