

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32123
C/kmb

_____AD3d_____

Argued - June 20, 2011

MARK C. DILLON, J.P.
RANDALL T. ENG
SANDRA L. SGROI
ROBERT J. MILLER, JJ.

2010-10471

DECISION & ORDER

Maxine Deller, appellant, v Mercy
Medical Center, et al., respondents.

(Index No. 4406/01)

Suckle Schlessinger PLLC, New York, N.Y. (Melissa K. Corrao of counsel), for appellant.

Bartlett, McDonough & Monaghan, LLP, White Plains, N.Y. (Edward J. Guardaro, Jr., and Patricia D'Alvia of counsel), for respondents.

In an action to recover damages for medical malpractice and lack of informed consent, the plaintiff appeals from an amended judgment of the Supreme Court, Nassau County, (Cozzens, Jr., J.), entered February 9, 2010, which, upon an order of the same court dated June 7, 2004, marking the case off the trial calendar, upon an order of the same court entered October 4, 2005, denying the plaintiff's motion to restore the action to the trial calendar, and upon a subsequent order of the same court entered January 12, 2007, denying the plaintiff's motion for leave to reargue, is in favor of the defendants and against her dismissing the complaint. Motion by the respondents, inter alia, to dismiss the appeal on the ground that the issues raised on the appeal are barred pursuant to *Bray v Cox* (38 NY2d 350). By decision and order on motion of this Court dated April 13, 2011, the branch of the motion which was to dismiss the appeal was held in abeyance and was referred to the Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the subject branch of the motion and the papers filed in opposition thereto, and upon the argument of the appeal, it is,

ORDERED that the subject branch of the motion is granted; and it is further,

August 30, 2011

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ORDERED that the appeal from the amended judgment entered February 9, 2010, is dismissed; and it is further,

ORDERED that one bill of costs is awarded to the defendants.

As a general rule, we do not consider an issue on a subsequent appeal which was raised or could have been raised in an earlier appeal which was dismissed for lack of prosecution, although the Court has the inherent jurisdiction to do so (*see Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750; *Bray v Cox*, 38 NY2d 350). The plaintiff appealed from a judgment entered January 12, 2009, which upon, inter alia, an order of the Supreme Court, Nassau County, entered October 4, 2005, denying the plaintiff's motion to restore the action to the trial calendar, dismissed the complaint pursuant to CPLR 3404. That appeal was dismissed by decision and order on motion of this Court dated August 4, 2010, for failure to perfect in accordance with the rules of this Court, and that dismissal constituted an adjudication on the merits with respect to all issues which could have been reviewed on that appeal (*see Bray v Cox*, 38 NY2d at 355). Under the circumstances of this case, we decline to exercise our discretion to determine the merits of the instant appeal from the amended judgment, which raises the same issues as could have been raised on the prior appeal (*see Bray v Cox*, 38 NY2d 350; *Graziano v Graziano*, 66 AD3d 835; *Blue Chip Mtge. Corp. v Stumpf*, 50 AD3d 936; *Matter of Talt v Murphy*, 35 AD3d 486; *Hepner v New York City Tr. Auth.*, 27 AD3d 418).

DILLON, J.P., ENG, SGROI and MILLER, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court