Davis v Alarcon
2022 NY Slip Op 30615(U)
February 24, 2022
Supreme Court, New York County
Docket Number: Index No. 805042/2017
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** *Justice* **PART** **56M**

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MICHAEL DAVIS and ALYSSA DAVIS,

Plaintiffs,

- v -

GABRIEL ALARCON, D.O., COLUMBIA MEMORIAL FAMILY CARE-VALATIE, THE COLUMBIA MEMORIAL HOSPITAL, LISA GALATI, M.D., STEVEN PARNES, M.D., UNIVERSITY EAR NOSE & THROAT OF NORTHEASTERN NEW YORK, LLP, MICHAEL KORTBUS, M.D., HUDSON ENT, P.C., TODD DOYLE, M.D., NEW YORK ONCOLOGY HEMATOLOGY, P.C., ALBANY MEDICAL CENTER HOSPITAL, and MEMORIAL HOSPITAL FOR THE TREATMENT OF CANCER AND ALLIED DISEASES,

Defendants.

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INDEX NO. 805042/2017

MOTION DATE 11/15/2021

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 334, 339, 344, 349, 366, 371, 376, 381, 382

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages for medical malpractice based upon departures from good and accepted medical practice and lack of informed consent, the defendants Lisa Galati, M.D., Steven Parnes, M.D., and Albany Medical Center Hospital (AMCH) together move pursuant to CPLR 3212 for summary judgment dismissing the complaint in its entirety insofar as asserted against Parnes and the second cause of action, alleging lack of informed consent, insofar as asserted against Galati and AMCH. The movants also seek summary judgment dismissing so much of the first cause of action (departure from good practice) and third cause of action (loss of consortium) as sought to recover from AMCH based on its vicarious liability for Parnes's negligence. The motion is granted, without opposition.

As relevant to the claims asserted against Galati, Parnes, and AMCH, on May 11, 2015, the plaintiff Michael Davis (hereinafter the patient), a man who was then 40 years of age, presented to internist Gabriel B. Alarcon, D.O., at Columbia Memorial Health with complaints hoarseness since the previous winter. Alarcon referred plaintiff to an otolaryngologist, Michael Kortbus, M.D., who examined the patient on May 20, 2015 at Hudson ENT. The patient reiterated his complaints of slight throat soreness since January 2015, as well as slight pressure in his ears and snoring. Kortbus performed a flexible fiberoptic laryngoscopy, which identified a large fungating mass comprising the entire left vocal cord, and advised the patient of the need for a direct microlaryngoscopy (DML) with biopsy. Kortbus performed a DML with tumor stripping at Columbia Memorial Hospital, which revealed the existence of left glottic squamous cell carcinoma. On June 1, 2015, the patient returned to Kortbus's office, denying the existence of any symptoms. Kortbus referred plaintiff to Galati, a surgical oncologist, and recommended that the patient undergo a PET scan and consult with a gastroenterologist.

On June 8, 2015, the patient underwent at PET scan at Columbia Memorial Hospital, which raised concerns that the patient was exhibiting a neoplastic process in the left anterior aspect of the larynx with nodularity. On June 26, 2015, the plaintiff presented to Galati at AMCH's ENT department for evaluation for possible surgical intervention. A flexible nasopharyngolaryngoscope (FNPLS) revealed that the larynx had a fungating mass along the entire length of the left vocal cord, with equal movement of the arytenoids. Galati diagnosed a T2N0M0 carcinoma of the larynx, and noted the presence of headache, insomnia, difficulty swallowing, hoarseness, and sinus complaints. She discussed the treatment option of laryngeal preservation surgery with the patient, but recommended radiation therapy instead to preserve the vocal cords. She thus referred the plaintiff to radiation oncologist Todd Doyle, M.D., who saw the patient at New York Oncology Hematology (NYOH) later that day for a radiation oncology consultation. Doyle recommended definitive radiation therapy alone.

Between July 2015 and August 2015, the patient underwent a course of radiation treatment. The patient followed up with Doyle and Galati after completion of the radiation therapy.

On October 16, 2015, the patient had a follow-up visit with Galati. On a scope examination of his larynx, Galati identified a very deep ulceration running the length of the left vocal cord. Galati recommended a thorough examination under anesthesia with jet ventilation and a biopsy of any ulceration. She scheduled the examination for November 17, 2015.

On November 12, 2015, only five days prior to the scheduled examination and biopsy, the patient presented to AMCH's ENT department for an emergency visit, and was seen by Parnes, who reviewed the patient's medical history, both as reported by the patient and as contained in the AMCH medical chart. During this visit, the patient complained of left ear pain for two days, and expressed concern about a recurrence of his cancer despite his prior radiation therapy. His voice was very hoarse, and his family reported many secretions from the nose and sinuses. On examination, the patient evinced a click caused by left-side temporomandibular joint dysfunction (TMJ), and a little inflamed erythema on the neck, but no obvious masses. A hypopharyngeal exam showed edema of the arytenoids and the aryepiglottic folds. Parnes noted that could not see the left vocal cord, and that there was not much movement on the left side. He further noted that the patient:

> "is having a biopsy by Dr. Galati for problems with his left vocal cord. He has a vocal cord cancer that [Doyle] treated with radiation and there is concern it may be recurrence. His voice is very hoarse, which has been for quite a while and also family says he is having a lot of secretions from his nose and sinuses."

Parnes himself did not treat the patient's cancer with radiation.

Parnes explained at his deposition that there was no reason to send the plaintiff

to the hospital for evaluation at this visit because he did not observe any issues or acute distress that would necessitate a hospitalization, such as airway issues, bleeding, or infections. Parnes advised the patient to increase his intake of fluids, avoid caffeine, use Mucinex and nasal sprays to help his symptoms, and to self-treat for TMJ with heat, analgesics, soft diet, and a bite block. Parnes also told the patient to go ahead with the biopsy scheduled for November 17, 2015. On that later date, the patient was admitted to AMCH for a microdirect laryngoscopy and biopsy of the left vocal cord lesion. Galati performed that procedure on that date. She noted that, intra-operatively, an irregular white, exophytic lesion was seen to be nearly replacing the left true vocal cord, with extension into the subglottis. Pathology of the left vocal cord revealed invasive squamous cell carcinoma that was moderately differentiated.

The plaintiff underwent a total laryngectomy with radical neck dissection at Memorial Sloan Kettering on December 16, 2015.

In their initial bill of particulars as to each of the movants, the plaintiffs objected to any request that they elucidate what conduct constituted a departure from good practice, asserting that those requests improperly sought expert opinions. In their first supplemental bill of particulars, the plaintiffs alleged that, due to the movants' negligence, the patient suffered from invasive squamous cell carcinoma of the throat, laryngeal edema, and vocal cord lesions, and was compelled to undergo a laryngectomy and thyroidectomy, with concomitant bilateral neck dissections, bilateral tracheo-esophageal groove dissections, free flap reconstruction, rectus abdominus myocutaneous free tissue transfer, and pharyngoesophageal repair with skin island of rectus abdominus flap. They claimed that the patient required a tracheostomy, and was left with surgical scarring from all of the procedures.

In their first supplemental bill of particulars, the plaintiffs alleged that the movants failed properly to care for the patient's tumor and abscesses between June 26, 2015, and November 25, 2015. They asserted that the movants failed to advise the patient of the proper protocol for

radiation treatment and failed to obtain his fully informed consent to the procedures that they ultimately performed. The plaintiffs further asserted that the movants failed properly to diagnose the patient's cancer and engaged in an inordinate delay before commencing treatment. They also claimed that the movants failed properly to treat the patient's cancer and abscesses inasmuch as they administered improper dosages of radiation for an incorrect period of time and prescribed incorrect medications. The plaintiffs asserted that the radiotherapy administered by the movants was insufficiently aggressive, that the procedures that were performed were contraindicated, and that the movants should have consulted with and retained other specialists to treat the patient. The plaintiffs' second, third, and fourth supplemental bills of particulars essentially reiterated most of these allegations, adding assertions that the movants failed to provide proper post-therapeutic care and treatment. In their amended bill of particulars, the plaintiffs alleged that the movants were further negligent in failing immediately to admit the patient into the hospital November 12, 2015 and failing to arrange for consultations with radiation oncologists and surgeons on that date as well. The plaintiffs effectively alleged that, had the movants treated the patient's cancer in a more timely and aggressive fashion, he would not have suffered a recurrence of his cancer after the radiation therapy, and would not have had to undergo a laryngectomy and thyroidectomy.

In support of their motion, the movants submitted the pleadings, the plaintiffs' several bills of particulars, relevant medical records, and the expert affirmation of their retained otolaryngologist, Michael Weiss, M.D. Dr. Weiss's affirmation addressed only the specific allegations made by the plaintiffs against Parnes, who was employed by AMCH's ENT department.

Dr. Weiss noted that the patient was already being seen by Galati for glottic squamous cell carcinoma, a form of larynx cancer, when he presented to Parnes on November 12, 2015 with complaints of left ear pain, and that he was already scheduled for a diagnostic biopsy of the vocal cord five days later, on November 17, 2015. Both Dr. Weiss and Parnes asserted that the

patient did not see Parnes on this one occasion to treat or manage his existing throat cancer, but only to assess acute otic symptomatology. In any event, as Dr. Weiss explained it,

> "[g]iven that the appropriate diagnostic tool for the plaintiff's cancer was a diagnostic biopsy, which requires obtaining medical clearance, space at an ambulatory surgery center, and involvement of an anesthesiologist, Dr. Parnes acted entirely within the standard of care when he advised the plaintiff to keep his biopsy appointment five days later. Furthermore, it is my opinion within a reasonable degree of medical certainty, that the alleged five day delay in diagnosis of a recurrence of vocal cord in no way changed the staging, treatment plan, prognosis, or chance of cure of plaintiff's glottic squamous cell carcinoma cancer."

After reciting the patient's treatment history with Galati and Doyle, Weiss opined that

> "Parnes performed an appropriate examination of the plaintiff on November 12, 2015. Ear pain is a non-specific complaint which could be attributable to many different conditions. An ENT physician must perform a physical examination involving an examination of the patient's ears, nose and throat. Here, Dr. Parnes documented that he could hear the plaintiff was very hoarse. Dr. Parnes then performed a physical examination. The plaintiff's ear canals and eardrums were normal. He had a normal tuning fork test indicating that he could hear. There was a positive finding of a very obvious click on the left TMJ. The plaintiff's oral cavity and oropharynx appeared normal. His neck had a little inflamed erythema, but there were no palpable masses. Dr. Parnes then performed a fiberoptic endoscopy which revealed a normal nasopharynx. The hypopharyngeal exam revealed a lot of edema of his arytenoids and the aryepiglottic folds, which were moving. The left vocal cord was not visible and Dr. Parnes could not see much movement on that side. Accordingly, it is evident from the testimony and records that Dr. Parnes performed a thorough external and internal exam of the plaintiff's ear, nose and throat. It is therefore my opinion within a reasonable degree of medical certainty that the examination of the plaintiff by Dr. Parnes on November 12, 2015 was appropriate and adhered to all applicable standards of care."

Weiss concluded that, inasmuch as the patient's condition upon examination was neither life threatening nor immediately threatening to any bodily organ, Parnes did not depart from good and accepted medical practice by declining to order the patient's immediate admission into the hospital for further treatment. He further opined that the five-day wait between the patient's appointment with Parnes and the already scheduled biopsy would not have had any affect on the outcome of the patient's cancer or the necessity of a laryngectomy or thyroidectomy.

> "To the extent the plaintiff's ear pain stemmed from his cancer, the appropriate work up would require a biopsy. Therefore, it is my opinion within a reasonable degree of medical certainty that Dr. Parnes appropriately relied on the plaintiff's already-scheduled biopsy appointment for continued work up of his left ear pain

> and potential recurrence of cancer. For the plaintiff's symptoms, Dr. Parnes appropriately recommended that the plaintiff . . . increase fluids, avoid caffeine, use Mucinex, nasal sprays, heat, analgesics, soft diet and a bite block. Moreover, there is no evidence that plaintiff did not understand the need to follow-up for his scheduled biopsy on November 17, 2015, since plaintiff underwent this procedure as scheduled."

Dr. Weiss stated that, during this one appointment, Parnes was not obligated to order any tests or studies, such as radiology scans, laboratory tests, or a throat biopsy. "The diagnostic biopsy, which had already been planned, would be the gold standard for determining whether the plaintiff's cancer had recurred." Moreover, Dr. Weiss explained that, even if radiology or laboratory tests were ordered and performed showing potential recurrence, a biopsy would have been required to confirm the results. Inasmuch as a biopsy of this type is a procedure that is performed under anesthesia, it required the reservation of an operating room at the hospital or an ambulatory surgery center and required the assessment and involvement of an anesthesiology team. Dr. Weiss noted that this process takes longer than five days, and that it usually takes weeks to schedule it, as it is not an emergent procedure and would not have been performed as part of an emergency presentation and evaluation. Hence, Dr. Weiss concluded that a biopsy would not have been performed before the November 17, 2015 biopsy that Galati ultimately performed.

As to the plaintiffs' claim of lack of informed consent against Parnes, Dr. Weiss rendered his opinion that Parnes had no obligation to obtain an informed consent, as Parnes did not perform an invasive procedure. Dr. Weiss noted that, to the extent the plaintiffs may claim that the nose and throat scope undertaken by Parnes was an invasive procedure, there is no claim that the scope caused or contributed to any injury. Dr. Weiss also explicitly rejected the plaintiffs' claims that the five-day interval between Parnes's examination and Galati's biopsy procedure caused or contributed to the necessity of a laryngectomy or thyroidectomy. He opined that glottic squamous cell carcinoma is a slow-growing cancer that does not progress in stage or progressiveness over the course of five days. Hence, Dr. Weiss concluded that even

had Parnes insisted that a biopsy be performed on November 12, 2015, it would not have changed the necessity of performing a full laryngectomy.

The movants further contend that, inasmuch as the complaint must be dismissed against Parnes, the claims against AMCH based on its vicarious liability for Parnes's negligence must be dismissed as well. In addition, they argue that, inasmuch as none of the examinations performed or the treatment that they rendered involved an invasion of the physical integrity of the plaintiff's body, a claim based on lack of informed consent does not lie against any of them. Moreover, they further contend that, once the complaint is dismissed insofar as asserted by the patient against any one defendant, his wife's claim for loss of consortium against that defendant must fall as well.

In an affirmation, the plaintiffs' attorney expressly stated that the plaintiffs do not oppose any of the relief sought in this motion.

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc*., 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr*., 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (*see Koulermos v A.O. Smith Water Prods*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism,* 135 AD3d 458, 462 [1st Dept 2016]).

"To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury" (*Frye v Montefiore Med. Ctr*., 70 AD3d 15, 24 [1st Dept 2009]; *see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Elias v Bash*, 54 AD3d 354, 357 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp*., 10 AD3d 521, 522 [1st

Dept 2004]). A defendant physician moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice (*Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 [1986]; *Frye v Montefiore Med. Ctr*., 70 AD3d at 24) or by establishing that the plaintiff was not injured by such treatment (*see McGuigan v Centereach Mgt. Group, Inc*., 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; *see generally Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

To satisfy the burden, a defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques v Noble*, 73 AD3d at 206; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). If the expert's opinion is not based on facts in the record, the facts must be personally known to the expert and, in any event, the opinion of a defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care" (*Ocasio-Gary v Lawrence Hospital*, 69 AD3d 403, 404 [1st Dept 2010]). Stated another way, the defendant's expert's opinion must "explain 'what defendant did and why'" (*id*., quoting *Wasserman v Carella*, 307 AD2d 225, 226, [1st Dept 2003]). Furthermore, to satisfy his or her burden on a motion for summary judgment, a defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Wall v Flushing Hosp. Med. Ctr*., 78 AD3d 1043 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr*., 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept 2007]).

Once satisfied by the defendant, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (*see Roques v Noble*, 73 AD3d at

207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]). Thus, to defeat a defendant's prima facie showing of entitlement to judgment as a matter of law, a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that contains "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice" (*Alvarez v Prospect Hosp*., 68 NY2d at 325; *see Frye v Montefiore Med. Ctr*., 70 AD3d at 24). In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to preclude an award of summary judgment in a defendant's favor (*see Murphy v Conner*, 84 NY2d 969, 972 [1994]; *Frye v Montefiore Med. Ctr*., 70 AD3d at 24). Where the expert's "ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp*., 99 NY2d 542, 544 [2002]; *see Frye v Montefiore Med. Ctr*., 70 AD3d at 24). Consequently, where the parties' conflicting expert opinions are adequately supported by the record, summary judgment must be denied (*see Frye v Montefiore Med. Ctr.*, 70 AD3d at 24 *Cruz v St. Barnabas Hospital,* 50 AD3d 382 [1st Dept 2008]).

The movants established their prima facie entitlement to judgment as a matter of law dismissing the medical malpractice cause of action against Parnes that was based on his alleged departures from good and accepted medical practice. Since the plaintiffs did not submit any opposition, summary judgment must be awarded to Parnes dismissing that cause of action against him. In addition, to the extent that any of the plaintiffs' claims against AMCH are premised upon AMCH's vicarious liability for Parnes's conduct as a hospital employee (*see Hill v St. Clare's Hospital,* 67 NY2d 72, 79 [1986]), they must also be dismissed.

The elements of a cause of action for lack of informed consent are

> "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable

> medical practitioner would have disclosed in the same 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"

(*Spano v Bertocci*, 299 AD2d 335, 337-338 [2d Dept 2002]; *see Zapata v Buitriago*, 107 AD3d 977, 979 [2d Dept. 2013]). For a statutory claim of lack of informed consent to be actionable, a defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d[2]).

"A failure to diagnose cannot be the basis of a cause of action for lack of informed consent unless associated with a diagnostic procedure that 'involve[s] invasion or disruption of the integrity of the body'" (*Janeczko v Russell*, 46 AD3d 324, 325 [1st Dept 2007], quoting Public Health Law § 2805-d[2][b]; *see Lewis v Rutkovsky*, 153 AD3d 450, 456 [1st Dept 2017]). Moreover, a claim to recover for lack of informed consent cannot be maintained where the alleged injuries resulted either from the failure to undertake a procedure or the postponement of that procedure (*see Ellis v Eng*, 70 AD3d 887, 892 [2d Dept 2010]; *Jaycox v Reid*, 5 AD3d 994, 995 [4th Dept 1994]). Stated another way, a plaintiff has no cause of action to recover for lack of informed consent where "[t]he injuries allegedly sustained by plaintiff were not the result of an invasive procedure, but instead were alleged to have been the result of a negligent failure to undertake or negligent postponing of such procedure" (*Jaycox v Reid*, 5 AD3d at 995; *see Saguid v Kingston Hosp*., 213 AD2d 770, 772 [3d Dept 1995]; *Karlsons v Guerinot*, 57 AD2d 73, 82 [4th Dept 1977]).

The movants established, prima facie, that the allegations against them involved only purported failures to diagnose, failures to undertake a procedure, or undue postponement of a purportedly necessary procedure. Since the plaintiffs expressly declined to oppose the motion, summary judgment must be awarded to the movants dismissing the lack of informed consent cause of action as against all of them.

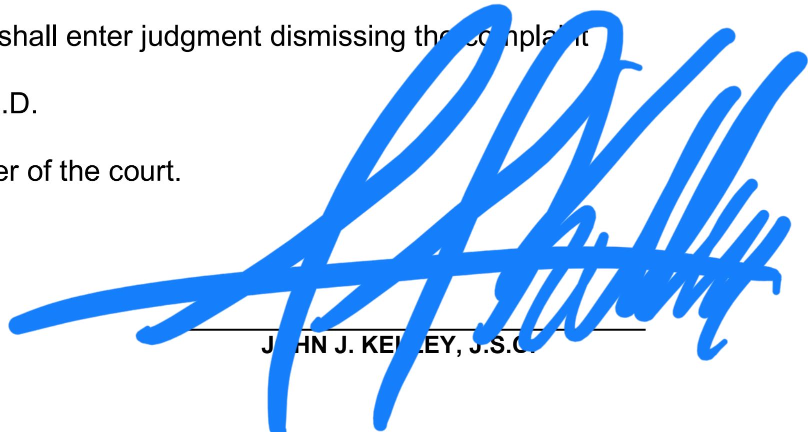
In light of the foregoing, it is

ORDERED that the motion of the defendants Lisa Galati, M.D., Steven Parnes, M.D., and Albany Medical Center Hospital is granted, without opposition, the complaint is dismissed in its entirety insofar as asserted against Steven Parnes, M.D., so much of the first and third causes of action as seeks to recover from Albany Medical Center Hospital for the negligent acts of Steven Parnes, M.D., is dismissed, and the second cause of action is dismissed insofar as asserted against Lisa Galati, M.D., and Albany Medical Center Hospital; and it is further,

ORDERED that the action is severed insofar as asserted against Steven Parnes, M.D.; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against Steven Parnes, M.D.

This constitutes the Decision and Order of the court.



2/24/2022
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE