

Larios v Gauthier

2025 NY Slip Op 31483(U)

April 10, 2025

Supreme Court, New York County

Docket Number: Index No. 805203/2022

Judge: Judith N. McMahon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH N. MCMAHON PART 30M

Justice

INDEX NO. 805203/2022

JOSE LARIOS, MOTION DATE 04/07/2025

Plaintiff,

MOTION SEQ. NO. 008

- v -

ARINXE GAUTHIER, SEBASTIAN RUEDA, HOWARD KATZ1, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION/ HARLEM

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 150, 151, 152, 153, 154, 155, 156, 158, 159, 160, 161, 162, 163, 164, 165

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that defendants' motion for summary judgment pursuant to CPLR 3212 is granted to the extent that the complaint is severed and dismissed as against defendant-house physician, Arinx Gauthier, M.D., and defendant-resident, Sebastian Valdivieso Rueda, M.D. The balance of the motion is denied for triable issues of fact raised by plaintiff's expert orthopedic surgeon, Omar Hussamy, M.D. (see NYSCEF Doc. No. 153) on the issues of medical malpractice and failure to obtain plaintiff's informed consent. Defendant New York City Health and Hospitals Corporation/Harlem (hereinafter "HHC") remains a defendant in this case to the extent of its vicarious liability for the alleged negligent conduct, if any is found, on the part of its employees Dr. Gauthier, Dr. Rueda, and/or any other employees of HHC.

1 Dr. Katz, plaintiff's attending orthopedic surgeon, was not served and is not a party to this action. In a July 3, 2024, Decision and Order, Hon. Arthur F. Engoron held that "under the doctrine of respondeat superior, HHC is vicariously liable for any finding of negligence on the part of Katz" (see NYSCEF Doc. No. 149).

Plaintiff commenced this action alleging medical malpractice and failure to obtain informed consent following fracture of his right lower leg, which he claims was not properly treated during an April 27, 2021, through May 5, 2021, admission to Harlem Hospital. It is undisputed that Mr. Larios, who arrived at Harlem Hospital by ambulance, was diagnosed with an (1) open comminuted unstable fracture of his right tibia and fibula; (2) two puncture open wounds with the bone protruding through the skin, and (3) arterial injury involving the peroneal artery, per CT angiogram. Non-party Dr. Howard Katz performed surgery on April 27, 2021, and plaintiff was discharged from HHC eight days later. Plaintiff subsequently underwent a purportedly successful revision surgery at Mount Sinai and has returned to his previous employment as a doorman.

Defendants move for judgment dismissing the complaint pursuant to CPLR 3212 or, alternatively, for partial summary judgment dismissing plaintiff's cause of action for lack of informed consent, or alternatively, for partial summary judgment on behalf of Dr. Gauthier and Dr. Rueda on the grounds that neither physician had any decision making responsibility as to what surgery was going to be performed on April 27, 2021, or how the surgery was going to be performed by the orthopedic attending physician, Dr. Howard Katz. Plaintiff opposes the motion.

The Court notes at the outset that defendants' initial failure to comply with the current version of CPLR 2106 is not fatal to the motion. Accordingly, the court has fully considered the affirmations submitted by defense counsel and their expert orthopedic surgeon, Dr. Lyden, who, regardless, furnished affirmations containing the CPLR 2106 language.

To prevail on a motion for summary judgment, the proponent must make *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence

demonstrating the absence of any material issue of fact (*see Klein v. City of New York*, 89 NY2d 833 [1996]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). “Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Ostrov v. Rozbruch*, 91 AD3d 147 [1st Dept. 2012]).

Here, the affirmation of John Lyden, M.D. (*see* NYSCEF Doc. No. 130) is detailed, specific and factual in nature, and is based upon the facts in the record (*see Roques v. Noble*, 73 AD3d 204, 206 [1st Dept. 2010]; *see also Pascocello v. Jibone*, 161 AD3d 516 [1st Dept. 2018]; [internal citations omitted]). Accordingly, defendants have met their *prima facie* burden of establishing the absence of a departure from good and accepted medical practice, or that such departure was not a proximate cause of plaintiff’s alleged injuries (*see Einach v. Lenox Hill Hosp.*, 160 AD3d 443 [1st Dept. 2018]).

“Where a defendant makes a *prima facie* case of entitlement to summary judgment dismissing a medical malpractice action...the burden shifts to the plaintiff to present evidence in admissible form that demonstrates the existence of a triable issue of fact” (*Bartolacci-Meir v. Sassoon*, 149 AD3d 567, 570 [1st Dept. 2017]; *see also DeCintio v. Lawrence Hosp.*, 25 AD3d 320 [1st Dept. 2006]; *Ducasse v. New York City Health & Hosps. Corp.*, 148 AD3d 434 [1st Dept. 2017]).

Here, plaintiff has met his burden of raising questions of fact sufficient to defeat dismissal of the complaint through, *inter alia*, the affirmation of his expert orthopedic surgeon, Omar Hussamy, M.D. (*see* NYSCEF Doc. No. 153), who is emphatic within a reasonable degree of medical certainty, that “the variation and continued fracture angulation with valgus alignment

of the tibial and proximal portion of the nail being left within the knee joint at the time of the procedure on April 27, 2021, was and still are a departure from acceptable standards of surgical and medical care” (*id.*, para. 22), “requiring removal of the hardware, tibia and fibula osteotomies and revision of the intramedullary nailing of the right tibia due to the deformity of the tibia and prominent nail in the knee joint” (*id.*, para. 17).

While Dr. Hussamy’s affirmation is silent as to specific conduct of Dr. Gauthier and Dr. Rueda, it does address defendants’ failure to obtain plaintiff’s informed consent.

All remaining arguments made by the parties have been considered by the Court and have been found unavailing.

Accordingly, it is


ORDERED that defendants’ motion for summary judgment (Motion Seq. No. 008) is granted to the extent that the complaint is severed and dismissed as against Arinxe Randy Gauthier, M.D. and Sebastian Valdivieso Rueda, M.D.; and it is further

ORDERED that the balance of the summary judgment motion is denied; and it is further

ORDERED that New York City Health and Hospitals Corporation/Harlem may be held vicariously liable for the negligent conduct, if any is found, on the part of its employees including Dr. Gauthier and Dr. Rueda; and it is further

ORDERED that the Clerk enter judgment dismissing plaintiff’s complaint as against Dr. Gauthier and Dr. Rueda; and it is further

ORDERED that the parties appear for a pretrial conference via Microsoft Teams on **May 27, 2025, at 11:00 a.m.**

<u>4/10/2025</u> DATE			 JUDITH N. MCMAHON, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE

Hon. Judith N. McMahon
J.S.C.