

**Piacente v Roccario**

2013 NY Slip Op 32669(U)

October 25, 2013

Sup Ct, Albany County

Docket Number: 1802-10

Judge: Joseph C. Teresi

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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JOHN THOMAS PIACENTE,

Plaintiff,

-against-

ERIC S. ROCCARIO; KATHLEEN OZSVATH;  
PRIME CARE PHYSICIANS, P.L.L.C.; and  
THE VASCULAR GROUP, P.L.L.C.,

Defendants.

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**DECISION and ORDER**  
**INDEX NO. 1802-10**  
**RJI NO. 01-10-099919**

Supreme Court Albany County All Purpose Term, October 4, 2013  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

The jury trial of this medical malpractice action started on August 19, 2013. It continued

until September 4, 2013, when the jury rendered its “no cause” verdict. Plaintiff now moves, pursuant to CPLR §4404(a), to set such verdict aside. Defendants<sup>1</sup> oppose the motion. Because Plaintiff demonstrated that his CPLR §4105 statutory jury right was violated, his motion is granted on that basis and the balance of his motion is rendered moot.

CPLR §4105 states: “[t]he first six persons who appear as their names are drawn and called, and are approved as indifferent between the parties, and not discharged or excused, must be sworn and constitute the jury to try the issue.” (emphasis added) While §4106 allows for the selection of additional “alternate jurors,” it does not modify §4105’s mandatory “first six person” directive.

The Uniform Rules for the New York State Trial Courts expands on these statutes and offers an alternative “undesigned jury” procedure. The Uniform Rules for Trial Courts (22 NYCRR) §220.1(a), however, requires a stipulation to utilize its procedure. The regulation states: “[u]pon consent of the parties, a court trying a civil case heard by a jury may adopt the procedure provided for in this section concerning the formation of the trial jury.” (Uniform Rules for Trial Courts [22 NYCRR] §220.1[a][emphasis added]). Such “procedure provided for” is then described by Uniform Rules for Trial Courts (22 NYCRR) §220.1(c), which states:

Designation of jurors. If more than six jurors are selected, they shall not at that time be designated as trial jurors and alternate jurors. Instead, if at the conclusion of the evidence more than six jurors remain on the jury, at that time the clerk of the court, in the presence of the court and the parties, shall randomly draw the names of six of the remaining jurors, who shall be the jurors who retire to deliberate upon a verdict. Unless otherwise determined by the court, the juror whose name was first drawn shall be designated as the foreperson. After

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<sup>1</sup> Kathleen Ozsvath, The Vascular Group, PLLC, Eric Roccario, and Prime Care Physicians, PLLC will all collectively be referred to as “Defendants” herein. Kathleen Ozsvath and The Vascular Group, PLLC will collectively be referred to as “Ozsvath,” while Eric Roccario and Prime Care Physicians, PLLC will collectively be referred to as “Roccario.”

the deliberating jurors have retired to deliberate, the remaining non-deliberating jurors shall be discharged. The court may, in appropriate circumstances, direct the discharged jurors not to discuss the case while the jury deliberates.

Here, the uncontested facts establish that both CPLR §4105 and Uniform Rules for Trial Courts (22 NYCRR) §220.1 were violated.

Before jury selection started the trial attorneys discussed, among themselves, whether the deliberating and alternate jurors would be designated or undesignated. Plaintiff's counsel stated that he wanted the first six individuals selected to be designated as the deliberating jurors, with the seventh and eighth individuals designated as alternate jurors. In effect, he was apprising defense counsel of their statutory rights. Both defense attorneys acknowledged that such conversation occurred, with Roccario's attorney specifically conceding that Plaintiff's designation demand "was our assumption during jury selection."

The issue of whether the jury was designated or undesignated was not brought to this Court's attention until after the close of proof. At that time, in accord with the above discussions, Plaintiff's attorney sought to have the first six individuals chosen during jury selection to be designated as the deliberating jury in this action. Both Roccario's attorney and Ozvath's attorney objected. While they acknowledged the prior discussions outlined above, they sought all eight jurors to be deemed undesignated. It was uncontested that no prior written or on the record agreement had been entered into to resolve these competing claims.

Relying on the Third Judicial District Rules - Doc. 10 §3, this Court rejected Plaintiff's request to designate jurors one through six as the deliberating jurors. The deliberating jurors were then selected by lot, resulting in the sixth individual chosen during jury selection being replaced by the eighth individual selected. Such reliance and the ruling were erroneous.



Third Judicial District Rules - Doc. 10 §3 states, in pertinent part, that: “[a]ll prospective jurors (six plus the agreed upon number of alternates) will be selected at random from the panel and seated in the jury box. Unless there is consent of all parties and the presiding judge to designate alternates, the jurors selected will not be designated.” (emphasis added, hereafter “Third District Rule”). Here, because the parties did not consent to designated alternates when selecting the jury, the Third District Rule required this Court to find that the jurors selected were not designated.

The Third District Rule, however, is specifically contradicted by Uniform Rules for Trial Courts (22 NYCRR) §220.1(a). Whereas the Third District Rule requires the consent of the presiding judge and the parties to “designate alternates,” the Uniform Rules for Trial Courts (22 NYCRR) §220.1(a) requires the parties’ consent prior to implementing its undesignated jury procedure.

The Third District Rule also violates CPLR §4105’s mandatory procedure. As set forth above, CPLR §4105 states that the first six individuals chosen during jury selection “must be sworn and constitute the jury to try the issue.” The statute requires no consent. Rather, its mandate is affirmative and designates the deliberating jurors. By necessary implication, it designates the alternate jurors as well. The Third District Rule, on the other hand, requires consent to designate alternates and, by implication, deliberating jurors. Such obligation to obtain consent disregards CPLR §4105’s mandatory designation of jurors. It too reverses the statutory structure which, by default, directs that jurors be designated. Thus, the Third District Rule is inconsistent with the applicable statute.

Because “no court rule can... abridge rights conferred by statute” (People v Ramos, 85

NY2d 678, 688 [1995]), the Third District Rule was wrongly relied upon in selecting the deliberating jurors by lot; rendering the replacement of juror number six by juror number eight arbitrary and without good cause. (Gallaher v Rathnathicam, 27 Misc 3d 829 [Sup Ct, Westchester County 2010]; People v Jeanty, 94 NY2d 507 [2000]; People v Ballard, 51 AD3d 1034 [2d Dept 2008]).

Accordingly, Plaintiff's motion is granted and the jury's September 4, 2013 verdict in this action is vacated.

This Decision and Order is being returned to the attorneys for Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York  
October 25, 2013

  
Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated September 18, 2013; Affirmation of Joseph Awad, dated September 18, 2013, with attached Exhibits A-G.
2. Affirmation of Andrea Demers, dated September 27, 2013, with attached Exhibit A.
3. Affidavit of Andrew McNamara, dated September 27, 2013 with attached Exhibits A-C.