

**Kashanian v Kulhan**

2011 NY Slip Op 30418(U)

February 23, 2011

Supreme Court, New York County

Docket Number: 109937/08

Judge: Alice Schlesinger

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

PRESENT. ALICE SCHLESINGER

~~PA~~ PART 16

Index Number : 109937/2008

KASHANIAN, MIRYAM

vs

KULHAN, DARLENE

Sequence Number : 002

SUMMARY JUDGMENT

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

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

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

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 for summary judgment by defendants Dr. Suzanne Levine and Institute Beaute, Inc. is granted in accordance with the accompanying memorandum decision.

FILED

FEB 24 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: FEB 23 2011

*Alice Schlesinger*

ALICE SCHLESINGER J.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  
MIRYAM KASHANIAN,

Plaintiff,

-against-

DR. DARLINE KULHAN, DR. SUZANNE LEVINE,  
INSTITUTE BEAUTE, INC. AND SCARSDALE  
FOOT SPECIALISTS, P.C.,

Defendants.  
-----X

**SCHLESINGER, J:**

Index No. 109937/08  
Motion Seq. No. 002

**FILED**

**FEB 24 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

On June 10, 2010, I denied a motion by defendants Dr. Suzanne Levine and Institute Beaute, Inc. for summary judgment. However, I denied the motion "without prejudice." I directed further discovery, primarily on the issue of whether Dr. Levine and her Institute provided any care and/or treatment to the plaintiff Miryam Kashanian.

This action is one that sounds in podiatric malpractice. Specifically, Ms. Kashanian alleges that the right bunion surgery that she underwent on August 3, 2007 was done negligently. It is clear that the first named co-defendant, Dr. Darline Kulhan, performed that surgery. Nevertheless, the plaintiff argues based on certain items she points to that she believes Dr. Levine also participated in her case.

Those items include the following: that at her initial visit with Dr. Kulhan, as it was ending, Dr. Kulhan brought Dr. Levine into the examining room where Dr. Levine looked at plaintiff's foot. Further, what is uncontested here but significant is how Dr. Kulhan came to be Ms. Kashanian's doctor. Ms. Kashanian called up the office, used by all the defendants, and spoke to the nurse/receptionist. Plaintiff wanted to make an appointment to see Dr. Levine. However, she was informed that Dr. Levine did not accept her insurance

but Dr. Kulhan did. Therefore, based on this information, Ms. Kashanian instead made an appointment to see Dr. Kulhan.

Another item which formed the basis for the plaintiff's opposition to the original summary judgment motion was a conversation Ms. Kashanian had with the nurse on the day before her surgery. The time for the surgery had been previously set for 11:00 a.m., but the nurse said it had to be moved up to 7:00 a.m. The reason given for the change, which Ms. Kashanian was unhappy about, was that Dr. Levine had to attend a funeral later on that day and therefore the time change was necessary so that Dr. Levine could be there. Further and consistent with the above, Ms. Kashanian recalls that right before the operation began, she saw Dr. Levine in the room, dressed in scrubs. The plaintiff also points to a prescription she received once that was on Dr. Levine's prescription pad and finally that all the forms she was asked to fill out were on Institute Beaute stationery.

Dr. Levine always maintained that she had nothing to do with the plaintiff's care or with the bunion surgery. Both she and Dr. Kulhan testified at their depositions that the latter was an independent contractor who simply rented space from Dr. Levine. Further, they stated that their practices were separate and apart. Dr. Kulhan also stated that her primary business address was in Scarsdale. With regard to who was present in the operating room, Dr. Kulhan testified Dr. Levine was not there. Dr. Levine says the same thing and denies ever consulting about Ms. Kashanian.

Further discovery took place, primarily the deposition on Nurse Nelia Banganay. She has no recollection of the change in time of the surgery. In fact, no one from the defense remembers this change.

Now Dr. Levine and the Institute are again moving for summary judgment as discovery has been completed. Their counsel cites to the First Department decision, *Sawh v. Schoen*, 215 AD2d 291 (1995). There, the Court first emphasizes that the issue of whether a legal duty is imposed upon an individual is one for the trial Court to decide as a legal, rather than a factual, one.

Here that issue is whether there is enough to say that arguably a doctor-patient relationship existed between Ms. Kashanian and the moving defendants sufficient to keep the defendants in this action. I find that there is not.

Here, what the plaintiff is relying on is simply not enough. The allegations that Dr. Levine may have looked at her foot and may have been in the operating room serve only as speculative predicates for the conclusion that Dr. Levine provided actual treatment or was involved in the surgery. The medical chart fails to corroborate Dr. Levine's presence or any participation in the August 3 procedure.

Further, there has been nothing shown here that Dr. Kulhan was Dr. Levine's employee, as opposed to her tenant, or that Dr. Levine was vicariously responsible for Dr. Kulhan's actions.

Finally, the use of one medication page from Dr. Levine's pad and Institute Beaute's forms has no evidentiary weight supporting plaintiff's belief that Dr. Levine was also her doctor. It is clear that when Ms. Kashanian first made contact with the defendants, she began a relationship solely with Dr. Kulhan. All parties agree here that while the plaintiff wished to see Dr. Levine, for whom a recommendation had been made, the visit would be with Dr. Kulhan because only Dr. Kulhan accepted her insurance. Consistent with that fact, it was Dr. Kulhan who evaluated her bunion, operated on it, and saw her for all subsequent

care.

At best, Dr. Levine may have been a consultant on a limited basis (looking at her foot on the first visit). But this is not enough. Nor are any of the other items pointed to by plaintiff sufficient to establish that Dr. Levine was her treating doctor who owed a duty of care to her.

Accordingly, it is hereby


ORDERED that the motion for summary judgment by defendants Dr. Suzanne Levine and Institute

Beaute, Inc. is granted and the complaint is dismissed in its entirety as against said defendants, without costs and disbursements, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and counsel shall appear in Room 222 for a pre-trial conference on May 4, 2011 at 11:00 a.m. as previously scheduled.

Dated: February 23, 2011

**FEB 23 2011**

  
**ALICE SCHLESINGER**

**FILED**

**FEB 24 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**