

Gimplin v Kubiak
2012 NY Slip Op 32895(U)
November 28, 2012
Sup Ct, Suffolk County
Docket Number: 23202/2008
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX NO. 23202/2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

MARVIN GIMPLIN, as Administrator of the Estate
 of CAROL GIMPLIN, deceased, and MARVIN
 GIMPLIN, Individually,

Plaintiff,

-against-

RICHARD KUBIAK, M.D., SCOTT PRESS, M.D.,
 DHIREN MEHTA, M.D., MICHAEL IMPERATO,
 M.D., DAVID GROSS, M.D., MARTIN VAN
 DYNE, M.D., ELIZABETH DUBOVSKY, M.D.,
 DAVID COHEN, M.D., PECONIC BAY MEDICAL
 CENTER, IMAGING ON CALL, LLC, IMAGING
 ON CALL, P.C., UROLOGICAL ASSOCIATES
 OF L.I., P.C., UROLOGICAL ASSOCIATES,
 PECONIC BAY PRIMARY MEDICAL CARE,
 P.C., MEHTA & MEHTA PHYSICIANS, P.C. and
 NORTH FORK RADIOLOGY, P.C.,

Defendants.

 PECONIC BAY MEDICAL CENTER,

Third-Party Plaintiff,

-against-

STONY BROOK EMERGENCY PHYSICIANS
 UFPC d/b/a STONY BROOK EMERGENCY
 PHYSICIANS, PC,

Third-Party Defendant.

ORIG. RETURN DATE: AUGUST 18, 2011
 FINAL SUBMISSION DATE: FEBRUARY 23, 2012
 MTN. SEQ. #: 005
 CROSS-MOTION: XMD

ORIG. RETURN DATE: AUGUST 18, 2011
 FINAL SUBMISSION DATE: FEBRUARY 23, 2012
 MTN. SEQ. #: 006
 CROSS-MOTION: XMD

ORIG. RETURN DATE: SEPTEMBER 15, 2011
 FINAL SUBMISSION DATE: FEBRUARY 23, 2012
 MTN. SEQ. #: 007
 CROSS-MOTION: XMOT D

ORIG. RETURN DATE: OCTOBER 3, 2011
 FINAL SUBMISSION DATE: FEBRUARY 23, 2012
 MTN. SEQ. #: 008
 CROSS-MOTION: XMOT D

ORIG. RETURN DATE: OCTOBER 11, 2011
 FINAL SUBMISSION DATE: FEBRUARY 23, 2012
 MTN. SEQ. #: 009
 CROSS-MOTION: XMOT D

ORIG. RETURN DATE: OCTOBER 11, 2011
 FINAL SUBMISSION DATE: FEBRUARY 23, 2012
 MTN. SEQ. #: 010
 MOTION: MOT D

ORIG. RETURN DATE: OCTOBER 11, 2011
 FINAL SUBMISSION DATE: FEBRUARY 23, 2012
 MTN. SEQ. #: 011
 CROSS-MOTION: XMOT D

ORIG. RETURN DATE: OCTOBER 13, 2011
 FINAL SUBMISSION DATE: FEBRUARY 23, 2012
 MTN. SEQ. #: 012
 CROSS-MOTION: XMOT D

ORIG. RETURN DATE: OCTOBER 11, 2011
 FINAL SUBMISSION DATE: FEBRUARY 23, 2012
 MTN. SEQ. #: 013
 CROSS-MOTION: XMOT D

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FINAL SUBMISSION DATE: FEBRUARY 23, 2012
MTN. SEQ. #: 014
MOTION: MOT D

ORIG. RETURN DATE: OCTOBER 20, 2011
FINAL SUBMISSION DATE: FEBRUARY 23, 2012
MTN. SEQ. #: 016
CROSS-MOTION: XMOT D

ORIG. RETURN DATE: OCTOBER 20, 2011
FINAL SUBMISSION DATE: FEBRUARY 23, 2012
MTN. SEQ. #: 015
CROSS-MOTION: XMOT D

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Upon the following papers numbered 1 to 51 read on these motions FOR PROTECTIVE ORDERS, TO AMEND PLEADINGS, TO DISMISS, AND FOR OTHER RELIEF. Notice of Cross-motion and supporting papers 1-3; Notice of Cross-motion and supporting papers 4-6; Affirmation in Support 7; Affirmation and supporting papers 8, 9; Affirmation in Opposition to Cross-motions 10; Affirmation in Opposition 11; Affirmation in Partial Opposition and supporting papers 12, 13; Affirmation in Partial Opposition 14; Notice of Cross-motion and supporting papers 15-17; Affirmation in Support 18; Affirmation and supporting papers 19, 20; Notice of Cross-motion and supporting papers 21-23; Notice of Cross-motion and supporting papers 24-26; Notice of Motion and supporting papers 27-29; Notice of Cross-motion and supporting papers 30-32; Notice of Cross-motion and supporting papers 33-35; Notice of Cross-motion and supporting papers 36-38; Notice of Motion and supporting papers 39-41; Notice of Cross-motion and supporting papers 42-44; Affirmation 45; Notice of Cross-motion and supporting papers 46-48; Affirmation 49; Reply Affirmation and supporting papers 50, 51; it is,

ORDERED that this cross-motion (seq. #005) by plaintiff, MARVIN GIMPLIN, as Administrator of the Estate of CAROL GIMPLIN, deceased, and MARVIN GIMPLIN, Individually, for an Order:

(1) granting a protective Order, pursuant to CPLR 3103, with respect to the third-party defendant's Notice to Admit dated August 1, 2011 and the third-party defendant's Notice for Discovery and Inspection dated July 26, 2011;

(2) striking the third-party defendant's Notice to Notice to Admit dated August 1, 2011, pursuant to CPLR 3123;

(3) striking the third-party defendant's Notice for Discovery and Inspection dated July 26, 2011;

(4) striking the third-party defendant's Answer, pursuant to CPLR 3126, for allegedly ignoring the Court's directives, failing to move regarding the issue of bankruptcy, improperly serving the Notice to Admit dated August 1, 2011 and Notice for Discovery and Inspection dated July 26, 2011, for willful contumacious and frivolous behavior in failing to provide discovery;

(5) certifying this case for trial and allowing further discovery;

(6) compelling third-party defendant to provide discovery on an expedited basis, including examinations before trial and documentary discovery; and

(7) assessing costs and sanctions against the attorneys for the third-party defendant,

is hereby **DENIED** as procedurally defective; and it is further

ORDERED that this cross-motion (seq. #006) by plaintiff, MARVIN GIMPLIN, as Administrator of the Estate of CAROL GIMPLIN, deceased, and MARVIN GIMPLIN, Individually, for an Order:

(1) granting a protective Order, pursuant to CPLR 3103, against further discovery related to the bankruptcy until the Court has ruled on the issue and quashing the twenty (20) subpoenas served by the attorney for defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC, all dated August 4, 2011, pursuant to CPLR 2304;

(2) striking the answers of defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC, pursuant to CPLR 3126, for allegedly ignoring the Court's directives, failing to move regarding the issue of bankruptcy, improperly serving twenty (20) subpoenas duces tecum dated August 4, 2011, and for willful, contumacious and frivolous behavior, bad faith and abuse of process;

(3) granting the relief requested in plaintiff's prior Notice of Cross-Motion;

(4) certifying this case for trial and allowing further discovery;

(5) compelling third-party defendant to provide discovery on an expedited basis, including examinations before trial and documentary discovery; and

(6) assessing costs and sanctions against the attorneys for defendant, MICHAEL IMPERATO, M.D., and the third-party defendant,

is hereby **DENIED** as procedurally defective; and it is further

ORDERED that this cross-motion (seq. #007) by defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC, for an Order:

(1) dismissing plaintiff's verified complaint, pursuant to CPLR 3126, for the alleged failure to comply with this Court's Orders; or in the alternative

(2) precluding plaintiff from testifying at the trial of this matter; and

(3) compelling plaintiff to provide all outstanding discovery within five days,

is hereby **GRANTED** solely to the extent set forth hereinafter; and it is further

ORDERED that this cross-motion (seq. #008) by defendants, DAVID GROSS, M.D. and NORTH FORK RADIOLOGY, P.C., for an Order granting these defendants leave to amend their answer in the form submitted, alleging that plaintiff, MARVIN GIMPLIN, lacked capacity to commence this action and that the Estate is precluded from introducing evidence of pecuniary loss on behalf of MARVIN GIMPLIN and/or JEFFREY GIMPLIN; and thereafter, dismissing all claims and causes of action brought by or on behalf of MARVIN GIMPLIN; dismissing and precluding all wrongful death claims for pecuniary damages by or on behalf of MARVIN GIMPLIN and/or JEFFREY GIMPLIN, if any, is hereby **GRANTED** solely to the extent set forth hereinafter; and it is further

ORDERED that this cross-motion (seq. #009) by defendant MARTIN J. VAN DYNE, M.D. s/h/a MARTIN VAN DYNE, M.D., for an Order:

(1) pursuant to CPLR 3025 (b) and 3211 (a) (3), granting this defendant leave to amend his Answer in the form submitted asserting the affirmative defense of lack of capacity to sue and dismissing the individual and pecuniary claims of MARVIN GIMPLIN and JEFFREY GIMPLIN;

(2) precluding plaintiff from introducing evidence of economic and non-economic pecuniary loss on behalf of plaintiff, MARVIN GIMPLIN, and distributee claimant, JEFFREY GIMPLIN; and

(3) pursuant to CPLR 8501, directing plaintiff, MARVIN GIMPLIN, to post security for costs in an amount of not less than \$10,000 as plaintiff, MARVIN GIMPLIN, is no longer domiciled in New York State,

is hereby **GRANTED** solely to the extent set forth hereinafter; and it is further

ORDERED that this motion (seq. #010) by defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC, for an Order:

(1) granting leave to serve and file an amended answer in the form submitted alleging that plaintiff MARVIN GIMPLIN lacked capacity to commence this action, that the Estate is precluded from introducing evidence of pecuniary loss on behalf of MARVIN GIMPLIN and JEFFREY GIMPLIN, and alleging the benefits and protections of article 14 of the CPLR;

(2) dismissing all claims in this action brought by or on behalf of MARVIN GIMPLIN;

(3) dismissing all wrongful death claims in this matter as pertain to claims for pecuniary loss by MARVIN GIMPLIN and JEFFREY GIMPLIN, if any; and

(4) compelling plaintiff to provide security for costs, pursuant to CPLR 8501 and 8502;

is hereby **GRANTED** solely to the extent set forth hereinafter; and it is further

ORDERED that this cross-motion (seq. #011) by defendant, ELIZABETH DUBOVSKY, M.D., for an Order:

(1) granting this defendant leave to amend her answer in the form submitted, alleging that plaintiff, MARVIN GIMPLIN, lacked capacity to commence this action, and that the Estate is precluded from introducing evidence of pecuniary loss on behalf of MARVIN GIMPLIN and/or JEFFREY GIMPLIN; and

(2) dismissing and precluding all wrongful death claims for pecuniary damages by or on behalf of MARVIN GIMPLIN and/or JEFFREY GIMPLIN, if any,

is hereby **GRANTED** solely to the extent set forth hereinafter; and it is further

ORDERED that this cross-motion (seq. #012) by defendants, IMAGING ON CALL, LLC, IMAGING ON CALL, P.C. and DAVID COHEN, M.D., for an Order dismissing plaintiff MARVIN GIMPLIN's individual cause of action, amending their answer to assert an affirmative defense of lack of capacity in which to sue; and dismissing all claims and causes of action brought on behalf of MARVIN GIMPLIN and precluding all claims for pecuniary damages brought on his behalf, is hereby **GRANTED** solely to the extent set forth hereinafter; and it is further

ORDERED that this cross-motion (seq. #013) by defendants, SCOTT PRESS, M.D. and UROLOGICAL ASSOCIATES OF L.I., P.C., for an Order:

(1) granting defendants leave to serve and file an amended answer alleging that plaintiff, MARVIN GIMPLIN, lacked the capacity to commence the instant lawsuit;

(2) dismissing all claims brought on or behalf of plaintiff MARVIN GIMPLIN;

(3) dismissing all wrongful death claims relating to pecuniary loss;
and

(4) compelling plaintiff to provide security costs in conformity with CPLR 8501 and 8502,

is hereby **GRANTED** solely to the extent set forth hereinafter; and it is further

ORDERED that this motion (seq. #014) by defendants, RICHARD KUBIAK, M.D. and PECONIC BAY PRIMARY MEDICAL CARE, P.C., for an Order:

(1) dismissing plaintiff MARVIN GIMPLIN's individual cause of action;

(2) amending their answer to assert the affirmative defense of lack of capacity in which to sue; and

(3) dismissing all claims and causes of actions brought on behalf of MARVIN GIMPLIN and precluding all claims for pecuniary damages brought on his behalf,

is hereby **GRANTED** solely to the extent set forth hereinafter; and it is further

ORDERED that this cross-motion (seq. #015) by defendants, DHIREN C. MEHTA, M.D. s/h/a DHIREN MEHTA, M.D. and MEHTA & MEHTA PHYSICIANS, P.C., for an Order:

(1) dismissing all claims brought on behalf of plaintiff, MARVIN GIMPLIN; and

(2) dismissing and precluding all wrongful death claims for pecuniary damages by or on behalf of MARVIN GIMPLIN and/or JEFFREY GIMPLIN, if any,

is hereby **GRANTED** solely to the extent set forth hereinafter; and it is further

ORDERED that this cross-motion (seq. #016) by plaintiff, MARVIN GIMPLIN, as Administrator of the Estate of CAROL GIMPLIN, deceased, and MARVIN GIMPLIN, Individually, for an Order:

(1) striking the Answers of defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC, for, *inter alia*, allegedly failing to adhere to the So-Ordered Stipulation of August 18, 2011;

(2) compelling counsel for defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC, to provide a statement, under oath, by a person with knowledge regarding the dates and manner of service of each of the non-party subpoenas served on behalf of his clients in this matter and a statement, under oath, regarding the further responses received;

(3) compelling counsel for defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC, to provide the basis for his claim of a “defacto bankruptcy” claimed in three submissions to the Court;

(4) compelling counsel for defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC, to provide a statement, under oath the basis for his statement that “Dr. Albino is insured by PBMC policies”;

(5) denying the relief requested in the Notice of Motion dated September 29, 2011 and the multiple cross-motions submitted by defendants;

(6) denying leave to serve the amended answers;

(7) denying preclusion sought by defendants;

(8) denying security for costs;

(9) granting security for costs only to the extent of \$250.00 and only if plaintiff fails to recommence the action within the time statutorily allotted by CPLR 205 (a); and

(10) imposing costs and sanctions for affirming, now for the third time, a theory of “de facto bankruptcy” regarding the deceased Mrs. Gimplin which plaintiff claims does not exist,

is hereby **GRANTED** solely to the extent hereinafter.

In this medical malpractice action, plaintiff alleges that the defendants were negligent in failing to properly and timely diagnose and treat a thoracic abdominal aneurysm, which allegedly resulted in the decedent's pain, suffering, and ultimate death on July 20, 2006. The action was commenced by the filing of a summons and complaint on April 23, 2007. According to plaintiff's Verified Bill of Particulars, dated August 7, 2007, the malpractice complained of herein took place from on or about January 1, 2005 through on or about July 20, 2006.

By Stipulation of the parties dated October 16, 2008 and So-Ordered by this Court on even date, the parties agreed to consolidate the instant action with another Supreme Court action entitled, *Marvin Gimplin, as Administrator of the Estate of Carol Gimplin, deceased, and Marvin Gimplin, Individually v. Scott Press, M.D., Elizabeth Dubovsky, M.D., David Cohen, M.D., Imaging On Call, LLC, Imaging On Call, P.C., Urological Associates of L.I., P.C. and Urological Associates*, under Index No. 23202/2008, for all purposes.

The parties have now filed the applications at bar seeking the relief described hereinabove. The Court has consolidated these applications for the purpose of rendering the within decision and Order.

Initially, with respect to plaintiff's cross-motions (seq. #005 and #006), the Court finds that both of these motions are procedurally defective in that they are designated "cross-motions" despite the fact that they seek affirmative relief from non-moving parties (see CPLR 2215; *Terio v Spodek*, 25 AD3d 781 [2006]; *Mango v Long Is. Jewish-Hillside Med. Ctr.*, 123 AD2d 843 [1986]; *Sandler v Sophie D. Ltd.*, 32 Misc 3d 1232A [Sup Ct, Queens County 2011]). Defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC, have raised this objection in opposition to the motions. In addition, the Court notes that as these "cross-motions" relate to discovery, plaintiff was required to annex a good faith affirmation to the applications indicating that plaintiff's counsel conferred with defendants' counsel in a good faith effort to resolve the issues raised in the motions (22 NYCRR § 202.7 [a]; *Amherst Synagogue v Schuele Paint Co., Inc.*, 30 AD3d 1055 [2006]; *Dunlop Dev. Corp. v Spitzer*, 26 AD3d 180 [2006]). Such affirmation must indicate the time, place and nature of the consultation, the issues discussed and

any resolutions, or must show good cause why no such conferral with defendants' counsel was held (22 NYCRR § 202.7 [c]). Plaintiff failed to include a good faith affirmation to either application. Therefore, these "cross-motions" by plaintiff are **DENIED** as procedurally defective.

The next motion at bar is a cross-motion (seq. #007) filed by defendant, MICHAEL IMPERATO, M.D. and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC. These parties seek dismissal of plaintiff's verified complaint, pursuant to CPLR 3126, for the alleged failure to comply with Court's Orders; or, in the alternative, to preclude plaintiff from testifying at trial, and to compel plaintiff to provide all outstanding discovery within five days. These parties allege that plaintiff MARVIN GIMPLIN intentionally and improperly refused to answer questions about his bankruptcy filing at his last deposition on July 1, 2011. Thus, dismissal of plaintiff's complaint is sought. These parties argue that the bankruptcy filing is discoverable herein relative to, among other things, plaintiff MARVIN GIMPLIN's credibility, and the claims for economic loss resulting from CAROL GIMPLIN's death.

CPLR 3126 provides that a court may, in its discretion, impose a wide range of penalties upon a party which either: (a) refuses to obey an order for disclosure; or (b) willfully fails to disclose information which the court finds ought to have been disclosed (CPLR 3126). The penalties proposed by the statute include: (1) deciding the disputed issue in favor of the prejudiced party; (2) precluding the disobedient party from producing evidence at trial on the disputed issue; or (3) either striking the pleadings of the disobedient party, or staying the proceedings until the ordered discovery is produced, or rendering a default judgment against the disobedient party (CPLR 3126). It is appropriate to strike a party's pleading where there is a clear showing that its failure to comply with discovery demands is wilful, contumacious, or in bad faith (see *Denoyelles v Gallagher*, 40 AD3d 1027 [2007]; *Fellin v Sahgal*, 268 AD2d 456 [2000]; *Harris v City of New York*, 211 AD2d 663 [1995]). Generally, "willfulness" is inferred from a party's repeated failure to respond to demands and/or to comply with disclosure orders, coupled with inadequate excuses for its defaults (see *Siegman v Rosen*, 270 AD2d 14 [2000]; *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41 [1998]; *Frias v Fortini*, 240 AD2d 467 [1997]).

On this record, the Court finds that dismissal of plaintiff's complaint or the sanction of preclusion is not warranted. However, CPLR 3101 (a) provides

for disclosure of "all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101 [a]). Although CPLR 3101 favors liberal disclosure, such disclosure must be material and necessary to the prosecution or defense of the action (CPLR 3101; *Gill v Mancino*, 8 AD3d 340 [2004]; *DeStrange v Lind*, 277 AD2d 344 [2000]). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material in the prosecution or defense" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 407 [1968]). Moreover, "New York has long favored open and far-reaching pretrial discovery" (*DiMichel v South Buffalo Ry. Co.*, 80 NY2d 184 [1992], *cert denied sub nom Poole v Consolidated Rail Corp.*, 510 US 816 [1993]), and "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101 [a]; *Northway Eng'g v Felix Indus.*, 77 NY2d 332 [1991]).

At plaintiff MARVIN GIMPLIN's deposition on July 1, 2011, counsel for plaintiff directed plaintiff not to answer certain questions posed to him regarding plaintiff's bankruptcy filing and financial situation, among others. Counsel argued at times that those questions were "plainly irrelevant," "plainly improper," or "patently improper." However, relevancy is not a ground to direct a deponent not to answer a question at a deposition (see 22 NYCRR § 221.2). While "plainly improper" is a valid ground, such question, if answered, must also cause significant prejudice if answered (*Id.*), which was not claimed by counsel for plaintiff. Furthermore, such financial questioning may be relevant on the issue of economic loss suffered by the decedent's distributees, and, as will be more fully discussed *infra*, the bankruptcy questioning may be relevant on the issue of plaintiff MARVIN GIMPLIN's credibility. At trial, a witness may be cross-examined with respect to any immoral, vicious, or criminal act which may affect the witness' character and show the witness to be unworthy of belief, provided the inquiry is made in good faith and there is a reasonable factual basis for it (see *Gedrin v Long Is. Jewish-Hillside Med. Center*, 119 AD2d 799 [1986]; *Dance v Town of Southampton*, 95 AD2d 442 [1883]; Richardson, Evidence § 498 [Prince, 10th ed]).

With the preceding in mind, this cross-motion (seq. #007) by defendant, MICHAEL IMPERATO, M.D. and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC, is **GRANTED** to extent that plaintiff MARVIN GIMPLIN shall be produced for yet another deposition within thirty (30) days of

service of the instant Order upon plaintiff with notice of entry, so that defendants may inquire as to plaintiff's bankruptcy filing, and the decedent and family's financial circumstances prior to the decedent's death.

Next, the Court will address the issue of plaintiff MARVIN GIMPLIN's capacity to commence this action in light of his bankruptcy filing. Plaintiff commenced this action on April 23, 2007, on behalf of the Estate as well as on his own behalf. Prior to commencement, on October 11, 2006, MARVIN GIMPLIN filed for bankruptcy protection in the Eastern District of New York. However, MARVIN GIMPLIN failed to include a potential medical malpractice and/or wrongful death action as an asset in the bankruptcy filing. MARVIN GIMPLIN was granted a discharge from bankruptcy by Order dated January 17, 2007 (Eisenberg, J.). Based upon the foregoing, the defendants delineated above have filed the instant motions for leave to amend their answers to assert the affirmative defense that MARVIN GIMPLIN lacked the capacity to commence this action and that the Estate is precluded from introducing evidence of pecuniary loss on behalf of MARVIN GIMPLIN and/or JEFFREY GIMPLIN, the son of MARVIN GIMPLIN and CAROL GIMPLIN. Defendants inform the Court that JEFFREY GIMPLIN similarly failed to include the instant lawsuit as an asset in his bankruptcy petition filed on or about May 25, 2010. Upon the granting of the amendment, defendants seek dismissal of all claims and causes of action brought by or on behalf of MARVIN GIMPLIN. In addition, defendants request dismissal of the wrongful death claims for pecuniary damages by or on behalf of MARVIN GIMPLIN and/or JEFFREY GIMPLIN.

CPLR 3025 (b) provides in pertinent part that, "[a] party may amend his pleading . . . at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just" (CPLR 3025 [b]). Leave to amend a pleading is to be freely given absent surprise or prejudice resulting from the delay. Whether to grant such leave is within the trial court's discretion, the exercise of which will not be lightly disturbed (*Pergament v Roach*, 2007 NY Slip Op 5247 [2d Dept]; *Madeline Lee Bryer, P.C. v Samson Equities, LLC*, 2007 NY Slip Op 5234 [2d Dept]; *Surgical Design Corp. v Correa*, 31 AD3d 744 [2006]). As plaintiff MARVIN GIMPLIN himself filed the bankruptcy petition, he cannot claim surprise or prejudice from the delay resulting from the amendment or from the amendment itself. Accordingly, those branches of defendants' motions seeking leave to amend their answers are all **GRANTED**. The proposed amended answers annexed to defendants' moving papers, shall be deemed served upon plaintiff *nunc pro tunc* as of the date of service of the

motions. However, the Court notes that the motion of defendants, IMAGING ON CALL, LLC, IMAGING ON CALL, P.C. and DAVID COHEN, M.D., failed to include a proposed amended answer and is therefore procedurally defective. While the motion of defendants RICHARD KUBIAK, M.D. and PECONIC BAY PRIMARY MEDICAL CARE, P.C., similarly failed to include a proposed amended answer, the Court notes that these defendants' original answer dated June 20, 2007, contains an affirmative defense of lack of capacity to sue.

When filing a bankruptcy petition, the debtor must include "a schedule of assets and liabilities" (11 USC § 521 [a] [1] [B] [i]). Assets include potential lawsuits so long as the debtor "knew or should have known of the facts allegedly giving rise to the . . . cause of action at the time" of the bankruptcy filing (*Whelan v Longo*, 7 NY3d 821, 822 [2006]; see *Gray v City of New York*, 58 AD3d 448 [2009]). Only lawsuits pursued in the debtor's individual capacity must be scheduled (see *Monson v Israeli*, 35 AD3d 680 [2006]; *Burton v Rogovin*, 262 AD2d 72 [1999]). The failure of a party to disclose a cause of action as an asset in a prior bankruptcy proceeding, which the party knew or should have known existed at the time of that proceeding, deprives him or her of the legal capacity to sue subsequently on that cause of action (*Whelan v Longo*, 7 NY3d 821, *supra*; *Potruch & Daab, LLC v Abraham*, 97 AD3d 646 [2012]; *Santori v Met Life*, 11 AD3d 597 [2004]).

In the instant action, plaintiff asserts five causes of action in the complaint: the first cause of action sounds in medical malpractice, the second in lack of informed consent, the third in negligence against defendants NORTH FORK RADIOLOGY, P.C., MEHTA & MEHTA PHYSICIANS, P.C., PECONIC BAY PRIMARY MEDICAL CARE, P.C., and PECONIC BAY MEDICAL CENTER, only; the fourth in wrongful death; and the fifth in loss of services on behalf of MARVIN GIMPLIN individually. "A cause of action brought on behalf of a deceased to recover damages for conscious pain and suffering suffered by the deceased is personal to the deceased" (*Monson v Israeli*, 35 AD3d 680 [2006]). Accordingly, the Court finds that MARVIN GIMPLIN has the capacity to prosecute the first, second and third causes of action herein seeking to recover damages for conscious pain and suffering predicated upon medical malpractice, lack of informed consent, and negligence, respectively.

With respect to the fourth cause of action for wrongful death, such a cause of action is brought not on behalf of the decedent's estate, but rather on behalf of the decedent's distributees (see EPTL 5-4.1), and the damages

recoverable are not in compensation for the injury sustained by the decedent, but rather for the injuries suffered by the distributees as a result of the decedent's death (see EPTL 5-4.3; *George v Mt. Sinai Hospital*, 47 NY2d 170 [1979]). In addition to the plaintiff-spouse MARVIN GIMPLIN, the decedent was survived by two adult children, to wit: JEFFREY GIMPLIN and DEBORAH FAIRALL. Plaintiff MARVIN GIMPLIN, as the Administrator of the Estate of CAROL GIMPLIN, is the only person eligible to bring the wrongful death cause of action on behalf of the distributees (see EPTL 5-4.1 [1]), and therefore his failure to list his interest as a distributee in the bankruptcy proceeding should not affect his capacity to prosecute the wrongful death cause of action (see *Hudak v New York-Presbyterian Hosp.*, 2011 NY Slip Op 32366[U] [Sup Ct, New York County 2011]), and defendants have not proffered any authority to the contrary regarding the wrongful death cause of action. Consequently, this cause of action shall continue.

Notwithstanding the foregoing, the Court finds that the fifth cause of action alleging loss of services must be dismissed. This cause of action is not encompassed within a wrongful death action (see *Liff v Schildkrout*, 49 NY2d 622 [1980]), and as it was brought in MARVIN GIMPLIN's individual capacity, he lacks the capacity to sue on his own behalf (see *Monson v Israeli*, 35 AD3d 680, *supra*; *Coogan v Ed's Bargain Buggy Corp.*, 279 AD2d 445 [2001]; *Goldstein v St. John's Episcopal Hosp.*, 267 AD2d 426 [1999]). Plaintiff MARVIN GIMPLIN advises the Court that he has moved to reopen his bankruptcy proceeding; thus, "the [bankruptcy] trustee must commence a new action in a representative capacity on behalf of [MARVIN GIMPLIN's] bankruptcy estate and, in doing so, he will receive the benefit of the 6-month extension embodied in CPLR 205" (*Pinto v Ancona*, 262 AD2d 472, 473 [1999]; see *Carrick v Central Gen. Hosp.*, 51 NY2d 242 [1980]).

Accordingly, those branches of the motions to dismiss by defendants (seq. #008-015) are **GRANTED** solely to the extent that plaintiff's fifth cause of action for loss of services is hereby dismissed, without prejudice.

Turning to plaintiff's cross-motion (seq. #016) which seeks, among other things, to strike the Answers of defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC, for, *inter alia*, allegedly failing to adhere to the So-Ordered Stipulation of August 18, 2011, the Court finds that the drastic remedy of striking these parties' Answers is not appropriate at this

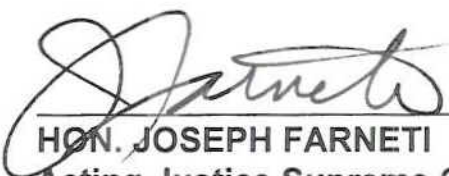
junction. Further, plaintiff has not proffered any authority to compel counsel for defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC, to provide a statement, under oath, by a person with knowledge regarding the dates and manner of service of each of the non-party subpoenas served on behalf of his clients in this matter and a statement, under oath, regarding the further responses received, or to compel counsel to provide the basis for his claim of a "defacto bankruptcy." However, with respect to counsel's statement that "Dr. Albino is insured by PBMC policies," plaintiff is entitled to ascertain any insurance coverages applicable to this action. Thus, plaintiff's motion is **GRANTED** solely to the extent that all defendants are hereby directed to furnish plaintiff with the relevant insurance coverage information within fifteen (15) days of the date of service of the instant Order with notice of entry, if they have not done so already.

Lastly, pursuant to CPLR 8501 (a), out-of-state residents must furnish security for costs (see *Verdino v Alexandrou*, 253 AD2d 553 [1998]; *Gonzalez v Flushing Hosp. Med. Ctr.*, 245 AD2d 543 [1997]; *Scharaga v Schwartzberg*, 149 AD2d 578 [1989]). It is undisputed that plaintiff MARVIN GIMPLIN no longer resides in New York, but now is a resident of Maryland. Therefore, the Court finds that an undertaking in the total sum of \$5,000 is required in this medical malpractice/wrongful death action in which defendants have and will incur a significant expense (see CPLR 8503; *Small v Stern*, 65 AD3d 1326 [2009]). The Court notes that there are fifteen defendants herein; multiple depositions have been conducted, with more remaining; and there have been sixteen motions made in this matter to date.

Any relief requested but not specifically granted herein is hereby **DENIED.**

The foregoing constitutes the decision and Order of the Court.

Dated: November 28, 2012


HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

 X NON-FINAL DISPOSITION