

Levy v Mens Health Manhattan
2026 NY Slip Op 31921(U)
April 21, 2026
Supreme Court, New York County
Docket Number: Index No. 805341/2024
Judge: Kathy J. King
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHY J. KING PART 06

Justice

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DAVID LEVY,

Plaintiff,

- v -

MENS HEALTH MANHATTAN, NORTHWELL HEALTH PHYSICIAN PARTNERS SMITH INSTITUTE FOR UROLOGY, DEPARTMENT OF UROLOGY, UROLOGY AT LENOX HILL, NORTHWELL HEALTH, LENOX HILL HOSPITAL, MANHATTAN EYE EAR AND THROAT HOSPITAL, DAMIAN MIGHTY, KIROLOS MEILIKA MD, ALAN PANIOGUA CRUZ MD, and BOBACK M BEROOKHIM MD,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 31, 32, 58, 59

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and Oral arguments having been heard, Defendants move for an Order:

- 1. Pursuant to CPLR 3211(a)(7) dismissing this action or parts thereof with prejudice for failure to state a cause of action;
2. Pursuant to CPLR 3211(a)(4) dismissing this action or parts thereof with prejudice as there was another action pending between the same parties for the same cause of action at the time the Complaint was filed;
3. Pursuant to CPLR 3041, 3042, and 3126, dismissing this action with prejudice for plaintiff's willful failure to comply with defendants' demands, including providing a Verified Bill of Particulars and responses to initial combined discovery demands, or, in the alternative;
4. Pursuant to CPLR 3126, precluding plaintiff from testifying or introducing any evidence at the time of trial for which a Bill of Particulars and discovery has not been provided; or in the alternative,
5. Pursuant to CPLR 3124, compelling plaintiff to serve a Verified Bill of Particulars and all outstanding discovery in compliance with defendants' demands by a date certain prior to the commencement of depositions; and
6. Establishing a self-executing Order for dismissal in the event that plaintiff fails to comply with discovery as directed by this Court.

Plaintiff opposes Defendants' motion to dismiss and compel.

BACKGROUND

This is an action to recover damages for personal injuries arising from alleged medical malpractice, lack of informed consent, fraud, and violations of patient privacy.

Plaintiff, David Levy, came under the care of Defendants on or about May 27, 2022, seeking urological and fertility-related diagnosis and treatment. On that date, Defendants performed and interpreted a scrotal ultrasound at various facilities, including Urology at Lenox Hill and Men's Health Manhattan. Based on the interpretation of this ultrasound, Defendants diagnosed Plaintiff with bilateral varicocele veins and recommended surgical intervention.

On June 27, 2022, Defendants Kirolos Meilika, MD, Alan Paniagua Cruz, MD, and Boback M. Berookhim, MD performed a bilateral microsurgical varicocelectomy on Plaintiff at Manhattan Eye Ear and Throat Hospital. Plaintiff continued to receive follow-up care through approximately January 10, 2023.

Plaintiff commenced this action on November 21, 2024, by filing a Verified Complaint setting forth twelve causes of action arising from medical treatment rendered between May 27, 2022, and January 10, 2023, and the claims are summarized as follows:

- **1st and 2nd (Medical Malpractice):** Alleging departures from standard care in the performance and interpretation of a May 27, 2022, ultrasound and the recommendation of unnecessary surgery.
- **3rd, 4th, and 5th (Surgical Malpractice):** Alleging negligence in the performance of a bilateral microsurgical varicocelectomy on June 27, 2022, and failure to document records accurately.
- **6th and 7th (Emotional Distress/Outrageous Conduct):** Seeking damages for mental anguish and alleging "extreme and outrageous" conduct by Defendants in "hiding the truth" and interpreting tests for profit.
- **8th (Fraud and Misrepresentation):** Alleging Defendants made material misrepresentations regarding the necessity of surgery and failed to produce an accurate DICOM ultrasound disc to deceive Plaintiff.
- **9th (Lack of Informed Consent):** Alleging Defendants failed to advise of risks, hazards, and alternatives to the surgical intervention.

- **10th, 11th, and 12th (HIPAA/Privacy):** Alleging violations of the Health Insurance Portability and Accountability Act (HIPAA) and failure to safeguard or provide access to protected health information (PHI).

Defendants now move to dismiss as follows on the grounds set below.

DISCUSSION

During oral argument on April 21, 2026, Plaintiff consented to the withdrawal of the 6th, 7th, 10th, 11th, and 12th causes of action. Accordingly, those branches of Defendants' motion to dismiss are granted on consent. The Court will address the remaining causes of action: the 1st, 2nd, 3rd, 4th, 5th, 8th, and 9th.

DISMISSAL OF THE 8TH CAUSE OF ACTION PURSUANT TO CPLR 3211(A)(4)

As a threshold matter, Defendants seek dismissal of the Eighth cause of action pursuant to CPLR 3211(a)(4), contending these matters were addressed in a prior proceeding under Index No. 153109/2024, which commenced by the filing of a petition and was a limited application for pre-action discovery pursuant to CPLR 3102(c). It is well settled that a motion to dismiss based on a prior action pending requires a substantial identity of parties and causes of action (*see Whitney v Whitney*, 57 NY2d 731 [1982]). Further, the First Department has clearly established that pre-action discovery is a limited "special proceeding" intended "to facilitate accurate pleading" (*Liberty Imports, Inc. v Bourguet*, 146 AD2d 535 [1st Dept 1989]). Such a proceeding does not constitute "another action pending" for the purposes of a plenary malpractice action because the relief sought—the production of a DICOM disc—is fundamentally distinct from the monetary damages sought herein (*see Matter of Gounder v Progressive Credit Union*, 170 AD3d 586 [1st Dept 2019]). As the prior proceeding could not result in a judgment on the merits of the malpractice claims, dismissal is improper (*Kent v Fidelity & Cas. Co. of N.Y.*, 7 NY2d 1 [1959]). Accordingly, that branch of the Defendants' motion is denied.

DISMISSAL OF THE 1ST THROUGH 5TH CAUSES OF ACTION**PURSUANT TO CPLR 3211(A)(7)**

Defendants move to dismiss the 1st through 5th causes of action, arguing they are duplicative of one another and fail to state distinct causes of action. Specifically, Defendants contend that the allegations concerning May 27, 2022, ultrasound (1st and 2nd Causes of Action) and the June 27, 2022, surgery (3rd, 4th, and 5th Causes of Action) arise from the same set of facts and seek identical damages.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83 [1994]). It is well settled that the “sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law,” the motion must be denied (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). While New York law generally disallows causes of action that “simply recapitulate” one another (*see Ofman v Katz*, 89 AD3d 909 [2d Dept 2011]), this rule is most strictly applied when a plaintiff attempts to dress a malpractice claim in the clothing of a different legal theory, such as breach of contract or fraud (*see B.F. v Reprod. Med. Assocs. of New York, LLP*, 136 AD3d 73 [1st Dept 2015]). However, within the realm of medical malpractice, a plaintiff is entitled to plead separate and distinct acts of negligence as independent causes of action, even if they all “sound” in malpractice. The Court of Appeals has held that where different acts of negligence contribute to an injury, or where a physician’s treatment constitutes separate departures from the standard of care at different times, the plaintiff is entitled to maintain those distinct theories (*see Bleiler v Bodnar*, 65 NY2d 65 [1985]).

Upon review of the Verified Complaint, the Court finds that the first five causes of action allege factually distinct wrongs occurring at different stages of the clinical timeline:

The 1st and 2nd causes of action allege a diagnostic failure (the misinterpretation of the May 27, 2022 ultrasound). The Third, Fourth, and Fifth causes of action allege an operative failure (the negligent performance of the June 27, 2022 surgery). The First Department has held that a failure to properly diagnose a condition is a separate legal theory from the subsequent negligent treatment of that condition (*see Cohen v Cabrini Med. Ctr.*, 94 NY2d 639 [2000]).

Plaintiff distinguishes between the decision to operate and the act of operating. Pleading that a surgery was “unnecessary and contraindicated” (2nd Cause of Action) requires a different evidentiary showing than pleading the surgery was physically performed in a “careless, reckless and/or negligent manner” (4th Cause of Action). Since this action involves several individual physicians (Drs. Berookhim, Meilika, and Cruz) and multiple corporate entities, Plaintiff is entitled to set forth separate causes of action to clarify which departures are attributable to which specific defendants at which specific times (*see CPLR 3013*).

On a motion to dismiss under CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true [and] accord plaintiffs the benefit of every possible favorable inference” (*Leon v Martinez*, 84 NY2d 83 [1994]). The First Department favors resolving such disputes on the merits rather than on technical pleading redundancies, provided the defendants are not prejudiced (*see In re New York City Asbestos Litig.*, 121 AD3d 230 [1st Dept 2014]).

Here, Defendants have not demonstrated that the inclusion of separate causes of action for the diagnostic phase and the surgical phase resulted in substantial prejudice. Rather, the separate claims provide a clear roadmap of the specific departures alleged.

Accordingly, the branch of Defendants' motion seeking dismissal of the 1st through 5th causes of action as duplicative is denied.

DISCOVERY SANCTIONS PURSUANT TO CPLR 3124 AND 3126

Defendants further move for dismissal of the action or, in the alternative, an order of preclusion, based on Plaintiff's alleged failure to serve a Verified Bill of Particulars and respond to combined discovery demands. Defendants additionally request a self-executing order of dismissal.

The "drastic remedy" of striking a pleading or precluding evidence pursuant to CPLR 3126 is only appropriate where there is a clear showing that a party's failure to comply with discovery is "willful, contumacious, or in bad faith" (*Kihl v Pfeffer*, 94 NY2d 118 [1999]; *Henderson-Jones v City of New York*, 87 AD3d 498 [1st Dept 2011]). The First Department has consistently held that such sanctions are a last resort, as New York public policy strongly favors resolving actions on their merits (*Postel v New York Univ. Hosp.*, 262 AD2d 40 [1st Dept 1999]). Here, while Defendants correctly note that discovery is outstanding, the record does not currently demonstrate the degree of willful or contumacious neglect required to warrant dismissal of a medical malpractice action. There is no history of Plaintiff violating multiple court orders or repeatedly ignoring deadlines set by the Court.

Furthermore, a motion to compel discovery under CPLR 3124 is the more appropriate remedy where, as here, the parties have a bona fide dispute regarding the litigation's scope (including the previously discussed CPLR 3211 motion). However, the Court agrees that the progression of this case requires the immediate exchange of basic discovery, including the Bill of Particulars, to facilitate depositions.

The Court finds that a self-executing order of dismissal is not warranted at this time. Such orders are typically reserved for cases involving a "long-standing pattern of noncompliance" (*see e.g., Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 [2010]). Instead, the Court grants the branch of the

motion seeking to compel discovery to the extent that a date certain is set for service of the outstanding items.

Accordingly, it is hereby

ORDERED that the 6th, 7th, 10th, 11th, and 12th causes of action are hereby withdrawn and dismissed with prejudice upon Plaintiff's consent; and it is further

ORDERED that the branch of Defendants' motion seeking dismissal of the 1st, 2nd, 3rd, 4th, 5th, and 8th causes of action are denied; and it is further

ORDERED that the branches of Defendants' motion seeking dismissal or preclusion pursuant to CPLR 3126 are denied; and it is further

ORDERED that Defendants' request for a self-executing order of dismissal is denied; and it is further

ORDERED that the branch of Defendants' motion pursuant to CPLR 3124 is granted to the extent that Plaintiff shall serve a Verified Bill of Particulars and responses to all outstanding initial discovery demands within forty-five (45) days of the date of entry of this Order; and it is further

ORDERED that Plaintiff shall serve and e-file an Amended Complaint, reflecting the withdrawal and dismissal of the causes of action as set forth in this Decision and Order, within sixty (60) days of the date of this Order.

This constitutes the Decision and Order of the Court.

4/21/2026
DATE

Kathy J. King
KATHY J. KING, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED SUBMIT ORDER GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER FIDUCIARY APPOINTMENT REFERENCE

INCLUDES TRANSFER/REASSIGN