

**Scarola v Rothar**

2021 NY Slip Op 33996(U)

October 20, 2021

Supreme Court, Nassau County

Docket Number: Index No. 608513-2017

Judge: Jerome C. Murphy

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

PRESENT:

HON. JEROME C. MURPHY,  
Justice.

ELIZABETH SCAROLA, as Administrator  
of the Estate of ANTONIO SCAROLA,  
deceased, and ELIZABETH SCAROLA,  
Individually,

Plaintiffs,

-against-

JOHN F. ROTHAR, M.D., SALISBURY  
MEDICAL PRACTICE, PC., JOHN C.  
PETERS, M.D., and PROHEALTH CARE  
ASSOCIATES, LLP,

Defendants.

TRIAL/IAS PART 7

Index No.: 608513-2017  
Motion Seq # 001 & 002  
Motion Date 8-26-2021

DECISION & ORDER

The following papers were read on this motion:

<u>Motion Sequence 001</u>	
Notice of Motion, Affirmation and Exhibits.....	1
Memorandum of Law in Support.....	2
Affirmation in Reply.....	3
 <u>Motion Sequence 002</u>	
Notice of Cross-Motion, Affirmation and Exhibits.....	1

PRELIMINARY STATEMENT

In Motion Sequence 001, Defendants, seek an Order: (I) Pursuant to CPLR §3212 granting summary judgment in favor of defendant John C. Peters, M.D. (Hereinafter “Dr. Peters”) and dismissing the verified complaint as against Dr. Peters; and (II) Deleting Dr. Peters from the caption; and (III) Granting Dr. Peters leave to enter judgment with the Clerk in his

favor and against the plaintiff; and (IV) For and other and further relief as to the Court may seem just and proper. Opposition and reply have been submitted.

In Motion Sequence 002, Plaintiffs see an order precluding the Defendants, John F. Rothar, M.D., Salisbury Medical Practice, P.C. and Prohealth Care associates, LLP, after adjudication of the underlying summary judgment motion, from asserting the benefits fo CPLR Article 16 with respect to acts or omissions of the Defendant, John Peters, M.D., in the event he is awarded summary judgment, and for such other and further relief as this Court deems just and proper.

#### BACKGROUND & DISCUSSION

The plaintiffs in this action seeks to recover damages for, inter alia, medical malpractice. They allege that the defendants' failure to diagnose and treat her husband, the decedent Antonio Scarola's cardiovascular condition lead to his untimely death on July 19, 2016 as the result of cardiosclerosis. The plaintiffs allege that Dr. Peters departed from good and accepted standards of medical care by failing to order a stress test for the decedent, failing to adequately consider his health history, failing to monitor his medical care, and incorrectly performing his echocardiogram on September 3, 2015. They also allege that Dr. Peters acted negligently by failing to have an informed consent discussion with the decedent prior to the procedure.

“ ‘In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries’ ” (*Maestri v Pasha*, 2021 WL 4558408 [2d Dept 2021], quoting *Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011]; citing *Assunta v Rubin*, 189 AD3d 1321, 1322–1323 [2d Dept 2020]). “ ‘A defendant seeking summary judgment in a medical malpractice action must make a prima facie showing either that he or she did not depart from the accepted standard of care or that any departure was not a proximate cause of the plaintiff's injuries’ ” (*Maestri v Pasha*, 2021 WL 4558408 [2d Dept 2021], quoting *M.C. v Huntington Hosp.*, 175 AD3d 578, 579 [2d Dept 2019], citing *Assunta v Rubin*, 189 AD3d at 1323; *Stukas v Streiter*, 83 AD3d at 24). “Once this showing has been made, the burden shifts to the plaintiff to rebut the defendant's prima facie showing with evidentiary

facts or materials so as to demonstrate the existence of a triable issue of fact” (*Assunta v Rubin*, 189 AD3d at 1323; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Stukas v Streiter*, 83 AD3d at 30).

In support of his motion, Dr. Peters has submitted the affirmation of internist and cardiologist Dr. Malcolm Phillips. Having reviewed the pertinent medical and legal records, Dr. Phillips opines to a reasonable degree of medical certainty as follows:

Dr. Phillips opines that it is common in the medical field for cardiologists who are specialists in reading echocardiograms to review them for other physicians and issue a report of their findings. Phillips opines that this practice does not rise to the level of a consultation since the specialized physician who reviews the patient’s echocardiogram does not meet with or speak to the patient nor does he perform a comprehensive analysis of his health condition. Dr. Phillips opines that a cardiologist performing this task is not required to follow up with the patient, review their history, obtain their medical records, recommend further tests or communicate with the patient in any way. Per both Dr. Peters and Dr. Rothar’s testimony at their examinations-before-trial, this is precisely the relationship that existed between Dr. Peters and the decedent. Dr. Peters’ only responsibility here was to read the decedent’s cardiogram and to reasonably interpret it vis a vis Dr. Rothar and convey his opinion of it to Dr. Rothar. Dr. Phillips further opines that Dr. Peters’ interpretation of the decedent’s echocardiogram was not inaccurate.

“ [L]ack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence’ ” (*Xiao Yan Ye v Lam*, 191 AD3d 827, 28 [2d Dept 2021] quoting *Jolly v Russell*, 203 AD 527, 528 [2d Dept 1994]; citing *Godel v Benjy Goldstein and George Freud, D.D.S., PLLC*, 155 AD3d 939, 941 [2d Dept 2017]). “To establish a cause of action for malpractice based on lack of informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to inform the patient of reasonably foreseeable risks and benefits associated with the treatment, and the alternatives thereto, that a reasonable medical practitioner would have disclosed under similar circumstances, (2) that a reasonably prudent patient in the same position would not have

undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury” (*Xiao Yan Ye v Lam*, 191 AD3d at 829, citing Public Health Law § 2805-d; *Schussheim v Barazani*, 136 AD3d 787, 789 [2d Dept 2016]).

As for the lack of informed consent, Dr. Phillips opines that Dr. Peters did not order the decedent’s echocardiogram, therefore, he had no duty to obtain any consent for it. He further opines that in any event, a “non-invasive transthoracic echocardiogram, which is what the decedent underwent...does not carry any risk,” therefore, disclosure and informed consent were not required. He further opines that a reasonably prudent person in the decedent’s position would have undergone the procedure. Dr. Phillips opines that Dr. Peters could not have negligently performed the decedent’s echocardiogram because he did not perform it. Finally, he opines that there is not a scintilla of evidence that Dr. Peters’ echocardiogram report contributed to the decedent’s demise.

Dr. Peter has established his entitlement to summary judgment dismissing the causes of action sounding in medical malpractice and lack of informed consent against him. The burden shifts to the other parties to establish the existence of an issue of fact. The plaintiffs have acknowledged that the decedent was not treated by Dr. Peters and that there are no grounds for opposing his motion for summary judgment.

The plaintiffs’ motion to preclude defendants John F. Rothar, M.D., Salisbury Medical Practice, P.C. and Prohealth Care Associates, LLP, from limiting their liability pursuant to CPLR Article 16 based on the acts or omissions of the defendant Dr. Peters is granted, without opposition. No cross-claims have been advanced by any of the remaining defendants against Dr. Peters and they have not opposed his motion for summary judgment. (See, *Johnson v Peloro*, 62 AD3d 955, 957 (2d Dept 2009); see also, *Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 256 (2d Dept 2012) (“if [defendant’s] cross motion were treated by the parties and the Supreme Court as one for summary judgment, then the functional equivalent of a trial has been held, and [the defendant] cannot be assessed liability for the plaintiffs’ damages to any degree—not even by the application of CPLR §1602 [1]”).

In conclusion, the Defendant Dr. Peters’ motion for summary judgment dismissing the

complaint against him is granted in its entirety: The complaint against Dr. Peters is dismissed; “Dr. Peters” is deleted from the caption; and, Dr. Peters is granted leave to enter judgment with the Clerk in his favor and against the plaintiffs.

The plaintiffs’ motion for an order precluding defendants John F. Rothar, M.D., Salisbury Medical Practice, P.C. and Prohealth Care Associates, LLP, from asserting the benefits of CPLR Article 16 with respect to the acts or omissions of defendant Dr. Peters is granted in its entirety and the defendants John F. Rothar, M.D., Salisbury Medical Practice, P.C. and Prohealth Care Associates, LLP, are barred from asserting the benefits of CPLR Article 16 with respect to the acts or omissions of defendant Dr. Peters.

To the extent that requested relief has not been granted, it is denied.

This constitutes the Decision and Order of the Court.

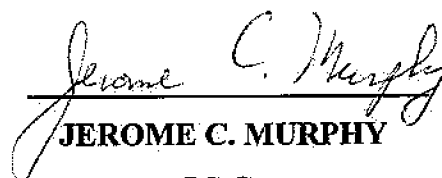
Dated: Mineola, New York  
October 20, 2021.

**ENTER:**

**ENTERED**

**Oct 21 2021**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

  
**JEROME C. MURPHY**

**J.S.C.**