

**Almonte v Shaukat**

2020 NY Slip Op 30719(U)

March 4, 2020

Supreme Court, New York County

Docket Number: 805363/2017

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

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JAHAIRA ALMONTE,

Plaintiff,

- against -

NADIA SHAUKAT, M.D., FABIENNE VARAS, R.N.,  
NEW YORK-PRESBYTERIAN/QUEENS, NEW  
YORK-PRESBYTERIAN HEALTHCARE SYSTEM,  
INC., EMCARE, INC., EMCARE PHYSICAL  
PROVIDERS, INC., and MONICA ROGAN, P.A., and  
QUEENS EMERGENCY MEDICAL ASSOCIATES,  
PLLC,

Defendants.  
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Index No.  
805363/2017

**DECISION  
and ORDER**

Mot. Seq. 3

HON. EILEEN A. RAKOWER, J.S.C.

Presently before the Court is Plaintiff Jahaira Almonte’s (“Plaintiff”) motion, pursuant to CPLR § 3403(a)(6), seeking a special preference for an expedited trial on the grounds that Plaintiff is terminally ill, and the terminal illness is a result of the conduct, culpability, and negligence of Defendants. Defendants oppose. No reply is submitted.

Plaintiff commenced this medical malpractice action by Summons and Complaint on October 4, 2017 against Defendants, Nadia Shaukat, M.D., Fabienne Varas, R.N., New York-Presbyterian/Queens, and New York-Presbyterian Healthcare System, Inc. Plaintiff alleges that Defendant’s failed to timely recognize and properly treat Plaintiff’s breast cancer on February 27, 2016 continuing through and including March 24, 2017. Plaintiff alleges that as a result of the malpractice, Plaintiff’s cancer has metastasized to the brain, liver, and lungs. Defendants, Nadia Shaukat (“Shaukat”), M.D., Fabienne Varas, R.N. (“Varas”), New York-Presbyterian/Queens (“Presbyterian/Queens”), and New York-Presbyterian Healthcare System Inc. (“Presbyterian Healthcare System”), interposed their Answers on October 27, 2017, December 8, 2017.

On April 16, 2018, Plaintiff filed a Notice of Motion to amend the Complaint to include Defendants, EMCARE, Inc. (“EMCARE”), EMCARE Physical

Providers, Inc. (“EMCARE Physical Providers”) and Monica Rogan, P.A. (“Rogan”). On June 14, 2018, this Court issued an Order granting Plaintiff’s motion deeming the Supplemental Summons and Complaint timely filed and served and amending the caption to include Defendants, EMCARE, EMCARE Physical Providers, and Rogan. Varas, Presbyterian/Queens, Presbyterian Healthcare System and Shaukat served and filed Verified Amended Answers on June 28, 2018 and July 16, 2018. EMCARE, EMCARE Physical Providers, and Rogan interposed their Answers on August 31, 2018.

On December 6, 2018, Plaintiff filed a Notice of Motion to amend the Complaint to include Defendant Queens Emergency Medical Associates, PLLC (“Queens Emergency”). On January 8, 2019, this Court issued an Order granting Plaintiff’s motion deeming the Second Supplemental Summons and Second Amended Complaint timely filed and served and amending the caption to include Queens Emergency.

On January 14, 2019, a Stipulation was so Ordered by this Court, which discontinued all claims against EMCARE, EMCARE Physical Providers and Rogan. On January 8, 2020, Plaintiff filed the Note of Issue.

#### Parties’ Contentions

Plaintiff argues that she is entitled to a Special Preference because she has a terminal illness which was the result of the “conduct, culpability, and negligence of Defendants.” Plaintiff argues that the purpose of CPLR § 3403(a)(6) “is to afford a terminally ill party a measure of financial comfort in his/her remaining years and to further [e]nsure ability to personally testify in the action.”

Varas, Presbyterian/Queens and Presbyterian Healthcare System oppose, stating that Plaintiff has already received an automatic trial preference pursuant to CPLR § 3403(a)(5), because the proceeding is a medical malpractice action. Varas, Presbyterian/Queens and Presbyterian Healthcare System contend that Plaintiff has not demonstrated that she “is terminally ill and” has not demonstrated “that such terminal illness is a result of the conduct, culpability or negligence of the defendant.” Varas, Presbyterian/Queens and Presbyterian Healthcare System contends that the “correspondence” from Padjama Bojanapally, M.D. (“Dr. Bojanapally”), Plaintiff’s Hematologist/Oncologist, states that Plaintiff is “clinically stable” and does not state, affirm or duly swear that “Plaintiff’s breast cancer was allegedly caused by the Defendants.”

Shaukat asserts that Plaintiff must submit affidavits and records “setting forth (1) prima facie the defendant’s culpability; (2) that within a reasonable degree of

medical certainty the exposure in question can and did cause her type of terminal cancer or other terminal illness; and (3) that plaintiff will not survive the normal calendar congestion notwithstanding the fact that she has a (*sic.*) terminal cancer or some other illness” pursuant to CPLR § 3403. Shaukat argues that the unsown correspondence by Dr. Bojanapally fails to state that Plaintiff has a terminal illness that was suffered as a result of the alleged malpractice by Defendants. Shaukat further argues that the correspondence was dated several months ago.

Rogan and Queens Emergency “fully adopt and incorporate by reference herein the law, arguments and analysis set forth in” Defendants’ oppositions.

### Trial Preference

CPLR § 3403 provides in relevant part:

- (a) Preferred cases. Civil cases shall be tried in the order in which notes of issue have been filed, but the following shall be entitled to a preference:

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- (5) an action to recover damages for medical, dental or podiatric malpractice.  
(6) an action to recover damages for personal injuries where the plaintiff is terminally ill and alleges that such terminal illness is a result of the conduct, culpability or negligence of the defendant.

A Plaintiff is not automatically entitled to the granting of more than one trial preference per action. *Green v. Vogel*, 144 A.D.2d 66 [2d Dept. 1989]. A trial court has “the broad latitude granted by the Uniform Rules for the New York State Trial Courts and in the exercise of sound judicial discretion [t]o facilitate the prompt trial of those actions which present extraordinary or exceptional circumstances in order to further the ends of justice.” *Green*, 144 A.D. 2d at 67.

“Pursuant to CPLR 3403(a)(6), a trial preference may be granted in an action to recover damages for personal injuries where the plaintiff is terminally ill and alleges that such terminal illness is a result of the conduct, culpability or negligence of the defendant.” *Belfer v. Travelers Ins. Co.*, No. 100603/11, 2013 WL 9863349, at \*1 [Sup Ct, New York County 2013]. “A trial preference may also be granted in an action in which the interests of justice will be served by an early trial. (CPLR 3404[a][3]).” *Id.* “When analyzing whether the interests of justice apply, a

preference should not be granted in a personal injury action unless there is a persuasive showing of destitution or probability of death before trial (Siegel, NY Prac §373 [5th ed]), in which case the courts require ‘an unreserved and unequivocal affidavit by the physician . . . and the opinion of the physician must be supported by credible medical facts’ (*Dodumoff v Lyons*, 4 AD2d 626 [1st Dept 1957]).” *Id.* The plaintiff bears the burden of establishing a right to a preference, by submitting unequivocal proof. *Id.*

### Discussion

Plaintiff, who is already entitled to a trial preference based on the nature of this action, has failed to show why an additional trial preference is also necessary. In seeking an additional trial preference, Plaintiff has only provided the Court with a “correspondence” from Dr. Bojanapally, Plaintiff’s Hematologist/Oncologist dated September 26, 2019. While the “correspondence” states that the breast cancer has metastasized to her brain, liver and lungs, Dr. Bojanapally further states that Plaintiff “[a]t this time is clinically stable.” Plaintiff has not submitted an affidavit by a physician but instead provides a “correspondence” which fails to state that Plaintiff has a terminal illness that was suffered as a result of the alleged malpractice by Defendants and that there is a probability of death before trial. Therefore, Plaintiff’s motion is denied.

Wherefore, it is hereby

ORDERED that Plaintiff Jahaira Almonte’s Motion for an additional trial preference is denied; and it is further

ORDERED that the parties are to appear for a pre-trial conference on April 7, 2020 at 9:30 AM in Part 6.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: MARCH 11, 2020



Eileen A. Rakower, J.S.C.