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| <b>Chiesa v Katz</b>                                                                                                                                                                                                           |
| 2019 NY Slip Op 33559(U)                                                                                                                                                                                                       |
| May 9, 2019                                                                                                                                                                                                                    |
| Supreme Court, Putnam County                                                                                                                                                                                                   |
| Docket Number: 328/2016                                                                                                                                                                                                        |
| Judge: Victor G. Grossman                                                                                                                                                                                                      |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

To commence the 30 day statutory time period for appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with notice of entry, upon all parties

PUTNAM COUNTY  
CLERK

2019 MAY 15 PM 4:27

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF PUTNAM**

-----X  
APRIL CHIESA and ANTHONY CHIESA,

Plaintiffs,

-against -

JEFFREY B. KATZ, M.D., HANSRAJ K. SHETH, M.D.,  
CARL F. CALICA, M.D., MT. KISCO MEDICAL  
GROUP, P.C., and PUTNAM HOSPITAL CENTER,

Defendants.  
-----X

**GROSSMAN, J.S.C.**

**DECISION & ORDER**

Index No. 328/2016

Sequence No. 3  
Motion Date: 4/2/19

The following papers, numbered 1 to 23, were considered in connection with Defendant Putnam Hospital Center's Notice of Motion, dated March 6, 2019, seeking an Order, pursuant to CPLR §§3126 and 3101(d) to preclude Plaintiffs' radiology expert from testifying and any evidence presented against Putnam Hospital Center at trial on an entirely new theory of liability never before pled, together with such other and further relief as this Court deems just and proper.

| <b>PAPERS</b>                                     | <b>NUMBERED</b> |
|---------------------------------------------------|-----------------|
| Notice of Motion/Affirmation in Support/Exhs. A-M | 1-15            |
| Affirmation in Opposition/Exhs. 1-6               | 16-22           |
| Affirmation in Support                            | 23              |

On March 8, 2016, Plaintiffs April and Anthony Chiesa commenced this medical malpractice action against Defendants Jeffrey B. Katz, M.D., Hansraj K. Sheth, M.D., Carl F. Calica, M.D., Mt. Kisco Medical Group, P.C. ("MKMG"), and Putnam Hospital Center ("Putnam Hospital"). Plaintiff Anthony Chiesa is seeking damages for loss of consortium. The

Verified Complaint alleges that on February 7, 2014, Ms. Chiesa underwent an elective hysterectomy at Putnam Hospital performed by Dr. Katz, after which, she developed serious complications during her stay at Putnam Hospital, forcing her to remain a patient until February 27, 2014, and undergo another surgery, on February 12, 2014, to correct a perforated bowel. She alleges that but for the negligence of the named Defendants, she would not have had these complications.

As to Putnam Hospital, Plaintiffs allege (Notice of Motion, Exh. A) (emphasis added):

59. Upon information and belief, defendant, PUTNAM HOSPITAL CENTER, its agents, servants and employees and those under its supervision and/or control were careless and negligent, committed acts and/or omissions and deviated and departed from the standards of medical and/or surgical and/or hospital and/or radiological and/or gynecologic standards and /or other indicated treatment; said defendant was further careless and negligent in supervising and/or controlling its agents, servants and/or employees; carelessly and negligently failing to treat and care for the plaintiff, APRIL CHIESA, in accordance with good and accepted standards of medical and/or surgical and/or radiological and/or gynecological and/or hospital care and treatment and/or working up plaintiff and/or following the plaintiff and addressing findings with respect to said plaintiff's condition and were careless and negligent in failing to heed signs, symptoms and complaints of the plaintiff and in carelessly and negligently failing to obtain necessary and appropriate consultations; carelessly and negligently failing to take into account clinical, radiological and laboratory findings; carelessly and negligent failing to appreciate the significance of objective findings on x-rays and CT Scans and other studies; failing to properly monitor and arrest and reverse the deteriorating condition of the plaintiff; failing to perform urgent surgical intervention upon plaintiff; carelessly and negligently failing to properly diagnose the true condition of the plaintiff; carelessly and negligently delaying necessary surgical intervention to plaintiff; failing to promulgate and implement rules, regulations, protocols, policies and guidelines with respect to the post-operative management of its patients; failing to supervise its agents, servants and employees; and in being otherwise caress [sic] and negligent under the prevailing circumstances;

Putnam Hospital interposed a Verified Answer, generally denying the allegations and raising two affirmative defenses, including failure to state a cause of action (Notice of Motion, Exh. B).

According to Plaintiffs' Bill of Particulars as they pertain to Putnam Hospital, Plaintiffs assert that Putnam Hospital and its employees were (Notice of Motion, Exh. C) (emphasis added):

3. \* \* \* careless and negligent, committed acts and/or omissions and deviated and departed from the standards of medical and/or surgical and/or hospital and/or radiological and/or gynecologic standards and/or other indicated treatment; said defendant was further careless and negligent in supervising and/or controlling its agents, servants and/or employees; carelessly and negligently failing to treat and care for the plaintiff, APRIL CHIESA in accordance with good and accepted standards of medical and/or surgical and/or radiological and/or gynecological and/or hospital care and treatment.

\* \* \*

5. (a)-(b) Upon information and belief, defendant PUTNAM HOSPITAL CENTER committed acts and/or omissions and deviated and departed from the standards of medical and/or surgical and/or hospital and/or radiological and/or gynecologic standards in working up plaintiff and/or following the plaintiff and addressing findings with respect to said plaintiff's condition and were careless and negligent in failing to heed signs, symptoms and complaints of the plaintiff and in carelessly and negligently failing to obtain necessary and appropriate consultations.

\* \* \*

(e)-(f) Upon information and belief, defendant PUTNAM HOSPITAL CENTER carelessly and negligently failing to take into account clinical, radiological and laboratory findings; carelessly and negligent failing to appreciate the significance of objective findings on x-rays and CT Scans and other studies; failing to properly monitor and arrest and reverse the deteriorating condition of the plaintiff; failing to perform urgent surgical intervention upon plaintiff; carelessly and negligently failing to properly diagnose the true condition of the plaintiff.

The Note of Issue was filed on May 18, 2018 (Notice of Motion, Exh. D). After

resolving the summary judgment motions by Decision and Order, dated January 17, 2019 and entered in the County Clerk's Office on January 18, 2019 (Notice of Motion, Exh. F), the Court set the matter down for trial, which is scheduled to commence on June 6, 2019.

On or about February 9, 2019, Plaintiffs served, inter alia, its Response to Demand for Expert Witness Information as it related to Dr. Allen Rubin, a board certified radiologist (Notice of Motion, Exh. H). In that Response, Plaintiffs detailed how and to what extent Dr. Rubin will testify that the radiological management of Plaintiff by Putnam Hospital, inter alia: "failed to comply with the standards of care"; was "negligent in properly recording, interpreting and transmitting key findings to the physicians and surgeons assigned to Plaintiff"; and "the radiology department's failure to produce a comprehensive, detailed and accurate report of the abdominal CT scan performed on February 9, 2012 [sic] led to continued pain and further development of multiple detrimental conditions including perforated bowel, gangrenous necrosis and peritonitis" (Notice of Motion, Exh. H). Plaintiffs continued to state, inter alia, that Dr. Rubin will also testify that "the radiological studies and reports were not comprehensive and failed to analyze the findings that were present in the CT scan performed February 9, 2014," and that the "report was far from adequate and contributed to the detriment of" Plaintiff's "condition" (Notice of Motion, Exh. H).

On or about February 25, 2019, Putnam Hospital wrote to Plaintiffs' counsel objecting to the disclosure of Dr. Rubin "on the basis that it contained new allegations not addressed in the Bill of Particulars, or during discovery" (Affirmation in Support at ¶15; Exh. J).

Putnam Hospital now moves for an Order, "pursuant to CPLR §3126 and 3101(d) to preclude [P]laintiff's radiology expert from testifying and to preclude any evidence to be

presented against Putnam Hospital at trial on an entirely new theory of liability never before pled” (Affirmation in Support at ¶2). Putnam Hospital asserts that Plaintiffs are attempting to assert new theories of liability at a time when discovery is complete, arguing that there is no allegation in the Bill of Particulars that “any radiology study was misinterpreted or underreported or inaccurate,” and that “no specific study was identified,” and that what was alleged in the Bill of Particulars was an implication that “the images were properly interpreted but the findings were not appreciated or properly acted upon by the plaintiff’s treating physicians” (Affirmation in Support at ¶18). Putnam Hospital notes that Plaintiffs never served a Supplemental Bill of Particulars, never requested any deposition on behalf of Putnam Hospital, and did not seek any discovery related to the radiology studies or other radiologists (Affirmation in Support at ¶19).

Putnam Hospital continues to argue that in opposition to its motion for summary judgment, Plaintiffs proffered an affidavit from Dr. David Mayer, a surgeon, claiming “for the first time that the ‘subpar analysis and under-reporting of the prior CT scan by the hospital radiologist contributed to [the plaintiff’s] declining condition’” (Affirmation in Support at ¶20). Putnam Hospital argued that it was unclear if Plaintiffs were claiming that the CTs were misinterpreted or whether they were not properly conveyed to Plaintiff’s physicians, and that Plaintiffs did not set forth this claim in the Bill of Particulars (Affirmation in Support at ¶21). According to Putnam Hospital, the Court did not directly address this argument, but “instead determined that there were conflicting expert opinions about the reporting of the plaintiff’s signs and symptoms and denied the motion” (Affirmation in Support at ¶21). And then, after the motion was decided that Plaintiffs served Dr. Rubin’s expert affidavit, “which offered further specificity as to claims about the alleged failure of Putnam Hospital to properly interpret and/or

report multiple radiology findings while at Putnam Hospital,” as well as affidavits from Drs. Mayer and Schwartz “which set forth claims about the alleged failure of Putnam Hospital to properly interpret and/or report radiology findings on the February 9, 2014 CT (Affirmation in Support at ¶22).

Putnam Hospital concludes “that plaintiff’s expert radiology disclosure, portions of the expert disclosures for Dr. Mayer and Dr. Schwartz, as well as the opinions set forth by Dr. Mayer in opposition to Putnam Hospital’s summary judgment motion about radiology findings and reports set forth a new theory of liability, one which was not raised before the Note of Issue was filed, and therefore never explored during discovery” (Affirmation in Support at ¶23). Putnam Hospital argues that it had no reason to anticipate that this new claim would be asserted after the filing of the Note of Issue because the only questions presented to co-Defendants at their depositions about the significance of the CTs were based upon the assumption that these images were properly interpreted, and “[t]here was nothing to suggest that claims that the plaintiff’s radiology images including her x-rays and CT scans were misinterpreted or that the February 9, 2014 image was under reported were being asserted” (Affirmation in Support at ¶¶25-27).

Plaintiffs oppose the motion to preclude, arguing that “there is no new theory of liability as the proposed testimony by Plaintiffs’ expert radiologist makes no new claims, only detailing claims which are clearly present and claimed before this Honorable Court in both the Summons and Complaint and Plaintiffs’ Bill of Particulars” (Affirmation in Opposition at ¶14).

In reply, Putnam Hospital responds to Plaintiffs’ arguments, and requests that if the Court were to permit this testimony, that Defendants must be provided an opportunity to retain a radiology expert and serve expert disclosure.

Pursuant to CPLR §3101(d)(1)(i), Plaintiffs were required “to disclose ‘in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify \* \* \* and a summary of the grounds for each expert’s opinion.’” Dalrymple v. Koka, 2 A.D.3d 769, 771 (2d Dept. 2003), quoting CPLR 3101(d)(1)(i). “A previously undisclosed theory is not deemed admissible merely on the ground that it is mentioned in a plaintiff’s medical records.” Rocco v. Ahmed, 146 A.D.3d 836, 838 (2d Dept. 2017), citing Dalrymple v. Koka, 2 A.D.3d 769, supra.

Here, based on its review of the pleadings, the Court acknowledges it has a difficult decision to make. A review of the pleadings reveals that Plaintiffs made general allegations, painting the negligence on the part of the radiologists with broad strokes and failing to allege with any specificity what the specific acts of negligence were being asserted against the hospital’s radiologists. The expert disclosure complained of here was served by Plaintiffs approximately 5 years after the incidents complained of, 3 years after the action was commenced, approximately 20 months after the original Bill of Particulars was served, and almost 9 months after the Note of Issue was filed, and there is no application to amend or supplemental the Bill of Particulars before this Court. Dr. Rubin’s disclosure elaborates on the alleged negligent acts, and arguably may assert new theories of liability which were not readily discernable from the allegations set forth in the Bill of Particulars. As such, it would be improper to permit him to testify to any unpleaded allegations relating to Putnam Hospital’s negligence as it relates to Plaintiff’s radiological treatment and care.

However, finding for Putnam Hospital and holding that this testimony should be precluded on the ground that it introduces a new theory of liability is extreme, as it can also be



argued that while inartfully and generally pleaded, Plaintiffs are not introducing new theories of liability, but rather elaborating on its pleaded theories, and Putnam Hospital was put on notice that Plaintiff's radiological treatment and care was at issue in this case. This is a medical malpractice action, alleging negligence on the part of many medical providers over the course of a three-week stay at Putnam Hospital. In fact, a review of Plaintiffs' Bill of Particulars reveals that there were general allegations made against all Defendants, as well as the claim that Putnam Hospital, *inter alia*, "carelessly and negligent failing to appreciate the significance of objective findings on x-rays and CT Scans and other studies." As such, there is no surprise that Plaintiffs would want to call an expert to question the care Plaintiff received in the hospital, especially in response to the radiology reports generated during her stay and how they affected her lengthy care and treatment. This should have been reasonably anticipated by all parties.

Therefore, to alleviate any prejudice to Defendants, and because the Court prefers to litigate issues on their merits, especially where there is no claim that Plaintiffs' delayed disclosure was willful or intentional (see generally Hernandez-Vega v. Zwanger-Pesiri Radiology Group, 39 A.D.3d 710, 710-711 [2d Dept. 2007]), the Court adjourns the trial for three (3) months to permit Defendants time to retain a radiology expert and serve expert disclosure.

As such, it is hereby

ORDERED that Defendant Putnam Hospital Center's motion is denied to the extent stated herein; and it is further

ORDERED that the trial is adjourned to provide Defendants an opportunity to retain a radiology expert and serve expert disclosure; and it is further

ORDERED that jury selection shall commence on Thursday, September 12, 2019 at 9:30

a.m. and the two-week trial shall commence on Monday, September 16, 2019. Counsel shall considered themselves engaged, and are reminded that trial notebooks shall be submitted to the Court on or before Friday, September 6, 2019 at 3:00 p.m.; and it is further

ORDERED that the parties and counsel are to appear before the undersigned on Thursday, June 6, 2019 for a status conference. No adjournments will be permitted unless for good cause shown; and it is further

ORDERED that any issue not directly addressed herein is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York  
May 9, 2019

  
HON. VICTOR G. GROSSMAN, J.S.C.

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