

<b>Gould v Iroku-Malize</b>
2017 NY Slip Op 32360(U)
October 17, 2017
Supreme Court, Suffolk County
Docket Number: 11-17176
Judge: W. Gerard Asher
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INDEX No. 11-17176

CAL. No. 16-02282MM

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 32 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. W. GERARD ASHER  
Justice of the Supreme Court

MOTION DATE 5-15-17 (001)  
MOTION DATE 5-16-17 (002)  
ADJ. DATE 8-15-17  
Mot. Seq. # 001 - MotD  
# 002 - MD

-----X  
LILLIAN GOULD,

Plaintiff,

- against -

TOCHI IROKU-MALIZE, M.D., MARK  
HILLEL AUERBACH, M.D., STEVEN  
SAMUELS, M.D., BRIAN SCOTT  
BLAUSTEIN, D.O., RONALD IRA  
LENEFSKY, M.D., SUFFOLK INTERNAL  
MEDICINE ASSOCIATES, P.C., BERNARD  
JAY NASH, M.D., ANDREW DOUGLAS  
ROGROVE, M.D., LONG ISLAND  
NEUROLOGY, P.C., "JOHN/JANE DOE, M.D."  
(first and last name being fictitious),  
SALVATORE J. PALUMBO, M.D.,  
SALVATORE J. PALUMBO, M.D., P.C.,  
PATRICK JULLIAN REID, M.D., PATRICK  
REID, M.D., P.C., and SOUTHSIDE  
HOSPITAL,

Defendants.  
-----X

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Upon the following papers numbered 1 to 38 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 27; 28 - 31; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 32 - 34; Replying Affidavits and supporting papers 35 - 36; 37 - 38; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (seq. 001) by defendants Tochi Iroke-Malize, M.D., Mark Hillel Auerbach, M.D., Brian Scott Blaustein, D.O., and Southside Hospital, and the motion (seq. 002) by defendants Salvatore J. Palumbo, M.D., and Salvatore J. Palumbo, M.D., P.C., are consolidated for purposes of this determination; and it is

**ORDERED** that the motion by defendants Tochi Iroke-Malize, M.D., Mark Hillel Auerbach, M.D., Brian Scott Blaustein, D.O., and Southside Hospital for summary judgment in their favor dismissing the complaint and all cross claims asserted against them is granted as set forth herein, and is otherwise denied; and it is further

**ORDERED** that the motion by defendants Salvatore J. Palumbo, M.D., and Salvatore J. Palumbo, M.D., P.C., for summary judgment in their favor dismissing the complaint and all cross claims asserted against them is denied.

Plaintiff Lillian Gould commenced this action to recover for personal injuries allegedly caused by defendants' medical malpractice in failing to timely diagnosis and treat an epidural abscess while plaintiff was a patient at Southside Hospital. Plaintiff alleges negligence in care and treatment she received resulting in paraplegia. Issue has been joined, discovery is complete, and a note of issue has been filed.

Defendants Tochi Iroke-Malize, M.D., Mark Hillel Auerbach, M.D., Brian Scott Blaustein, D.O., and Southside Hospital now move for summary judgment in their favor. In support of the motion, they submit, among other things, a copy of the pleadings; plaintiff's certified medical records; the deposition transcripts of plaintiff, Dr. Iroku-Malize, Dr. Mark Hillel Auerbach, Dr. Brian Scott Blaustein, Dr. Steven Samuels, Dr. Ronald Lenefsky, Dr. Bernard Nash, Dr. Andrew Rogove, Dr. Salvatore Palumbo, and Dr. Patrick Reid; and the expert affirmations of Dr. Ira Leviton and Dr. Joan McInerney.

Defendants Salvatore J. Palumbo, M.D., and Salvatore J. Palumbo, M.D., P.C. also move for summary judgment in their favor. In support of the motion, they submit an affirmation of counsel and a memorandum of law. On a CD, without working copies, they submit the expert affirmation of Dr. John Houten, a copy of the pleadings, plaintiff's medical records, portions of the deposition transcripts of plaintiff, and Dr. Patrick Reid, and the full deposition transcript of Dr. Salvatore Palumbo.

Plaintiff does not oppose the applications of Dr. Tochi Iroke-Malize, Dr. Mark Hillel Auerbach, and Dr. Brian Scott Blaustein. In opposition to Southside Hospital's application and Dr. Palumbo's motion, plaintiff submits a redacted expert physician's affidavit. The redaction of the expert physicians affidavit includes the state the physician is licensed to practice in, the physicians full signature, and any notarization. Plaintiff maintains that an unredacted copy of plaintiff's expert affidavit was provided to the Court for in camera review on August 10, 2017. On September 5, 2017, plaintiff submits a certificate of conformity from the State of New Mexico, attempting to cure any defects in the expert affidavit (CPLR 2309 [c]).

Medical records indicate that plaintiff presented to the emergency department at Southside Hospital on May 2, 2010, at 10:52 p.m., with complaints of a red patch on her arm with fever. Her medical and surgical history included breast cancer, left breast mastectomy with lymph node dissection, and a history of polio as a child with associated left foot drop. Plaintiff was initially diagnosed by a triage nurse with

cellulitis of her left arm. She was seen by Dr. Mark Auerbach, an emergency room attending physician. Dr. Auerbach testified that he ordered lab work and an infectious disease consultation. Blood culture revealed gram positive cocci in pairs and chains. Dr. Auerbach testified that he ordered clindamycin, and that on May 3, 2010, at 12:15 a.m., he spoke with Dr. Steven Samuels, plaintiff's primary care physician and an infectious disease specialist. Dr. Tochi Iroku-Malize, a hospitalist with defendant Southside Hospital, testified he admitted plaintiff to Southside Hospital with complaints of chest pains radiating to her back. Dr. Iroku-Malize testified that ordered clindamycin, IV morphine, and venous compression boots, with aggressive ambulation to prevent the formation of blood clots. Dr. Samuels testified he examined plaintiff on May 3, 2010, changed her antibiotic from clindamycin to cefazolin, and ordered morphine for pain. Medical records indicate a PICC line was inserted for continued IV infusions. On May 7, 2010, Dr. Samuels discharged plaintiff from the hospital.

Medical records indicate that plaintiff again presented to the emergency department at Southside Hospital on May 19, 2010, with complaints of a warm, red and painful left arm. She was examined by emergency room attending physician Dr. Brian Blaustein. Dr. Blaustein testified he diagnosed plaintiff with chronic swelling secondary to lymphedema from mastectomy. He testified he consulted Dr. Samuels and discharged plaintiff from the emergency department on May 20, 2010. Medical records indicate plaintiff was admitted to Southside Hospital later that same day, with increasing pain and fever. Blood tests from May 19, 2010, revealed Group B strep, consistent with severe sepsis. Medical records indicate that on May 23, 2010, plaintiff twice refused an MRI examination of her thoracic spine due to claustrophobia. Medical records indicate that on May 25, 2010, plaintiff was discharged by Dr. Samuels' partner, Dr. Ronald Lenefsky, with orders for IV vancomycin and an outpatient open MRI to rule out epidural collection or vertebral infection.

The MRI examination revealed metastatic disease to plaintiff's spine. On May 26, 2010, plaintiff was seen by vascular neurologist Dr. Andrew Rogove. Dr. Rogove testified he diagnosed plaintiff with metastatic disease to her spine and prescribed steroids. Medical records indicate that plaintiff was admitted to Southside Hospital on May 26, 2010. On May 27, 2010, plaintiff was diagnosed with malignant metastatic cancer based upon the MRI finding of cord compression. On May 28, 2010, a thoracic spine MRI examination revealed cord compression associated with metastatic tumor infiltration from T4 through T7 perivertebral soft tissue neoplastic surrounding the cord, maximizing at T6 and T7. On May 29, 2010, a chest CT scan showed destructive bony process involving T4 through T7 with soft tissue mass suspicious for osseous metastasis. On June 1, 2010, a CT guided biopsy ruled out a malignancy. Bone cultures from T6 revealed Group B strep. On June 6, 2010, plaintiff was discharged from the hospital and prescribed IV vancomycin.

On June 11, 2010, medical records indicate plaintiff was admitted to Southside Hospital with complaints of a backache and weakness in her legs. On June 14, 2010, plaintiff was seen by defendant Dr. Salvatore Palumbo, a neurosurgeon. Dr. Palumbo testified he believed the May 28, finding of soft tissue enhancement of plaintiff's thoracic spine was an epidural abscess rather than a neoplasm. Dr. Palumbo testified he re-examined plaintiff on June 15, 2010, and found her to be neurologically stable with complaints of a dead foot and band-like pain underneath her breast. On June 16, 2010, an MRI revealed diskitis (inflammation that develops between the intervertebral discs of the spine) and osteomyelitis (an infection of bone) from T4 to T7, with severe infection at level T6 -T7, and destructive changes. Dr.

Palumbo testified he recommended a laminectomy to decompress plaintiff's spine, but plaintiff declined that surgery. Defendant neurosurgeon Dr. Patrick Reid testified that on June 17, 2010, he advised plaintiff that surgery was not recommended. Medical records indicate that on June 18, 2010, Dr. Borimir J. Darakchiev, Dr. Palumbo's partner, recommended spinal decompression surgery the following week to prevent acute neurologic decline and plaintiff declined that surgery. On June 21, 2010, plaintiff was transferred to rehabilitation service at Southside Hospital with a diagnosis of vertebral osteomyelitis secondary to bacteremia (the presence of bacteria in the blood).

On June 26, 2010, plaintiff developed numbness in her lower extremity and a CT scan on June 27, 2010, revealed destructive changes at T4-T7 vertebral bodies. Plaintiff was transferred to North Shore University Hospital and an MRI examination revealed a thoracic epidural abscess. On June 28, 2010, a thoracic spine CT revealed diskitis osteomyelitis, intradiscal abscess at level T6-T7, and osteomyelitis of the T4 and T5 vertebral bodies. Medical records indicate a vertebral bone biopsy was performed on plaintiff on June 29, 2010, and was consistent with active osteomyelitis. Medical records indicate that Dr. Salvatore Insinga performed a T6-T7 corpectomy (a surgical procedure that involves removing all or part of the vertebral body) and T4-T8 fusion. On July 1, 2010, a thoracic spine CT provided that plaintiff still had "significant soft tissue inflammatory/infectious tissue present." Medical notes of July 6, 2010, indicate the muscle strength in plaintiff's left leg was graded 1/5 and muscle strength in her right leg was graded 2/5 proximally and 3/5 distally.

To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant must establish through medical records and competent expert affidavits that it did not deviate or depart from accepted medical practice in the treatment of the plaintiff or that it was not the proximate cause of plaintiff's injuries (*see Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *Deutsch v Chaglassian*, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; *Plato v Guneratne*, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]; *Jones v Ricciardelli*, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]; *Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). To satisfy this burden, the defendant must present expert opinion testimony that is supported by facts in the record and addresses the essential allegations in the bill of particulars (*see Roques v Noble*, 73 AD3d 204, 899 NYS2d 193 [1st Dept 2010]; *Ward v Engel*, 33 AD3d 790, 822 NYS2d 608 [2d Dept 2006]). Conclusory statements that do not address the allegations in the pleadings are insufficient to establish entitlement to summary judgment (*see Garbowski v Hudson Val. Hosp. Ctr.*, 85 AD3d 724, 924 NYS2d [2d Dept 2011]). A physician owes a duty of reasonable care to his or her patients and will generally be insulated from liability where there is evidence that he or she conformed to the acceptable standard of care and practice (*see Spensieri v Lasky*, 94 NY2d 231, 701 NYS2d 689 [1999]; *Barrett v Hudson Valley Cardiovascular Assoc., P.C.*, 91 AD3d 691, 936 NYS2d 304 [2d Dept 2012]; *Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]).

Failure to demonstrate a prima facie case requires denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 5088 NYS2d 923 [1986]). Once the defendant makes a prima facie showing, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp.*, *supra*; *Kelley v Kingsbrook Jewish Med. Ctr.*, 100 AD3d 600, 953 NYS2d 276 [2d Dept 2012]; *Fiorentino v TEC Holdings, LLC*, 78 AD3d 911

NYS2d 146 [2d Dept 2010]). In a medical malpractice action, a plaintiff opposing a motion for summary judgment need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing (*see Bhim v Dourmashkin*, 123 AD3d 862, 999 NYS2d 471 [2d Dept 2014]; *Hayden v Gordon*, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; *Schichman v Yasmer*, 74 AD3d 1316, 904 NYS2d 218 [2d Dept 2010]).

Here, Dr. Tochi Iroke-Malize, Dr. Mark Hillel Auerbach, and Dr. Brian Scott Blaustein have established a prima facie entitlement to summary judgment in their favor dismissing the complaint as asserted against them. Their expert, Dr. Ira Leviton, opines Dr. Auerbach, the emergency room attending physician on May 2, 2010, Dr. Iroku-Malize, the hospitalist, and Dr. Blaustein also an emergency room attending physician, satisfied the standard of care owed to plaintiff. Dr. Leviton opines such defendants' examinations, diagnostic studies, consultations and recommended plans of treatment were appropriate and satisfied the standard of care. Likewise, Dr. Joan McInerney opines that the care and treatment rendered to plaintiff by Dr. Auerbach and Dr. Blaustein satisfied an emergency room physician's standard of care.

Southside Hospital, however, failed to offer expert evidence demonstrating its staff satisfied the appropriate standard of care, did not deviate or depart from accepted medical practice in the treatment of the plaintiff, was not the proximate cause of plaintiff's injuries. Accordingly, the application by defendants Tochi Iroke-Malize, M.D., Mark Hillel Auerbach, M.D., Brian Scott Blaustein, D.O., for summary judgment dismissing the complaint as asserted against them is granted. The branch of the motion related to Southside Hospital is denied.

As to defendants Salvatore J. Palumbo, M.D., and Salvatore J. Palumbo, M.D., P.C., their moving papers refer to exhibits A through O provided only on CD. Accordingly, the motion is denied without prejudice, defendant having failed to submit a full set of motion papers marked as working copies (*see* Uniform Rules of Trial Cts [22 NYCRR] § 202.5-b [d] [4]). Additionally, and in the interest of judicial economy, the Court notes plaintiff's expert affidavit, which is redacted as to the State the expert is licensed to practice in, signature, and notarization, is without evidentiary value (*Colletti v Deutsch*, 150 AD3d 1196, 54 NYS3d 657 [2d Dept 2017]). Moreover, by letter dated September 28, 2017, Dr. Palumbo's counsel indicates that the State of South Carolina has declared Oceanus Insurance Company, RRG, Dr. Palumbo's insurer, insolvent and placed it into liquidation. The South Carolina Court also issued an injunction and a stay of all proceedings regarding Oceanus and its policyholders. The parties here are invited to brief whether pursuant to New York Insurance Law § 7408 [b] [6] that South Carolina is a reciprocal state, and whether this Court should honor the stay to the detriment of plaintiff and the defendants herein.

Dated: Oct. 17, 2017

J. Gerard Asker  
J.S.C.

           FINAL DISPOSITION   X   NON-FINAL DISPOSITION