Bourgade v Katz
2014 NY Slip Op 32211(U)
July 30, 2014
Sup Ct, Suffolk County
Docket Number: 11-18293
Judge: Daniel Martin

[* 1]

SHORT FORM ORDER

INDEX No. 11-18293
CAL No. 13-00999MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Acting Justice of the Supreme Court

MOTION DATE 9-25-13 (#001)
MOTION DATE 10-30-13 (#002)
ADJ. DATE 1-14-14
Mot. Seq. # 001 - MG
002 - MG

DAVID BOURGADE,

Plaintiff,

- against -

VICTOR KATZ, M.D., VICTOR KATZ, M.D., P.C., FARID SHAH KOOHI, M.D., CHARLES A. MITGANG, M.D., CHARLES A. MITGANG, M.D., P.C., XENOPHON P. XENOPHONTOS, M.D., LONG ISLAND VASCULAR & SURGICAL P.C. and MERCY MEDICAL CENTER,

Defendants.

DUFFY & DUFFY, PLLC
Attorney for Plaintiff
1370 RXR Plaza, West Tower, 13th Floor
Uniondale, New York 11556

GABRIELE & MARANO, LLP
Attorney for Defendants Koohi, M.D., Mitgang, M.D., & Mitgang, M.D., P.C.
100 Quentin Roosevelt Boulevard
P.O. Box 8022
Garden City, New York 11530

ALBANESE & ALBANESE, LLP
Attorney for Defendants Katz, M.D.
1050 Franklin Avenue
Garden City, New York 11530

RIVKIN RADLER LLP
Attorney for Defendants Xenophontos, M.D. & Long Island Vascular & Surgical
926 RXR Plaza
Uniondale, New York 11556

CHARLES E. KUTNER, ESQ.
Attorney for Defendant Mercy Medical Center
110 East 59th Street
New York, New York 10022

Upon the following papers numbered 1 to 40 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; 14 - 29 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 30 - 32 ; Replying Affidavits and supporting papers 33 - 37; 38 - 40 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED the motion (#001) by the defendants Victor Katz, M.D., and Victor Katz, M.D., P.C., and the motion (#002) by the defendants Xenophon Xenophontos, M.D., and Long Island Vascular & Surgical P.C., hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by the defendants Victor Katz, M.D., and Victor Katz, M.D., P.C., seeking summary judgment dismissing the complaint against them is granted; and it is further

ORDERED that the motion by the defendants Xenophon Xenophontos, M.D., and Long Island Vascular & Surgical P.C., seeking summary judgment dismissing the complaint against them is granted.

The plaintiff David Bourgade commenced this medical malpractice action to recover damages for injuries he allegedly sustained as a result of an anterior lumbar interbody fusion procedure performed by the defendant Dr. Victor Katz at Mercy Medical Center on July 24, 2007. The gravamen of the plaintiff's complaint is that the defendants Dr. Victor Katz, Victor Katz, M.D., P.C., Dr. Farid Shahkoohi, Dr. Charles Mitgang, Charles Mitgang, M.D., P.C., Dr. Xenophon Xenophontos, Long Island Vascular & Surgical P.C., and Mercy Medical Center failed to prevent, diagnose and properly treat the deep vein thrombosis ("DVT") that developed in his left leg, and the subsequent pulmonary embolism that developed in his chest, while he was a patient at Mercy Medical Center after his initial admission for back surgery on July 24, 2007, and that such failure required a second admission to the hospital from July 30, 2007 through August 13, 2007. The plaintiff, by his supplemental bill of particulars, also alleges that the defendants failed to timely and properly place an inferior vena cava ("IVC") filter, and failed to properly order anticoagulation therapy following the spinal fusion procedure.

On September 13, 2006, the plaintiff presented to Dr. Katz at his private office with complaints of pain in the lumbar region of his spine, a history of chronic back pain, a back injury at the age of 25, and treatments from numerous doctors, including a neurologist, for his back pain. After conducting a physical examination and reviewing magnetic resonance images ("MRI") films ordered by another physician, which demonstrated degenerative changes at levels L4 through S1, Dr. Katz diagnosed the plaintiff as suffering from degenerative disc disease, with two herniated incompetent discs. He recommended the plaintiff undergo spinal fusion surgery to stabilize his spine, and explained that the procedure would be performed via an anterior surgical approach. However, the surgery was not performed until July 2007, after it was authorized by the plaintiff's medical carrier through Workers' Compensation. Prior to the surgery, Dr. Katz advised the plaintiff to stop taking his daily dose of aspirin, and had the plaintiff go through pre-surgical testing at Mercy Medical Center and receive medical clearance from his general practitioner.

On July 24, 2007, the plaintiff was admitted into Mercy Medical Center, and Dr. Katz performed the anterior lumbar interbody fusion surgery. During the procedure, Dr. Katz was assisted by Dr. Xenophontos, a vascular surgeon, who performed the exposure of the spinal disc level. The procedure

was performed without any complications and the plaintiff was placed in thromboembolism-deterrent stockings ("TEDS") postoperatively. On July 25, 2007, Dr. Katz referred the plaintiff to physical therapy and directed that he begin ambulating to help reduce the pain in his left hip. Later that day, a physical therapy evaluation noted that the plaintiff was unable to sit up in bed due to significant pain and that he had weakness in both lower extremities. The plaintiff was administered Demerol and Percocet for the pain. Subsequently, he was examined by Dr. Xenophontos, who noted that he did not have any signs of edema and recommended continuing the current care plan. Early in the morning hours of July 26, 2007, a nurse noted in the plaintiff's chart that he refused to wear the TEDS or use the Venodyne compression device. Later that same day, the plaintiff was discharged from the hospital with instructions to follow-up with Dr. Katz on August 1, 2007, and that to phone Dr. Katz's office immediately if he experienced any problems or increase in pain.

On July 28, 2007, the plaintiff called Dr. Katz's office because his entire left leg had become numb, and he was instructed by Dr. Katz to stop taking the Skelaxin he had prescribed, to increase the Percocet dosage, and to call him in the morning if the problems persisted or new ones developed. On July 30, 2007, the plaintiff presented at Dr. Katz's office with pain, swelling, and a purplish hue in the left leg, causing Dr. Katz to suspect DVT of the left lower extremity. Dr. Katz instructed the plaintiff to go to the emergency room at Mercy Medical Center, where Dr. Shahkoohi, an internist, was waiting to receive him. Upon admission into the hospital, the plaintiff's care was overseen by Dr. Mitgang, an internist. A Doppler duplex scan of the plaintiff's left leg revealed that he had a thrombus in the vessels of his lower left leg. As a result of the Doppler duplex scan, Dr. Xenophontos diagnosed the plaintiff as having DVT of the left lower extremity and issued orders to start him on intravenous ("IV") Heparin, with a later change to Coumadin, pain medications as needed, and elevation of the leg. On August, 4, 2007, the plaintiff was started on Coumadin, since his condition was improving, and he was referred to physical therapy.

On August 7, 2007, the plaintiff complained to Dr. Xenophontos of chest pain, chest tightness and shortness of breath. Dr. Xenophontos ordered a computed tomography ("CT") angiogram of the plaintiff's chest and lower extremities, which revealed a pulmonary embolus in his chest. As a result, on August 8, 2007, Dr. Xenophontos placed an IVC filter in the plaintiff's stomach to treat the embolism. Later in August 2007, a complete hypercoagulable work-up was performed on the plaintiff after blood tests taken during his second admission to Mercy Medical Center revealed a post-hypercoagulable state, associated with a Factor V abnormality. On August 13, 2007, the plaintiff was discharged from Mercy Medical Center with plans to continue the usage of Coumadin for six months. Thereafter, the plaintiff continued to treat with Dr. Xenophontos at his private office at Long Island Vascular & Surgical P.C. until December 2007, and he continued to treat with Dr. Katz at his private office for approximately one year after his discharge. In 2008, an MRI study of the plaintiff's lumbar spine revealed no compression or abnormal instability at the site of the surgery. It also revealed that the plaintiff had developed new disc bulges above the surgical site that were unrelated to the surgery.

The defendants Victor Katz, M.D., and Victor Katz, M.D., P.C. (hereinafter referred to as "the Katz defendants") now move for summary judgment on the bases that they did not deviate or depart from good and acceptable standards of medical care in the treatment rendered to plaintiff from July 2007 through August, 2007, and that the care provided did not, in any way, proximately cause the alleged

injuries sustained by the plaintiff. In support of the motion, the Katz defendants submit copies of the pleadings, the parties' deposition transcripts, uncertified copies of the plaintiff's medical records, and the affirmation of their expert, Dr. Philip Robbins. Dr. Xenophontos and Long Island Vascular & Surgical P.C. (hereinafter referred to as "the Xenophontos defendants") also move for summary judgment on the grounds that they did not depart from acceptable medical practice in their treatment of the plaintiff, and that their treatment of the plaintiff was not a proximate cause of his injuries. In support of the motion, the Xenophontos defendants submit copies of the pleadings, the affirmation of their expert, Dr. George Todd, uncertified copies of the plaintiff's medical records, and the parties' deposition transcripts.

The plaintiff opposes the motions, arguing that there are triable issues of fact as to whether the defendants deviated from the applicable medical standard of care in rendering treatment to him, and whether that deviation was the proximate cause of his injuries. In opposition to the motions, the plaintiff submits the redacted and unsigned affirmation of his expert. The plaintiff also has submitted the signed and unredacted affirmation of his expert for the Court's in camera review.

To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in defendant's treatment of the patient and that defendant was not the proximate cause of plaintiff's injuries (*see* ***Castro v New York City Health & Hosps. Corp.***, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; ***Deutsch v Chaglassian***, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; ***Plato v Guneratne***, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]; ***Jones v Ricciardelli***, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]; ***Mendez v City of New York***, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). A physician owes a duty of reasonable care to his patients and will generally be insulated from liability where there is evidence that he conformed to the acceptable standard of care and practice (*see* ***Spensieri v Lasky***, 94 NY2d 231, 701 NYS2d 689 [1999]; ***Barrett v Hudson Valley Cardiovascular Assoc., P.C.***, 91 AD3d 691, 936 NYS2d 304 [2d Dept 2012]; ***Geffner v North Shore Univ. Hosp.***, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]). A doctor is not a guarantor of a correct diagnosis or a successful treatment, nor is a doctor liable for a mere error in judgment if he or she has considered the patient's best interest after careful evaluation (*see* ***Nestorowich v Ricotta***, 97 NY2d 393, 740 NYS2d 668 [2002]; ***Oelsner v State of New York***, 66 NY2d 636, 495 NYS2d 359 [1985]; ***Bernard v Block***, 176 AD2d 843, 575 NYS2d 506 [2d Dept 1991]). Where the defendant has met that burden, the plaintiff, in opposition, must submit a physician's affidavit of merit attesting to a departure or deviation from acceptable medical practice and attesting to the fact that the departure or deviation was a competent cause of the injuries sustained by the plaintiff (*see* ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; ***Arkin v Resnick***, 68 AD3d 692, 890 NYS2d 95 [2d Dept 2009]; ***Rebozo v Wilen***, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]; ***Johnson v Queens-Long Is. Group***, 23 AD3d 525, 806 NYS2d 614 [2d Dept 2005]; ***Dellacone v Dorf***, 5 AD3d 625, 774 NYS2d 776 [2d Dept 2005]; ***Domaradzki v Glen Cove Ob/Gyn Assoc.***, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). However, general allegations of medical malpractice, merely conclusory in nature and unsupported by competent evidence establishing the essential elements of the claim, are insufficient to defeat a motion for summary judgment (*see* ***Arkin v Resnick***, *supra*; ***Dolan v Halpern***, 73 AD3d 1117, 902 NYS2d 585 [2d Dept 2010]; ***Holbrook v United Hosp. Med. Ctr.***, 248 AD2d 358, 669 NYS2d 631 [2d Dept 1998]).

Here, the Katz defendants have established their entitlement to judgment as a matter of law through the submission of the plaintiff's medical records, the parties' deposition testimony, and their expert's report that Dr. Katz did not deviate or depart from acceptable standards of medical care during his treatment of the plaintiff from July 24, 2007 through August 2007 (*see* ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; ***Adjetey v New York City Health & Hosps. Corp.***, 63 AD3d 865, 881 NYS2d 472 [2d Dept 2009]; ***Costello v Kirmani***, 54 AD3d 656, 863 NYS2d 262 [2d Dept 2008]; ***Dandrea v Hertz***, 23 AD3d 332, 804 NYS2d 106 [2d Dept 2005]). Dr. Philip Robbins opined to a reasonable degree of medical certainty that Dr. Katz did not deviate from good and accepted standards of medical care with the treatment he rendered to the plaintiff and that, in any event, Dr. Katz's treatment of the plaintiff was not a proximate cause of any of the injuries sustained by the plaintiff (*see* ***Forrest v Tierney***, 91 AD3d 707, 936 NYS2d 295 [2d Dept 2012]; ***Graziano v Cooling***, 79 AD3d 803, 913 NYS2d 302 [2d Dept 2010]). Dr. Robbins, a board certified orthopedic surgeon, states that the spinal fusion surgery was indicated and properly performed by Dr. Katz. He states that prescribing prophylactic anticoagulation to the plaintiff prior to the surgery was not indicated, because the potential for bleeding from the surgery posed too great a risk, and that the use of compression stockings, TEDS, post-operatively, was appropriate. Dr. Robbins explains that the development of DVT is a known risk of surgery, especially when the surgery requires the patient to remain on the operating table for an extended period of time, and that the use of compression stockings, which were placed on the plaintiff, are helpful in preventing DVT, but were removed by the plaintiff. Dr. Robbins opines that the plaintiff was timely seen and examined by Dr. Katz after he developed symptoms of DVT, and that Dr. Katz promptly and correctly diagnosed the plaintiff with DVT, and immediately referred him to the emergency department of Mercy Medical Center for anticoagulation therapy, which successfully prevented a fatal pulmonary embolus. Dr. Robbins further states that Dr. Katz's follow-up orthopedic care was appropriate, and that an August 2008 CT scan of the plaintiff's lumbar spine showed that the screws and plates inserted by Dr. Katz were in place with no evidence of lucency to suggest the hardware had loosened or there was an infection, and that the plaintiff had a new disc pathology, which was unrelated to the surgery performed by Dr. Katz.

Likewise, the Xenophontos defendants have established their prima facie entitlement to judgment as a matter of law by submitting deposition testimony, medical records, and the affirmation of their expert, Dr. George Todd, who is board certified in general surgery and vascular surgery, which demonstrated that the care and treatment rendered to the plaintiff did not deviate or depart from good and acceptable medical care, and that their treatment of the plaintiff was not the proximate cause of any injuries he sustained (*see* ***Muniz v Mount Sinai Hosp. of Queens***, 91 AD3d 612 [2d Dept 2012]; ***Andreoni v Richmond***, 82 AD3d 1139, 920 NYS2d 225 [2d Dept 2011]; ***Ellis v Eng***, 70 AD3d 887, 895 NYS2d 462 [2d Dept 2010]). Dr. Todd states that, in his opinion, within a reasonable degree of medical certainty, at all times the medical care and treatment provided to the plaintiff by Dr. Xenophontos comported with good and acceptable medical practice. Dr. Todd states that Dr. Xenophontos' role in the surgery performed on the plaintiff on July 24, 2007, was limited to providing exposure of the spine, and that Dr. Xenophontos properly performed the exposure without any complications. Dr. Todd further explains that, as the assisting surgeon, Dr. Xenophontos was not involved in the pre-operative planning or testing, and that it was Dr. Katz's duty, as the attending physician and primary surgeon, to determine whether the plaintiff required anticoagulation therapy pre-operatively or post-operatively. Dr. Todd opines that testing to assess for Factor V Leiden thrombophilia, an inherited blood clotting disorder, was

not indicated, since the plaintiff did not reveal a family history of this disorder; instead, he indicated pre-operatively that he did not have any bleeding or clotting abnormalities. He also concludes the plaintiff was not a candidate for anticoagulation therapy, because it posed a greater risk of intra-operative and post-operative hemorrhage as a result of the extensive spinal surgery performed. Additionally, Dr. Todd states that, since the plaintiff had undergone two previous surgeries without complication from DVT, prophylactic anticoagulation therapy was not warranted. Furthermore, Dr. Todd states that the risk of DVT was properly managed post-operatively by utilizing TEDS and sequential compression devices, which are designed to limit the development of DVT in patients that are immobile, as well as having the plaintiff ambulate the day after the surgery.

Dr. Todd further states, within a reasonable degree of medical certainty, that the plaintiff did not exhibit any signs or systems of DVT, which includes swelling, discoloration and warmth in the affected area, when Dr. Xenophontos examined him the day after the spinal fusion surgery. Dr. Todd explains that the hip pain and leg pain noted in the plaintiff's medical chart were not consistent with DVT, and that, in the absence of swelling, discoloration and warmth in the area, complaints of pain in the hip or leg are not uncommon for a patient having just undergone an anterior lumbar interbody fusion surgery. Moreover, Dr. Todd explains that, at the time of his discharge, the plaintiff made no complaints of pain in his left hip or leg.

Finally, Dr. Todd opines, within a reasonable degree of medical certainty, that Dr. Xenophontos provided the plaintiff with good and acceptable treatment during his July 30, 2007 admission into Mercy Medical Center. Dr. Todd states that the DVT was immediately diagnosed, and that Dr. Xenophontos appropriately treated the DVT with anticoagulation therapy and elevation of the leg. He states the IVC filter was timely and appropriately placed once the pulmonary embolism was discovered by a CT scan following the plaintiff's complaints of chest tightness and shortness of breath. Dr. Todd states that, prior to such complaints by the plaintiff and the pulmonary embolism diagnosis, there was no medical indication for the prophylactic placement of an IVC filter. Dr. Todd explains that an IVC filter will be placed in patients that have contraindications or complications with anticoagulation or in patients who develop pulmonary embolisms while on anticoagulants. Moreover, Dr. Todd states that the prophylactic placement of an IVC filter was not indicated because the DVT was located in the plaintiff's common femoral vein, which is not an area of high risk for a pulmonary embolism, and, prior to his complaints of chest pain, he was showing marked improvement on the anticoagulation therapy; nor was the plaintiff's Factor V Leiden mutation an indicator for the placement of an IVC filter prior to the confirmation by the CT scan and the plaintiff's complaints of chest pain. Dr. Todd further states, that the placement of an IVC filter places a patient at an increased risk of developing a clot around the filter and should be avoided, if possible, in patients who are in a hypercoagulable state, such as those with the Factor V Leiden mutation.

In opposition, the plaintiff has failed to raise a triable issue of fact to the defendants' prima facie showing (*see* ***Castro v New York City Health & Hosps. Corp.***, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; ***Arkin v Resnick***, 68 AD3d 692, 890 NYS2d 95 [2d Dept 2009]). The affirmation of the plaintiff's unnamed expert, who is board certified in surgery, which indicates that Dr. Katz and Dr. Xenophontos departed from acceptable standards of medical care, and that each of their departures was a substantial contributing factor in the injuries sustained by the plaintiff, is speculative and without

probative value (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Forrest v Tierney***, 91 AD3d 707, 936 NYS2d 295 [2d Dept 2012]; ***Cerny v Williams***, 32 AD3d 881, 822 NYS2d 548 [2d Dept 2006]). The plaintiff's expert, in a conclusory manner, states that the defendants were required to implement a DVT prophylaxis, such as aspirin therapy, and to closely monitor the plaintiff following his surgery, because he was at a high risk for developing DVT. He further states that once the plaintiff developed DVT, it was a departure from the standard of care not to have placed an IVC filter to prevent a pulmonary embolism. The plaintiff's expert states that reducing the risk of developing DVT is a high priority after this particular type of surgery, and that there are two categories of DVT prevention – the medical method of prevention, such as TEDS, pulsatile stockings, ambulation, and the medicinal method of prevention, such as aspirin, Herapin, Coumadin. Although acknowledging that TEDS and a Venodyne compression device were placed on the plaintiff intra-operatively and post-operatively, and that the plaintiff received physical therapy to help him ambulate the day after the procedure, the plaintiff's expert perfunctorily concludes that it was a departure for the defendants to fail to ensure that the pulsatile stockings remained on the patient's legs and to fail to initiate aspirin therapy after the surgery, and fails to address the effect of the plaintiff's removal and refusal to wear the TEDS. Furthermore, the expert fails to address the defendants' experts' assertions that the plaintiff was not a candidate for anticoagulation therapy because it posed a greater risk of intra-operative and post-operative hemorrhage due to the extensive spinal surgery performed on him. Nor does the expert address the fact that the plaintiff had undergone two previous surgeries without complication from DVT.

In addition, the plaintiff's expert states that it was a departure from the standard of care to have discharged the plaintiff from the hospital on July 26, 2007, because he was experiencing pain in his leg and thigh, and, therefore, the standard of care required that DVT be ruled out by performing a doppler study on the plaintiff's left leg prior to his discharge. However, this conclusion by the plaintiff's expert assumes facts not supported by the evidence, is not based on any facts in the record, and is not supported by facts fairly inferable from the evidence (*see* ***Hambsch v New York City Tr. Auth.***, 63 NY2d 723, 480 NYS2d 195 [1984]; ***Cassano v Hagstrom***, 5 NY2d 643, 187 NYS2d 1 [1959]). Instead, the record shows that the plaintiff did not make any complaints of pain in his left leg or thigh on the date of his discharge from the hospital, and that the plaintiff's complaints of pain in his legs only occurred after he had received physical therapy. Moreover, the expert failed to address the fact that the plaintiff did not exhibit any signs or symptoms associated with DVT during his admission in the hospital or on the date of his discharge. Indeed, the plaintiff testified at his deposition that it was not until he was on his way to Dr. Katz's office that his leg began to turn blue and to swell. An expert is not allowed to reach a conclusion by assuming material facts not supported by the evidence, and is not allowed to guess or speculate in drawing a conclusion (*see* ***Reilly v Ninia***, 81 AD3d 913, 917 NYS2d 652 [2d Dept 2011]; ***Lee v Shields***, 188 AD2d 637, 591 NYS2d 522 [2d Dept 1992]).

Furthermore, the plaintiff's expert opines that it was a departure from the standard of care by the defendants not to have recommended or inserted an IVC filter when the plaintiff was readmitted into Mercy Hospital on July 30, 2007, and that this departure was a substantial contributing factor in the injuries suffered by the plaintiff, including his development of venous insufficiency. The plaintiff's expert asserts that the placement of an IVC filter, at that time, would have captured the embolizing clot before it passed into the inferior vena cava and pulmonary vasculature. Significantly, the expert fails to address the assertions made by Dr. Xenophontos' expert, Dr. Todd, that the placement of an IVC filter

increases the risk of a patient developing a clot around the filter and should be avoided, if possible, in patients who are in a hypercoagulable state; that an IVC filter's usage is indicated in patients who develop pulmonary embolisms while on anticoagulant therapy; and that the location of the clot in the common femoral vein did not warrant placement of an IVC filter until a CT scan confirmed the existence of a pulmonary embolism. Consequently, the plaintiff's expert's allegations of medical malpractice are unsupported by the evidence and, thus, are insufficient to defeat the defendants' motions for summary judgment (*see* ***Lahara v Auteri***, 97 AD3d 799, 948 NYS2d 693 [2d Dept 2012]; ***Parrilla v Buccellato***, 95 AD3d 1091, 944 NYS2d 604 [2d Dept 2012]; ***Melnik-Mirzakhan v Tavdy***, 84 AD3d 1039, 923 NYS2d 335 [2d Dept 2010]). Accordingly, the defendants' motions for summary judgment dismissing the complaint against them are granted. The action is severed and continued as against the remaining defendants.

Dated: July 30 2014

J.S.C.

___ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**