

<b>Schaefer v MacKinnon</b>
2014 NY Slip Op 32312(U)
August 27, 2014
Sup Ct, New York County
Docket Number: 117235/09
Judge: Joan B. Lobis
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8/29/14  
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS  
Justice

PART 6

SCHAEFER, FRANK, ET AL.

INDEX NO. 117235/09

- v -  
DAVID MACKINNON, M.D.,  
ET AL.

MOTION DATE 6/24/14

MOTION SEQ. NO. 05

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

The following papers, numbered 1 to 3 were read on this motion to/for summary judgment

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

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

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

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, it is ordered that this motion

AUG 29 2014

NEW YORK  
COUNTY CLERK'S OFFICE

RECEIVED  
AUG 29 2014  
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NYS SUPREME COURT - CIVIL

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION and  
Order

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

Dated: 8/27/14

JOAN B. LOBIS  
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  
NEW YORK COUNTY: IAS PART 6**

-----X  
FRANK SCHAEFER and MARIA SCHAEFER,

Plaintiffs,

Index No. 117235/09

-against-

**Decision and Order**

DAVID MACKINNON, M.D., HEART DIAGNOSTICS OF  
NEW YORK, BROADWAY CARDIOPULMONARY, P.C.,  
KRISTIAN KOSCHAL, ELIN ALLEN, SACHAL BADLANI,  
M.D., FARAH LAJAM, M.D., BHUPENDRA PATEL, M.D.,  
and WILLIAM SCHWARTZ, M.D.,

**FILED**

Defendants.

-----X  
AUG 29 2014

**JOAN B. LOBIS, J.S.C.:**

**NEW YORK  
COUNTY CLERK'S OFFICE**

Frank Schaefer, and his spouse, Maria Schaefer, bring this medical malpractice action arising out of injuries that Mr. Schaefer sustained in a fall during a cardiac stress test. Four of the Defendants, Sachal Badlani, M.D., Farah E. Atallah-Lajam, M.D., sued here as Farah Lajam, M.D., Bhupendra Patel, M.D., and William Schwartz, M.D., the shareholders of Defendant Broadway Cardiopulmonary, P.C., move for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules. Plaintiffs oppose the motion. For the following reasons, the motion are denied.

On referral from his cardiologist, on February 5, 2009, Frank Schaefer, age 39, went to Broadway Cardiopulmonary, P.C., which professional service corporation was doing business as Heart Diagnostics of New York, (The Practice) for a nuclear stress test. The Practice, now defunct, had offices at 110 East 59th Street here in New York City. On his patient history form, Schaefer complained of chest pain and discomfort, lightheadedness and dizziness, peripheral numbness and pain, as well as palpitations. He indicated that his current medications included atenolol, minicyclen

and indomethacine. He was 6' 2" and weighed 185 pounds.

Mr. Shaefer also signed a Nuclear Stress Test Consent Form, which indicated that the test was "by Dr. MacKinnon." The form expressly provided that the patient "will have an interview and be examined by a physician." Witness initials on the form indicated "EA."<sup>1</sup> It is undisputed that Dr. MacKinnon did not interview or examine Mr. Schaefer prior to or in the course of the testing.

During the resting portion of the test, which was conducted by Defendant Kristian Koschal, a medical technologist, Mr. Shaefer fell. An occurrence report by the Practice indicated that his fall was heard, not witnessed. Mr. Koschal was not in the room at the time. Mr. Shaefer, who had passed out, struck his face and was stuporous on examination. He had a laceration beside his eye, and his blood pressure was 100/60. Emergency medical services were called.

For his injuries, Mr. Schaefer was admitted to Lenox Hill Hospital, where he was discharged on February 7, 2009. He was admitted again later that month and discharged the next day. He was confined at home based on his injuries until mid-March 2009.

In 2009 the Schaeferes sued Dr. MacKinnon and the Practice. An action was filed in July 2011 against the remaining Defendants: Medical Technologist Koschal and Medical Assistant Allen, both employees of the Practice, as well as the Practice's four shareholders, Drs. Badlani, Atallah-Lajam, Patel, and Schwartz (Shareholders). This Court consolidated the 2009 and 2011

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<sup>1</sup>The Practice's medical assistant, Elin Allen, is a pro se Defendant in this case.

lawsuits in March 2012.

The complaint raises three causes of action: negligence and medical malpractice, lack of informed consent, and a loss of services claim, which is made on behalf of the patient's spouse, Maria Schaefer. The bills of particulars against the movants allege, among others, negligent supervision and failure to properly train and hire personnel. Schaefer seeks damages relating to head trauma, facial fractures and complications, which required hospitalization and surgery and which he alleges have caused permanent injuries including numbness to the right side of his face, including the eye, nose, cheek, mouth, gum, teeth and lip. He further alleges abnormal closing of the right eye and facial asymmetry, among other permanent injuries. Special damages for medical expenses are estimated at approximately \$50,000.

The Defendant Shareholders now move for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules. They rely on Section 1505(a) of the New York Business Corporation Law, the liability provision for shareholders of professional service corporations, which creates, in pertinent part, shareholder liability for persons under shareholders' direct supervision and control. They contend that the record shows that there is no genuine issue of material fact that as shareholders of Broadway Cardiopulmonary, P.C., they did not directly supervise or control any of the alleged tortfeasors in this action, and, accordingly, they are entitled to summary judgment as a matter of law. In support of their claim, they attach excerpts of deposition testimonies.

Plaintiffs oppose the motion for summary judgment. They attach additional excerpts of deposition testimony and other documentation from the record. Plaintiffs underscore that they do

not claim that the Shareholders provided any “direct, hands on medical care,” but rather the Shareholders were “directly and personally responsible for failing to implement certain guidelines, protocols and procedures for the proper and safe performance” of the testing. The Practice’s hiring of a business consultant or delegation to Dr. MacKinnon of professional services, they assert, is not dispositive of the Shareholders’ statutory responsibility. The record citations to Shareholders’ acts of omission in exercising direct supervision and control, including failure to properly supervise, train and control the staff involved, Plaintiffs contend, raise a jury question over the Shareholders’ liability under Business Corporation Law Section 1505(a).

In considering a motion for summary judgment, this Court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep’t 2007). A movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. C.P.L.R. Rule 3212(b). The affidavit must recite all material facts and show, where a defendant is the movant, that the causes of action have no merit. Id. This Court may grant the motion if, upon all the papers and proof submitted, it is established that the Court is warranted as a matter of law in directing judgment. Id. It must be denied where facts are shown “sufficient to require a trial of any issue of fact.” Id. This Court does not weigh disputed issues of material facts. See, e.g., Matter of Dwyer’s Estate, 93 A.D.2d 355 (1st Dep’t 1983). It is well-established that summary judgment proceedings are for issue spotting, not issue determination. See, e.g., Suffolk County Dep’t of Soc. Servs. v. James M., 83 N.Y.2d 178, 182 (1994). If a movant makes a prima facie showing of entitlement to summary judgment, the burden then shifts to the non-moving party “to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” Alvarez v.

Prospect Hosp., 68 N.Y.2d 320, 324 (1986).

The New York Court of Appeals has recognized that a principal attribute of the corporate form of business association is the elimination of personal shareholder liability. We're Assocs. Co., v. Cohen, Stracher & Bloom, P.C., 65 N.Y.2d 148, 151 (1985). While shareholders are generally not personally liable for corporate debts, liability remains, however, against individual shareholders of professional service corporations in connection with rendition of professional services on behalf of the corporation. Id. Liability of shareholders of professional service corporations is statutorily defined. Section 1505(a) of the New York Business Corporation Law provides, in pertinent part, as follows: “[e]ach shareholder . . . of a professional service corporation . . . shall be personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by [the shareholder] or by any person under [the shareholder’s] direct supervision and control . . . .”

The Appellate Division, construing this statutory language has adopted a multi-factorial test to determine a shareholder’s liability based on “direct supervision and control.” Wise v. Greenwald, 208 A.D.2d 1141 (3rd Dep’t 1994). In Wise, the appellate court considered the liability under Section 1505(a) of the Business Corporation Law of a shareholder of a dental practice, whose employee dentist allegedly negligently extracted Wise’s tooth. Indicia of liability included the shareholder’s hiring responsibilities, setting hours of operation, evaluation of employees, and whether any intermediary supervisor lay between the shareholder and employee whose actions were at issue. Id. at 1142. Applying these factors, the Wise Court affirmed the denial of the shareholder’s motion for summary judgment. Id. at 1143.

Similarly in this case, the Court finds that genuine issues of material fact remain regarding the Shareholders' liability under Business Corporation Law Section 1505(a) for any direct supervision and control of persons rendering professional services for the Practice. Shareholder Patel testified that all four Shareholders met at least every two months to discuss the Practice's operation. There is testimony that all four Shareholders signed the lease to rent the office space, approved the type of cardiac imaging machine at issue, and the Shareholders were involved with ordering medical and office supplies. They hired Dr. MacKinnon. Shareholder Badlani testified that the Shareholders evaluated Dr. MacKinnon for salary and wage increases. Shareholder Atallah-Lajam testified that he spoke with Dr. MacKinnon daily, by phone and sometimes in person at the Manhattan office or more often the Queens facility, in which conversations he discussed operational issues, including staff scheduling. The record further indicates all four Shareholders hired Medical Technologist Koschal with the assistance of Larry Lee, a business consultant to the Practice, and set Koschal's pay and work hours. Shareholders Schwartz and Atallah-Lajam testified that the Shareholders had the power to terminate employees. Shareholder Schwartz further testified that Shareholder Patel worked with Consultant Lee on business and operational issues.

In addition, Medical Technologist Koschal testified that he reported directly to Shareholder Atallah-Lajam. Koschal, who immediately previously to working for the Practice had worked for the manufacturer of the cardiac equipment at issue in this case, testified that he had not been trained or given any procedures to follow in operating the equipment. In questioning regarding the operator's manual, he testified, "I wouldn't say I've read it." He indicated that he had received no instruction in connection with the use of the equipment seatbelt or any obligation to remain in the room during the equipment's operation. He acknowledged blood pressure, respiration or pulse were

not monitored before the resting portion of the cardiac stress test. Patients were only interviewed by Defendant Allen, the Practice's medical assistant.

Based on this record, the Court finds that genuine issues of material fact remain for the jury to determine whether for purposes of Section 1505(a) of the Business Corporation Law the Shareholders are liable for persons at the Practice who are alleged to have rendered professional services to Mr. Schaefer, and the Shareholders have not established that they are entitled to summary judgment as a matter of law. Accordingly, it is

ORDERED that the motion for summary judgment is denied; and it is further

ORDERED that the parties appear for a pretrial conference, on September 30, 2014, at 9:30 am.

Dated: August 27, 2014

**FILED**  
AUG 29 2014  
NEW YORK  
COUNTY CLERKS OFFICE

ENTER:

  
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JOAN B. LOBIS, J.S.C.