

**Mulbach v Gramse**

2015 NY Slip Op 30457(U)

March 27, 2015

Supreme Court, Suffolk County

Docket Number: 211-29727

Judge: Daniel Martin

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SHORT FORM ORDER

INDEX No. 11-29727

CAL No. 14-00963MM

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

**PRESENT:**

Hon. DANIEL MARTIN

MOTION DATE 8-22-14 (001)

MOTION DATE 10-16-14 (002)

ADJ. DATE 10-21-14

Mot. Seq. # 001 MD  
# 002 MotD

-----X

ESTHER MULBACH,  
  
Plaintiff,

- against -

MICHAEL GRAMSE, BROADWAY  
DIAGNOSTIC and REHABILITATION,  
GLENN SEGAL and GLENN SEGAL  
PHYSICAL THERAPY, P.C.,  
  
Defendants.

-----X

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Upon the following papers numbered 1 to 55 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; 26 - 51 ; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 52 - 53 ; Replying Affidavits and supporting papers 54 - 55 ; Other     ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the motion (seq. 001) by defendants Michael Gramse, D.C., and Broadway Diagnostic and Rehabilitation and the motion (seq. 002) by defendants Glenn Segal and Glenn Segal Physical Therapy, P.C., are consolidated for purposes of this determination; and it is

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**ORDERED** that the motion by defendants Michael Gramse, D.C., and Broadway Diagnostic and Rehabilitation for summary judgment in their favor is denied; and it is further

**ORDERED** that the motion by defendants Glenn Segal and Glenn Segal Physical Therapy, P.C., for summary judgment in their favor is granted to the extent set forth herein, and is otherwise denied.

On June 21, 2010, plaintiff Esther Mulbach allegedly was injured while receiving treatment at an office located at 333 Broadway in Amityville, which was leased and operated by defendants Michael Gramse, D.C., and Broadway Diagnostic and Rehabilitation. Months earlier, in March 2010, plaintiff presented at the office of Broadway Diagnostic and Rehabilitation seeking treatment for injuries she allegedly sustained when she was struck by a vehicle while walking on the side of the roadway. In addition to receiving chiropractic treatments from Dr. Gramse, plaintiff allegedly received physical therapy treatments at the office from Yelana Harpaz, a physical therapist employed by defendant Glenn Segal Physical Therapy, P.C., which, along with various other medical and therapy providers, sublet space at 333 Broadway from Dr. Gramse. According to her deposition testimony, plaintiff suffered a burn and scarring after Ms. Harpaz placed a moist heat pack directly on her back.

Subsequently, plaintiff brought this action against Dr. Gramse, Broadway Diagnostic and Rehabilitation, Glenn Segal Physical Therapy, and its sole shareholder, Glenn Segal, alleging they failed to render proper care and failed to “properly use a heating pad on the plaintiff.” By her bill of particulars, plaintiff alleges, among other things, that defendants were negligent in failing to “place a towel or other protective item between the plaintiff’s skin and the heating pad”; in failing to timely remove the heating pad from plaintiff’s skin; and in failing to treat the burn to plaintiff’s skin caused by the heating pad.

Dr. Gramse and Broadway Diagnostic and Rehabilitation (hereinafter collectively referred to as the Gramse defendants) now move for summary judgment dismissing the complaint against them, arguing they cannot be liable for any negligence Ms. Harpaz may have committed during her treatment of plaintiff, as she was not an employee of the chiropractic practice. The Gramse defendants’ submissions in support of their motion include copies of the pleadings and the bill of particulars, transcripts of the parties’ deposition testimony, the transcript of the deposition testimony of Ms. Harpaz, the employment agreement between Glenn Segal Physical Therapy and Ms Harpaz, and “sign-in” sheets printed with the name Glenn Segal Physical Therapy and dated from April 14 to June 28, 2010. The Gramse defendants also submit numerous uncertified records and unsworn reports related to plaintiff’s treatment in 2010 that allegedly were contained in Broadway Diagnostic and Rehabilitation’s file for plaintiff, and an affidavit of Dr. Gramse.

Defendants Segal and Glenn Segal Physical Therapy (hereinafter collectively referred to as the Segal defendants) also move for summary judgment in their favor, arguing there is no

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evidence plaintiff was their patient. Alternatively, the Segal defendants assert that any treatment rendered by Ms. Harpaz was for personal financial gain and outside the scope of her employment with Glenn Segal Physical Therapy. In support of their motion, they submit copies of the pleadings, the parties' deposition transcripts, Ms. Harpaz' deposition transcript, an uncertified claim form from the Motor Vehicle Accident Indemnification Corporation allegedly submitted by Broadway Diagnostic and Rehabilitation for care provided to plaintiff in June 2010, and an affidavit of Glenn Segal.

Plaintiff opposes both motions, arguing various triable issues of fact exist, such as whether she was a patient of Glenn Segal Physical Therapy, whether the hot pack at issue was owned by or supplied by Dr. Gramse, and whether the hot pack was administered as part of her chiropractic treatment or her physical therapy treatment. Plaintiff also argues triable issues exist as to whether, under the particular circumstances in this case, where multiple medical providers and therapists were working out of the same office space, Dr. Gramse had a duty to supervise Harpaz' actions and, if so, whether he breached such duty.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). "To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd. [b]), and he must do so by tender of evidentiary proof in admissible form" (*Friends of Animals v Associate Fur Mfrs.*, 46 NY2d 1065, 1067-1068, 416 NYS2d 790 [1979]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Solan v Great Neck Union Free School Dist.*, 43 AD3d 1035, 842 NYS2d 52 [2d Dept 2007]; *Engelhart v County of Orange*, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). Although proximate cause generally is a matter for the jury, a plaintiff who brings a negligence action must establish prima facie that the defendant's negligence was a substantial cause of the event which produced his or her injury (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, 434 NYS2d 166 [1980]; *see Maheshwari v City of New York*, 2 NY3d 288, 778

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NYS2d 442 [2004]; **Garcia v Pepe**, 11 AD3d 654, 783 NYS2d 406 [2d Dept 2004], *lv dismissed in part, denied in part* 5 NY3d 821, 804 NYS2d 31 [2005]). Proximate cause may be inferred from the facts and circumstances surrounding the injury; however, there must be sufficient proof in the record to permit a finding of proximate cause based not upon speculation, but upon the logical inferences to be drawn from the evidence (*see Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 500 NYS2d 95 [1986]; **Hartman v Mountain Val. Brew Pub**, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]; **Babino v City of New York**, 234 AD2d 241, 650 NYS2d 778 [2d Dept 1996]).

“An allegation that a party failed in the proper performance of services related primarily to [his or her] profession is a claim of professional malpractice” (**Travelers Indem. Co. v Zeff Design**, 60 AD3d 453, 455, 875 NYS2d 456 [1st Dept 2009]). To establish liability for professional malpractice, a plaintiff must prove the defendant deviated or departed from the accepted practices of such profession, and that such deviation or departure was a proximate cause of the plaintiff’s injury (**Archer v Haeri**, 91 AD3d 685, 685, 936 NYS2d 559 [2d Dept 2012]; **Georgetti v United Hosp. Med. Ctr.**, 204 AD2d 271, 272, 611 NYS2d 583 [2d Dept 1994]; *see 43 Park Owners Group, LLC v Commonwealth Land Title Ins. Co.*, 121 AD3d 937, 995 NYS2d 148 [2d Dept 2014]; **Bruno v Trus Joist a Weyerhaeuser Bus.**, 87 AD3d 670, 929 NYS2d 163 [2d Dept 2011]). On a motion for summary judgment dismissing a professional malpractice action, a defendant has the initial burden of establishing the absence of any departure from good and accepted practice in such profession or that the plaintiff was not injured thereby (*see e.g. Archer v Haeri*, 91 AD3d 685, 936 NYS2d 559; **Shank v Mehling**, 84 AD3d 776, 922 NYS2d 495 [2d Dept 2011]; **Kung v Zheng**, 73 AD3d 862, 901 NYS2d 334 [2d Dept 2010]; **Shahid v New York City Health & Hosps. Corp.**, 47 AD3d 800, 850 NYS2d 519 [2d Dept 2008]).

It is well settled that the requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted standards of medical practice, and (2) evidence that such departure was a proximate cause of the plaintiff’s injury or damage (*see Myers v Ferrara*, 56 AD3d 78, 864 NYS2d 517 [2d Dept 2008]; **Sheenan-Conrades v Winifred Masterson Burke Rehabilitation Hosp.**, 51 AD3d 769, 858 NYS2d 280 [2d Dept 2008]; **Rebozo v Wilen**, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]; **Biggs v Mary Immaculate Hosp.**, 303 AD2d 702, 758 NYS2d 83 [2d Dept], *lv denied* 100 NY2d 506, 763 NYS2d 812 [2003]). However, as the practice of the profession of chiropractic is distinct from the practice of the profession of medicine (*see Education Law* §§ 6521, 6551), a chiropractor is held to the standard of care that a reasonable prudent chiropractor would exercise under the particular circumstances (*see Mitrovic v Silverman*, 104 AD3d 430, 961 NYS2d 75 [1st Dept 2013]; **Patrella v Atlantic Chiropractic Group**, 41 AD3d 806, 839 NYS2d 177 [2d Dept], *lv denied* 9 NY3d 940, 844 NYS2d 781 [2007]; **Flower v Noonan**, 271 AD2d 825, 706 NYS2d 245 [3d Dept 2000]), unless such chiropractor departs “from the restrictions placed upon his profession . . . and ventures into the practice of medicine” (**Taormina v Goodman**, 63 AD2d 1018, 1018, 406 NYS2d 350 [2d Dept

2008]). In that event, a chiropractor will be held to the same standard of care as a physician (*id.*). Similarly, a physical therapist will be held to the standard of care of a reasonably prudent physical therapist (*see Archer v Haeri*, 91 AD3d 685, 936 NYS2d 559; *Shank v Mehling*, 84 AD3d 776, 922 NYS2d 495 [2d Dept 2011]).

Thus, a chiropractor or physical therapist accused of malpractice moving for summary judgment must establish as a matter of law that he or she did not deviate from the good and accepted practices of his or her respective profession, or that any deviation therefrom was not a proximate cause of the plaintiff's injuries (*see Barlev v Bethpage Physical Therapy Assoc., P.C.*, 122 AD3d 784, 995 NYS2d 514 [2d Dept 2014]; *Shank v Mehling*, 84 AD3d 776, 922 NYS2d 495; *Bickom v Bierwagen*, 48 AD3d 1247, 852 NYS2d 542 [4th Dept 2008]). If the defendant makes such a showing, the burden shifts to the plaintiff to lay bare his or her proof and demonstrate the existence of a triable issue as to whether the defendant deviated from accepted practices and whether such deviation was a proximate cause of the plaintiff's injuries (*see Latona v Roberson*, 71 AD3d 1498, 897 NYS2d 378 [4th Dept 2010]; *Bickom v Bierwagen*, 48 AD3d 1247, 852 NYS2d 542; *Ives v Allard Chiropractic Off.*, 274 AD2d 910, 711 NYS2d 85 [3d Dept 2000]; *see also Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358, 669 NYS2d 631 [2d Dept 1998]).

Here, plaintiff testified at her deposition that Dr. Gramse was the first health care provider she sought treatment from after allegedly being struck in the leg by a car in March 2010, and that she presented at his office just days after her accident because she was pleased with the care she had received from him for injuries she suffered as a result of a 2006 motor vehicle accident. She testified, in part, that she treated with Dr. Gramse from March 2010 to June 2010, that when she arrived for her appointments she was instructed by the office receptionist to sign in on three different sheets, that she would receive treatments from Dr. Gramse and perhaps from one or two other health care providers or therapists during her office visits, and that such treatments were for conditions in her leg, arm and back. Further, plaintiff testified that she received heat therapy at each appointment, and that on some days Dr. Gramse applied the heat pack and on other days one of two women employed at the office would apply it. According to plaintiff's testimony, on the day of the incident at issue, Ms. Harpaz instructed her to lay face down on a treatment table situated in a large room containing four other treatment tables. Plaintiff testified that, though a heat pack routinely is wrapped in a towel before applied to a patient, Ms. Harpaz placed the pack directly on her back, on top of the blouse she was wearing. She testified that while she immediately called out loud that the heating pack was burning her, it took approximately three minutes for Ms. Harpaz to remove it. She testified after it was removed, the heat pack was wrapped in a towel and placed on her back for approximately 20 to 25 minutes. Plaintiff testified that two days after the incident she discovered a burn on her back, and that she did not advise Dr. Gramse about the incident involving the heat pack until her next office visit on June 28, 2010. She testified that she also told Ms. Harpaz about the burn that same day.

Dr. Gramse testified that in 2010 he rented one of three office suites at the premises known as 333 Broadway, and that he subleased space in his office to Fabritzia Marsal, an acupuncturist, Glenn Segal Physical Therapy, and Dr. Eleman, a physiatrist. He testified that Glenn Segal Physical Therapy employed two or three physical therapists to work in the office, and that Ms. Harpaz was one of its employees. In contrast to plaintiff's testimony, Dr. Gramse testified that he performed only chiropractic manipulations, that he only treated plaintiff's neck and back, and that he did not provide heat therapy or other adjunctive therapies to plaintiff or to any of his other chiropractic patients. However, he also testified that he owned the heat packs used in the office and the hydrocollator warming unit in which the packs are heated. He testified that in late March 2010 he referred plaintiff to Dr. Eleman, Ms. Marsal and Glenn Segal Physical Therapy for evaluations, and that subsequently she received pain management treatment, acupuncture and physical therapy from such physician and therapists. Dr. Gramse denied that Ms. Harpaz ever worked for him. However, he testified that he recalled observing plaintiff sleeping with a heating pack on her back during an appointment in June 2010, and that he spoke with Ms. Harpaz about taking it off of her. He also testified that plaintiff spoke with him about the burn on her back, and that he saw plaintiff speak to Ms. Harpaz on the last day she appeared at the office for chiropractic care.

Glenn Segal testified that Glenn Segal Physical Therapy sublet space at 333 Broadway from Dr. Gramse during the period from March 2009 through September 2010. He testified that two or three physical therapists employed by Glenn Segal Physical Therapy, including Yelana Harpaz, worked at Dr. Gramse's office, and that evaluations and treatment records would be prepared by the treating therapists and faxed each night to his billing company. Mr. Segal testified that he never personally treated plaintiff, and that Glenn Segal Physical Therapy had no record of her as a patient. He also testified that plaintiff, who allegedly was injured in a hit-and-run accident, was receiving insurance benefits from the Motor Vehicle Accident Indemnification Corporation, and that his physical therapy practice did not accept such benefits as payment for its services.

In addition, Ms. Harpaz testified at her deposition that she was employed as a physical therapist by Glenn Segal Physical Therapy from October 2009 through July 2010. She testified that she was the only physical therapist who worked in the office space at 333 Broadway leased by Dr. Gramse, and that all of the patients she treated were billed through Glenn Segal Physical Therapy. She testified that she treated patients in the same treatment area used by Dr. Gramse, and that Dr. Gramse and the physical therapists used the same heat packs to treat patients. Further, Ms. Harpaz testified that she did not recall treating plaintiff, and that she did not recognize a photograph of plaintiff shown to her during the deposition. She also denied that she burned a patient's skin with a heating pack while working for Glenn Segal Physical Therapy.


The summary judgment motion by Dr. Gramse and Broadway Diagnostic and Rehabilitation is denied. Here, the deposition testimony submitted with their moving papers

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raises a triable issue as to whether plaintiff sustained a burn to her upper back as she was receiving chiropractic care from Dr. Gramse or physical therapy treatment (*see Tolpygina v Teper*, 44 AD3d 747, 842 NYS2d 913 [2d Dept 2007]). Significantly, while Dr. Gramse testified that he did not administer heat therapy to his patients, Ms. Harpaz testified that heat packs were used in the office for chiropractic treatment, and plaintiff testified that Dr. Gramse would sometimes apply heat packs to her back. Both Mr. Segal and Ms. Harpaz denied that they ever treated plaintiff, and Mr. Segal testified that Glenn Segal Physical Therapy has no record of having provided physical therapy treatment to plaintiff. Moreover, no evidence was offered by the Gramse defendants addressing the allegations of negligence or the accepted standards of chiropractic practice (*see generally Berkley v Emma*, 291 AD2d 517, 738 NYS2d 250 [2d Dept 2002]). Additionally, the conflicting testimony regarding the treatments plaintiff received during the period from March 2010 through June 2010 reveals an issue as to whether Dr. Gramse could be vicariously liable under the principle of apparent agency for any alleged negligence the jury may determine was committed by Ms. Harpaz (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904 [1986]; *Hovsepian v Kleinman-Cindrich*, 239 AD2d 317, 657 NYS2d 991 [2d Dept 1997]).

The branch of the motion by the Segal defendants for summary judgment dismissing the complaint against Glenn Segal is granted. Here, plaintiff does not dispute Mr. Segal's evidence that he did not personally provide physical therapy treatment to her. Summary judgment dismissing the complaint against Glenn Segal Physical Therapy, however, is denied. Although arguing that it did not provide physical therapy to plaintiff and, therefore, could not be liable for malpractice, the conflicting deposition testimony submitted with the moving papers raises a triable issue as to whether plaintiff was a patient of Glenn Segal Physical Therapy and, if so, whether Ms. Harpaz was negligent in applying a moist heat pack to plaintiff's back that was neither wrapped in a towel or placed inside an insulated cover so as to protect the skin. In addition to failing to establish as a matter of law that it did not owe a duty of care to plaintiff, Glenn Segal Physical Therapy failed to present evidence showing it did not depart from accepted standards of physical therapy practice or that any departure did not cause the alleged injury to plaintiff's skin (*see Barlev v Bethpage Physical Therapy Assoc., P.C.*, 122 AD3d 784, 995 NYS2d 514; *Archer v Haeri*, 91 AD3d 685, 936 NYS2d 559; *cf. Shank v Mehling*, 84 AD3d 776, 922 NYS2d 495).

Dated: March 27, 2015

  
A.J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION