

**Ojeda v Barabe**

2019 NY Slip Op 31610(U)

May 13, 2019

Supreme Court, Kings County

Docket Number: 501515/13

Judge: Bernard J. Graham

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At an IAS Term, Part 36 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at the Civic Center, Brooklyn, New York, on the 13<sup>th</sup> day of May, 2019.

P R E S E N T:

HON. BERNARD J. GRAHAM,  
Justice.

-----X  
MARTHA GUTIERREZ OJEDA, as Administrator  
of the Estate of ROSALIA OJEDA SANCHEZ;  
EFRAIN DELGADO CASTRO; et al.,

Plaintiffs,

- against -

DAVID N. BARABE, M.D.,  
SHAKEEL A. USMANI, M.D.,  
ASHFORD S. MCALLISTER, M.D.,  
LUTHERAN MEDICAL CENTER, and  
NES HEALTHCARE GROUP,  
Defendants.

-----X

The following e-filed papers read herein:

Notice of Motion, Affidavits (Affirmations), and  
Exhibits Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) and Exhibits Annexed \_\_\_\_  
Reply Affidavits (Affirmations) and Exhibits Annexed \_\_\_\_\_  
Supplemental Affidavit \_\_\_\_\_

Index No. 501515/13

Mot. Seq. No. 10-12

NYSCEF No.:

205-222, 224-235, 236-246  
249-251, 258-260, 261-263  
264-266  
252-253, 267, 268-269  
271

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Upon the foregoing papers, defendants David N. Barabe, M.D. (Dr. Barabe), Shakeel A. Usmani, M.D. (Dr. Usmani), and Lutheran Medical Center (collectively, the Lutheran defendants) jointly move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing all causes of action as against them (Seq. No. 11). Codefendant Ashford S. McAllister, M.D. (Dr. McAllister) moves by amended notice of motion for an order, pursuant to CPLR 3212, granting him summary judgment dismissing the second, fifth,

sixth, seventh, and eighth causes of action as against him (Seq. No. 10). The remaining defendant NES Healthcare Group (NES Healthcare) moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing all causes of action as against it (Seq. No. 12).

### ***Introduction***

Plaintiffs' decedent, Rosalia Ojeda Sanchez (Sanchez), died of a subarachnoid hemorrhage on July 27, 2012. Thereafter, Martha Gutierrez Ojeda as the administrator of Sanchez's estate, together with Sanchez's husband, her three children, and her one grandchild (collectively, plaintiffs), commenced this action to recover damages for, inter alia, medical malpractice and lack of informed consent. Following completion of discovery and the filing of a note of issue, the instant motions for summary judgment were timely served.

### ***Background***

On July 5, 2012, at approximately 1 a.m., Sanchez presented to the emergency medicine (EM) department of Lutheran Medical Center (Lutheran) with complaints of vomiting and a headache on the scale of 9 out of 10. Dr. Barabe, an EM physician then on duty at Lutheran, obtained medical history from Sanchez, examined her, and ordered IV fluids and a battery of tests: a CBC panel, chemistry panel, and urinalysis. Dr. Barabe's physical examination of Sanchez reflected that she was stable overall, that her neurological functions were intact, and that her family history was negative for cerebral aneurysms. He diagnosed Sanchez with a migraine for which he prescribed pain and anti-nausea medications. Sanchez was discharged home the same day when her headache resolved with medications.

On July 11, 2012, Sanchez presented to her primary care clinic, nonparty Lutheran Family Health Center (Lutheran Health), with complaints of headache, vomiting, and weakness. Sanchez described to Lutheran Health her July 5<sup>th</sup> visit to Lutheran, noting that her nausea and vomiting had since resolved. Sanchez was evaluated and diagnosed with a migraine without aura.

On July 14, 2012, Sanchez returned to Lutheran Health with complaints of a severe headache accompanied by two weeks of intermittent nausea and vomiting, exacerbated by neck stiffness over the course of the preceding two days. A Lutheran Health physician ordered that Sanchez be immediately transferred to Lutheran to rule out meningitis.

At Lutheran, Sanchez reiterated to Dr. Usmani, an EM physician then on duty, her complaints of a worsening headache for three to four days, nausea, vomiting, head stiffness, and photophobia. After examining Sanchez, Dr. Usmani ordered a non-contrast CT scan of her brain and a series of blood tests. The results of Sanchez's brain CT scan were interpreted by Dr. McAllister, a New York state-licensed radiologist who, at the time, provided teleradiology services to Lutheran from Atlanta, Georgia. Dr. McAllister, on review of Sanchez's CT scan films, found no intracranial hemorrhage, infarction, mass lesion, midline shift, or other intracranial abnormalities, and issued a radiology report to the same effect. The results of Sanchez's blood tests, however, revealed a slightly elevated white blood cell count. Dr. Usmani advised Sanchez to undergo a lumbar puncture (LP). Sanchez refused to undergo an LP and left Lutheran against medical advice.

On July 27, 2012, Sanchez experienced a severe headache and convulsions for which she was rushed to Maimonides Medical Center. There, Sanchez was diagnosed with intracranial subarachnoid and subdural hemorrhage from which she died the following day.

***Parties' Contentions***

Plaintiffs, in their amended complaint (NYSCEF #81), advance eight causes of action:

(1) medical malpractice arising from defendants' alleged failure to timely diagnose and treat Sanchez's intracranial subarachnoid and subdural hemorrhage; (2) lack of informed consent; (3) vicarious liability as against Lutheran; (4) loss of consortium on behalf of Sanchez's husband; and (5)-(8) loss of support and services by Sanchez's three children and one grandchild. Plaintiffs allege that as a result of defendants' medical malpractice Sanchez sustained pain and suffering, disability, hospitalization, and emotional distress.

In support of their motion for summary judgment, the Lutheran defendants rely on the expert affirmation of Dr. Christopher C. Raio (Dr. Raio), a New York state-licensed and board-certified EM physician. Dr. Raio opines that none of the Lutheran defendants departed from the accepted standards of EM care in their treatment of Sanchez during her visits to Lutheran on July 5 and 14, 2012, and that none of their actions or omissions were the proximate cause of injury to Sanchez. Specifically, Dr. Raio opines that the medical care Sanchez received on July 5<sup>th</sup> met the accepted standards of EM care; namely, that Dr. Barabe's negative findings on his physical examination of Sanchez, together with her negative medical history, indicated that the likelihood of Sanchez suffering from a subarachnoid hemorrhage or a cerebral aneurysm was exceedingly low; hence, Dr. Barabe appropriately decided to forego diagnostic imaging. Dr. Raio further opines that on

Sanchez's next (and final) visit to Lutheran on July 14, 2012, Dr. Usmani met the accepted standards of EM care by (1) ordering a CT scan of Sanchez's brain and blood work, and (2) advising her, in light of her elevated white blood count and neck stiffness, to undergo an LP to rule out meningitis and brain hemorrhage. In Dr. Raio's opinion, Dr. Usmani appropriately explained to Sanchez, with the aid of a Spanish-speaking interpreter, the risks of *not* having an LP which is the gold standard for diagnosing brain hemorrhage. Dr. Raio concludes that Sanchez's refusal to undergo an LP and to leave Lutheran's EM department against Dr. Usmani's medical advice proximately caused her brain hemorrhage to go undetected.

Lutheran contends that the dismissal of plaintiffs' direct claims against Dr. Barabe and Dr. Usmani necessitates dismissal of their vicarious liability claims against it, as plaintiffs failed to specify anyone, other than Dr. Barabe and Dr. Usmani, for whom Lutheran may be potentially liable. In opposition, Dr. McAllister contends that Lutheran is vicariously liable for any claims of negligence against him, considering that Sanchez entered Lutheran through the EM department, and that he acted on Lutheran's behalf by reviewing Sanchez's July 14, 2012 brain CT scan and by preparing a radiological report for Dr. Usmani.

Separately, Dr. McAllister contends that plaintiffs' informed consent cause of action must be dismissed because Sanchez's injuries resulted from an alleged failure to diagnose and treat a medical condition. Next, Dr. McAllister points out that plaintiffs' causes of action on behalf of Sanchez's children and grandchild must be dismissed as a matter of law because there is no right to recovery for loss of parental consortium in the context of medical malpractice.

The remaining defendant, NES Healthcare, maintains that it is entitled to summary judgment because it provided no medical treatment to Sanchez, nor that can it be held vicariously liable for the alleged malpractice of either Dr. Barabe or Dr. Usmani. NES Healthcare posits that plaintiffs mistakenly brought this action against it instead of NES Medical Services of New York, P.C. (NES Medical), with whom Dr. Barabe and Dr. Usmani both had entered into employment contracts to provide physician services at Lutheran. NES Healthcare emphasizes that it is a separate entity from NES Medical and that it has no nexus to the claims being asserted against the Lutheran defendants. In support of its motion, NES Healthcare submits an affidavit from Jennifer Moore, its Chief Executive Officer, averring that NES Healthcare was (and remains) separate from NES Medical.

Plaintiffs (in their opposition papers at ¶ 3) have withdrawn their second cause of action for lack of informed consent and their fifth through eight causes of action for loss of support and services by Sanchez's three children and one grandchild as against all defendants. Plaintiffs' remaining causes of action are for medical malpractice, vicarious liability, and loss of consortium (the first, third, and fourth causes of action, respectively).

In defense of their medical malpractice claim, plaintiffs submit an expert affidavit of Peter Petropoulos, M.D. (Dr. Petropoulos), a New York state-licensed and board-certified EM physician, who reviewed Sanchez's medical records from Lutheran Health, Lutheran's EM department, her autopsy report from the Chief Medical Examiner's Officer, and the moving defendants' deposition transcripts.

Dr. Petropoulos opines that Dr. Barabe departed from the accepted standards of EM care by failing to take a proper medical history of Sanchez when she first presented to

Lutheran on July 5, 2012. Specifically, Dr. Petropoulos avers that Dr. Barabe should have probed into Sanchez's migraine history to determine whether her symptoms were consistent with a typical migraine. In Dr. Petropoulos's opinion, Dr. Barabe overlooked the significance of Sanchez reporting that her headache had awoken her from sleep, meaning that a headache of that magnitude was a red flag for the presence of an intracranial hemorrhage. Dr. Petropoulos opines that the accepted standards of EM care required Dr. Barabe to include an intracranial hemorrhage in his differential diagnosis and to order appropriate diagnostic imaging testing, such as a brain CT scan. Dr. Petropoulos avers that the absence of double vision or other neurological symptoms in Sanchez does not negate a possibility of an intracranial hemorrhage, as such symptoms are present only in the more advanced stages of an intracranial hemorrhage. Dr. Petropoulos further avers that had a brain CT scan been performed on July 5, 2012, it would have likely shown that Sanchez was then experiencing an intracranial hemorrhage.

With respect to Sanchez's July 14<sup>th</sup> visit to Lutheran, Dr. Petropoulos opines that it was a departure from the accepted standards of EM care for Dr. Usmani to discharge Sanchez based solely on her refusal to undergo an LP. In Dr. Petropoulos's view, Dr. Usmani should have ordered (or at least should have offered to order) a CT or an MRI angiogram for Sanchez to rule out the differential diagnose of an intracranial hemorrhage. Dr. Petropoulos opines that, based on his years of experience and training, patients who are hesitant or who refuse to undergo an LP for fear of pain or potential complications are more likely to undergo a CT or an MRI angiogram, and that had Dr. Usmani performed either of such alternate diagnostic tests, Sanchez's intracranial hemorrhage would have been detected and, therefore, could have been treated with immediate surgical intervention.

Plaintiff opposes NES Healthcare's motion on the ground that its CEO's affidavit is defective as it was executed and notarized out of state, and lacked a certificate of conformity under CPLR 2309 (c). Alternatively, plaintiffs contend that NES Healthcare held itself out to the public as an entity which provided EM physicians to Lutheran, based on NES Healthcare's website pages reflecting that it generally solicited EM physicians to work at Lutheran.

In reply, the Lutheran defendants submit Dr. Raio's supplemental expert affirmation. Upon review of plaintiffs' expert opposition, Dr. Raio avers that Dr. Barabe's management of Sanchez's headache met the accepted standards of EM care, noting that her headache had resolved completely by the time of her discharge from Lutheran. Dr. Raio opines that "given [Sanchez's] history of migraine headaches and her clinical improvement it was reasonable to discharge her with close follow-up." Dr. Raio opines that the symptomology and clinical picture with which Sanchez presented on July 5 and 14 were not suspicious of an intracranial hemorrhage which classically involves a thunder-clap headache of acute onset.

#### *Standard of Review*

"To prevail on a motion for summary judgment in a medical malpractice action, the defendant must make a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the patient's injuries" (*McCarthy v Northern Westchester Hosp.*, 139 AD3d 825, 826-827 [2d Dept 2016] [internal quotation marks omitted]). "[T]o sustain this burden, the defendant is only required to address and rebut the specific allegations of malpractice set forth in the plaintiff's complaint

and bill of particulars” (*Schuck v Stony Brook Surgical Assoc.*, 140 AD3d 725, 726 [2d Dept 2016]).

“In opposition, a plaintiff . . . must submit material or evidentiary facts to rebut the defendant’s prima facie showing that he or she was not negligent in treating the plaintiff” (*Dolan v Halpern*, 73 AD3d 1117, 1118 [2d Dept 2010] [internal quotation marks omitted]). “[P]laintiff need only raise a triable issue of fact regarding the element or elements on which the defendant has made its prima facie showing” (*McCarthy*, 139 AD3d at 826-827 [internal quotation marks omitted]). Further, “general allegations of medical malpractice that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a defendant’s motion for summary dismissal” (*Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927 [1st Dept 2010]).

In addressing the issue of proximate cause, “[i]n a medical malpractice action, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant” (*Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881, 883 [2d Dept 2005] [internal quotation marks omitted]). “A plaintiff’s evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant’s act or omission decreased the plaintiff’s chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may infer that the defendant’s conduct diminished the plaintiff’s chance of a better outcome or increased [the] injury” (*Semel v Guzman*, 84 AD3d 1054, 1055-1056 [2d Dept 2011] [internal quotation marks omitted; alteration in the original]). “The issue of whether a doctor’s

negligence is more likely than not a proximate cause of [a plaintiff's] injury is usually for the jury to decide" (*Polanco v Reed*, 105 AD3d 438, 439 [1st Dept 2013] [internal quotation marks omitted; alteration in the original]).

It has also been held that where "a failure to treat is alleged, the plaintiff simply must show that it was probable that some diminution in the chance of survival had occurred" (*Borawski v Huang*, 34 AD3d 409, 410 [2d Dept 2006] [internal quotation marks omitted]).

"[T]he evidence presented by the plaintiff need not eliminate every other possible cause of the resulting injury" (*Clarke v Limone*, 40 AD3d 571, 571-572 [2d Dept 2007] [internal quotation marks omitted], *lv denied* 9 NY3d 809 [2017]).

***Lutheran Defendants' Joint Motion (Seq. No. 11)***

Dr. Barabe has established his prima facie entitlement to summary judgment by the submission of Dr. Raio's expert affirmation and Sanchez's medical record at Lutheran demonstrating that he did not depart from the accepted standards of EM care in his treatment of Sanchez, and that, in any event, any alleged departures were not a proximate cause of her injuries (*see generally Brinkley v Nassau Health Care Corp.*, 120 AD3d 1287, 1289 [2d Dept 2014]; *Lahara v Auteri*, 97 AD3d 799, 799 [2d Dept 2012]). Specifically, Dr. Barabe has established, through Dr. Raio's affirmation, that he met the accepted standards of EM care in his evaluation, diagnosis, and treatment of Sanchez's headache on July 5, 2012. In that regard, Dr. Raio avers that Dr. Barabe obtained a thorough medical history from Sanchez, assessed her on more than one occasion throughout her stay in the EM department, and investigated her chief complaint of a migraine by conducting a cranial nerve examination, ordering a CBC panel, chemistry panel, and urinalysis. Dr. Raio opines that neither the blood

work nor the cranial nerve exam suggested the possibility that she was suffering from a subarachnoid hemorrhage. According to Dr. Raio, the accepted standards of EM care did not require Dr. Barabe to order a brain CT scan or other radiologic testing, and that he adequately addressed Sanchez's complaints by ordering appropriate medications. As Dr. Barabe explained in his pretrial deposition (at page 69, lines 12-18; page 42 lines 8-10), he did not order a brain CT scan because Sanchez's headache was consistent with her regular migraines and she exhibited no symptoms of a subarachnoid hemorrhage; namely, a sudden headache, a stiff neck, or other neurological deficits.

In opposition, plaintiffs have failed to raise a triable issue of fact as to whether Dr. Barabe departed from the accepted standards of EM care. Dr. Petropoulos's expert opinion regarding Dr. Barabe's care of Sanchez is conclusory, speculative, and factually unsupported; hence, it is insufficient to raise a triable issue of fact (*see Duvidovich v George*, 122 AD3d 666, 667 [2d Dept 2014]; *Cafaro v Ceka*, 120 AD3d 732, 733 [2d Dept 2014]; *Ahmed v Pannone*, 116 AD3d 802, 806 [2d Dept 2014], *lv dismissed* 25 NY3d 964 [2015], *rearg denied* 26 NY3d 944 [2015]). Whereas Dr. Petropoulos opines (in ¶ 11) that "when a patient presents with symptoms of a headache that awakens the patient from sleep and with a pain that is stronger than the patient has historically experienced, the standard of care requires the physician to include subarachnoid hemorrhage in the differential diagnosis," he bases his conclusion on the erroneous assumption that Sanchez's headache was "sudden" because it woke her up. A nurse's note, timed at 6:37 a.m. on July 5, 2012, indicates that Sanchez woke up in the EM department, *approximately five hours post-arrival*, complaining of a headache (Lutheran Medical Records, page 187). As Dr. Barabe explained at his pretrial

deposition (at page 53, line 24 to page 54, line 4), “the initial onset of the headache would be a *sudden* headache. She [Sanchez] had already been treated with morphine. It could have been wearing off” (emphasis added). Thus, Dr. Petropoulos’s opinion that Sanchez presented to Dr. Barabe with a sudden-onset headache was factually erroneous. Dr. Petropoulos’s further opinion that had a brain CT scan been performed on July 5, 2012, it “would have likely shown that [Sanchez] suffered from a subarachnoid hemorrhage,” is speculative and insufficient to raise a triable issue of fact (*see Shashi v South Nassau Communities Hosp.*, 104 AD3d 838, 839 [2d Dept 2013]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 928 [1st Dept 2010]; *see also Rivers v Birnbaum*, 102 AD3d 26, 45 [2d Dept 2012]; *see generally Senatore v Epstein*, 128 AD3d 794, 795 [2d Dept 2015]; *Bendel v Rajpal*, 101 AD3d 662, 663 [2d Dept 2012]). Dr. Petropoulos fails to point to any medical record substantiating his opinion that Sanchez was experiencing an intracranial hemorrhage on July 5, 2012. Though Sanchez eventually died of a subarachnoid hemorrhage on July 27, 2012, there is no indication that the headache she experienced three weeks prior on July 5, 2012 was the genesis of that fatal hemorrhage.

Turning to Dr. Usmani, the Court finds that he has established *prima facie* that he did not depart from the accepted standards of EM care in his treatment of Sanchez on July 14, 2012. In this regard, Dr. Raio opines that Dr. Usmani met the accepted standards of EM care by reaching a differential diagnosis of an arachnoid hemorrhage, ordering blood work, and further ordering a non-contrast CT scan. Dr. Raio opines that, based on Sanchez’s then-elevated white blood cell count and her neck stiffness, Dr. Usmani met the accepted standards of EM care by ordering an LP to rule out meningitis and intracranial hemorrhage.

Dr. Raio opines that Dr. Usmani properly conveyed, through a Spanish-speaking interpreter, the potential complications associated with an LP and the risks of foregoing it, and that Dr. Usmani cannot be held liable for Sanchez's refusal to undergo it and her decision to leave Lutheran against medical advice.

In opposition, Dr. Petropoulos's affidavit raises triable issues of fact warranting the denial of Dr. Usmani's motion. Specifically, Dr. Petropoulos opines that Dr. Usmani departed from the accepted standards of EM care when, in light of Sanchez's refusal of an LP, he failed to consider less invasive diagnostic tests, such as a CT or an MRI angiogram, to rule out an intracranial hemorrhage. Dr. Petropoulos avers that such alternative diagnostic testing would have detected Sanchez's hemorrhage and allowed for timely surgical intervention. Dr. Petropoulos contends that Sanchez's headache, elevated white blood cell count, and neck stiffness required Dr. Usmani to investigate further the etiology of her symptoms by ordering a less invasive diagnostic testing in the form of a CT or an MRI angiogram.

It is well settled that summary judgment may not be granted in a medical malpractice action where, as here, the parties offer conflicting expert opinions requiring a jury's resolution (*see e.g. Loaiza v Lam*, 107 AD3d 951, 953 [2d Dept 2013]; *Dandrea v Hertz*, 23 AD3d 332, 333 [2d Dept 2005]). Dr. Usmani's and plaintiffs' respective experts present conflicting opinions as to the accepted standards of EM care in ordering less invasive diagnostic testing to rule out an intracranial hemorrhage where, as here, a patient refused to undergo invasive testing in the form of an LP. Viewing the evidence in a light most

favorable to plaintiffs, issues of fact exist warranting the denial of Dr. Usmani's motion for summary judgment.

With respect to Lutheran, vicarious liability for medical malpractice generally turns on agency or control in fact (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]; *Hylton v Flushing Hosp. & Med. Ctr.*, 218 AD2d 604, 606 [1995], *lv denied* 87 NY2d 807 [1996]). "Under the doctrine of respondeat superior, a hospital may be vicariously liable for the medical malpractice of physicians who act in an employment or agency capacity" (*Deltoro v Arya*, 44 AD3d 896 [2d Dept 2007]; *Mendez v White*, 40 AD3d 1057 [2d Dept 2007]; *Boone v North Shore Univ. Hosp.*, 12 AD3d 338, 339 [2d Dept 2004]). With respect to Dr. Barabe, the branch of the Lutheran defendants' motion for summary judgment dismissing plaintiffs' vicarious liability claim against it *with respect to Dr. Barabe* is granted. Conversely, the branch of the Lutheran defendants' motion for summary judgment dismissing plaintiffs' vicarious liability claim against it *with respect to Dr. Usmani* is denied.

***Dr. McAllister's Motion (Seq. No. 10)***

As noted, plaintiffs have withdrawn their second cause of action for lack of informed consent, as well as their fifth through eighth causes of action for loss of support and services by Sanchez's children and grandchild. Therefore, Dr. McAllister's motion is granted without opposition.

***NES Healthcare's Motion (Seq. No. 12)***

NES Healthcare has established prima facie that it is entitled to summary judgment because it did not provide any medical treatment to Sanchez as reflected by her medical records. Furthermore, NES Healthcare has established that it cannot be held vicariously

liable for the alleged medical malpractice of Dr. Barabe and Dr. Usmani in the absence of an employer-employee relationship with them. NES Healthcare has provided copies of the employment contracts between Dr. Barabe and Dr. Usmani, on the one hand, and NES Medical, on the other hand, which contracted with these physicians to provide EM services at Lutheran (NES Healthcare's Motion, Ex. I, "Addendum to Physician Agreement"). The affidavit of NES Healthcare's CEO further establishes that NES Healthcare is a separate entity from NES Medical, each with its own employees, assets, and board of directors.

Plaintiffs, in opposition, have failed to rebut NES Healthcare's prima facie showing of entitlement to summary judgment. Although the CEO's affidavit was signed and notarized out of state, and was not accompanied by a certification in accordance with CPLR 2309 (c), the defect was not fatal, as plaintiffs were not prejudiced thereby (*see e.g. Clements v Securitas Security Servs. USA, Inc.*, 170 AD3d 799, 800 [2d Dept 2019]). More fundamentally, plaintiffs have failed to raise a triable issue of fact as to why NES Healthcare should be held liable for the alleged negligence of NES Medical's employees. Plaintiffs have not sought to depose anyone from NES Healthcare during discovery. The website pages purporting to show that NES Healthcare was soliciting EM physicians for Lutheran are not specific to the facts of this case and cannot, in and of themselves, establish any connection between NES Healthcare and NES Medical in this case.

### ***Conclusion***

Accordingly, it is

ORDERED that the Lutheran defendants' motion in Seq. No. 11 for summary judgment is *granted to the extent* of dismissing (1) all causes of action *as against*

*Dr. Barabe*; (2) vicarious cause of action *as against Lutheran with respect to Dr. Barabe*, (3) the informed consent cause of action, as well as the fifth through eighth causes of action for loss of support and services by Sanchez's children and grandchild, *as against Dr. Usmani*; and their motion is otherwise denied; and it is further

ORDERED that Dr. McAllister's motion in Seq. No. 10 for summary judgment is *granted*, and plaintiffs' informed consent cause of action, as well as their fifth through eighth causes of action for loss of support and services by Sanchez's children and grandchild, are all dismissed as against him; and it is further

ORDERED that NES Healthcare's motion in Seq. No. 12 for summary judgment is granted, and the amended complaint is dismissed as against NES Healthcare *without prejudice*; and it is further

ORDERED that in light of dismissal of Dr. Barabe and NES Healthcare from this action, the action is severed and continued against the remaining defendants, Dr. Usmani, Dr. McAllister, and Lutheran; and it is further

ORDERED that the caption of this case is amended to read in its entirety as follows:

-----X  
MARTHA GUTIERREZ OJEDA, as Administrator  
of the Estate of ROSALIA OJEDA SANCHEZ; and  
EFRAIN DELGADO CASTRO,

Plaintiffs,

- against -

Index No. 501515/13

SHAKEEL A. USMANI, M.D.,  
ASHFORD S. MCALLISTER, M.D., and  
LUTHERAN MEDICAL CENTER,

Defendants.

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Plaintiffs' counsel is directed to electronically serve a copy of this decision, order, and judgment with notice of entry on defendants' respective counsel and to electronically file an affidavit of said service with the Kings County Clerk.

The foregoing constitutes the decision, order, and judgment of the court.

ENTER,

*Bernard J. Graham*  
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J. S. C.  
HON. BERNARD J. GRAHAM

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