

**Perez v Baez**

2023 NY Slip Op 31793(U)

May 16, 2023

Supreme Court, Kings County

Docket Number: Index No. 508880/16

Judge: Ellen M. Spodek

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6<sup>th</sup> day of May, 2023.

P R E S E N T:

HON. ELLEN M. SPODEK,  
Justice.

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AMALIA PEREZ, as administratrix of the estate of MOISES PEREZ, deceased,

Plaintiff,

-against-

DAYSI BAEZ, M.D.,  
FOREST HILLS HOSPITAL, and  
SERGIO MARTINEZ, M.D.,

Defendants.

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DECISION/ORDER

Index No. 508880/16

Mot. Seq. Nos. 9-10

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion, Affirmations, Memoranda of Law,  
and Exhibits Annexed \_\_\_\_\_

177-183; 185-201

Affirmations in Opposition, Memoranda of Law,  
and Exhibits Annexed \_\_\_\_\_

208-211; 213-215

Reply Affirmations and Exhibits Annexed \_\_\_\_\_

219-220; 221-222

In this action to recover damages for medical malpractice and wrongful death, defendants Sergio Martinez, M.D. (“Dr. Martinez”), and Long Island Jewish Forest Hills, a division of Long Island Jewish Medical Center, formerly known as Forest Hills Hospital, sued herein as Forest Hills Hospital (“FHH”), separately move in motion sequence (mot. seq.) 9 and 10, respectively, for an order: (1) pursuant to CPLR 3212 and CPLR 2221 (a) and (e), seeking a determination of their prior summary judgment motion in mot. seq. 7 and 6, respectively; and (2) pursuant to CPLR 3212, granting summary

judgment on the issues of liability and proximate cause. Plaintiff Amalia Perez, as the administratrix of the estate of her late husband, Moises Perez (“plaintiff”), opposes both motions.

### **Factual Background**

On July 30, 2013, plaintiff’s decedent, Moises Perez (the “patient”), accompanied by his wife, plaintiff herein, presented to FHH’s emergency room at the direction of his primary care physician, non-moving defendant Daysi Baez, M.D. (“Dr. Baez”). A day or two previously, Dr. Baez had advised the patient that his blood sodium level was dangerously low (the condition known as “hyponatremia”). The patient’s mental examination and review of systems on admission were significant for “forgetfulness,” “periods of confusion,” and “generalized weakness.” The patient, age 67 at the time, was a life-long (but tapering) smoker. A non-contrast chest CT scan, performed on the day of the patient’s admission, revealed (among other findings) a mass in his left lung’s upper lobe (the “mass”). The interpreting radiologist attributed the etiology of the mass to either cancer, an infection, or a tuberculosis exposure.<sup>1</sup> The patient was admitted to the medical service for treatment of his pre-existing hyponatremia and his newly discovered lung mass. On August 1, 2013, Dr. Martinez (the pulmonologist assigned by FHH to the patient’s care) performed a closed endoscopic biopsy of the patient’s left lung. The preliminary pathology report, issued in the afternoon of August 2, 2013, found no cancer

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<sup>1</sup> The impression section of the CT scan report stated, in relevant part, “[t]here is a cavitating mass in the left upper lobe anteriorly. . . . Findings may be the sequela of a bronchogenic carcinoma or possibly an infectious, cavitating process such as reactivation TB or a fungal infection” (FHH’s records at 163).

in the mass. In the evening of the following day, August 2, 2013, the patient was discharged from FHH, when his blood sodium level increased to the normal level. The final pathology report which was issued three days after the patient's discharge indicated that: (1) the pathology samples, on final review, were negative for cancer in the mass; (2) a "clinical correlation and possible rebiopsy if clinically feasible [was] recommended"; and (3) Dr. Martinez (who practiced outside FHH) was notified of the results of the final pathology report.

According to plaintiff's pretrial testimony, Dr. Martinez informed her and her husband that the mass was no more than a "spot" in his left lung, and that such spot was old and likely attributable to a prior contact with someone infected with tuberculosis. Because Dr. Martinez has not been deposed in this action to date (nor did he submit an affidavit in the course of this action), he has neither confirmed nor denied plaintiff's version of events.

Initially, there is a contradiction in the record as to which individual physically handed the discharge papers to the patient and his wife. According to plaintiff's pretrial testimony, an assistant to Dr. Martinez physically handed the discharge papers to the patient and his wife. Conversely, the pretrial testimony of FHH's nurse practitioner (who, together with the attendings and residents, was making rounds on the patient's floor at the time of his hospitalization and who participated in the preparation of his discharge papers) reflects that the standard operating procedure at FHH at the time was

for a bedside nurse (rather than for Dr. Martinez's assistant or for anyone else for that matter) to physically hand the discharge papers to the patient and his family.

There is a further disagreement in the record as to the content of the copy of the discharge papers which the patient and his wife received at the time of his discharge. According to FHH's copy of the discharge papers which are co-signed by the patient, and as independently corroborated by the nurse practitioner's pretrial testimony, the patient was directed to follow up with Dr. Martinez within one week following his discharge from FHH. Plaintiff, however, vehemently disputes FHH's narrative. According to plaintiff's pretrial testimony: (1) Dr. Martinez's assistant (rather than a bedside nurse) told her and the patient, at the time of his discharge, to follow up with Dr. Baez (rather than with Dr. Martinez); and (2) neither she nor the patient were made aware that he needed to follow up with Dr. Martinez following his discharge.

Plaintiff testified that after glancing at some (but not all) portions of the patient's copy of the discharge papers, she handed them all to Dr. Baez at his next post-discharge visit with her on August 5, 2013. In turn, Dr. Baez testified at her pretrial deposition that she reviewed and incorporated some of the contents of the discharge papers in her office notes for the patient, although (for reasons she could not explain) she failed to make or retain her own copy of the discharge papers in her file for the patient. Finally, plaintiff averred in her pretrial testimony that she was no longer in possession of her (and the patient's) copy of the discharge papers, thus suggesting that their copy of the discharge papers was lost.

In any event, the patient did not follow up with Dr. Martinez for the remainder of 2013 and for the entirety of 2014. Likewise, Dr. Martinez did not contact the patient for a post-discharge follow-up, nor did he perform a repeat biopsy, during that period.

On July 23, 2015, the patient (accompanied by plaintiff) presented to FHH with the chief complaints of generalized weakness, loss of appetite, and insomnia. Plaintiff informed FHH's emergency room staff that a chest CT scan had been performed at an outside facility a few days prior. Dr. Martinez, upon review of the CT scan report, told plaintiff that the patient was suffering from lung cancer. In addition, Dr. Martinez performed a repeat bronchoscopy which confirmed the radiographic finding of lung cancer. The patient's lung cancer, at the time of its discovery in July 2015, was in the advanced stage and, by then, had metastasized to his liver (among other organs). The patient was hospitalized until his discharge from FHH on August 5, 2015, and succumbed to cancer on August 29, 2015 at the age of 69.

#### **Procedural Background**

On May 26, 2016, plaintiff commenced this action to recover damages for medical malpractice and wrongful death against, as relevant herein, Dr. Martinez and FHH (collectively, "defendants"). The complaint alleged negligent acts and omissions by defendants related to the patient's hospitalizations at FHH: (1) from July 30, 2013, to August 2, 2013 (the "initial hospitalization"); and (2) from July 23, 2015 to August 5, 2015 (the "subsequent hospitalization"). After joinder of issue but before discovery was completed, defendants separately moved pursuant to CPLR 3211 (a) (5) to dismiss, as

time-barred, so much of the complaint as was based on the alleged acts of malpractice committed before November 26, 2013, inclusive of those claims that were predicated on the patient's initial hospitalization. In an order, dated August 16, 2018, the Court granted defendants' separate motions (the "statute-of-limitations order") (*see Perez v Baez*, 2018 NY Slip Op 32228[U] [Sup Ct, Kings County 2018]). Upon plaintiff's motion for leave to reargue his opposition to defendants' motions, the Court, by order dated April 5, 2019, adhered to its original determination (the "reargument-denial order") (*see Perez v Baez*, 2019 NY Slip Op 31002[U] [Sup Ct, Kings County 2019]). Plaintiff appealed the statute-of-limitations order (and, thereafter, the reargument-denial order) to the Second Judicial Department. Approximately two years later, the Second Judicial Department decided plaintiff's appeals.

In the interim, defendants separately moved for summary judgment dismissing the entirety of plaintiff's claims (*i.e.*, those related to the patient's initial hospitalization, as well as those related to his subsequent hospitalization). By short-form order, dated August 6, 2019, the Court granted defendants' motions, with the proviso that should plaintiff's claims, as predicated on the initial hospitalization, be reinstated on appeal by the Second Judicial Department, defendants would have leave to renew their respective summary judgment motions (the "summary judgment order") (NYSCEF Doc. Nos. 147-148). By order, dated October 22, 2019, the Court (in furtherance of the summary judgment order) severed the action and continued it as against the remaining defendant Dr. Baez (the "October 2019 order") (NYSCEF Doc. No. 162). By judgment, dated

November 26, 2019, the Court embodied the terms of the summary judgment order into a judgment (the “November 2019 judgment”) (NYSCEF Doc. No. 166).

On July 29, 2020, the Second Judicial Department reversed the statute-of-limitations order (as well as vacated the reargument-denial order) and reinstated plaintiff’s claims as against defendants as predicated on the initial hospitalization (*see Perez v Baez*, 185 AD3d 1062 [2d Dept 2020]).

Two years later, on July 22, 2022, the Court held a virtual conference, at which time the action was restored to active status, the October 2019 order and the November 2019 judgment were each vacated, as the consequence of the Second Judicial Department’s decision/order and the defendants were granted leave to renew their prior summary judgment motions in accordance with the summary judgment order, by no later than November 16, 2022. (NYSCEF Doc. No. 173).

Before the November 16<sup>th</sup> deadline, defendants timely renewed their prior summary-judgment motions. Plaintiff opposed, contending (based on the affirmation of her expert plaintiff’s expert Ronald M. Goldenberg, M.D who opposed the prior summary judgment motions) that her expert was unable to render his opinion as to defendants’ alleged negligence in the absence of the pretrial examinations of Dr. Martinez and FHH’s bedside nurse.

### Discussion

“A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party’s position may exist but cannot then be

stated (see CPLR 3212 [f])” (*Matter of Fasciglione*, 73 AD3d 769, 770 [2d Dept 2010]). Such is the case here, inasmuch as the pretrial depositions of Dr. Martinez and FHH’s bedside nurse had not been conducted when the prior motions for summary judgment were decided (see *Lecorps v Chaplia*, 115 AD3d 818, 818-819 [2d Dept 2014]; *Chmelovsky v Country Club Homes, Inc.*, 106 AD3d 684 [2d Dept 2013]). Therefore, the motions are denied with leave to renew upon completion of the depositions.

### Conclusion

Based on the foregoing, it is

**ORDERED** that Dr. Martinez’s and FHH’s motions in mot. seq. 9 and 10, respectively, are each denied, in the Court’s discretion, without prejudice to renew after completion of the pretrial depositions of Dr. Martinez and (if available) FHH’s bedside nurse, as more fully set forth below; and it is further

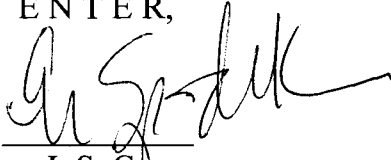
**ORDERED** that the parties shall exercise their best efforts to complete the pretrial depositions of Dr. Martinez and (if available) FHH’s bedside nurse within 90 days after electronic service of this decision/order with notice of entry by plaintiff’s counsel on the other parties’ respective counsel; and it is further

**ORDERED** that, for the avoidance of doubt, the scope of Dr. Martinez’s pretrial examination may encompass both the initial *and* subsequent hospitalizations; and it is further

**ORDERED** that within 60 days after completion of the pretrial depositions of Dr. Martinez and (if available) FHH's bedside nurse, each defendant may renew their prior motion for summary judgment, as supplemented by the additional pretrial testimony as directed herein; and it is further

**ORDERED** that plaintiff's counsel shall electronically serve a copy of this decision/order with notice of entry on the other parties' respective counsel and shall electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision/order of the Court.

ENTER,  
  
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J. S. C.  
HON. ELLEN M. SPODEK

KINGS COUNTY CLERK  
FILED  
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