

<b>Hernandez v Khabie</b>
2019 NY Slip Op 34749(U)
February 20, 2019
Supreme Court, Westchester County
Docket Number: Index No. 58274/2016
Judge: William J. Giacomo
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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JOSE HERNANDEZ and BERTINA HERNANDEZ,  
Plaintiffs,

Index No. 58274/2016

- against -

Sequence No. 1 & 2

VICTOR KHABIE, M.D., SOMERS ORTHOPAEDIC  
SURGERY & SPORTS MEDICINE GROUP, P.L.L.C.,  
BETHEL NURSING & REHABILITATION CENTER and  
NORTHERN WESTCHESTER HOSPITAL,  
Defendants.

**DECISION & ORDER**

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In an action to recover damages for personal injuries, etc. (1) Northern Westchester Hospital (motion sequence #1); and (2) Victor Khabie, M.D. and Somers Orthopaedic Surgery & Sports Medicine Group, P.L.L.C (motion sequence #2) separately move for summary judgment, pursuant to CPLR 3212, dismissing the complaint insofar as asserted against them:

**Papers Considered**

1. Notice of Motion/Affirmation of Patricia Lacy, Esq./Exhibits A-P;
2. Notice of Motion/Affirmation of Micah I. Friedberg, Esq./Exhibits A-Z;
3. Affirmation of Elias Sayegh, Esq. in Opposition/Exhibits A-F;
4. Reply Affirmation of Patricia Lacy, Esq.
5. Reply Affirmation of Micah I. Friedberg, Esq./Exhibits AA-BB.

**Factual and Procedural Background**

Plaintiffs commenced this action against Victor Khabie, M.D., Somers Orthopaedic Surgery & Sports Medicine Group, P.L.L.C, and Northern Westchester Hospital.<sup>1</sup> The complaint alleges that Dr. Khabie negligently performed a right total knee replacement on plaintiff, Jose Hernandez, on December 6, 2013, at Northern Westchester Hospital. Plaintiff was discharged to Bethel Rehabilitation and Nursing Center on December 10, 2013. On December 11<sup>th</sup> and 12<sup>th</sup>, plaintiff complained of right knee pain, with swelling and redness and his leg was warm to the touch. Plaintiff was sent to the emergency

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<sup>1</sup> Plaintiffs discontinued the action against Bethel Nursing & Rehabilitation Center, pursuant to a Stipulation dated June 12, 2018.

department and seen by Dr. Khabie who noted a cellulitis. He was discharged on December 19, 2013, to Helen Hayes Hospital.

The complaint asserts that Dr. Khabie cut the bone improperly; implanted the knee hardware incorrectly; and failed to timely diagnose and treat a post-operative infection, necessitating a total knee revision in September 2014 at White Plains Hospital. The complaint alleges that Somers Orthopaedic permitted improperly trained staff to assist in the surgical procedure, negligently employed personnel to treat plaintiff, and allowed medical doctors – who failed to know proper techniques – to perform surgery.

The complaint alleges that Northern Westchester negligently provided medical and surgical evaluations, examinations, care, treatment, procedures, tests, services, and advice to plaintiff.

Northern Westchester moves for summary judgment dismissing the complaint and submits an affidavit of Alexander McMeeking, M.D., board certified in internal medicine and infectious disease. Dr. McMeeking attests that, with a reasonable degree of medical certainty, there were no departures on the part of the staff of Northern Westchester Hospital in the treatment of plaintiff and that no act or omission by the hospital staff proximately caused his injuries.

Dr. McMeeking opines, with a reasonable degree of medical certainty, that Northern Westchester did not depart from the standard of care in maintaining appropriate infection control practices. He noted that infection is a complication of surgery that may occur even with adherence to infection control practices. Any break in the skin, such as a surgical incision, provides an entry point for bacteria which can cause cellulitis, a common superficial skin infection. According to Dr. McMeeking, the evidence showed appropriate adherence to infection control practices by hospital staff before, during, and after the surgery. There is no evidence that the hospital staff failed to provide sanitary and sterile equipment and instruments for the surgery as well as a sanitary area and atmosphere.

Dr. McMeeking attests that plaintiff was appropriately monitored by the hospital staff who observed and documented the plaintiff's condition. The hospital staff appropriately and timely followed the orders and directions of the patient's physician. Plaintiff was on a cardiac monitor during his admission and his vital signs were taken at appropriate intervals and documented. Assessments were appropriately done of the plaintiff's neurological, respiratory, and circulatory systems, as well as his IV site, incision, pain level, and intake and output. Assessment of the wound dressing, the tissue around the wound, drainage, and swelling were also appropriately documented.

Dr. McMeeking opines that there were no signs or symptoms of infection during plaintiff's admission to Northern Westchester from December 6<sup>th</sup> through 10<sup>th</sup>. His temperature and white blood cell count were within normal ranges. His pain level was not unusual, and he was able to participate in physical therapy. The wound was inspected at appropriate intervals and did not show signs of infection. There was no significant

swelling, redness, drainage, or warmth at the incision. He further states that the treatment rendered during the December 12, 2013 admission by the staff was appropriate.

Dr. McMeeking opined that the superficial skin infection was resolved by the plaintiff's discharge from Northern Westchester on December 19, 2013, and did not effect his right knee or his subsequent surgical course. The blood cultures were negative meaning the infection did not spread systemically. The cellulitis did not affect the surgical incision and was limited to the right thigh.

Dr. Khabie and Somers Orthopaedic also move for summary judgment dismissing the complaint. In support, they submit expert affirmations of Michael Kelly, M.D., board certified in orthopaedic surgery, and Jonathan Luchs, M.D., board certified in radiology.

Dr. Kelly opined, with a reasonable degree of medical certainty, that Dr. Khabie's care and treatment of plaintiff met the standard of care and that no acts or omissions of Dr. Khabie were a proximate cause of plaintiff's alleged injuries. Dr. Kelly's review of the records and films revealed that all the bone cuts were made correctly and appropriately within the standard of care. The femur and tibia were cut appropriately to allow the components to be implanted in accordance with the manufacturer's specifications, using the manufacturer's equipment. Dr. Kelly states that there is no documentary or radiographic evidence that the components loosened at any time. Dr. Khabie also chose an appropriate angle of 3 degrees. According to Dr. Kelly, the x-rays confirm that the posterior tibial slope was appropriate. Dr. Kelly opined that the plaintiff's arthroplasty failed due to arthrofibrosis and the posterior tibial cut and resulting posterior tibial slope were not responsible for the development of arthrofibrosis.

Dr. Kelly further opines that there is no merit to plaintiffs' claim that Dr. Khabie placed the components in a manner that made it unstable, used an incorrectly sized component, failed to measure plaintiff's anatomy properly, or caused any damage requiring additional surgery. He further opines that Dr. Khabie acted in accordance with the standard of care at all times and that plaintiff never had an infection of the knee prosthesis or the incision. Plaintiff developed a superficial cellulitis infection sometime after his discharge from Northern Westchester. Moreover, Dr. Khabie administered prophylactic antibiotics prior to surgery, in accordance with good and accepted standards of practice, and plaintiff did not exhibit any signs or symptoms of infection prior to his discharge from Northern Westchester.

Dr. Kelly opines that Dr. Khabie's actions did not cause the plaintiff's patella baja (an abnormally low-lying patella). If the patella baja had been caused by some error during surgery, it would have been immediately present on postoperative x-rays. The plaintiff's patella baja was caused by postoperative arthrofibrosis that caused shortening of the patellar tendon. Dr. Kelly opined that given Dr. Khabie's education, training, and experience, he was exceptionally qualified, experienced, and possessed the requisite skill to perform the total knee arthroplasty.

Dr. Luchs opines, to a reasonable degree of medical certainty, that all x-ray images between December 6, 2013, and May 20, 2014, demonstrate good position and alignment of the prosthesis and there is no evidence of loosening. The images show a normal total knee arthroplasty. He further opines that the posterior tibial slope following the knee arthroplasty was well within an acceptable and standard range. The posterior slope through at least May 20, 2014, was between 5.01 degrees and 6.14 degrees. Dr. Luchs further opines that the joint line was well aligned and in a good position and that the joint line and posterior tibial slope did not need to be revised based on radiographic imaging. The x-ray taken May 20, 2014, shows possible patella baja, however, it was not radiographically significant enough to warrant revision arthroplasty.

In opposition, Plaintiffs argue that Dr. Khabie departed from good and accepted medical practice and that such departures caused plaintiff's injuries. Plaintiffs also argue that Dr. Khabie was an employee of Somers Orthopaedic and therefore Somers is vicariously responsible from Dr. Khabie's malpractice. As to Northern Westchester, plaintiffs argue that issues of fact exist as Dr. Khabie was more than merely a doctor with admitting privileges there. Plaintiffs point out that the Northern Westchester website identifies Dr. Khabie as the chairman of surgical services, co-chief of orthopedic & sports medicine, co-director of the orthopedic and spine institute, and director of sports medicine.

Plaintiffs submit a redacted expert affirmation of a board certified orthopaedic surgeon. Plaintiff's expert opines, within a reasonable degree of medical certainty, that Dr. Khabie departed from good and accepted medical practice in his treatment of plaintiff which resulted in the need for further surgical intervention and medical treatment and caused plaintiff's pain and discomfort.

Plaintiff's expert states that Dr. Kelly's opinion is flawed and based upon incorrect and inaccurate information as Dr. Kelly utilized Dr. Luch's measurements. According to plaintiff's expert, many of the x-rays used were incorrectly positioned, therefore, Dr. Luchs' affidavit and report are fundamentally flawed and inaccurate. In order to obtain a more accurate finding, the central longitudinal axis of the tibia was used by plaintiff's expert which showed the slope was zero degrees preoperatively. According to plaintiffs' expert, this is a significant, atypical, and notable finding and must be considered by the surgeon in determining the methods used in the surgical procedure. Dr. Khabie did not consider this finding which was a departure from good and accepted medical practice.

Plaintiff's expert further opines that there were no comprehensive preoperative x-rays performed in the months prior to the surgery whereas standard practice is to perform at least an 18 or 36 inch coronal x-ray and an 18 inch sagittal x-ray in order to appropriately template a knee for surgery.

Plaintiff's expert further opines that a patella baja was created during surgery by Dr. Khabie by raising plaintiff's joint line. The raising of the joint line was a direct result of the decisions made by Dr. Khabie in performing the surgery including the cut and removal

of bone. According to plaintiffs' expert, this approach was a departure of good and accepted medical practice and a competent producing cause of plaintiff's pain and discomfort and necessitated the need for further surgical procedures. Plaintiff's expert opines that plaintiff's condition is permanent and will not be significantly improved with additional surgery or medical intervention and the permanency is the result of Dr. Khabie's departure from good and accepted medical practice during the surgery.

In reply, Northern Westchester argues that plaintiff's expert failed to assert any departure from the standard of care on its part and fail to challenge the sufficiency of its expert affirmation. Northern Westchester argues that plaintiff raised a new theory in opposition, arguing that Northern Westchester is liable for Dr. Khabie's malpractice because it hired him as chief of orthopedics.

### Discussion

"In order to establish liability for medical malpractice, a plaintiff must prove that the defendant deviated or departed from accepted community standards of practice and that such departure was a proximate cause of the plaintiff's injuries" (*Leavy v Merriam*, 133 AD3d 636, 637 [2d Dep't 2015]). A physician moving for summary judgment in a medical malpractice action must establish, prima facie, either that there was no departure from accepted community standards of medical practice, or that any alleged departure was not a proximate cause of the plaintiff's injuries (see *Aronov v Soukkary*, 104 AD3d 623, 624 [2d Dep't 2013]; *DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2d Dep't 2012]). Once a defendant has made such a showing, the burden shifts to the plaintiff to "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

"A plaintiff cannot rebut a defendant physician's showing that he or she was not negligent and defeat a motion for summary judgment by offering an expert's affidavit containing general allegations of medical malpractice which are conclusory in nature and unsupported by competent evidence tending to establish the elements of medical malpractice" (*Shectman v Wilson*, 68 AD3d 848, 849 [2d Dept 2009]; see also *Alvarez v Prospect Hosp.*, 68 NY2d at 324-325; *Shahid v New York City Health & Hosps. Corp.*, 47 AD3d 800, 801 [2d Dept 2008]).

Here, Dr. Khabie and Somers Orthopaedic made a prima facie showing of entitlement to summary judgment by demonstrating through expert opinion that Dr. Khabie did not deviate from the accepted standards of medical practice or that any alleged departure was not a proximate cause of plaintiff's injuries (see *Alvarez v Prospect Hosp.*, 68 NY2d 320; *Reustle v Petraco*, 155 AD3d 658 [2d Dept 2017]). However, in opposition, plaintiffs' expert affidavit raised a triable issue of fact as to whether Dr. Khabie departed from good and accepted medical practice and whether such departures were a proximate cause of plaintiff's injuries (see *Reustle v Petraco*, 155 AD3d 658).

"A hospital may not be held liable for injuries suffered by a patient who is under the care of a private attending physician chosen by the patient where the resident physicians

and nurses employed by the hospital merely carry out the orders of the private attending physician" (*Cham v St. Mary's Hosp. of Brooklyn*, 72 AD3d 1003, 1004 [2d Dept 2010]), unless the hospital staff commits "independent acts of negligence or the attending physician's orders are contradicted by normal practice" (*Cerny v Williams*, 32 AD3d 881, 883 [2d Dept 2006]; see *Pearce v Klein*, 293 AD2d 593 [2d Dept 2002]).

Here, Northern Westchester established its prima facie entitlement to judgment as a matter of law. Northern Westchester's expert affidavit demonstrated that the hospital staff did not commit any independent acts of negligence, that the attending physician's orders were not contraindicated by normal practice, and that any alleged departures were not a proximate cause of plaintiff's injuries (see *Gattling v Sisters of Charity Med. Ctr.*, 150 AD3d 701 [2d Dept 2017]). In opposition, plaintiffs failed to raise an issue of fact. Indeed, the expert affidavit submitted by plaintiffs solely opines as to the negligence and departures of Dr. Khabie (see *Gattling v Sisters of Charity Med. Ctr.*, 150 AD3d 701; *Bedard v Klein*, 88 AD3d 754 [2d Dept 2011]). Plaintiffs' argument that the hospital's motion should be denied because Dr. Khabie is its chief of orthopedics is without merit. Dr. Khabie testified at his deposition that plaintiff was a private patient of Somers Orthopaedic, that he did not receive any compensation from Northern Westchester for plaintiff's care, and that his care of plaintiff had nothing to do with his administrative positions held at Northern Westchester.

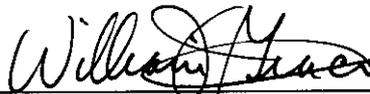
Accordingly, it is

**ORDERED** that Northern Westchester Hospital's motion for summary judgment, pursuant to CPLR 3212, dismissing the complaint insofar as asserted against it is **GRANTED** (motion sequence #1); and it is further

**ORDERED** that the motion of Victor Khabie, M.D. and Somers Orthopaedic Surgery & Sports Medicine Group, P.L.L.C for summary judgment, pursuant to CPLR 3212, dismissing the complaint insofar as asserted against them is **DENIED** (motion sequence #2).

Counsel for all remaining parties are directed to appear in the Settlement Conference Part, Room 1600, on **March 19, 2019, at 9:15 a.m.** for further proceedings.

Dated: White Plains, New York  
February 20, 2019



HON. WILLIAM J. GIACOMO, J.S.C.