

**Gimplin v Kubiak**

2015 NY Slip Op 31750(U)

September 8, 2015

Supreme Court, Suffolk County

Docket Number: 23202/2008

Judge: Joseph Farneti

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

**PRESENT:**

**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**

MARVIN GIMPLIN, as Administrator of the Estate  
of CAROL GIMPLIN, deceased, ROBERT L.  
PRYOR, AS TRUSTEE OF THE ESTATE OF  
MARVIN I. 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: JANUARY 14, 2013  
FINAL SUBMISSION DATE: APRIL 24, 2014  
MTN. SEQ. #: 017  
MOTION: MOT D

ORIG. RETURN DATE: FEBRUARY 14, 2013  
FINAL SUBMISSION DATE: APRIL 24, 2014  
MTN. SEQ. #: 018  
MOTION: MOT D

ORIG. RETURN DATE: JANUARY 31, 2013  
FINAL SUBMISSION DATE: APRIL 24, 2014  
MTN. SEQ. #: 019  
CROSS-MOTION: XMD

ORIG. RETURN DATE: FEBRUARY 14, 2013  
FINAL SUBMISSION DATE: APRIL 24, 2014  
MTN. SEQ. #: 020  
CROSS-MOTION: XMD

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Upon the following papers numbered 1 to 27 read on these motions \_\_\_\_\_  
**TO REARGUE AND CROSS-MOTIONS TO DISMISS** \_\_\_\_\_.

Notice of Motion and supporting papers 1-3 ; Notice of Motion and supporting papers 4-6 ;  
Affirmation in Opposition and supporting papers 7, 8 ; Affirmation in Opposition and supporting  
papers 9, 10 ; Affirmation in Opposition and supporting papers 11, 12 ; Affirmation in  
Opposition and supporting papers 13, 14 ; Affirmation in Opposition 15 ; Affirmation in  
Partial Opposition 16 ; Affirmation in Partial Opposition 17 ; Notice of Cross-motion and  
supporting papers 18-20 ; Affirmation in Support and in Opposition and supporting papers 21,  
22 ; Affirmation in Support and in Opposition and supporting papers 23, 24 ; Notice of Cross-  
motion and supporting papers 25-27 ; it is,

**ORDERED** that this motion (seq. #017) by plaintiff, MARVIN GIMPLIN, as Administrator of the Estate of CAROL GIMPLIN, deceased ("plaintiff"), for an Order:

(1) pursuant to CPLR 2221, granting reargument with respect to plaintiff's Notice of Cross-Motion dated August 5, 2012, and upon reargument:

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

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

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

(d) compelling third-party defendant to provide discovery, including examinations before trial and documentary discovery;

(2) pursuant to CPLR 2221, granting reargument with respect to plaintiff's Notice of Cross-Motion dated August 12, 2012, and upon reargument:

(a) granting a protective Order, pursuant to CPLR 3103, quashing the 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, pursuant to CPLR 2304;

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

(c) compelling third-party defendant to provide discovery, including examinations before trial and documentary discovery;

(3) pursuant to CPLR 2221, granting reargument with respect to defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC's Notice of Motion dated September 9, 2011, and upon reargument:

(a) denying the motion in its entirety as procedurally defective on the basis, *inter alia*, that the Good Faith Affirmation submitted in support fails to rise to the level set forth in this Court's Order dated November 8, 2012; and

(b) denying discovery with respect to bankruptcy, the financial records of plaintiff and plaintiff's decedent, and denying a further examination before trial of plaintiff MARVIN GIMPLIN; and

(4) pursuant to CPLR 2221, granting reargument with respect to defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC's Notice of Motion dated September 23, 2011, and upon reargument, denying the motion as procedurally defective on the basis that no Good Faith Affirmation was submitted in support of the relief sought;

(5) pursuant to CPLR 2221, granting reargument with respect to defendant MARTIN J. VAN DYNE, M.D. s/h/a MARTIN VAN DYNE, M.D.'s Notice of Cross-Motion dated September 30, 2011, and upon reargument, denying the motion as procedurally defective on the basis that no Good Faith Affirmation was submitted in support of the relief sought;

(6) pursuant to CPLR 2221, granting reargument with respect to defendants SCOTT PRESS, M.D. and UROLOGICAL ASSOCIATES OF L.I., P.C.'s Notice of Cross-Motion dated October 3, 2011, and upon reargument, denying the motion as procedurally defective on the basis that no Good Faith Affirmation was submitted in support of the relief sought;

(7) pursuant to CPLR 2221, granting reargument with respect to plaintiff's Notice of Cross-Motion dated October 13, 2011, and upon reargument:

(a) 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" as it constitutes an Affirmative Defense pursuant to CPLR 3018 and will be the subject of any further examination before trial of plaintiff MARVIN GIMPLIN;

(b) 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 statement that "Dr. Albino is insured by PBMC policies"; and

(c) 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 proof of service of the non-party subpoenas served on behalf of his clients in this matter as required by the parties' So-Ordered Stipulation of August 18, 2011; and

(8) granting the following relief based upon the instant Notice of Motion and supporting papers, including a Good Faith Affirmation:

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

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

(c) granting a protective Order, pursuant to CPLR 3103, quashing the 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;

(d) denying discovery on the issues of plaintiff's bankruptcy and finances;

(e) denying discovery with respect to the finances of the plaintiff's decedent;

(f) denying a further examination before trial of plaintiff MARVIN GIMPLIN;

(g) granting a protective Order regarding discovery of Mrs. Gimplin's finances pursuant to CPLR 3103 and limiting any further discovery with respect to Mrs. Gimplin, to her medical condition;

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

(i) compelling third-party defendant to provide discovery, including examinations before trial and documentary discovery enumerated herein; and

(j) compelling defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC to provide copies of: the materials received in discovery relating to Mr. Gimplin and/or Mrs. Gimplin; any documents relating to bankruptcy and finances of plaintiff and plaintiff's decedent; and any other materials sought to be used at any further EBT of MARVIN GIMPLIN; and

(k) 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 proof of service regarding the dates and manner of service of each of the non-party subpoenas served in this matter as required by this Court's So-Ordered Stipulation of August 18, 2011;

(l) 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" as it constitutes an Affirmative Defense pursuant to CPLR 3018 and will be the subject of any further EBT of plaintiff MARVIN GIMPLIN; and

(m) 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 the statement that "Dr. Albino is insured by PBMC policies"; and

(n) compelling counsel for defendant PECONIC BAY MEDICAL CENTER to provide a statement as to whether Dr. Albino is covered under its policy,

is hereby **GRANTED** as to reargument. Upon reargument, plaintiff's motion is hereby **GRANTED** solely to the extent provided hereinafter and is otherwise **DENIED**; and it is further

**ORDERED** that this motion (seq. #018) by plaintiff for an Order:

(1) pursuant to CPLR 2221, granting reargument with respect to plaintiff's Notice of Cross-Motion dated August 5, 2012, and upon reargument:

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

(b) striking the third-party defendant's Notice for Discovery and Inspection dated July 26, 2011; certifying this case for trial while allowing further discovery; and

(c) compelling third-party defendant to provide discovery, including examinations before trial and documentary discovery;

(2) pursuant to CPLR 2221, granting reargument with respect to plaintiff's Notices of Cross-Motion dated August 12, 2012, and upon reargument:

(a) granting a protective Order pursuant to CPLR 3103 quashing the 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, pursuant to CPLR 2304;

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

(c) compelling third-party defendant to provide discovery, including examinations before trial and documentary discovery;

(3) pursuant to CPLR 2221, granting reargument with respect to defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC's Notice of Motion dated September 9, 2011, and upon reargument:

(a) denying the motion in its entirety as "procedurally defective" on the basis, *inter alia*, that the Good Faith Affirmation submitted in support fails to rise to the level set forth in this Court's Order dated November 8, 2012;

(b) denying discovery with respect to: bankruptcy, the financial records of plaintiff, and plaintiff's decedent; and

(c) denying the further EBT of plaintiff MARVIN GIMPLIN;

(4) pursuant to CPLR 2221, granting reargument with respect to defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC's Notice of Motion dated September 23, 2011, and upon reargument:

(a) denying the motion as "procedurally defective" on the basis that no Good Faith Affirmation was submitted in support of the relief sought;

(5) pursuant to CPLR 2221, granting reargument with respect to defendant VAN DYNE's Notice of Cross-Motion dated September 30, 2011, and upon reargument:

(a) denying the motion as "procedurally defective" on the basis that no Good Faith Affirmation was submitted in support of the relief sought;

(6) pursuant to CPLR 2221, granting reargument with respect to defendant PRESS's Notice of Cross-Motion dated October 3, 2011, and upon reargument:

(a) denying the motion as "procedurally defective" on the basis that no Good Faith Affirmation was submitted in support of the relief sought;

(7) pursuant to CPLR 2221, granting reargument with respect to plaintiff's Notice of Cross-Motion dated October 13, 2011, and upon reargument:

(a) 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" as it constitutes an Affirmative Defense pursuant to CPLR 3018 and will be the subject of any further EBT of plaintiff MARVIN GIMPLIN;

(b) 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 statement that "Dr. Albino is insured by PBMC policies"; and

(c) 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 proof of service of the non-party subpoenas served on behalf of his clients in this matter as required by the Court's So-Ordered Stipulation of August 18, 2011;

(8) granting the following relief based upon the instant motion and supporting papers, including the attached Good Faith Affirmation:

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

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

(c) granting a protective Order pursuant to CPLR 3103 quashing the 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; and

(d) denying discovery on the issues of plaintiff's bankruptcy and "finances"; and

(e) denying discovery with respect to the finances of Mrs. Gimplin; and

(f) denying the further EBT of plaintiff MARVIN GIMPLIN;

(g) granting a protective Order regarding discovery of Mrs. Gimplin's finances pursuant to CPLR 3103 and limiting any further discovery with respect to Mrs. Gimplin, to Mrs. Gimplin's medical condition;

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

(i) compelling third-party defendant to provide discovery, including examinations before trial and documentary discovery enumerated in the motion;

(j) compelling defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC to provide copies of: the materials received in discovery relating to Mr. Gimplin and/or the plaintiff's decedent, to Mrs. Gimplin; any documents relating to bankruptcy and finances of plaintiff and plaintiff's decedent; and any other materials sought to be used at any further EBT of plaintiff MARVIN GIMPLIN;

(k) 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 proof of service regarding the dates and manner of service of each of the non-party subpoenas served in this matter as required by the Court's So-Ordered Stipulation of August 18, 2011;

(l) 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" as it constitutes an Affirmative Defense pursuant to CPLR 3018 and will be the subject of any further EBT of plaintiff MARVIN GIMPLIN;

(m) 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 as well as to provide the basis for his statement that "Dr. Albino is insured by PBMC policies"; and

(n) compelling counsel for defendant PECONIC BAY MEDICAL CENTER to provide a statement as to whether Dr. Albino is covered under its policy; and

(9) extending plaintiff's time to file security for costs, *nunc pro tunc*;

and

(10) deeming plaintiff's Notice of Motion dated December 28, 2012 to have been properly and timely made and to be properly before the Court;

(11) in the event the Court deems the Notice of Motion dated December 28, 2012 to have been procedurally defective or improperly made, to consider those same issues which are once again raised herein anew and incorporated in the instant motion; and

(12) extending plaintiff's time, pursuant to CPLR 2004, to move for reargument so that it may consider the issues raised in plaintiff's notices of motion dated December 28, 2012 and January 29, 2013,

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

**ORDERED** that this cross-motion (seq. #019) 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) pursuant to CPLR 3126, dismissing plaintiff's Verified Complaint for failure to comply with this Court's Orders; or, in the alternative

(2) pursuant to CPLR 8502, dismissing this matter for plaintiff's failure to post security for costs;

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

(4) compelling plaintiff to provide all outstanding discovery within five (5) days,

is hereby **DENIED** in its entirety for the reasons set forth hereinafter; and it is further

**ORDERED** that this cross-motion (seq. #020) by defendants, DAVID GROSS, M.D. and NORTH FORK RADIOLOGY, P.C., for an Order, pursuant to CPLR 3126, dismissing plaintiff's Verified Complaint for failure to comply with this Court's Orders, is hereby **DENIED** for the reasons set forth hereinafter.

### **FACTUAL AND PROCEDURAL HISTORY**

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.

By Order dated November 28, 2012 ("Prior Order"), this Court decided twelve motions by the parties seeking various forms of relief. Plaintiff, defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC, and defendants, DAVID GROSS, M.D. and NORTH FORK RADIOLOGY, P.C., 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.

Subsequent to the Prior Order, a separate action was commenced in the name of *Robert L. Pryor, as Trustee of the Estate of Marvin I. Gimplin, Individually*, under Index No. 198/2013, against the identical defendants in the instant action. By So-Ordered Stipulation dated April 23, 2015, the parties agreed to consolidate the actions under Index No. 23202/2008 for all purposes, and to amend the caption to reflect such consolidation.

### **PLAINTIFF'S MOTIONS TO REARGUE**

Plaintiff has filed the first two, largely repetitive, motions seeking reargument of the motions that resulted in the Prior Order. Plaintiff filed the second motion in response to the allegation of defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC, that the first motion was made during the automatic stay prescribed by CPLR 8502, which was triggered by the granting of security for costs in the Prior Order pursuant to CPLR 8501. However, CPLR 8502 stays all proceedings *other than to review or vacate such order* (CPLR 8502 [emphasis added]). Thus, the first motion did not violate the stay. If reargument is denied, plaintiff seeks anew all the relief sought in the prior motions, so that the Court may nevertheless address the merits of the myriad relief requested. However, the Court is not aware of any authority for this request; in doing so, plaintiff attempts to circumvent the rules concerning motions that seek review of a prior order.

CPLR 2221 (d) (2) provides that a motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion. It is a basic principle that a movant on reargument must show that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision (*Bolos v Staten Island Hosp.*, 217 AD2d 643 [1995]). A motion to reargue is not to be used as a means by which an unsuccessful party is permitted to argue again the same issues previously decided (*Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1984]). Nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted (see *Giovanniello v Carolona Wholesale Office Machine Co., Inc.*, 29 AD3d 737 [2006]).

Here, upon reargument, plaintiff has failed to demonstrate that the Court overlooked a matter of fact or law in determining the prior motions, except to the limited extent set forth hereinafter. The Court found in the Prior Order, among other things, that plaintiff improperly labeled the motions as "cross-motions" despite the fact that they sought affirmative relief from non-moving parties, and defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC, raised this objection in opposition to the motions. In addition, the Court noted that as the motions related 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. Plaintiff failed to include a good faith affirmation with either application. Therefore, the Court did not overlook a matter of fact or law when characterizing the motions as procedurally defective. Plaintiff's argument that the various defendants' prior motions should have been denied in the absence of good faith affirmations is unavailing, as those motions were primarily for leave to amend their answers.

### **Bankruptcy Issue**

With respect to the issue of plaintiff MARVIN GIMPLIN's bankruptcy, the Court fully addressed this issue on the merits in the Prior Order when it held:

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 . . . [p]laintiff 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, 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, 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 . . . and as it was brought in MARVIN GIMPLIN's individual capacity, he lacks the capacity to sue on his own behalf

(Prior Order, at 14-15 [citations omitted]).

Plaintiff moved to reopen his bankruptcy proceeding and, as discussed, the bankruptcy trustee, Robert L. Pryor, commenced a new action in a representative capacity on behalf of MARVIN GIMPLIN's bankruptcy estate, which has now been consolidated with this action by So-Ordered Stipulation.

### **Financial Discovery**

Further, upon reargument, the Court adheres to its determination in the Prior Order that financial questioning of plaintiff may be relevant on the issue of economic loss suffered by the decedent's distributees relative to the wrongful death cause of action, and on the issue of plaintiff's credibility.

### Economic Loss of Distributees

A cause of action for wrongful death is brought on behalf of the decedent's distributees (see EPTL 5-4.1), and the damages recoverable are for the pecuniary 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]). As held in *Freeman v Corbin Ave. Bus Co.*, 60 AD2d 824 (1978):

In a wrongful death action, the jury is entitled to know the amount the deceased earned, his habits, the relations existing between the wife and him and the position he has taken in respect to his obligations to support her. In a wrongful death action, the plaintiff tenders the issue of pecuniary loss sustained by the next of kin. On that issue any proof as to age, sex, health, intelligence, habits, earning capacity, life expectancy and the like, was competent unless prohibited by statute

(*Freeman v Corbin Ave. Bus Co.*, 60 AD2d 824, 825 [1978]; see *Gonzalez v New York City Housing Authority*, 77 NY2d 663 [1991]).

Section 2:320 of New York's Pattern Jury Instructions, entitled *Actions for Wrongful Death and Conscious Pain and Suffering*, is instructive on this issue as to what may be considered by a jury in awarding damages in such actions:

In deciding the amount of monetary losses, you should consider the character, habits and ability of the plaintiff; the circumstances and condition of the distributees; the services that the plaintiff would have performed for them; the portion of her earnings that the plaintiff would have spent in the future for the care and support of the distributees . . . You should also consider the amount, if any, by which the plaintiff, if she had lived, would have increased her estate from her earnings and thus added to the amount that would have been inherited from her, provided that you find that at least one of the distributees would have been alive to inherit from her

(PJI 2:320).

### Credibility

As noted in the Prior Order, on October 11, 2006, MARVIN GIMPLIN filed for bankruptcy protection in the Eastern District of New York, but failed to include a potential medical malpractice and/or wrongful death action as an asset in the bankruptcy filing and in his testimony given during the bankruptcy proceedings. 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]). Defendants argue that the failure of Mr. Gimplin to include this action in the bankruptcy proceeding rises to the level of an immoral, vicious, or criminal act which may affect his credibility at trial.

Based upon the foregoing, the Court adheres to its prior decision that another deposition of plaintiff MARVIN GIMPLIN is warranted in order to inquire as to the distributees' and the decedent's financial situation as it pertains to the damages sought in the wrongful death cause of action.

### Non-party Subpoenas

However, upon reargument, the Court finds that the non-party subpoenas served by defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC, upon various financial institutions and credit card companies did not comply with CPLR 3120 (3). The aforementioned section provides in pertinent part:

3. The party issuing a subpoena duces tecum . . . shall at the same time serve a copy of the subpoena upon all other parties and, within five days of compliance therewith, in whole or in part, give to each party notice that the items produced in response thereto are available for inspection and copying, specifying the time and place thereof

(CPLR 3120 [3]). It is undisputed that the subpoenas were not served upon all other parties herein at the time of issuance, and that notice was not given to all

other parties within five days of compliance therewith that the items were available. Furthermore, defendant and third-party plaintiff failed to provide proof of service of the non-party subpoenas as required by the parties' So-Ordered Stipulation of August 18, 2011. Therefore, upon reargument, the subpoenas served by defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC, are hereby quashed (*see Needleman v Tornheim*, 88 AD3d 773 [2011]). The items produced in response thereto shall be returned to plaintiff without review or use by defendants for any purpose herein.

Moreover, the Court adheres to its determination not to compel counsel for defendant and third-party defendant to provide the basis for his claim of a "defacto bankruptcy." Plaintiff has failed to proffer any authority that such claim is tantamount to an affirmative defense. Therefore, CPLR 3018 (b) is inapplicable.

With respect to counsel's statement that "Dr. Albino is insured by PBMC policies," the Court had found that plaintiff is entitled to ascertain any insurance coverages applicable to this action, and all defendants were directed to furnish plaintiff with the relevant insurance coverage information within fifteen (15) days of the date of service of the Prior Order with notice of entry, if they had not done so already. In partial opposition to plaintiff's instant applications, defendant/third-party plaintiff PECONIC BAY MEDICAL CENTER consents to providing such information with respect to Dr. Albino, but requests additional time to investigate and respond.

#### **Notice for Discovery and Inspection dated July 26, 2011**

The Court finds that third-party defendant's Notice for Discovery and Inspection, dated July 26, 2011, fails to meet the "reasonable particularity" requirement of CPLR 3120 (2). Therefore, plaintiff's application to strike this Notice for Discovery and Inspection is **GRANTED**, without prejudice to the third-party defendant serving a proper set of discovery requests (*see Astudillo v St. Francis-Beacon Extended Care Facility, Inc.*, 12 AD3d 469 [2004]).

### SECURITY FOR COSTS

Finally, as recited in the Prior Order, the out-of-state plaintiff must file an undertaking in the total sum of \$5,000 as security for costs, pursuant to CPLR 8501 (a), within thirty days pursuant to CPLR 8502. The Court found that an undertaking is required in this medical malpractice/wrongful death action in which the fifteen defendants have and will incur a significant expense (see CPLR 8503; *Small v Stern*, 65 AD3d 1326 [2009]). Plaintiff has submitted a copy of an Undertaking For Costs in the amount of \$5,000.00, dated January 28, 2013 and filed with the Suffolk County Clerk on January 29, 2013, more than thirty (30) days from the date of entry of the Prior Order, to wit: December 3, 2012. However, the Court finds the delay to be *de minimis*. Therefore, that branch of plaintiff's motion to extend plaintiff's time to file security for costs, *nunc pro tunc*, is **GRANTED**, pursuant to CPLR 2004, to January 29, 2013.

### CROSS-MOTIONS TO DISMISS

Defendant, MICHAEL IMPERATO, M.D., and third-party defendant, STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, PC, seek an Order, pursuant to CPLR 3126, dismissing plaintiff's Verified Complaint for failure to comply with this Court's Orders, alleging that plaintiff failed to appear for a further deposition in violation of the Prior Order. Or, in the alternative, defendant and third-party defendant seek dismissal, pursuant to CPLR 8502, for plaintiff's failure to post security for costs. Defendant and third-party defendant also seek to preclude plaintiff from testifying at the trial of this matter, and to compel plaintiff to provide all outstanding discovery within five (5) days.

Defendants, DAVID GROSS, M.D. and NORTH FORK RADIOLOGY, P.C., seek an Order, pursuant to CPLR 3126, dismissing plaintiff's Verified Complaint for failure to comply with this Court's Orders, alleging that plaintiff failed to appear for a further deposition.

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]).

Under the circumstances presented, the Court finds that dismissal of plaintiff's complaint or the sanction of preclusion is not warranted. Plaintiff's failure to comply with the Prior Order was not wilful, contumacious, or in bad faith. That branch of the cross-motion by defendant and third-party defendant, pursuant to CPLR 8502, dismissing this action for plaintiff's failure to post security for costs, is **DENIED** in view of the Court's ruling extending plaintiff's time to file *nunc pro tunc*.

### CONCLUSION

Upon reargument, plaintiff's motions are **GRANTED** solely to the extent provided hereinabove. Defendants' cross-motions are **DENIED** in their entirety. Any relief requested but not specifically granted herein is hereby **DENIED**. The remaining discovery issues shall be addressed by the Court at the compliance conference of this matter scheduled for **September 10, 2015, at 9:30 a.m., in Part 37, Hon. Alan D. Oshrin Supreme Court Building, 1 Court Street, Riverhead, New York.**

The foregoing constitutes the decision and Order of the Court.

Dated: September 8, 2015

  
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 HON. JOSEPH FARNETI  
 Acting Justice Supreme Court

\_\_\_\_ FINAL DISPOSITION

  X   NON-FINAL DISPOSITION