

Skirianos v Mount Sinai Hosp.
2017 NY Slip Op 30889(U)
May 2, 2017
Supreme Court, New York County
Docket Number: 805150-2012
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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JANET SKIRIANOS, As Administratrix of the Estate
of Andreas F. Skirianos, and JANET SKIRIANOS,
Individually,

Plaintiffs,

Index No. 805150-2012

-against-

DECISION/ORDER

Motion Sequence 001

THE MOUNT SINAI HOSPITAL, SIMON HALL, M.D.,
JONATHAN BROMBERG, M.D., DANIEL
GAINSBURG, M.D., DR. S. YU, DR. N. ANSALL and
CELIA DIVINO, M.D.,

Defendants.

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HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmations & Collective Exhibits Annexed.....	<u>1, 2, 3</u>
Answering Affirmation & Exhibits Annexed.....	<u>4, 5</u>
Reply Affirmation.....	<u>6</u>

In this action, Plaintiff Janet Skirianos, as Administratrix of the Estate of Andreas F. Skirianos, and Janet Skirianos, individually ("Plaintiff"), sounding in medical malpractice and wrongful death as the result of her husband, Andreas F. Skirianos' ("Skirianos") death on July 18, 2010. Defendants the Mount Sinai Hospital ("Mt. Sinai"), Simon Hall, M.D. ("Dr. Hall"), Jonathan Bromberg, M.D. ("Dr. Bromberg"), Daniel Gainsburg, M.D. ("Dr. Gainsburg"), Dr. S. Yu ("Dr. Yu"), Dr. N. Ansall ("Dr. Ansall"), and Celia Divino, M.D. ("Dr. Divino"), move for an Order, pursuant to CPLR § 3212, granting them summary judgment and dismissing Plaintiff's claims. Plaintiff opposes the motion.

The case involves Plaintiff's decedent, Skirianos, who at the time of his death was a 60 year old man with a history of renal disease (ESRD) and was on kidney dialysis three times a week (Plaintiff's Mem. at 3). In May of 2010, Skirianos' daughter, non-party Angela Skirianos,

offered to donate her kidney in order for Skirianos to undergo a kidney transplant (*Id.*). Prior to undergoing the transplant, Skirianos underwent various testing, including a CAT scan by Dr. Bromberg (*Id.*). Results of the CAT scan showed a small lesion on Skirianos' kidney that was cancerous (*Id.*). As a result, Dr. Bromberg referred Skirianos to defendant Dr. Hall to address the kidney lesion, prior to any transplant surgery (*Id.*).

Skirianos next presented to Dr. Hall on June 28, 2010 (*Id.*). Dr. Hall's consultation note documents a history of hemodialysis since 2007 and chronic renal disease for approximately 10 years, and Skirianos had prior surgeries for toe amputation, cardiac stent placement, and drainage of a mastoid infection (*Id.*). Lastly, Dr. Hall noted Skirianos' social history was positive for smoking approximately three packs of cigarettes a year, and having quit 10 years ago (*Id.* at 3). However, at her deposition, Plaintiff testified that her husband smoked two packs per day for 25 years (*Id.* at Ex. B, 44:15-20). A CAT scan reviewed by Dr. Hall with Plaintiff and Skirianos demonstrated a 1.5 cm mass in the lower pole anterior of the right kidney, thought to be consistent with a carcinoma. Dr. Hall recommended Skirianos undergo laparoscopic removal of the kidney to be followed by a kidney transplant (*Id.* at 4).

Next, on July 7, 2010, Skirianos was seen by non-party Dr. Janice Lin for a preoperative exam and medical clearance, ahead of his planned nephrectomy procedure with Dr. Hall. Dr. Lin noted Skirianos' vitals as blood pressure 144/67, pulse 67 p.m., temperature 98 and oxygen saturation at 97% (*Id.* at 5). Again, Skirianos was noted as having ESRD with hemodialysis three days a week (*Id.*). Dr. Lin further noted that Skirianos had diabetes and was taking Lantus four times a day in addition to Amoldipine, Labetalol, Lisinopril, Protonix, Ectotrin, Toresmide, Terazosin, Prevacid, and Potassium Bitartrate powder (*Id.*). Dr. Lin further conducted blood analysis and determined that the review of systems was normal with the exceptions of Skirianos' hematocrit and hemoglobin were low at 10.3 and 32.2 respectively, potassium was 5.5, CO2 total 21.7, urea nitrogen 63 and creatine 8.7, based on a September 27, 2009 sample (*Id.*). Promthrombin Time and International Normalized Ratio (PT/INR) values were noted as 13.1 and 1.0 from June 18, 2010 (*Id.* at 6). Thyroid-Stimulating Hormone (TSH) value was noted as 1.97 from December 20, 2006 (*Id.*). Notably, Dr. Lin did not perform or order any new or additional blood tests at this visit (*Id.*).

According to Dr. Lin, Skirianos was at high risk for a perioperative cardiac event for the planned nephrectomy. A cardiac consultation was not requested and at this time, no further assessment of Skirianos' cardiac, pulmonary, renal status, or of his potassium level was ordered or recommended (*Id.*). Indeed, Dr. Lin cleared Skirianos for surgery that day and an addendum by non-party Dr. Erin Eileen Rule ("Dr. Rule") further recommended that Skirianos continue antihypertensive medications, including on the morning of surgery (*Id.*).

On July 9, 2010 at approximately 9:30 a.m., Skirianos was admitted to Mt. Sinai for elective surgery with an admitting diagnosis of adenocarcinoma of the kidney (*Id.* at 7). Skirianos had blood work done at 10:16 a.m. which reported a potassium level of 5.7(H) (*Id.*). Due to the elevated potassium level, a renal consult was obtained at 11:35 a.m. where it was noted that

hemodialysis had been done the day prior (*Id.*). At the renal consult, the plan was for another round of hemodialysis STAT for hyperkalemia pre-operatively, which was performed from 11:32 a.m. until 1:32 p.m., after which Skirianos' pre-operative potassium level dropped from 5.7 to 4.4 at approximately 2:14 p.m. (*Id.*).

Approximately three hours after dialysis was completed, Dr. Hall and non-party Dr. Sherwin Zargaroff ("Dr. Zargaroff") performed a right laparoscopic radial nephrectomy (*Id.*). During the nephrectomy, Peak T waves were noted on the cardiac monitor, which Plaintiff argues indicated that Skirianos might be hyperkalemic, that is, have elevated blood potassium levels (*Id.* at 8). At 6:25 p.m., blood gases and potassium tests taken by Dr. Gainsburg, the attending anesthesiologist, revealed Skirianos' potassium level had risen to 6.1 (*Id.*). In response to this increased potassium level, the respiratory rate and tidal volume were increased (*Id.*). At approximately 6:30 p.m. Skirianos' anesthetic agent was switched from Isoflurane to Desflurane, with the intention of extubating Skirianos after the procedure (*Id.*). Further, Skirianos was administered insulin and dextrose, and later, calcium chloride to prevent cardiotoxic effect of elevated potassium (*Id.*). At 7:00 p.m. Skirianos' potassium level was at 5 (*Id.*). Further, despite switching Skirianos' anesthetic agent from Isoflurane to Desflurane for the purposes of post-operative extubation, while Skirianos was hyperkalemic, Dr. Gainsburg decided that he should be admitted to the surgical intensive care unit ("SICU") and that he would be kept intubated in order to hyperventilate him to keep his potassium levels low (*Id.*). Dr. Gainsburg testified that this was done because patients who are extubated can have potassium levels rise because patients don't breathe as well when they are sedated, and therefore CO2 tends to build up, and the body becomes more acidotic which results in potassium coming out of the cells and into the bloodstream (*Id.*; Gainsburg Tr. at 136:15-25).

Skirianos was placed in SICU and remained intubated throughout the rest of his stay (*Id.* at 9). The following day, July 10, the SICU patient care record notes that he was agitated when moved and moved all extremities when aroused (*Id.*). On July 12, 2010, Skirianos was sedated to a Ransey of 3 and later had sedation increased to a Ransey of 4. On July 16, Skirianos experienced V tech arrest and was resuscitated, and subsequently started on continuous venovenous hemodialysis and underwent an exploratory laparotomy with Dr. Divino, who noted ischemic colitis (*Id.*). The following day, July 17, per SICU notes, Skirianos had symptoms consistent with ischemic liver failure, and stage II bedsore with open areas and darkened skin (*Id.*). Ultimately, Skirianos suffered multi-organ failure and cardiopulmonary arrest and died on July 18, 2010 (*Id.*). No autopsy was performed at the request of Plaintiff (*Id.*).

Plaintiff commenced this action on June 18, 2012 by service of a Summons and Complaint to recover for medical malpractice, lack of informed consent, and wrongful death, in addition to a derivative claim on behalf of Plaintiff individually. Subsequently, Plaintiff discontinued against defendants Dr. Jonathan Bromberg and Dr. Celia Divino by stipulation dated October 21, 2015. Defendants now move, pursuant to CPLR § 3212, for an order granting them summary judgment and dismissing Plaintiff's claim. Plaintiff opposes the motion.

In moving for summary judgment on the medical malpractice claim, Defendants argue that there are no genuine issues of material fact and they are therefore entitled to summary judgment as a matter of law. In support of the motion, Defendants submit Skirianos' medical records, deposition testimony of Dr. Gainsburg, Dr. Hall, Dr. Divino, and Plaintiff, and the expert opinions of Dr. Glyn Morgan, M.D. ("Dr. Morgan"), a New York licensed physician, board certified in general surgery, and Dr. Brian S. Kaufman, M.D. ("Dr. Kaufman"), a New York licensed physician, board certified in anesthesiology, critical care medicine, and internal medicine.

First, Dr. Morgan states that in his opinion within a reasonable degree of medical certainty that the treatment provided to Skirianos by Defendants was at all times in accordance with acceptable standards of care, and was not the cause of Skirianos' alleged injuries (Def. Ex. C at ¶ 6). Specifically, Dr. Morgan states that the pre-operative management was performed within the standard of care because Dr. Hall referred Skirianos to Dr. Lin for medical clearance on June 28, 2010, with the evaluation taking place on July 7, 2010 (*Id.* at ¶ 7). Dr. Morgan states that the evaluation comported with applicable standards of care in that Dr. Lin "properly elicited from the patient a history of co-morbid illnesses including: diabetes mellitus, hypertension, anemia and renal failure" and further elicited a surgical history, included a comprehensive list of Skirianos' medications and doses, and conducted a multi-systems examination (*Id.*). Further, Dr. Morgan notes that "[a] complete blood count plus platelets was drawn and analyzed" and it was observed that Skirianos' potassium level was slightly elevated at 5.5 (*Id.*). Further, Dr. Morgan notes that both Dr. Hall and Dr. Gainsburg were aware of all of these findings and that in his opinion, there were absolutely no contraindications to Skirianos undergoing surgery on July 9, 2010, after receiving dialysis (*Id.*). Specifically, Dr. Morgan notes there is no contraindication to performing a nephrectomy under general anesthesia in the context of a patient who had dialysis on the day of the surgery, and on the day prior as well (*Id.*).

Further, Dr. Morgan opines that it was within the standard of care for Dr. Hall to defer to Dr. Gainsburg relative to the management of the transient episode of hyperkalemia, which resulted in a corrected potassium level of 5.1 after a spike to 6.1 (*Id.* at ¶ 9). Lastly, Dr. Morgan opines that the decision to keep Skirianos intubated was within the standard of care because of the need for additional dialysis and that no act or omission by Defendants was proximately related to the alleged injuries (*Id.* at ¶ 11).

Defendants' second expert, Dr. Kaufman, states that in his opinion within a reasonable degree of medical certainty that the treatment provided to Skirianos by Defendants was at all times in accordance with acceptable standards of care, and was not the cause of Skirianos' alleged injuries (Def. Mem. Ex. D at ¶ 6). Specifically, Dr. Kaufman states that Skirianos was properly assessed pre-operatively for risk of complications as an ASA Risk 4, and that Dr. Gainsburg correctly used his judgment to change the risk level to Risk level 4 after the anesthesia resident, Dr. Ansall, initially categorized Skirianos as a Risk level 3 (*Id.* at ¶ 8). Dr. Kaufman states that ASA Risk level 4, "patient with severe systemic disease that presents a constant threat to life" was warranted based on Skirianos' renal failure, prior heart disease, and diabetes (*Id.*).

Further, Dr. Kaufman opines that the administering of the anesthetic agents Midazolam, Propofol, and Metoprolol, the inhalations agents Desflurane and Isoflurane, and the antibiotic therapy in the form of Cefazolin were completely within the standard of care for anesthesia in the setting of a nephrectomy because none of the aforementioned were contraindicated and none are metabolized through the kidneys or have a hepatotoxic potential (*Id.*). Dr. Kaufman further opines that upon observing possible Peak T-waves and finding an elevated potassium level of 6.1, the administration of insulin and D-50, and increasing ventilation, were “well designed to rid the blood stream of added Potassium” (*Id.* at ¶ 10). Dr. Kaufman asserts that Skirianos did not suffer an anoxic injury in the operating room as evidenced by the post-operative lactate value of 1.7 which reflects good blood flow throughout the entire body (*Id.*). Dr. Kaufman notes that “in the presence of any type of brain injury, there would be evidence of poor oxygenation and/or poor or inadequate flow to the brain” under which the lactate levels would be very elevated (*Id.*). Lastly, Dr. Kaufman opines that the decision to keep Skirianos intubated post-operatively because of the need to perform additional dialysis was within the standard of care and that ultimately, Defendants did not cause, or contribute to, the alleged injuries (*Id.* at ¶ 11-12).

In opposition to Defendants’ motion, Plaintiff submits the expert testimony of an unnamed physician licensed to practice medicine in the State of New York and board certified in anesthesiology. Plaintiff’s expert opines that non-party Dr.’s Lin and Rule departed from good and accepted standards of care by clearing Skirianos for surgery while relying on blood test results that were older than 30 days (Plaintiff Ex. A at ¶ 29-30). Plaintiff’s expert states that the standard of care requires that “new blood samples be drawn and tested or if relying on those previously performed, that those be no older than approximately 30 days” (*Id.* at ¶ 30). Plaintiff’s expert goes on to state that the failure to perform a proper cardiac work-up preoperatively was a departure from the standard of care due Skirianos’ multiple risk factors for coronary artery disease (*Id.* at ¶ 31).

Plaintiff’s expert goes on to opine that performing dialysis immediately prior to the surgery was a departure from the standard of care. In support, Plaintiff’s expert points to an article titled “Anesthesia and Uncommon Disease” written by Lee A. Fleisher, which states “[i]n preparation for elective surgery, patients with [end stage renal disease] should receive dialysis the day before the operation. This is essential to achieve a volume status as close to normovolemic as possible, to allow the patient to tolerate fluid load associated with surgery, and to obtain normal electrolyte concentrations ... Dialysis should not be given immediately before surgery because of the possibility of causing rapid fluid shifts and hypokalemia” (*Id.* at ¶ 33). Plaintiff’s expert goes on to argue that the article is consistent with Mr. Sinai policy recommending dialysis be performed the day prior to surgery, as Dr. Gainsburg testified to during his deposition (*Id.*; Gainsburg Tr. at 38:10-18). Plaintiff’s expert further asserts that defendants failure to medically optimize Skirianos prior to the nephrectomy procedure resulted in hyperkalemia as evidenced by the Peak T-waves and ventricular tachycardia (*Id.* at ¶ 34).

Plaintiff’s expert further opines that Dr. Ansall’s failure to note the fact that there was no

recent lab work as part of the preoperative clearance was a departure from accepted standard of care, and that senior resident Dr. Yu, and attending Dr. Gainsburg's similar failure was also a departure (*Id.* at ¶ 36). Plaintiff's expert opines that as a result of these failures, Skirianos underwent a nephrectomy when he was not medically optimized (*Id.*).

It is well-settled that on a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, its right to judgment (*Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial (*Id.*). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1st Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*Id.*). Further, a defendant in a medical malpractice action establishes prima facie entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries (*see Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific, and factual in nature (*Colarusso v Lo*, 42 Misc 3d 1210[A] 2013 NY Slip Op 52268[U] [Sup Ct, NY County 2013]). Further, "it is well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence" (*Roques*, 73 AD3d at 206).

Once a defendant meets that burden, the plaintiff must rebut the prima facie showing with "evidentiary proof in admissible form sufficient to establish the existence of material issues of fact" concerning whether the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]). Although this burden-shifting paradigm has recently been called into question by the Court of Appeals, it remains the standard in this Department (*see Pullman v Silverman*, 28 NY3d 1060 [2016, Fahey, J., concurring]). Further, "[w]here opposing experts disagree on issues, those issues must be resolved by a fact finder, and summary judgment is precluded" (*Harvin v Roth*, 44 Misc 3d 1226[A], 2014 NY Slip Op 51351[U] [Sup Ct, NY County 2014] citing *Barnett v Fashakin*, 85 AD3d 832, 835 [2d Dept 2011]; *Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 25 [1st Dept 2009]). However, "[w]here the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation ... the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Nor is a "shadowy semblance" of an issue enough to defeat a motion for summary judgment (*Id.*).

Defendants first challenge Plaintiff's assertion that Dr.'s Hall and Gainsburg departed from the standard of care by proceeding with surgery where Skirianos was showing signs of hypokalemia and Metabolic blood levels, and where Skirianos had undergone hemodialysis on the day of surgery. Here, Defendants have successfully made a prima facie showing of

entitlement to summary judgment (*Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]). Defendants' expert, Dr. Morgan opined that Dr. Hall was aware of Dr. Lin's pre-operative clearance and there were no contraindications for undergoing surgery on July 9, 2010. Dr. Morgan further opined that Dr. Hall was specifically aware of Skirianos' pre-existing co-morbid illnesses, all of his chemistry values, including Potassium and metabolic blood values, and that Skirianos required additional hemodialysis to normalize these values. Lastly, Dr. Morgan opined that it is within the standard of care to proceed with a right nephrectomy after consecutive days of dialysis, including on the date of the operation.

In opposition, Plaintiff successfully raises a triable issue of fact as to whether there was a departure from the standard of care (*Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 4 [1st Dept 2015]). Plaintiff's expert opines that undergoing a laparoscopic nephrectomy on the same day as undergoing hemodialysis is a departure from good and accepted medical practice. In support, Plaintiff's expert points to a 2006 article in Elsevier Health Sciences, which states that "[d]ialysis should not be given immediately before surgery because of the possibility of causing rapid fluid shifts and hypokalemia." Additionally, Plaintiff's expert states that this standard is consistent with Mt. Sinai's policy recommending dialysis be performed the day prior to surgery, as referenced by Dr. Gainsburg at deposition. Although Dr. Gainsburg did not testify that it was against hospital policy to perform dialysis on the day of surgery, the fact that the policy recommends dialysis the day prior is enough to raise an issue of fact as to departure. As such, Plaintiff has raised a triable issue of fact as to whether Dr. Hall departed from the standard of care in performing hemodialysis on the day of the nephrectomy.

Further, Plaintiff has successfully raised an issue of fact as to whether that departure proximately caused Skirianos' injuries (*Anyie B.*, 128 AD3d at 4). Plaintiff's expert opines that the hemodialysis performed on July 9, 2010 was simply enough to lower his potassium level and mask the underlying cause of Skirianos' increased potassium levels which had been as high as 5.7, 20 hours after the July 8th hemodialysis (Plaintiff's Ex. A ¶ 33). Further, Plaintiff's expert opines that the failure to address the underlying cause of Skiriano's increased potassium levels further led to "an unanticipated rise in potassium to 5.1 (mild hyperkalemia) during surgery to 7.1 (severe hyperkalemia) in the SICU on July 10th following surgery (*Id.* at ¶ 34). Plaintiff's expert further opines that hyperkalemia can result in ventricular tachycardia such as that suffered by Skirianos on July 10th and can cause EKG changes such as the Peak T-waves noted during Skirianos' surgery (*Id.*). As such, Plaintiff has successfully raised an issue of fact, and Defendants motion for summary judgment must be dismissed.

However, as residents under a supervising attending physician, Dr.'s Ansall and Yu cannot be liable for malpractice here because "[a] resident who assists a doctor during a medical procedure, and who does not exercise any independent judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene" (*Boston v Weissbart*, 62 AD3d 517, 518-19 [1st Dept 2009] citing *Soto v Andaz*, 8 AD3d 470, 471 [2d Dept 2004]). Here, Defendants Dr.'s Ansall and Yu satisfied their burden by submitting physician's deposition testimony and

hospital records demonstrating they were under Dr. Gainsburg direct supervision during the medical procedures, and that Dr. Gainsburg did not so greatly deviate from normal practice that either Dr. Ansall or Dr. Yu should be liable for not intervening. In opposition, Plaintiff fails to raise a triable issue of fact. Indeed, Plaintiff alleges no such departure. As such, the claims against Dr.'s Ansall and Yu must be dismissed and it is hereby

ORDERED that the portion of the motion seeking to dismiss the complaint herein as against defendants Dr. S. Yu and Dr. N. Ansall is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion to dismiss is otherwise denied; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the following amended caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
JANET SKIRIANOS, As Administratrix of the Estate
of Andreas F. Skirianos, and JANET SKIRIANOS,
Individually,

Plaintiffs,

Index No. 805150-2012

-against-

THE MOUNT SINAI HOSPITAL, SIMON HALL, M.D.,
and DANIEL GAINSBURG, M.D.,

Defendants.

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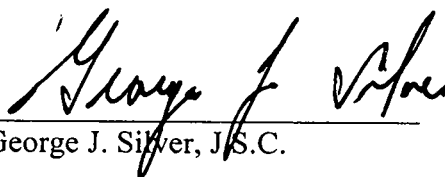
And it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the parties are to appear for a status conference on June 7, 2017 at 2:15 p.m., at Part 10, 60 Centre St. New York, NY 10007; and it is further

ORDERED that Plaintiff is to serve a copy of this order, with notice of entry, upon Defendants within 20 days of entry.

Dated: *May 2, 2017*
New York County


George J. Silver, J.S.C.

GEORGE J. SILVER