

<b>Gibson v Northwell Health</b>
2019 NY Slip Op 34325(U)
October 8, 2019
Supreme Court, Nassau County
Docket Number: Index No. 601170-16
Judge: Robert A. Bruno
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**SHORT FORM ORDER**

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

**PRESENT: HON. ROBERT A. BRUNO, J.S.C.**

-----X  
TIFFANY GIBSON,

TRIAL/IAS PART 12

Plaintiff,

*-against-*

Index No.: 601170-16  
Submission Date: 8-06-19  
Motion Sequence: 002

NORTHWELL HEALTH, NORTSHORE-LONG  
ISLAND JEWISH HEALTH SYSTEM, INC.,  
NORTH SHORE UNIVERSITY HOSPITAL AND  
NORTH SHORE UNIVERSITY HOSPITAL  
AT PLAINVIEW,

**DECISION & ORDER**

Defendants.

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**Papers Numbered**

<i>Sequence #002</i>	
Notice of Motion, Affirmation & Exhibits.....	1
Memorandum of Law in Support.....	2
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Upon the foregoing papers, the motion by defendants NORTHWELL HEALTH, NORTSHORE-LONG ISLAND JEWISH HEALTH SYSTEM, INC., NORTH SHORE UNIVERSITY HOSPITAL (“NORTH SHORE MANHASSET”) and NORTH SHORE UNIVERSITY HOSPITAL AT PLAINVIEW (“PLAINVIEW HOSPITAL”) (collectively “defendants”) for an Order pursuant to CPLR §3212, granting summary judgment in favor of defendants, thereby dismissing each and every one of the plaintiff’s claims in their entirety, is determined as set forth below.

This action is predicated upon allegations that defendants breached their duty to plaintiff to prevent unauthorized access to her electronic medical records. Plaintiff alleges that on August 22, 24, 25 and 31, 2013, and November 19, 2013, plaintiff’s electronic medical record relating to

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her August 2013 treatment at PLAINVIEW HOSPITAL was accessed by plaintiff's employer, non-party Kathie Brand, M.D. without the consent of plaintiff. Plaintiff alleges further that on March 12, 13, 14 and 17, plaintiff's electronic medical record relating to plaintiff's March 2014 treatment at NORTH SHORE MANHASSET was accessed by plaintiff's employer, non-party Kathie Brand, M.D. As a result, plaintiff alleges, she suffered mental and emotional distress, conscious pain and suffering, and loss of employment. See Complaint (*NYSCEF Doc. 24*), Bill of Particulars and Supplemental Bill of Particulars (*NYSCEF Doc. 26*).

Based upon the foregoing allegations, the Complaint alleges two causes of action. The FIRST alleges violation of the Federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and Section 18 of the New York Public Health Law. The SECOND alleges negligence, departure from good and accepted medical practice and violation of plaintiff's medical privilege.

Defendants seek to dismiss the Complaint in its entirety. With respect to the FIRST cause of action, defendants assert that neither HIPAA nor Public Health Law §18 provides for a private right of action, and that, in any event, Public Health Law §18 does not apply to the facts and circumstances alleged. With respect to the SECOND cause of action, defendants assert that they cannot be held vicariously liable for the actions of Dr. Brand insofar as she was not their employee. To the extent that plaintiffs allege a departure from good and accepted medical practice, defendants assert that the allegations, if anything, sound in negligence, and not medical malpractice. Finally, defendants maintain that they were not independently negligent, insofar as they took reasonable measures to safeguard plaintiff's electronic medical records.

In support of their motion, defendants submit, among other things: (i) the transcript of plaintiff's deposition, conducted on February 12, 2018 (*NYSCEF Doc. 27*); (ii) the transcript of the deposition of Jennifer Fromkin, witness for defendants, conducted on April 9, 2018 (*NYSCEF Doc. 28*); (iii) the transcript of the deposition of non-party witness Kathie Brand, MD, conducted on August 29, 2018 (*NYSCEF Doc. 29*); and (iv) the Affidavit of David N. Hoffman, Esq., defendants' expert, sworn to on March 4, 2019 (*NYSCEF Doc. 32*).

*Plaintiff's Testimony.* Plaintiff testified that she was employed by Dr. Kathie Brand as a medical biller from 2012 through 2014. She was never a patient of Dr. Brand. She had no relationship with Dr. Brand other than an employment relationship. During the period of her employment, she never talked to Dr. Brand about her health, or sought Dr. Brand's medical opinion or advice. She never showed Dr. Brand her medical records. She never authorized Dr. Brand to view her medical records.

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In August of 2013, plaintiff was admitted to PLAINVIEW HOSPITAL for gallbladder removal surgery. In March of 2014, she went to the emergency room at NORTH SHORE MANHASSET for treatment of anxiety and stress. After both of her hospital visits in 2013 and 2014, plaintiff was informed by her co-workers that Dr. Brand had told them about her surgery and hospitalization. Plaintiff never told Dr. Brand about her surgery or hospitalization.

Plaintiff testified further that Dr. Brand had treating privileges at certain hospitals within the NORTH SHORE - LONG ISLAND JEWISH HEALTH SYSTEM, and that she has access to all patients' records at these hospitals. Dr. Brand had told staff that she had a key with an access code that enabled her to log on to the electronic medical record system. According to plaintiff, Dr. Brand used that key to access plaintiff's medical record without her permission.

Plaintiff testified that while she was still employed by Dr. Brand, plaintiff spoke with Mr. William Stewart of Northwell Health's corporate compliance department to inform them of her belief that Dr. Brand had accessed her medical records without authorization. Mr. Stewart advised that an investigation of the matter would be opened. According to plaintiff, Dr. Brand fired her shortly after her March 2014 hospital visit.

*Jennifer Fromkin's testimony.* Jennifer Fromkin, Regional Compliance Director and Privacy Officer for NORTHWELL HEALTH testified as to the safeguards in place to prevent unauthorized access to patients' electronic medical records. In sum and substance, Ms. Fromkin testified that:

(i) In 2013-2014, NORTHWELL HEALTH had a written policy in place, Policy 800.42, the purpose of which was to protect the confidentiality of protected health information in accordance with HIPAA.

(ii) In 2013-2014, the only physicians who could access patients' electronic medical record were physicians employed by the health system, or those who had treating privileges at the health system.

(iii) Physicians with treating privileges needed access to the records of patients with whom they could come into contact, as a matter of patient safety.

(iv) Physicians who had treating privileges were required to receive privacy training, and were provided access to the health system's internal policies regarding privacy.

Ms. Fromkin also gave testimony regarding the investigation into the unauthorized access to plaintiff's medical record. Dr. Kathie Brand was identified as the doctor who allegedly accessed the record without permission. Dr. Brand was not an employee of the NORTH SHORE - LONG ISLAND JEWISH HEALTH SYSTEM, but she had treating privileges at NORTH

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SHORE MANHASSET and PLAINVIEW HOSPITAL. Ms. Fromkin was unaware of any prior instances in which Dr. Brand was accused of accessing patient records without consent.

*Dr. Kathie Brand's testimony.* Dr. Brand's testimony confirmed that, as a physician with treating privileges, Dr. Brand had remote access to patients' electronic medical records maintained by NORTH SHORE MANHASSET and PLAINVIEW HOSPITAL. She did access plaintiff's medical records regarding plaintiff's admission to PLAINVIEW HOSPITAL in 2013 and her treatment at NORTH SHORE MANHASSET in 2014. Dr. Brand claims that she had plaintiff's verbal permission to access the records, in order to advise plaintiff regarding her medical care, and that she did not share any information with other employees. According to Dr. Brand, she did not fire plaintiff. Rather, plaintiff never returned to the office after April 1, 2014, and Dr. Brand was informed by plaintiff's co-workers that plaintiff had gotten another job.

Dr. Brand also confirmed that she was familiar with HIPAA, and that she did receive and complete the defendants' HIPAA in-service training prior to March of 2014.

*Affidavit of David N. Hoffman, Esq.* Defendants retained David N. Hoffman, Esq. as an expert in the field of patient privacy, as well as hospital and institutional compliance with HIPAA regulations. In his sworn Affidavit, Mr. Hoffman opines generally that defendants acted in compliance with HIPAA and with the customs and standards of the healthcare industry with respect to the confidentiality of patient records. Mr. Hoffman reasons as follows:

(a) Federal HIPAA regulations do not restrict physician access to medical records of patients for treatment purposes, or require a patient's written consent for such access, because a delay in access to medical records would negatively impact patient care. Insofar as Dr. Kathie Brand had treatment privileges at NORTH SHORE MANHASSET and PLAINVIEW HOSPITAL, the governing statutory, ethical and administrative practice standards for proper patient care required that Dr. Brand be provided with timely and unimpeded access to patient medical records.

(b) Defendants had policies and procedures in place to ensure appropriate, HIPAA-compliant access to medical records. These policies and procedures were compliant with all industry standards, HIPAA requirements, and custom and practice in the healthcare industry. In particular, Mr. Hoffman highlights:

(i) Policy 800.42, which memorialized the defendants policies with regard to HIPAA and confidentiality of patient medical records, and which was made available to all physicians with treating privileges at the NORTH SHORE - LONG ISLAND JEWISH HEALTH SYSTEM;

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(ii) that defendants provided training to every physician who held treating privileges regarding HIPAA regulations and standards of confidentiality and privacy; and

(iii) that defendants restricted medical records access to only those physicians with treating privileges, and other clinicians, who had completed the above-referenced training and had been assigned a username and password. Such physicians were issued an electronic token containing certain credentials and a numerical code which had to be entered in order to access the records, and were required to sign a confidentiality attestation as part of the onboarding process.

Mr. Hoffman also notes that there was no evidence that defendants had knowledge or were on notice prior to the events in question that Dr. Kathie Brand ever improperly accessed, or would have accessed, patient medical records without authorization in violation of HIPAA.

In opposition, plaintiff argues that defendants fail to show *prima facie* entitlement to judgment as a matter of law because: (1) they did not put forth any evidence or argument that they have not violated plaintiff's medical privilege; (2) their proof is insufficient to demonstrate that defendants were not negligent in allowing Dr. Brand access to plaintiff's medical record.

With respect to the FIRST cause of action predicated upon allegations that defendants violated HIPAA and Section 18 of the New York Public Health Law, the Court finds that defendants have established, *prima facie*, a right to the relief sought. HIPAA does not create a private right of action for a violation of its confidentiality provisions. *Acara v Banks*, 470 F3d 569 (5<sup>th</sup> Cir. 2006); *Warren Pearl Const. Corp. v Guardian Life Ins. Co. of America*, 639 FSupp2d 371 (SDNY 2009); *Romanello v Intesa Sanpaolo S.p.A.*, 97 AD3d 449 (1<sup>st</sup> Dept. 2012). NY Public Health Law §18 does not apply. This section deals primarily with ensuring a patient's access to his or her own medical records. Subsection (12) provides that health care facilities, such as defendants herein, are immune from liability arising solely from granting or providing access to patient information in accordance with this section. Subsection (6) imposes certain requirements on disclosure to third persons, but by its terms, does not apply to disclosure to practitioners or other personnel employed by or under contract with the facility.

Plaintiff's opposition does not address this issue. Accordingly, it is deemed conceded. *Kuehne & Nagel v Baiden*, 36 NY2d 539 (1975); *Steffan v Wilensky*, 150 AD3d 419 (1<sup>st</sup> Dept. 2017); *Brown v George*, 138 AD3d 466 (1<sup>st</sup> Dept. 2016); *McNamee Const. Corp. v City of New Rochelle*, 29 AD3d 544, 545-546 (2d Dept. 2006); *Failla v Amodeo*, 220 AD2d 965 at n.3 (3d Dept 1996).

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With respect to the SECOND cause of action, defendants have made a *prima facie* showing that they cannot be held vicariously liable for Dr. Brand's actions because she is not their employee. See *St. Andrews v Scalia*, 51 AD3d 1260 (3d Dept. 2008). Further, they have demonstrated that plaintiff's claim is not in the nature of medical malpractice. *Weiner v Lenox Hill Hosp.*, 88 NY2d 784 (1996). Plaintiff does not address, and effectively concedes, these issues.

The SECOND cause of action includes an allegation that defendants violated plaintiff's medical privilege. Neither the Complaint, nor the Bill of Particulars is clear as to what this allegation refers. The purported violation is alleged as one of a list of violations constituting negligence on the part of defendants.<sup>1</sup> Nowhere does the plaintiff refer to the physician-patient privilege codified in CPLR §4504. Not until her response to the instant motion, does plaintiff clarify that her allegation refers to a breach of the statutory physician-patient privilege. Accordingly, defendants' failure to specifically address this allegation does not defeat their *prima facie* case.

Under CPLR §4504, a viable cause of action exists when a patient's medical information is disseminated to third parties without the patient's consent. *Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 (2016). The elements of a cause of action for breach of physician-patient confidentiality are: (1) the existence of a physician-patient relationship; (2) the physician's acquisition of information relating to the patient's treatment or diagnosis; (3) the disclosure of such confidential information to a person not connected with the patient's medical treatment, in a manner that allows the patient to be identified; (4) lack of consent for that disclosure; and (5) damages. *Id.*, at 53-54.

At bar, plaintiff does not allege, let alone demonstrate, an intentional or affirmative act of disclosure on the part of defendants. Nor does plaintiff cite any authority for the proposition that a cause of action for breach of the physician-patient privilege may be sustained on a strict liability basis – that is, solely on the basis that the patient's confidential information wound up in

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<sup>1</sup> "The defendants, and each of them, were careless, reckless and negligent in causing, allowing and permitting the plaintiffs medical records to be accessed without her authorization; in violating Section 18 of the New York Public Health Law; in violating the Health Insurance Portability and Accountability Act; in violating the Plaintiff's medical privilege and in failing to maintain reasonable and appropriate administrative, technical, and physical safeguards to prevent intentional or unintentional use or disclosure of the plaintiffs protected information." Supplemental Verified Bill of Particulars, ¶ 9 (*NYSCEF Doc. 26*).

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the wrong hands, without any culpable conduct on the part of defendants. At minimum, such cause of action appears to require proof of negligence on the part of the defendant.

The Court finds that the defendants in this case have demonstrated, *prima facie*, that they were not negligent in maintaining the confidentiality of patients' electronic medical records. The Court finds that the opinion of defendants' expert, and the evidence upon which it was based, adequately demonstrates that defendants took reasonable measures to secure patients' medical records, including limiting access to such records and providing written policies and training to authorized users with respect to HIPAA compliance and standards of confidentiality and privacy. Moreover, there is no evidence that defendants were on notice of any potential misuse of access to patient information prior to the incidents alleged here.

The Court finds further that plaintiff has failed to raise a triable issue of fact in this regard. Notably, plaintiff provides no alternative standard upon which to assess defendants' practices, nor any authoritative statement of what defendants could or should have done further to protect plaintiff's medical information. Accordingly, the Court finds that both the negligence and breach of physician-patient privilege claims cannot be sustained.

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein. Based upon the foregoing, it is


**ORDERED**, that defendants' motion for an Order pursuant to CPLR §3212, granting summary judgment in their favor, thereby dismissing the Complaint in its entirety, is *granted*.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: October 28, 2019  
Mineola, New York

ENTER:



Hon. Robert A. Bruno, J.S.C.

**ENTERED**  
NOV 06 2019  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE