

Philip v New York Foundling
2026 NY Slip Op 30241(U)
January 21, 2026
Supreme Court, New York County
Docket Number: Index No. 155478/2021
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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JOHN PHILIP, as Administrator of the Estate of JOEY PHILIP, Deceased,

Plaintiff,

INDEX NO. 155478/2021

MOTION DATE 12/04/2025

MOTION SEQ. NO. 004

- v -

NEW YORK FOUNDLING, formerly known as NEW YORK FOUNDLING HOSPITAL, KAI HUANG, GARY M. PHILLIPS, MARIANNA GOLDEN, SHOLEH KAMALIAN, DANIEL SILOVITZ, and MONTEFIORE NYACK HOSPITAL,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 185, 186, 187, 188, 189, 190, 191, 192, 193

were read on this motion to/for AMEND CAPTION/PLEADINGS.

This is an action to recover damages for medical malpractice based on alleged departures from good and accepted practice, common-law negligence, and wrongful death, and pursuant to Public Health Law § 2801-d for purported violations of statutes and regulations governing nursing homes. The defendants Gary M. Phillips, Sholeh Kamalian, and Daniel Silovitz (hereinafter the moving defendants) move pursuant to CPLR 3025(b) for leave to serve and file amended answers adding, as an affirmative defense, that the amount of any judgment recovered against each of them must be set off by the total amount for which the plaintiff had settled his claims against the former defendants Earl L. Zeitlin and Marianna Golden. No party opposes the motion. The motion is granted, and the proposed amended answers that were attached as Exhibit E to the moving defendants' motion papers, and uploaded to the New York State Court Electronic Filing system as Docket Entry No. 191, are deemed to have been served and filed nunc pro tunc as of November 12, 2025, the date that the moving defendants made the instant motion.

Leave to amend a pleading is to be freely given absent prejudice or surprise resulting from the amendment, provided that the evidence submitted in support of the motion indicates that the proposed amendment may have merit (see CPLR 3025[b]; *McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp.*, 59 NY2d 755 [1983]; *360 West 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552 [1st Dept 2011]; *Smith-Hoy v AMC Prop. Evaluations, Inc.*, 52 AD3d 809 [1st Dept 2008]). The court must examine the sufficiency of the proposed amendment only to determine whether the proposed amended pleading is “palpably insufficient or clearly devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; see *Badesch v Fort 710 Assoc., L.P.*, 233 AD3d 604, 604 [1st Dept 2024]; *Ferrer v Go New York Tours Inc.*, 221 AD3d 499, 500 [1st Dept 2023]).

In the instant action, the plaintiff alleged that, initially, the defendant New York Foundling, formerly known as New York Foundling Hospital, committed malpractice, and was liable both for common-law negligence and pursuant to Public Health Law § 2801-d, when it permitted his decedent, who was a resident there, to ascend a staircase unattended, after which he fell and sustained serious neurological and orthopedic injuries. He further asserted that several hospitals and individual healthcare providers who treated his decedent, both immediately after the fall and over the following months, committed medical malpractice. On December 20, 2023, the defendants Montefiore Nyack Hospital (MNH) and Golden together settled the plaintiff’s claims against them for the sum of \$650,000.00. On May 1, 2024, this court issued a decedent’s compromise order approving that settlement. On February 6, 2024, this court approved the plaintiff’s discontinuance of his claims against the former defendants Earl L. Zeitlin and Highland Medical, P.C., doing business as Rockland Neurological Associates.

Pursuant to General Obligations Law § 15-108(a), “[t]he original tort-feasors [are] liable not only for the injuries incurred by” the decedent as a result of his “fall but also for the aggravation of those injuries through the malpractice” of any subsequent healthcare provider who negligently treated him (*Hill v St. Clare’s Hosp.*, 67 NY2d 72, 78 [1986]; see *Matter of*

Parchefsky v Kroll Bros., 267 NY 410, 412-413 [1935]; *Milks v McIver*, 264 NY 267, 270 [1934]; PJI 2:305).

“Such liability is, however, successive rather than joint, and the injured plaintiff cannot recover the same damages twice. It follows that an original wrongdoer held for all of the damages incurred by the person injured is subrogated to the latter's right to recover from the physician for the damages caused by his or her malpractice and that if the injured person recovers first from the physician, he may not thereafter recover from the original tort-feasor for the malpractice aggravation”

(*Hill v St. Clare's Hosp.*, 67 NY2d at 82-83). Pursuant to General Obligations Law § 15-108(a), a release tendered by a plaintiff to a tortfeasor

“reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest”

(*id.* at 83, quoting General Obligations Law § 15-108[a]). “The reference to ‘two or more persons liable or claimed to be liable in tort for the same injury’ covers successive as well as joint tort-feasors” (*Hill v St. Clare's Hosp.*, 67 NY2d at 83; see *Mavashev v New York City Tr. Auth.*, 300 AD2d 552, 553-554 [2d Dept 2002]; *Casey v State of New York*, 119 AD2d 363, 367-368 [2d Dept 1986]).

Consequently, in the event that the plaintiff's secures a judgment against any of the moving defendants, each of them would be entitled to a set off of \$650,000.00 as a consequence of the plaintiff's settlement with, and release of, MNH and Golden, and as a further consequence of his discontinuance of the action against Zeitlin. The moving defendants thus have established that the proposed amendment to their answers is not palpably insufficient or clearly devoid of merit, and that no party would be surprised or prejudiced by the amendment.

Accordingly, it is,

ORDERED that the motion is granted, the defendants Gary M. Phillips, Sholeh Kamalian, and Daniel Silovitz are each granted leave to serve and file an amended answer in the form attached as Exhibit E to their motion papers and uploaded to the New York State Court

Electronic Filing system as Docket Entry No. 191, and those amended answers are deemed to have been served and filed nunc pro tunc as of November 12, 2025.

This constitutes the Decision and Order of the court.

1/21/2026

DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: