

Zifen Gu Chang v St. Luke's Roosevelt Hosp. Ctr.

2007 NY Slip Op 30377(U)

March 23, 2007

Supreme Court, New York County

Docket Number: 0105188

Judge: Marilyn Shafer

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHAFFER
Justice

PART 62

CHANG, ZIFENG GU

INDEX NO.

105188/05

MOTION DATE

MOTION SEQ. NO.

03

MOTION CAL. NO.

- v -

ST. LUKE'S-ROSBAVANT
HOSPITAL CENTER, ETAL.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*is denied
pursuant to attached Mem*

FILED

MAR 28 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/23/07

9

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

[* 1]

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER
Justice

PART 62

ZIFEN GU CHANG,

INDEX NO. 105188/05

Plaintiff,

-against-

ST. LUKE'S ROOSEVELT HOSPITAL CENTER,
CONTINUUM HEALTH PARTNERS, INC. and
CONTINUUM HEALTH PARTNERS, INC. d/b/a
ST. LUKE'S ROOSEVELT HOSPITAL CENTER, and
NEW YORK CITY OFFICE OF THE MEDICAL
EXAMINER,

Defendants.

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MOTION SEQ. NO. 93

The following papers were read on this motion to reargue:

PAPERS NUMBERED

Order to Show Cause	1
Affidavit of Service	2
Memo or Law in Support of Motion to Renew and Reargue	3
Affirmation in Opposition	4
Reply Memo of Law	5

Upon the foregoing papers, this court grants the motion to reargue, and upon reargument, modifies its prior decision.

Pursuant to CPLR §2221, plaintiff Zifen Gu Chang (Chang) moves by order to show cause to reargue and renew this court's order of November 16, 2006 (the Order) only insofar as the Order assessed sanctions against Chang's firm in the amount of \$5,000. Chang is the widow of Harry Chang, who died at the age of 86 in defendant St. Luke's Roosevelt Hospital Center

(St. Luke's) and underwent an autopsy by the Medical Examiner following allegations by Harry's adult children that his death may have been the result of foul play by Chang, their stepmother.

Chang brought the underlying action against St. Luke's for their negligent failure to obtain Chang's consent to the autopsy, a practice repugnant to Chang and allegedly to her late husband, whose religious convictions proscribed post mortem (Order to Show Cause, Exhibit 1, p 4). This court found that, in despatching Harry Chang's remains for an autopsy, St. Luke's had complied with its statutory duty to report suspicious deaths to the Medical Examiner, who had the discretion to perform an autopsy. The Order dismissed Chang's emotional distress claim as time-barred, and denied Chang's cross-motion to amend the complaint.

Discussion

CPLR §2221(d) 2 provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (*Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]). The purpose of reargument is not to give an unsuccessful party another opportunity to reargue an issue already decided or to present new arguments (*Foley v Roche*, 68 AD2d 558[1st Dept 1979]). CPLR §2221 (e) 2 provides, in relevant part, that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination . . .," and CPLR §2221(e) 3 requires that the motion "shall contain reasonable justification for the failure to present such facts on the prior motion."

In addition to or in lieu of awarding costs, the court, in its discretion, may impose financial sanctions on any party or attorney in a civil action or proceeding who engages in

frivolous conduct, as provided by CPLR §8303-a (a) and NY Comp. Codes R. & Regs. Tit. 22 §130-1.1 (c) (22 NYCRR). Under 22 NYCRR, conduct is frivolous if (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; or (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false (*Levy v Carol Management Corp.*, 260 AD 2d 27, 34 [1st Dept 1999]). At the least, conduct during litigation must have a good faith basis (*In the Matter of Wecker v D'Ambrosio*, 6 AD3d 452 [2d Dept 2004]).

The gravamen of the complaint was that there was no objective medical evidence that Harry Chang's death was in any way suspicious, warranting an autopsy, and, in opposition to dismissal, that triable issues of fact precluded summary judgment on the question of whether the autopsy was negligent or violated Chang's right of sepulcher. Here, Chang does not seek to renew or reargue the merits of the action, arguing merely that it was not brought or continued in bad faith.

As a threshold matter, Chang alleges that it was not given notice by St. Luke's that the latter was seeking sanctions against Chang. However, the notice of motion for summary judgment is clear on its face that the relief sought by St. Luke's included costs and sanctions (Order to Show Cause, Exhibit 14).

Additionally, Chang argues that new facts, unavailable at the time of the dispositive motion, would have supported Chang's complaint. After St. Luke's moved for summary judgment, the Medical Examiner released an autopsy report concluding that Harry Chang died in a natural manner caused by "Parkinson's disease with recurrent aspiration pneumonia" (Order to Show Cause, Exhibit 5). Pursuant to CPLR (e) (3), Chang produced reasonable justification for the failure to present the autopsy report on the prior motion, as it was not then available.

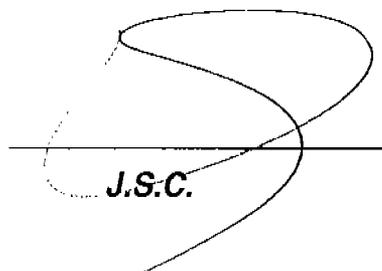
On further consideration, this court finds that while the complaint was without merit in law, there is some evidence in the record to show that the complaint had a good faith basis.

Accordingly it is

ORDERED that the motion to renew and reargue is granted, and upon reargument, this court's prior decision is modified only to the extent that the award of costs and sanctions to defendant St. Luke's Hospital is denied.

This reflects the decision of this court.

Dated: 3/23/07


J.S.C.

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