

Ming Zhang v Mani

2024 NY Slip Op 33416(U)

September 20, 2024

Supreme Court, Kings County

Docket Number: Index No. 506256/20

Judge: Ellen M. Spodek

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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 Civic Center, Brooklyn, New York, on the 20 day of September, 2024.

P R E S E N T:

HON. ELLEN M. SPODEK,

Justice.

-----X
MING ZHANG, as Executrix of the Estate of
GEORGE MEROLLE, deceased, and
MING ZHANG, Individually,

Plaintiffs,

- against -

MATHEW MANI, MANISHA RAYAVARAPU,
AMBOY MEDICAL PRACTICE, P.C.,
GAIL YARMISH, STATEN ISLAND UNIVERSITY HOSPITAL,
NORTHWELL HEALTH, INC., VIMALA SIM,
PREETI SARAN, RAKESH KUMAR KOUL, RAFI YUSUF, and
THE NEW YORK HOTEL TRADES COUNCIL AND HOTEL
ASSOCIATION OF NEW YORK CITY, HEALTH CENTER, INC.,
a/k/a BROOKLYN HEALTH CENTER,

Defendants.
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DECISION AND ORDER

Index No. 506256/20.

Mot. Seq. Nos. 3-9

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion, Affirmations, and Exhibits Annexed	<u>219-242; 243-260; 261-287;</u> <u>299-334; 335-350; 351-371; 372-389</u>
Affirmations in Opposition and Exhibits Annexed	<u>423-454; 455-485; 486-501;</u> <u>502-523; 524-544; 545-581; 582-616</u>
Reply Affirmations and Exhibits Annexed.	<u>622-623; 627; 628; 629; 630; 632; 633</u>

In this action to recover damages for medical malpractice, lack of informed consent, and wrongful death arising out of the alleged failures to timely suspect, refer to a specialist, and/or diagnose a myeloma, the following motions for summary judgment by all defendants except The New York Hotel Trades Council and Hotel Association of New York City Health Center, Inc.,

also known as Brooklyn Health Center (BHC),¹ have been consolidated for disposition and, upon consolidation and after oral argument held on May 21, 2024,² are decided as follows.

Dr. Vimala Sim's Motion (Seq. No. 3)
Decedent's Visits with Dr. Sim on February 15, May 7, and May 11, 2018 at BHC

Dr. Sim's motion for summary judgment is granted to the extent that plaintiff's claim for lack of informed consent is dismissed without opposition, and the remainder of her motion is denied. Dr. Sim has failed to meet her initial burden of entitlement to summary judgment on plaintiff's medical malpractice and wrongful death claims as against her because her expert, Richard Bakst, M.D., a board-certified radiation oncologist, failed to establish a foundation for the reliability of his expert opinions in the field of internal medicine (which is Dr. Sim's specialty), as well as in the field of medical oncology (as to which he has proffered his extensive opinions). *See Roizman v Stroemer*, 185 AD3d 978, 981-982 (2d Dept 2020); *DeGiorgio v Racanelli*, 136 AD3d 734, 737 (2d Dept 2016). *See also Abruzzi v Maller*, 221 AD3d 753, 758 (2d Dept 2023).

Plaintiff's experts' affirmations in opposition to Dr. Sim's motion have raised triable issues of fact as to: (1) whether Dr. Sim departed from the applicable standards of care in failing to screen the patient for myeloma and to refer him to a hematologist/oncologist during and following any of his three visits with Dr. Sim on February 15, 2018, May 7, 2018, and May 11, 2018, as the laboratory results for his first, February 15, 2018 visit with her showed normocytic-

¹ By Partial Stipulation of Discontinuance, dated May 25, 2023, plaintiff discontinued all direct (but not vicarious) claims against BHC (NYSCEF Doc No. 218).

² The Court assumes the parties' familiarity with the underlying facts, procedural history, and the issues presented, to which the Court refers only as necessary to explain its decision. The record on the motions is voluminous, comprised (without duplication) of approximately 5,000 pages.

normochromic anemia, hyperglobulinemia, and hypoalbuminemia; and further that his clinical presentation at the February 15th visit was significant for a “sore throat and soreness in [his] lungs when inhaling[;] . . . a burning feeling, dry feeling, present for 2-3 weeks”, (BHC’s records, page 139 of 467) and (2) whether such alleged departures proximately caused a delay in the diagnosis of (and the commencement of treatment for) the patient’s myeloma which was diagnosed by a different medical provider (SIUH) in the early part of September 2018 and from which he ultimately died in June 2023 at the age of 55.

Dr. Rafi Yusuf’s Motion (Seq. No. 4)

Decedent’s Visit with Dr. Yusuf on April 26, 2018 at BHC

Dr. Yusuf’s motion for summary judgment is granted to the extent that plaintiff’s claim for lack of informed consent and her “res ipsa” claim are both dismissed without opposition, and the remainder of his motion is denied. There are triable issues of fact as to whether Dr. Yusuf, at the patient’s sole visit with him on April 26, 2018, departed from the applicable standards of care: (1) by failing to review the results of the patient’s February 15th lab tests, which Dr. Yusuf conceded at his pretrial deposition were sufficiently concerning that if he had accessed such lab results at the April 26th visit, he either would have had the previous tests repeated (and/or supplemented with additional tests) or, in the alternative, would have referred the patient to a hematologist;³ (2) by failing to appreciate the patient’s presenting complaints at the April 26th visit of his “left facial tingling, dizziness, pain behind [his] left eye with numbness at [the] back of [his] head and neck [for] 2 days,” (BHC’s records, page 236 of 467 (visit section)), together

³ Dr. Yusuf’s EBT tr at page 150, line 8 to page 155, line 24 and, in particular at page 155, lines 22-24 (“[I]t possibly could have helped, . . . It possibly could have helped, truthfully.”). Dr. Yusuf’s expert, Brian Moynihan, D.O. (Dr. Moynihan), in rendering his expert opinions, completely ignored Dr. Yusuf’s pretrial testimony (NYSCEF Doc No. 259).

with his generalized weakness, photophobia, and trigeminal neuralgia; (BHC's records, page 36 of 467 (orders section)) and (3) by merely offering the patient a single medication called Gabapentin for neuropathy without establishing a definitive diagnosis or cause therefor. Further, there are triable issues of fact as to whether Dr. Yusuf's alleged acts and omissions proximately delayed a diagnosis and treatment of the patient's myeloma.

The opinion of Dr. Yusuf's expert, Dr. Moynihan, on proximate cause (or, more precisely, the alleged lack thereof) is conclusory, repetitive, and medically unsupported. *See* Dr. Moynihan's Expert Affirmation, ¶ 2 ("It is . . . my opinion with a reasonable degree of medical certainty that none of the acts or omissions alleged as to Dr. Yusuf were a proximate cause of any claimed injury to [the patient]."); ¶ 4 ("[I]t is my opinion with a reasonable degree of medical certainty that no act or omission as alleged by plaintiffs on the part of Dr. Yusuf was a proximate cause of the injuries alleged herein."); and ¶ 17 ("It is also my opinion with a reasonable degree of medical certainty that the injuries being claimed by the plaintiff were not proximately caused by any claimed departure from the standard of care by Dr. Yusuf."). Dr. Yusuf's attempt (in ¶ 49 of its counsel's opening affirmation) to bootstrap the inadequate opinion of Dr. Moynihan on proximate cause by piggy-backing on the opinion of Dr. Sim's radiation oncology expert, Richard Bakst, M.D., is unavailing. As noted above, Dr. Bakst has failed to establish a foundation for the reliability of his expert opinion on behalf of his client, Dr. Sim.

Dr. Yusuf's attempt (in ¶ 19 of its counsel's reply affirmation) to further bootstrap Dr. Moynihan's proximate-cause opinion by additionally piggy-backing on the opinions of Dr. Koul's experts, Dr. Morton Coleman and Dr. Reed Philips, is rejected as untimely. *See Moore v Long Is. Coll. Hosp.*, 273 AD2d 365, 366 (2d Dept 2000).

In a last-ditch effort to shore up Dr. Yusuf's position, his counsel contends (in ¶ 17 of the reply affirmation) that "the plaintiff has wholly failed to demonstrate that any of the alleged injuries were proximately caused by any of the alleged acts or omissions as to [Dr. Yusuf]." This contention is unavailing because it was Dr. Yusuf's initial burden as the movant to establish, prima facie, the lack of causation. *See Santiago v Abramovici*, 226 AD3d 720, 721 (2d Dept 2024); *Pezulich v Grecco*, 206 AD3d 827, 830 (2d Dept 2022); *Tardio v Saleh*, 193 AD3d 901, 903 (2d Dept 2021); *Joynes v Donatelli*, 190 AD3d 845, 846 (2d Dept 2021).⁴

Dr. Rakesh Kumar Koul's Motion (Seq. No. 5)
Decedent's Visit with Dr. Koul on April 20, 2018 at BHC

Dr. Koul's motion for summary judgment is granted to the extent that plaintiff's claim for lack of informed consent is dismissed without opposition, and the remainder of his motion is denied. There are triable issues of fact as to whether Dr. Koul, at the patient's sole visit with him on April 20, 2018, departed from the applicable standards of care by failing: (1) to review the patient's abnormal lab results from the February 15th test; (2) to perform a comprehensive medical examination and work-up of the patient, including a review of his medical history which included multiple bacterial infections and persistent costochondritis; and (3) to refer the patient to a hematologist. *See Lopresti v Alzoobae*, 217 AD3d 759, 761 (2d Dept 2023); *see also McCarthy v Town of Massena*, 218 AD3d 1082, 1088-1089 (3d Dept 2023); *Colon v Choi*, 192 AD3d 1442, 1443-1444 (3d Dept 2021). As was the instance with the preceding defendants,

⁴ Dr. Yusuf's contention (in ¶ 25 of its counsel's reply affirmation) that "[p]laintiff's attorney's affirmation fails to assert that an original and unredacted copy of the physician [affirmations] has been provided to the Court" is conclusively rebutted by plaintiff's attorney's statement to the contrary at page 2, footnote 2 of her affirmation (NYSCEF Doc No. 455).

there are also triable issues of fact as to whether Dr. Kouf's alleged acts and omissions proximately delayed a diagnosis and treatment of the patient's myeloma.

Contrary to Dr. Kouf's contention, "[t]o raise a triable issue of fact [on the element of proximate cause], a plaintiff need not establish that, but for a defendant doctor's failure to diagnose, the patient would have been cured." *Neyman v Doshi Diagnostic Imaging Servs., P.C.*, 153 AD3d 538, 546 (2d Dept 2017). "Curing cancer, while an ultimate and worthy aspiration, is not the only positive treatment outcome. Whether a diagnostic delay affected a patient's prognosis is typically an issue that should be presented to a jury." *Neyman*, 153 AD3d at 546 (internal quotation marks omitted). "Where a medical malpractice plaintiff alleges a failure to timely diagnose a condition, the plaintiff must show that the departures from the standard of care delayed diagnosis and decreased the chances of a better outcome or increased the injury." *Paglinawan v Jeng*, 211 AD3d 743, 745 (2d Dept 2022). Here, plaintiff's oncology expert addresses in detail the specific assertions made by Dr. Kouf's oncology expert, Reed Phillips, M.D., as well as sets forth his/her own reasoning as to how those departures proximately caused the patient's injuries and death. *See Stewart v North Shore Univ. Hosp. at Syosset*, 204 AD3d 858, 860 (2d Dept 2022); *Neyman*, 153 AD3d at 545-546.

**Dr. Gail Yarmish, SIUH, and Northwell Health Inc. (NHI) Joint Motion (Seq. No. 6)
Decedent's January 2017 CT Scan at SIUH**

The joint motion of Dr. Yarmish, SIUH, and NHI is granted to the extent that (1) plaintiff's claim for lack of informed consent, all of her direct (but not vicarious) claims against SIUH, and all of her claims (whether direct or vicarious) against NHI, are all dismissed without opposition in each instance; and (2) plaintiff's legal theory (advanced for the first time

in opposition to Dr. Yarmish's motion) that Dr. Yarmish departed from the applicable standards of care by "failing to verbally contact [the patient's] clinical physicians to relay the CT findings" (the "verbal report theory") is dismissed; whereas the remainder of their joint motion is denied.

The general rule is that "[a] plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those [theories that are] pleaded in the complaint and the bill of particulars." *Palka v Village of Ossining*, 120 AD3d 641, 643 (2d Dept. 2014). "If the theory is discernable from the pleadings, it may be considered, especially if the theory is referred to in the depositions." *Larey v Kamler*, 185 AD3d 564, 566 (2d Dept 2020) (internal citations omitted). Here, however, the so-called verbal report theory was neither discernible from plaintiff's pleadings,⁵ nor referred to in Dr. Yarmish's pretrial deposition. See *Campbell v Ditmas Park Rehabilitation & Care Ctr., LLC*, 225 AD3d 835, 837 (2d Dept 2024); *Mendoza v Maimonides Med. Ctr.*, 203 AD3d 715, 717 (2d Dept 2022).

There are triable issues of fact as to whether (1) Dr. Yarmish properly interpreted the patient's January 2017 CT scan, in particular, her "Bones/Soft Tissues" findings of the "Left-sided L5 pars defect. No suspicious osseous lesion;" (SIUH's records, pages 1-2 (report of the patient's abdominal/pelvic contrast-enhanced CT scan, performed on January 30, 2017, at SIUH)

⁵ Compare Plaintiff's Verified Bill of Particulars as to Dr. Yarmish, ¶ 5 (alleging, among other theories, that Dr. Yarmish "fail[ed] to timely, properly, and appropriately report the findings of the aforesaid bone lesions [in the January 2017 CT scan] to the plaintiff's medical care providers; [and] fail[ed] to warn and advise the plaintiff's medical care providers of suspicious and worrisome findings, which were present in the aforesaid January 2017 CT scan.") (NYSCEF Doc No. 225). A generic failure to "report" and/or to "warn and advise" is not equivalent to a specific failure to "verbally contact." More to the point, however, is that Dr. Yarmish did not assume any duty of care toward the patient beyond that of reading and interpreting the January 2017 CT scan images, as well as documenting and reporting her findings to the ordering physician. See *Munn v Okere*, 195 AD3d 910, 912 (2d Dept 2021).

(NYSCEF Doc No. 429)); (2) whether (if the opinion of plaintiff's expert radiologist is credited) Dr. Yarmish missed "multiple suspicious bone lesions," and (3) whether (again if the opinion of plaintiff's expert radiologist is credited) Dr. Yarmish failed to recommend a hematological consultation, clinical evaluation, and/or further imaging. In addition, there are issues of fact as to whether Dr. Yarmish's alleged misreading of the January 2017 CT scan proximately delayed a timely diagnosis and treatment of the patient's myeloma. *See Dye v Okon*, 203 AD3d 702, 704 (2d Dept 2022); *Palmeiro v Luchs*, 202 AD3d 989, 991 (2d Dept 2022). *See also Keane v Dayani*, 178 AD3d 797, 799 (2d Dept 2019).

Dr. Yarmish's principal contentions to the contrary are without merit. First, the opinion of Dr. Yarmish's expert radiologist, Douglas S. Katz, M.D. (Dr. Katz), that "the standard of care [in] review[ing] . . . the CT scan of the abdomen and pelvis in the emergency setting would not have yielded a diagnosis of multiple myeloma," (Expert Affirmation of Radiologist Douglas S. Katz, M.D., ¶ 10 (NYSCEF Doc No. 301)) is unduly narrow, as it overlooks the fact that one of the principal symptoms/signs of myeloma is the myeloma bone disease which is characterized by the "punched out" lytic lesions caused by the increased bone destruction (osteoclastic) process, accompanied by the decreased or suppressed bone regeneration (osteoblastic) process, with both of those processes having been caused by the underlying myeloma. Second, the defense contention that Dr. Katz initially had reviewed the January 2017 CT scan films "blindly" before he was informed of the substance of plaintiff's claims, does not elevate the validity and credibility of his "blind" review (or otherwise diminish his inherent bias as a retained defense expert) because his review was not "double-blind." In other words, Dr. Katz had known beforehand for whom he was performing his "blind" review. Third and finally, Dr. Katz's

subsequent re-review of the January 2017 CT scan films (together with the September 2018 CT scan films) did not clearly and unambiguously rule out the lytic bone lesions on the January 2017 CT scan films. The contention of Dr. Yarmish's counsel that plaintiff's expert radiologist had the benefit of hindsight reasoning because he/she had been provided with both the January 2017 and the September 2018 CT scan films, while Dr. Katz initially had been provided with only the January 2017 CT scan films, is unavailing for two reasons. First, Dr. Katz conceded that "[a]fter completing a blind review and receiving the rest of the file materials[,] including learning of plaintiff[s] claims, I re-reviewed the subject imaging, and [p]laintiff's subsequent CTA imaging from September 2018 in which the cancer was diagnosed" (Dr. Katz's Expert Affirmation, ¶ 10). Second, Dr. Katz was unable to affirmatively rule the presence of bone lesions on the January 2017 CT scan films; hence, Dr. Katz's use of an ambiguous phrase "bone findings." According to Dr. Katz, "[a]ny *bone findings* [on the January 2017 CT scan films] in [his] opinion were very subtle even on further review of the subject imagining." (Dr. Katz's Expert Affirmation, ¶ 10). The italicized phrase "bone findings," however, is so vague and imprecise as to raise issues of fact.

Dr. Mathew Mani's Motion (Seq. No. 7)
Decedent's Visits Between January 4, 2016 to March 20, 2017 at BHC

Dr. Mani's motion for summary judgment is granted in its entirety, the amended complaint is dismissed against him without costs and disbursements, and the action is severed accordingly. Correspondingly, plaintiff's vicarious claims against BHC, insofar as predicated on Dr. Mani's alleged acts/omissions, are dismissed.

In opposition to Dr. Mani's prima facie showing on the element of departure (by way of, among other submissions, the affirmation of his expert internist Martin Coleman, M.D., at NYSCEF Doc No. 338), plaintiff has failed to raise a triable issue of fact. The patient's Hemoglobin levels while under Dr. Mani's care remained within the normal range of 12.3 to 17, thereby defeating plaintiff's contention that the patient was then suffering from normocytic-normochromic anemia. A slight decrease in the patient's Hemoglobin level from 12.9 in April 2016 to 12.8 in August 2018 is immaterial because, as noted, his Hemoglobin level remained within the normal range for the entirety of his treatment with Dr. Mani. An amalgamation of disjointed factual assertions in the form of several out-of-range lab results (taken at defendant AMP in 2016 and at SIUH in January 2017) cannot, with the benefit of hindsight reasoning, raise a triable issue of fact that Dr. Mani should have ordered diagnostic testing for myeloma. See *Prunty v Pastula*, 171 AD3d 1110, 1111 (2d Dept 2019); *Ortiz v Wyckoff Hgts. Med. Ctr.*, 149 AD3d 1093, 1095 (2d Dept 2017); see also *Clifford v White Plains Hosp. Med. Ctr.*, 217 AD3d 405, 405 (1st Dept 2023), *lv denied* 40 NY3d 908 (2023); *G.L. v Harawitz*, 146 AD3d 476, 477 (1st Dept 2017). Nor can Dr. Yarmish's alleged failure to diagnose the bone lesions on the January 2017 CT scan films be attributed to Dr. Mani. As a primary care physician, Dr. Mani was entitled to rely on Dr. Yarmish's report and her interpretations therein. See *Herlica v Patel*, 217 AD3d 1188, 1189 (3d Dept 2023).

The fundamental fault in plaintiff's theory of liability against Dr. Mani lies in her internal medicine expert's re-interpretation of a series of non-specific complaints with which the patient, a Caucasian male under the age of 60, occasionally presented to Dr. Mani to suggest that additional medical testing should have been undertaken. Plaintiff's position that the patient's

myeloma was seamlessly progressing from its early asymptomatic stage to its late, end-organ-damage stage in the course of his treatment with Dr. Mani from January 2016 to March 2017 is speculative, conclusory, and insufficient to raise a triable issue of fact on the element of departure. *See Ortiz*, 149 AD3d at 1095; *Holmes v Bronx Lebanon Hosp. Ctr.*, 128 AD3d 596 (1st Dept 2015); *Lau v Wan*, 93 AD3d 763, 765 (2d Dept 2012); *Moticik v Sisters Healthcare*, 19 AD3d 1052, 1053 (4th Dept 2005). Accordingly, dismissal of the amended complaint as against Dr. Mani (and, vicariously, as against BHC) is warranted.

Dr. Preeti Saran's Motion (Seq. No. 8)
Decedent's Visits on November 17, 2017 and April 2, 2018 at BHC

Dr. Saran's motion for summary judgment is granted to the extent that (1) plaintiff's claim for lack of informed consent is dismissed without opposition, and (2) all of the claims arising out of the patient's November 17, 2017 visit with Dr. Saran are dismissed for the reasons stated above with respect to Dr. Mani, whereas the remainder of her motion, insofar as predicated on the patient's April 2, 2018 visit with Dr. Saran, is denied for all the reasons stated above with respect to Dr. Sim, Dr. Yusuf, and Dr. Koul.

Briefly stated, plaintiff, in opposition to Dr. Saran's prima facie showing, has raised triable issues of fact on the element of departure with respect to the patient's April 2, 2018 (but not the November 17, 2017) visit with Dr. Saran; namely, her alleged failures at the April 2, 2018 visit: (1) to review the patient's abnormal labs from the February 15th test; (2) to perform a comprehensive medical examination of the patient in light of his presenting signs and symptoms of "chest wall pain which is worse with hand movements and worse with certain

position[s,] pain worse with deep breathings and cough,” and that “he still has pain and couldn’t go to work since [the] [preceding] two days” (BMC’s records, pages 240-241); (3) to order a radiological work-up (beyond a perfunctory chest X-ray) on account of the severity of the patient’s presenting signs and symptoms, as well as on account of her own documented findings of “chest wall – tenderness ++ on [] the sternum and [the] para[-]sternal region”; and (4) to refer the patient to a hematologist or other specialist. As was the instance with several of the preceding defendants, there are also triable issues of fact as to whether Dr. Saran’s alleged acts and omissions at the April 2, 2018 (but not at the November 17, 2017) visit proximately delayed a diagnosis and treatment of the patient’s myeloma.

**Dr. Manisha Rayavarapu & Amboy Medical Practice’s (AMP) Joint Motion (Seq. No. 9)
(Decedent’s Visit on May 31, 2016 at AMP)**

Finally, the joint motion of Dr. Rayavarapu and AMP (collectively, the “AMP defendants”) for summary judgment is granted in its entirety, the amended complaint is dismissed against both of them without costs and disbursements, and the action is severed accordingly. In opposition to the AMP defendants’ prima facie showing, plaintiff’s experts have failed to raise a triable issue of fact on both the departure and the causation elements. The patient’s single visit to AMP in May 2016 and the results of his blood test in August 2016 do not, in and of themselves, establish any basis for liability to plaintiff for the AMP defendants’ alleged failure to work him up for myeloma or to refer him to a hematologist.

It is further,

ORDERED that to reflect the dismissal of defendants Mathew Mani, Manisha Rayavarapu, Amboy Medical Practice, P.C., and Northwell Health, Inc., as well as to reflect the

defendant doctors' proper titles either as an "M.D." or a "D.O.," the caption is amended to read in its entirety as follows:

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MING ZHANG, as Executrix of the Estate of
GEORGE MEROLLE, deceased, and
MING ZHANG, Individually,

Plaintiffs,

- against -

Index No. 506256/20

GAIL YARMISH, M.D.,
STATEN ISLAND UNIVERSITY HOSPITAL,
VIMALA SIM, M.D.,
PREETI SARAN, M.D.,
RAKESH KUMAR KOUL, M.D.,
RAFI YUSUF, D.O., and
THE NEW YORK HOTEL TRADES COUNCIL AND HOTEL
ASSOCIATION OF NEW YORK CITY, HEALTH CENTER, INC.,
a/k/a BROOKLYN HEALTH CENTER,


Defendants.

-----X

; and it is further

ORDERED that plaintiff's counsel is directed to electronically serve a copy of this Decision and Order with notice of entry on the other parties' respective counsel and to electronically file an affidavit thereof with the Kings County Clerk.

This constitutes the Decision and Order of the Court.

ENTER,

J. S. C.
HON. ELLEN M. SPODEK
2024 SEP 26 10:49
KINGS COUNTY CLERK
FILED