Garcia v Global Prop. Servs., Inc.
2018 NY Slip Op 30957(U)
April 3, 2018
Supreme Court, Bronx County
Docket Number: 25460/2016E
Judge: Robert T. Johnson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX – PART 12

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HECTOR LUIS GARCIA, DECEASED, BY AMANDA, ELIZABETH RODRIGUEZ AS ADMINISTRATOR OF THE ESTATE OF HECTOR LUIS GARCIA,
Plaintiff,

- against -

GLOBAL PROPERTY SERVICES, INC., ET. AL.,
Defendants.

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Index No. 25460/2016E

DECISION/ ORDER

Hon. Robert T. Johnson

Defendants John Aljan, M.D., Sanjiv Bansal, M.D., Thomas Bombadier, M.D., Reginald Camillo, M.D. Barry Finklestein, D.P.M., Gary Fishman, M.D., Albert Graziosa, M.D., Emmanuel Hostin, M.D., Brent Lambert, M.D., Luke Lambert, Dennis Nachman, DPM, Andrew Niang, M.D. s/h/a Andrew Niang, M.D. s/h/a Andrew Nasing, M.D., Jalu Patel, D.P.M., Neil Patel, M.D., Anthony Terraciano, M.D. George Violin, M.D., Arnold Wilson, M.D. and Jian Zhand, D.P.M. (collectively "the Corporate Owner defendants"), in lieu of answering, seek dismissal of the complaint as against them based upon a defense founded on documentary evidence, pursuant to CPLR 3211(a)(1), for a failure to state a cause of action, pursuant to CPLR 3211(a)(7), and, alternatively, dismissal of plaintiff's punitive damages claim (motion sequence No. 1).

Defendants New York Eye and Ear Infirmary of Mount Sinai ("NYEEI") and Mount Sinai Health Care Systems (collectively "the Mt. Sinai defendants"), in lieu of answering, seek dismissal of the complaint as against them based upon a defense founded on documentary evidence, pursuant to CPLR 3211(a)(1), for a failure to state a cause of action, pursuant to CPLR 3211(a)(7), and,

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alternatively, dismissal of plaintiff's punitive damages claim (motion sequence No. 2).

Defendants Gabriel Dassa, D.O., Dassa Orthopedic Medical Services, P.C. s/h/a Dassa Orthopedic Medical Services, P.C. and Bronx Medical Orthopedic Services (collectively "the Dassa defendants"), seek dismissal of the vicarious liability claims asserted against Dr. Gabriel Dassa, exclusively, based upon a defense founded on documentary evidence, pursuant to CPLR 3211(a)(1), for a failure to state a cause of action, pursuant to CPLR 3211(a)(7), and dismissal of the punitive damages claim as against the Dassa defendants (motion sequence No. 3).

Defendant Adriano Ari, P.A. ("PA Ari"), seeks dismissal of plaintiff's punitive damages claim, pursuant to CPLR 3211(a) (motion sequence No. 4).

Defendants Scott R. Horn, M.D. s/h/a Scott Horn, M.D., Russell T. Baker, M.D. s/h/a Russell Baker, M.D., Neil Dhingra, M.D. and Leah R. Reimer, M.D. s/h/a Leah Reimer, M.D. (collectively "the Horn defendants") seek dismissal of plaintiff's punitive damages claim, pursuant to CPLR 3211(a)(7) (motion sequence No. 5).

Defendant Jacob Katanov, P.A. ("PA Katanov") seeks an order pursuant to CPLR 3025(b) granting him leave to serve an amended answer containing affirmative defenses and cross-claims against all co-defendants (motion sequence No. 6).

FACTUAL AND PROCEDURAL HISTORY

On or about September 9, 2015, Hector Luis Garcia ("Garcia") was the front seat passenger in a vehicle owned by Phoenix House of New York and operated by a Phoenix House of New York employee, Kendall Donaldson, when the vehicle was struck in the rear by a truck owned by defendants Global Property Services, Inc., doing business as Global Compactor and Pest Control and/or Global Pest Control ("Global Property"). The Global Property vehicle was being operated by its employee

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defendant Louis A. Reyes, Jr. ("Reyes").

As a result of the collision Garcia allegedly sustained injuries to his shoulder, neck and back. Garcia sought medical treatment related to his injuries with the Dassa defendants, who recommended arthroscopic shoulder surgery. On or about February 10, 2016, Garcia presented to an ambulatory surgical facility, located at 3170 Webster Avenue, in the Bronx, known as Bronx Surgery Center, LLC; Bronx SC, LLC; Bronx SC, LLC doing business as Empire State Ambulatory Surgery Center a/k/a Empire State Ambulatory Surgery Center; Empire State Ambulatory Surgery Center; Ambulatory Surgical Centers of America (collectively "Bronx Surgery Center" or "the subject ambulatory center"). It is alleged that during pre-surgical evaluation or surgery Garcia suffered "deprivation of oxygen, pre-anesthesia complications, anesthesia complications, anoxia, hypoxia, airway obstruction, and other injuries" resulting in Garcia's death on such date.

Plaintiff commenced this action, on or about August 11, 2016, against both Global Property, as related to the motor vehicle accident, and against the medical providers and corporate entities allegedly involved with Garcia's February 10, 2016 medical treatment, to recovery damages for Garcia personal injuries and wrongful death

Plaintiff's second and third causes of action sound in medical malpractice, lack of informed consent, and vicarious liability against the Corporate Owner defendants, the Mt. Sinai Defendants, and Dr. Dassa based upon their alleged respective ownership interests or partnership interests in Bronx Surgery Center. In addition to compensatory damages, plaintiff seeks "punitive and exemplary damages to ensure that such egregious medical conduct does not take place again."[1] As is relevant, plaintiff alleges that PA Ari and PA Katanov were employed by and/or affiliated with Bronx Surgery

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[1] Plaintiff's fourth cause of action sets forth a claim for wrongful death.

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Center and acting within the scope of their agency and/or employment when rendering treatment to Garcia and that the Horn defendants were physicians employed by or acting as agents on behalf of Bronx Surgery Center and/or the Mt. Sinai defendants, with privileges and authorization to provide anesthesia services at Bronx Surgery Center.

Plaintiff contends, *inter alia*, that the treating defendants failed to properly assess Garcia's pre-surgical condition; improperly determined that an LMA mask was a proper method of providing and maintaining an airway; failed to intubate Garcia; failed to properly monitor and maintain Garcia's vital signs and oxygen saturation level; permitted Garcia to experience hypoxia and/or anoxia; failed to timely call proper specialist; used defective equipment; allowed a LMA mask and pulse oximeter to become dislodged and failed to timely recognize same; failed to timely and properly intubate or to take other appropriate steps to establish a proper airway; and improperly performing resuscitation measures. Plaintiff also alleges that the treating defendants barred EMS personnel from removing Garcia from Bronx Surgery Center to a hospital where he could timely receive proper care and that Bronx Surgery Center was negligent in the hiring, retention and supervision of its doctors and employees. Plaintiff contends that the treating defendants acted with reckless disregard for the safety of others, as set forth in CPLR 1602(7), and, therefore, this action is exempt from a limitations of liability under CPLR 1601.[2]

On or about December 11, 2015, non-party Donaldson commenced a separate action against Global Property and Reyes to recovery damages for personal injuries allegedly sustained as a result of the subject accident (*Kendall Donaldson v Global Property Services, Inc. et. al.*, Sup Ct, Bronx County, Index No. 305185/15) ("the Donaldson action"). On or about June 14, 2017, Donaldson was

[2] This assertion is included within plaintiff's second cause of action for medical malpractice.

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granted summary judgment against Reyes on the issue of liability. Thereafter, a motion was made in the Donaldson action for consolidation with the within action. The motion to consolidate is currently *sub judice*.

DISMISSAL OF VICARIOUS LIABILITY CLAIMS

Plaintiff alleges that Bronx Surgery Center and Bronx SC, LLC were limited liability corporations or companies organized in New York, doing business as Empire State Ambulatory Surgery Center – also a New York limited liability company. Plaintiff asserts that Ambulatory Surgical Centers of America ("ASC") was either a New York or Massachusetts corporation, a limited liability company, or Massachusetts partnership, doing business in New York. Finally, plaintiff alleges that the Corporate Owner defendants, the Mt. Sinai defendants and Dr. Dassa all maintained an ownership or partnership interest in ASC and other entities who owned managed, operated, maintained or controlled the subject ambulatory center, and as a result of such interest are vicariously liability for the claimed negligence.

The Corporate Owner defendants and the Mt. Sinai defendants seek dismissal of this action pursuant to CPLR 3211(a)(7) for failure to state a cause of action against them based upon medical malpractice and vicarious liability as officers, members, or owners of the subject ambulatory center. In this regard, the Corporate Owner defendants and the Mt. Sinai defendants point out that plaintiff does not allege that they rendered any care or treatment to Garcia and, therefore, a potential physician-patient relationship does not exist. Dr. Dassa similarly seeks partial dismissal of plaintiff's claim against him to the extent that plaintiff asserts liability based upon Dr. Dassa's ownership interest in the Bronx Surgery Center or ASC.

The Corporate Owner defendants, Mt. Sinai defendants, and Dr. Dassa argue that they cannot

be held vicariously liable solely based upon their ownership interest in the subject ambulatory center, as the relevant entities – as alleged by plaintiff – were either limited liability companies or corporations. They assert that as members, owners, or shareholders of Bronx SC, LLC, Bronx Surgery Center, LLC and Empire State Ambulatory Surgery Center, limited liability companies or corporations, they cannot be held individually liable for the company's obligations or corporation's torts based solely upon their interest. With regard to plaintiff's allegation that ASC was a *partnership* that owned the subject ambulatory center and the defendants had partnership interests in ASC, the moving defendants supply an online printout from *Delaware.gov*, Department of State: Division of Corporations website listing ASC as a registered corporation, in Delaware. They argue that this documentary evidence conclusively establishes that the allegation that ASC is a partnership, is not true.

The Mt. Sinai defendants submit two corporate documents in further support of dismissal. First, they supply the "Written Consent of the Members and Managers of Bronx SC, LLC and Sixth Amendment to Operating Agreement of Bronx SC, LLC" ("the Sixth Amendment"). The Sixth Amendment, effective July 25, 2013, purports to demonstrate that Bronx SC, LLC is a New York limited liability company and that the members were seeking to authorize Bronx SC, LLC to enter into a lease agreement with 3170 Webster Avenue LLC. The Sixth Amendment further provides that "New York Eye and Ear Infirmary was incorrectly identified as the Class C Member of [Bronx SC, LLC] in that certain Third Amendment to the Operating Agreement (the "Third Amendment"), the Members acknowledge that NYEE Holding Corp. is the proper Class C Member of [Bronx SC, LLC]." The signature page of the Sixth Amendment lists all of the members and managers of Bronx SC, LLC and reflects that NYEEI was not a member or manager, at that time.

Second, the Mt. Sinai defendants annex the corporate bylaws, amended and restated as of April

28, 2014, related to Mount Sinai Health System, Inc. ("MSHS") that reveals that MSHS is a corporation that is not authorized to provide hospital services or health related services, operate a hospital, operate an independent practice association, or provide any health care professional services that require a license to practice medicine or nursing. The Mt. Sinai defendants aver, through their attorney's affirmation, that MSHS is merely an umbrella organization for entities that, in turn, own or manage hospitals or health care facilities, that MSHS holds no direct ownership interest in the subject ambulatory center, nor does it provide treatment.

Furthermore, the Corporate Owner defendants, the Mt. Sinai defendants, and Dr. Dassa contend that plaintiff has failed to state any facts sufficient to plead or establish grounds for piercing the corporate veil. In this connection, they argue that plaintiff's claim that the defendants failed to maintain sufficient assets or malpractice insurance to satisfy potential judgments is, standing alone, insufficient to support piercing the corporate veil.[3]

In opposition to the Corporate Owner defendants, the Mt. Sinai defendants and the Dassa defendants' motions, plaintiff does not dispute the authenticity or import of the documents submitted by the moving defendants with regard to the legal status of Bronx SC, LLC, MSHS, or ASC. Rather, plaintiff appears to accept the moving defendants' assertion of limited liability against the members and owners of the relevant entities – which are either limited liability companies or corporations – and now seeks leave to replead relevant facts against the moving defendants sufficient to pierce the corporate veil. Pertinently, plaintiff's request for further discovery, pursuant to CPLR 3211[d], does

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[3] In this regard, plaintiff alleges that ASC had an ownership interest in Bronx Surgery Center and violated Garcia's patient right by failing to secure sufficient limits of medical malpractice insurance and failing to ensure that it had sufficient resources and assets to compensate victims of medical malpractice for which Bronx Surgery Center would be responsible.

not relate to corporate documents in an effort to discover or verify the legal status of the relevant limited liability companies and corporations.

Plaintiff raises, for the first time in opposition to the motions to dismiss, that the moving parties have engaged in fraudulent conduct designed to mislead the public and Garcia regarding the true roles and responsibilities of the moving defendants in the ownership, operation and day-to-day functioning of the subject ambulatory center. In support of this contention, plaintiff supplies current printouts from the Empire State Ambulatory Surgery Center website that indicates that the facility is "An Affiliate of the New York Eye and Ear Infirmary of Mount Sinai" and lists the Corporate Owner defendants as the "Physician Owners of the Center." Plaintiff also supplies a form entitled "Acknowledgment of Ownership," signed by Garcia on or about February 10, 2016, that disclosed that his treating physician may have a financial interest in the business and, also, lists the owners of "Bronx Surgery Center LLC" as including NYEEI, the Corporate Owner defendants and Dr. Dassa. Plaintiff contends that the website purports to mislead the public as it does not mention any "corporate" or "limited liability company" affiliation and lists an affiliation with NYEEI. Plaintiff maintains that "[d]iscovery is necessary to establish the basis for such public representations and its impact on liability in this matter."

Alternatively, plaintiff argues that the motions are premature as plaintiff has not had an opportunity for discovery of facts and documents necessary to pierce the corporate veil and to determine whether the moving defendants abused the corporate form to commit a wrong against plaintiff. Specifically plaintiff points out that she has not been provided with discovery of the subject ambulatory center's operating agreement, documents related to the supervision and management duties of the respective parties, and contracts among and between the respective parties. Plaintiff avers that

such documents are within the exclusive knowledge and control of the moving defendants and are essential in order to oppose this motion.

Global Property Services also submits opposition on the ground that dismissal is premature as no discovery has taken place.

In reply, the Mt. Sinai defendants argue that the documentary evidence submitted demonstrates that neither NYEEI or MSHS are owners of the subject ambulatory center. Nor do they manage, operate, or control the subject ambulatory center. The Mt. Sinai defendants further argue that they cannot be held vicariously liability for the alleged negligence of the physicians or other employees rendering treatment at the subject ambulatory center as such individuals are not their agents or employees. Moreover, they aver, even if NYEEI was affiliated with the subject ambulatory center, such an affiliation is insufficient to impute a physician's negligent conduct to the hospital or facility. The Mt. Sinai defendants contend that plaintiff fails to allege a basis to support piercing the corporate veil because the Mt. Sinai defendants hold no ownership interest in the subject ambulatory center, and there are no allegations that they exercised complete domination over any subsidiary, and that such domination and control was exercised to commit a fraud or wrong against Garcia that resulted in his injury.

The Corporate Owner defendants, Mt. Sinai defendants and Dr. Dassa also argue in reply that plaintiff should not be granted leave to amend her pleadings as her request improperly fails to include a proposed amended pleading and an affidavit of merit in support.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts

as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see Chanko v Am. Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016]). "[H]owever, 'allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration'" (*Simkin v Blank*, 19 NY3d 46, 52 [2012][internal citations omitted]). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

For purposes of CPLR 3211(a)(1) "documentary" evidence "must be unambiguous and of undisputed authenticity (see Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22)" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010]). Such documents include judicial records, judgments, orders, and contracts (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014], citing David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10 at 22).

Here, the parties supply an online printout from the State of Delaware, Department of State: Division of Corporations public website demonstrating that ASC is Delaware Corporation and not, as alleged by plaintiff, a Massachusetts partnership. Plaintiff does not dispute the authenticity or accuracy of the Department of State printout or the corporate documents submitted as to Bronx SC, LLC and MSHS (*see generally Mendoza v Mortlen Realty Corp.*, 88 AD3d 611, 612 [2011][court may properly consider printouts from New York City Department of Housing Preservation and Development as evidence of a building's classification]; *Brandes Meat Corp. v Cromer*, 146 AD2d 666, 668 [1989][failure to dispute the accuracy of Secretary of State certificate amounted to a concession of its

accuracy]). Moreover, a court may take judicial notice of matters of public record *(see Matter of Pi*, 86 AD3d 542, 543 [2d Dept 2011]; 5 New York Civil Practice: Evidence in New York State and Federal Courts §2:3 [note: online treatise][court may take judicial notice of facts that can be ascertained by reference to readily available sources whose accuracy is not subject to reasonable dispute]). Here, the State of Delaware, Division of Corporations, online entity search is available for public inspection and its contents are not subject to reasonable dispute.[4]

"Dismissal is warranted only if the documentary evidence submitted 'utterly refutes plaintiff's factual allegations and conclusively establishes a defense to the asserted claims as a matter of law'" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d at 433 [internal citations omitted]). A corporation exists independently of its owners, as a separate legal entity, thus, its owners are normally not liable for the debts or torts of the corporation merely by reason of his or her official character (*Morris v State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993]; *Park-1, LLC v Metro Constr. Servs.*, 4 AD3d 328, 329-330 [2d Dept 2004], citing 14A NY Jur 2d, Business Relationships § 763 at 434). Indeed, the "law permits the incorporation of a business for the very purpose of enabling its proprietors to escape personal liability" (*Walkovszky v Carlton*, 18 NY2d 414, 417 [1966]). Likewise a "member of a limited liability company cannot be held liable for the company's obligations by virtue of his or her status as a member thereof" (*Bd. of Mgrs. of 325 Fifth Ave. Condominium v Cont. Residential Holdings LLC*, 149 AD3d 472, 475 [1st Dept 2017]). As the documentary evidence establishes that ASC is a corporation, that Bronx SC, LLC is a limited liability company, and that MSHS is a corporation, the Corporate Owner defendants, the Mt. Sinai defendants

[4] The printout supplied accurately reflects the contents of the website (State of Delaware, Department of State: Division of Corporations, *https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx* [accessed March 8, 2018]).

and Dr. Dassa sufficient demonstrate that they cannot be held vicariously liable, in their individual capacities, for the potential liabilities and obligations of such entities.

However, an exception to the rule limiting corporate officer liability exists, regardless of piercing the corporate veil, where fraud is alleged and the corporate officer participated in or had knowledge of the fraud, even if they did not stand to gain personally (*see Polonetsky v Better Home,* 97 NY2d 46, 55 [2001]). Setting aside the requirement of the corporate officer's participation in an alleged fraud, here plaintiff does not allege in her complaint, or in her request to replead, the required elements of a cause of action for fraud (*Simcuski v Saeli*, 44 NY2d 442 [1978]). "To establish a prima facie case for fraud, [plaintiff] would have to prove that '(1) defendant made a representation as to a material fact; (2) such representation was false; (3) defendant[] intended to deceive plaintiff; (4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and (5) as a result of such reliance plaintiff sustained pecuniary loss'" (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]). Plaintiff argues that the contents of the subject ambulatory center's website intentional mislead the public as to the organizational structure and ownership, however there are no allegations that Garcia reasonably relied on the alleged misrepresentations or that such reliance resulted in any injury or damage to Garcia (*see Hanlon v MacFadden Publs., Inc.*, 302 NY 502, 510 [1951][actual damage or injury to the plaintiff is an essential element of the action for fraud]; *Black v Chittenden*, 69 NY2d 665, 668 [1986][while an exact measure of damages need not be pleaded, there must be allegations of facts from which damages may properly be inferred]; *Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002][to establish causation, plaintiff must show both that the misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which

plaintiff complains (loss causation)]).

Although the court may deny a motion to dismiss where discovery is needed, plaintiff has failed to establish that "facts essential to justify opposition may exist" (CPLR 3211 [d]; *see Mandel v Busch Entertainment Carp.*, 215 AD2d 455 [2d Dept 1995] [a party seeking to invoke CPLR 3211 (d) must come forward with some tangible evidence showing the validity of the cause of action]). Here, the facts establishing the elements of a claim for fraud, which are lacking, are within the plaintiff's knowledge yet not alleged (*see Halmar Corp. v Hudson Founds.*, 212 AD2d 505, 506 [2d Dept 1995]).

Finally, the court may "pierce the corporate veil" and hold a corporate officer personally liable for the corporation's liabilities or debts when it is demonstrated that "complete domination was exerted by the owner or shareholder to commit a wrong against the one seeking to pierce the corporate veil" (*Brito v DILP Corp.*, 282 AD2d 320, 321 [1st Dept 2001]; *see TNS Holdings Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]; *Shisgal v Brown*, 21 AD3d 845, 848 [1st Dept 2005]; *Walkovszky v Carlton*, 18 NY2d at 417 [court will pierce the corporate veil to prevent fraud or to achieve equity]). Here, plaintiff fails to assert, in her complaint or in her opposition, any facts which could support an inference that the Corporate Owner defendants, the Mt. Sinai defendants or Dr. Dassa used their corporate position for personal rather than corporate ends (*see Brito v DILP Corp.*, 282 AD2d at 321) or that their conduct constituted an abuse of the privilege of doing business in the corporate form (*see JGK Indus., LLC v Hayes NY Bus., LLC*, 145 AD3d 979, 981 [2d Dept 2016]; *E. Hampton Union Free Sch. Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 127 [2d Dept 2009], *affd Sandpebble Bldrs., Inc. v Mansir*, 90 AD3d 888 [2d Dept 2011]; *Andejo Corp. v S. St. Seaport LP*, 40 AD3d 407, 407 [1st Dept 2007][plaintiffs failed to allege particularized facts to warrant piercing the corporate veil]). Indeed, plaintiff does allege, even in conclusory fashion, that the owners abused the privilege of doing

business in the corporate form in order to perpetrate a wrong or injustice against Garcia (*see TNS Holdings Inc. v MKI Sec. Corp.*, 92 NY2d at 339; *Padilla v Edison Transp., Inc.*, 104 AD3d 518, 518 [1st Dept 2013]; *E. Hampton Union Free Sch. Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d at 127; *Shisgal v Brown*, 21 AD3d at 848).

The moving defendants correctly argue that "[t]he corporate form may not be disregarded merely because the assets of the corporation, together with the mandatory insurance. . . are insufficient to assure . . . the recovery sought" (*Walkovszky v Carlton*, 18 NY2d at 419). Thus, an allegation that the corporation has insufficient assets or insurance to satisfy plaintiff's potential damages is not a basis upon which to impose a corporate liability on an individual owner or shareholder (*Brito v DILP Corp.*, 282 AD2d at 321, *citing Walkovszky v Carlton*, 18 NY2d at 418-420).

The plaintiff requests further discovery, pursuant to CPLR 3211[d], to determine the extent to which the corporate officers and directors were involved with the day-to-day operation and management of the subject ambulatory center. However, the mere hope that discovery may reveal a some evidence of domination or control does not warrant denial of the motion (*see Bd. of Mgrs. of 325 Fifth Ave. Condominium v Cont. Residential Holdings LLC*, 149 AD3d at 475 [plaintiffs' contention that it was improper to dismiss their alter ego claims without giving them an opportunity to conduct discovery was unavailing]; *Cracolici v Shah*, 127 AD3d 413, 413 [1st Dept 2015]; *Andejo Corp. v S. St. Seaport LP*, 40 AD3d at 407; CPLR 3211 [d]).

In summary, the claims against the Corporate Owner defendants, the Mt. Sinai defendants and Dr. Dassa based solely upon their respective ownership interest in the subject ambulatory center are dismissed based upon the undisputed documentary evidence that the entities – plaintiff alleges to have had an ownership interest in the subject ambulatory center – were either limited liability companies

or corporations. As plaintiff fails to allege sufficient facts or submit evidentiary proof to support a claim against the Corporate Owner Defendants, the Mt. Sinai defendants or Dr. Dassa based upon fraud or piercing the corporate veil, leave to replead would not cure the current deficiencies in the pleadings (*see Kocourek v Booz Allen Hamilton Inc.*, 71 AD3d 511, 512 [1st Dept 2010] [request to replead an oral contract denied as it was unsupported by facts that would correct a statute of fraud violation and render the claims actionable], *subsequent appeal* 85 AD3d 502, 503 [1st Dept 2011]; *Janssen v Inc. Vil. of Rockville Ctr.*, 59 AD3d 15, 27 [2d Dept 2008] [leave to replead should be freely granted absent prejudice or surprise to the opposing party, unless the proposed amendment is devoid of merit or palpably insufficient]; *see also Ullman v Hillyer*, 106 AD3d 579, 579 [1st Dept 2013]). Moreover, plaintiff fails to support his request to replead with a proposed amended pleading and affidavit of merit (*see AJW Partners, LLC v Admiralty Holding Co.*, 93 AD3d 486, 486 [1st Dept 2012], citing *Fletcher v Boies, Schiller & Flexner*, LLP, 75 AD3d 469, 470 [1st Dept 2010]; *see also Bag Bag v Alcobi*, 129 AD3d 649, 649 [1st Dept 2015]).

However, with regard to the Mt. Sinai Defendants, it is true that a hospital or facility will not be held vicariously liable for the conduct of an independent treating physician who is merely affiliated with the hospital (*Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]). However, it is also established law that a hospital is vicariously liable for the negligence or malpractice of its employees (*Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]). Here, plaintiff alleges that defendants PA Ari, PA Katanov, Dr. Baker, Dr. Dhingra, Dr. Horn, and Dr. Reimer were employed by, and acting within the course and scope of their employment with, the Mt. Sinai defendants when they rendered treatment to Garcia on February 10, 2016 (complaint at §§ 289, 295, 302, 309, 317, 323[5]). Accordingly, plaintiff has

[5] Complaint number 323 is misnumbered as a duplicate number 313.

adequately set forth a claim for vicarious liability against the Mt. Sinai defendants based upon an employer-employee theory (*see Hill v St. Clare's Hosp.*, 67 NY2d at 79). The Sixth Amendment or the MSHS corporate bylaws do not sufficiently demonstrate that the Mt. Sinai defendants could not and did not employee the alleged medical staff or physicians. While the MSHS bylaws purport to establish that MSHS is not authorized to operate certain facilities or provide certain services requiring a medical or nursing license, it cannot be said that the document "utterly refutes" the plaintiff's contention against the Mt. Sinai defendants. The attorney affirmation of the Mt. Sinai defendants cannot be considered "documentary" evidence for purposes of refuting plaintiff's allegation (*see Mamoon v Dot Net Inc.*, 135 AD3d 656, 657 [1st Dept 2016]). Accordingly, the Mt. Sinai defendants' motion is granted to the extent that the claims based upon this ownership interest are dismissed and their time to respond to the verified complaint herein is extended to thirty days from service of a copy of this order with notice of entry.

DISMISSAL OF PUNITIVE DAMAGES

With the exception of PA Katanov, the moving defendants seek dismissal of plaintiff's demand for punitive damages on the ground that plaintiff fails to allege conduct, as against each party, characterized as gross and morally reprehensible and of such wanton dishonesty as to imply a criminal indifference to civil obligations or that they authorized or ratified such conduct. In addition, they argue that plaintiff is not entitled to punitive damages as she has fails to allege that any egregious tortious conduct was part of a pattern of similar conduct directed at the public generally, that the conduct was authorized, participated in or ratified by the actor's employer, or that the employer deliberately retained the unfit servant.

Plaintiff does not appear to oppose dismissal of the punitive damages claim as against the

Corporate Owner defendants, and in any event the issue is moot as all claims against the Corporate Owner defendants are dismissed. With regard to the Dassa defendants plaintiff contends that she has sufficiently plead willful, wanton, and reckless conduct on behalf Dr. Dassa related to his failure to supervise a physician assistant while preparing Garcia for surgery, allowing the physician assistant to dislodge and then attempt to reposition a surgical mask. With regard to the Horn defendants, plaintiff alleges that they were unable to re-establish an airway and intubate Garcia. In addition, plaintiff alleges that the Dassa defendants and the Horn defendants refused and prevented NYC Emergency Medical Services (EMS) from gaining access to Garcia for approximately 15 minutes, contributing to his injuries. Plaintiff contends that whether such conduct constitutes gross negligence is a question of fact for the jury. Moreover, plaintiff argues that she had not had an adequate opportunity to conduct discovery with regard to the circumstances surrounding the treatment of Garcia.

A separate motion, not currently before this court, was made by Katanov for dismissal of plaintiff's punitive damages claims as against him, pursuant to CPLR 3211(a), and for dismissal of the complaint pursuant to CPLR 3126 related to plaintiff's failure to provide discovery (motion seq. No. 7). In a May 11, 2017 order by another Justice of the Court, Katanov's motion to dismiss the demand for punitive damages was held in abeyance until the completion of discovery. The court's records reveal that motion seq. No. 7 was the only motion, related to this case, calendared in the medical malpractice discovery motion part on May 11, 2017, and, therefore, the order of May 11, 2017 did not resolve any of the motions currently before this court.

"[P]unitive damages are available for the purpose of vindicating a public right only where the actions of the alleged tort-feasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the pubic generally or are activated by evil or reprehensible motives" (*Thomas v*

Farrago, 154 AD3d 896, 898 [2d Dept 2017][internal citations and quotations marks omitted]). Punitive damages have been allowed "not only to punish the defendant but to deter him [or her], as well as others who might otherwise be so prompted, from indulging in similar conduct in the future" (*Walker v Sheldon*, 10 NY2d 401, 404 [1961]).

The court may make a *prima facie* determination on the issue of punitive damages deciding whether, as a matter of law, the claimed conduct rises to "the level of culpability required for an award of punitive damages" (*Ross v Louise Wise Servs.*, Inc., 28 AD3d 272, 306 [1st Dept 2006], *affd in part mod in part* 8 NY3d 478 [2007]). Punitive damages may be awarded in negligence actions when a defendant's conduct is so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others (*Randi A. J. v Long Is. Surgi-Center*, 46 AD3d 74, 81 [2d Dept 2007]; *Don Buchwald & Associates, Inc. v Rich*, 281 AD2d 329, 330 [1st Dept 2001]). In a medical malpractice action, punitive damages are recoverable when "the conduct is wantonly dishonest, grossly indifferent to patient care, or malicious and/or reckless" (*Schiffer v Speaker*, 36 AD3d 520, 521 [1st Dept 2007]). Allegations amounting to nothing more than mere negligence do not rise to the level of moral culpability necessary to support a claim for punitive damages (*see Thomas v Farrago*, 154 AD3d at 898 [court granted CPLR 3211[a] dismissal of demand for punitive damages in medical malpractice action based upon the negligent treatment of the late heavyweight boxer Magomed Abdusalamov during boxing match]; *Sanders v New Rochelle Hosp. Med. Ctr.*, 203 AD2d 550, 550 [2d Dept 1994][leave to add a claim for punitive damages denied in medical malpractice action based upon the fatal burn injuries caused in the hospital to decedent who was receiving highly flammable oxygen]). When the complaint lacks the requisite allegations of egregious conduct or moral turpitude necessary to support punitive damages the plaintiff's claim for punitive damages shall be stricken (*see*

Denenberg v Rosen, 71 AD3d 187, 196 [1st Dept 2010]).

Here, with regard to plaintiff's claims of medical malpractice for a failure to properly and timely render medical treatment to Garcia and the improper supervision of the physician assistant, this conduct, in the main, amounts to mere negligence that does not rise to the level that would support an award of punitive damages. However, plaintiff alleges in paragraph 351 of the complaint that the defendants were negligent in "failing to timely institute emergency measures to provide needed oxygen to the decedent" and in "improperly barring EMS personnel from removing the patient to a hospital where he could timely receive proper care and assistance." Plaintiff alleges that such conduct evinces a reckless disregard for the safety of others. Further discovery is necessary to explore the circumstances surrounding such allegations to determine whether the charged medical staff and physicians evinced a gross indifference of patient care or a reckless practice which may have affected patients other than just Garcia (*see Graham v Columbia-Presbyterian Medical Center*, 185 AD2d 753 [1st Dept 1992][summary judgment denied with respect to a punitive damages claim in an action for medical malpractice because issue of fact existed as to whether the defendant doctor's possible abandonment of an unstable patient was aggravated beyond mere negligence]; *Sultan v Kings Highway Hospital Center*, 167 AD2d 534 [2d Dept 1990][punitive damages in a medical malpractice action were recoverable where a defendant's conduct constitutes gross negligence]). Accordingly, the motion to strike plaintiff's demand for punitive damages is denied with regard to the alleged treating defendants Dr. Dassa, PA Ari and the Horn defendants, with leave to renew upon the completion of discovery.

The vicarious liability of an employer for punitive damages arising from the conduct of its employee requires a showing that a superior officer of the employer "'authorized, participated in,

consented to or ratified the conduct giving rise to such damages, or deliberately retained the unfit servant' such that it is complicit in that conduct" (*Cleghorn v NY C. & H. R. R. Co.*, 56 NY 44, 47-48 [1874][master not liable to be punished in punitive damages unless he or she is also chargeable with gross misconduct]; *see Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 42 [1st Dept 2009]; *1 Mott St., Inc. v Con Edison*, 33 AD3d 531, 532 [1st Dept 2006]; *Loughry v Lincoln First Bank*, 67 NY2d 369, 378 [1986]["complicity rule" results in employer liability for punitive damages only when a superior officer in the course of employment orders, participates in, or ratifies outrageous conduct]). With regard to hiring and retention, plaintiff merely alleges that the defendants were "careless," lacking any inference of gross negligence or intentional conduct.[6] As plaintiff fails to allege that any officer of the Mt. Sinai defendants participated in, consented to or ratified the alleged negligent conduct for which she seeks punitive damages, the claim for punitive damages against the Mt. Sinai defendants are dismissed. However, with respect to Dr. Dassa, it is alleged that he personally participated in the alleged conduct giving rise to the claim for punitive damages. It has not been established, on this limited record, that Dr. Dassa was not a superior officer of the Dassa defendants or that he did not hold a superior position in the Dassa defendant's practice. Thus, dismissal of plaintiff's punitive damages claim against the Dassa defendants is denied as premature, with leave to renew upon the completion of discovery.

KATANOV'S MOTION TO AMEND

On November 18, 2016, PA Katanov served the within motion to amend his verified answer, previously served on October 7, 2016, to include **(A)** affirmative defenses based upon (1) a failure to

[6] In paragraph 352 of the verified complaint plaintiff alleges that defendants were careless in their employment, retention and supervision of the treating medical providers and staff.

state a cause of action, (2) statute of limitations, (3) contributory negligence on behalf of Garcia, (4) a limitation of damages pursuant to the collateral source rule of CPLR 4545, (5) limitation of liability pursuant to CPLR Section 1601 et. seq., (6) failure to mitigate damages, (7) liability of the acts of an independent third party over whom PA Katanov exercised no direction or control, (8) Garcia's alleged injuries were the result of superceding and intervening actions of negligence by persons over whom PA Katanov had neither control nor the right to control, (9) failure to state a claim for punitive damages, and (10) reservation of the right to assert further defenses as discovery progresses, **(B)** a cross claim against all co-defendants for indemnification on the basis of apportionment of fault and a limitation of liability under Article 16 of the CPLR, together with costs, disbursements and reasonable attorneys' fees, and **(C)** a supplemental verification of the answer executed by PA Katanov personally.

Plaintiff opposes amendment on the grounds that the proposed amendments are frivolous with neither basis in law nor fact, "wide-ranging," "over-inclusive," and "inapplicable." With regard to PA Katanov's first, second and sixth affirmative defenses, plaintiff contends that she has set forth a claim of negligence against PA Katanov; that the claim accrued on February 2, 2016; that the action was timely commenced on August 11, 2016; and that Garcia was under anesthesia prior to his loss of oxygen and death and, therefore, it cannot be said that he failed to mitigate damages. Plaintiff further argues that PA Katanov's proposed tenth affirmative defense, which seeks a reservation of right to assert further affirmative defenses, is an improper pleading.

In reply, PA Katanov contends that plaintiff's complaint fails to state a cause of action against him because it provides only conclusions of law and fails to specify the manner in which PA Katanov breached a duty of care to Garcia. In this regard, PA Katanov maintains that the "laundry list of

failures" alleged the complaint against "groups of Defendants" is insufficient to state a claim against him. PA Katanov withdraws his second affirmative defense based upon the statute of limitations.

"[L]eave to amend a pleading should be granted where there is no significant prejudice or surprise to the opposing party and where the evidence submitted in support of the motion indicates that the amendment may have merit" (*Ingrami v Rovner*, 45 AD3d 806, 808 [2nd Dept 2007]; CPLR 3025). "[I]n order to conserve judicial resources, an examination of the proposed [amendment] is warranted, and leave to amend will be denied where the proposed pleading fails to state a [defense] of [the] action, or is palpably insufficient as a matter of law" (*Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 [1st Dept 2001]; *Detrinca v De Fillippo*, 165 AD2d 505, 509 [1st Dept 1991]). The authority to grant leave to amend is committed to the sound discretion of the trial court (*see Edenwald Contr. Co. v City of New York*, 60 NY2d 957 [1983]; *see also Murray v City of New York*, 43 NY2d 400, 404-405 [1977]).

The verified complaint sufficiently stated a cognizable cause of action for negligence against PA Katanov based upon the allegations that PA Katanov rendered treatment to Garcia, that PA Katanov was negligent in the rendition of such medical services and that the negligent conduct was a cause of Garcia's injuries. Accordingly, defendant's first affirmative defense is stricken as without merit. Turning to PA Katanov's defense based upon a failure to mitigate damages, as the record before the court is limited, in that discovery and depositions have not been held, the circumstances surrounding the alleged negligence are not readily before the court and it cannot be said that such defense is palpably insufficient as a matter of law. PA Katanov's proposed tenth affirmative defense which seeks to reserve his right to assert further defenses is stricken as improper, as it does not offer a legal or factual defense to the action (CPLR 3018[b]). As to the remaining proposed amendments, it is noted that the plaintiff claims no prejudice or surprise by the amendment, there was no delay in

seeking amendment, and PA Katanov has stated legally sufficient facts to support the proposed amendments (*see Detrinca v De Fillippo*, 165 AD2d 505, 509 [1st Dept 1991]). Accordingly, PA Katanov's motion to amended is denied with regard to the proposed first, second, and tenth affirmative defenses, only, and is otherwise granted. PA Katanov shall EFILE an amended verified answer in accordance with this decision within 30 days of entry of this decision.

CONCLUSION

The motions are decided as follows:

ORDERED, that the motion of the Corporate Owner defendants (motion seq. No. 1) is granted and the complaint as asserted against John Aljan, M.D., Sanjiv Bansal, M.D., Thomas Bombadier, M.D., Reginald Camillo, M.D. Barry Finklestein, D.P.M., Gary Fishman, M.D., Albert Graziosa, M.D., Emmanuel Hostin, M.D., Brent Lambert, M.D., Luke Lambert, Dennis Nachman, DPM, Andrew Niang, M.D. s/h/a Andrew Niang, M.D. s/h/a Andrew Nasing, M.D., Jalu Patel, D.P.M., Neil Patel, M.D., Anthony Terraciano, M.D. George Violin, M.D., Arnold Wilson, M.D. and Jian Zhand, D.P.M. is dismissed; and it is further,

ORDERED, that the motion of the Mt. Sinai defendants (motion seq. No. 2) is granted to the extent that claims against the Mt. Sinai defendants based upon their ownership interest in the subject ambulatory center are dismissed and the motion is otherwise denied. The Mt. Sinai defendants' time to respond to the verified complaint herein is extended to thirty days from service of a copy of this order with notice of entry; and it is further,

ORDERED, that the motion of the Dassa defendants (motion seq. No. 3) is granted to the extent that claims against Dr. Dassa based upon his ownership interest in the subject ambulatory center and claims for punitive damages against Dassa Orthopedic Medical Services, P.C. and Bronx Medical

Orthopedic Services are dismissed and the motion is otherwise denied, with leave to renew as indicated; and it is further,

ORDERED, that the motion of Adriano Ari, P.A. (motion seq. No. 4) is denied, with leave to renew upon the completion of discovery; and it is further,

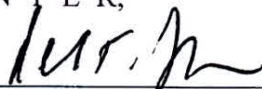
ORDERED, that the motion of the Horn defendants (motion seq. No. 5) is denied, with leave to renew upon the completion of discovery; and it is further,

ORDERED, that the motion of Jacob Katanov, P.A. (motion seq. No. 6) is granted to the extent indicated and denied with regard to the proposed first, second, and tenth affirmative defenses, only. PA Katanov shall EFILE an amended verified answer in accordance with this decision within 30 days of entry of this decision.

This constitutes the decision and order of the Court.

Dated: April 3, 2018

E N T E R,



Robert T. Johnson, J.S.C.