

Greenberg v Mount Sinai Med. Ctr.

2007 NY Slip Op 31107(U)

May 1, 2007

Supreme Court, New York County

Docket Number: 0115406/2004

Judge: Sheila Abdus-Salaam

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

PRESENT: HON. SHEILA ABDUS-SALAAM
Justice

PART 13

Cameron Greenberg

INDEX NO. 115406/04

MOTION DATE 4/26/07

MOTION SEQ. NO. 02

- v -

Mount Sinai Medical Center, et al.

MOTION CAL. NO. _____

FILED
MAY 08 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by defendant Mount Sinai Hospital, s/h/a Mount Sinai Medical Center, for an extension of time to file a motion for summary judgment is denied.

The note of issue in this medical malpractice action was filed September 1, 2006. Pursuant to my order, as set forth in the Preliminary Conference Order, summary judgment motions were required to be filed no later than 60 days after filing of the note of issue, or by October 31, 2006. By a so-ordered stipulation dated October 5, 2006, that deadline was extended to December 11, 2006. Defendants Adler, Kurtz and New York Obstetrics and Gynecology, P.C. timely filed for summary judgment. Their motion, returnable April 19, 2007, is currently pending and plaintiffs served opposition to it on March 26, 2007. This motion by defendant Mount Sinai for a further extension of the deadline, brought by order to show cause dated April 11, 2007, comes four months after the extended deadline had

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

expired and after plaintiffs have already opposed the other defendants' motion.

Defendant Mount Sinai explains that the reason it did not move for summary judgment earlier is that it recently received confirmation from the infant plaintiff's former treating pediatric neurologist, Dr. Abba Cargan, that the infant plaintiff's medical records and radiology films show a congenital defect inconsistent with the hypoxic/ischemic neurological injury plaintiff claims to have suffered as a result of the perinatal care he received from defendants. Dr. Cargan purportedly is willing to sign an affidavit to that effect. At oral argument on the motion, defendant's counsel conceded that defendant could have made the motion sooner since an expert defendant had consulted before the deadline expired rendered the same opinion (which was confirmed by a second neuroradiology expert after the deadline had expired), but defense counsel asserts that Dr. Cargan's confirmation makes the opinion more persuasive because plaintiff's expert relies on Dr. Cargan's diagnosis of cerebral palsy in opposing the summary judgment motion of the other defendants. Defendant maintains that a combination of plaintiff's failure to provide an authorization to speak with Dr. Cargan until December 12, 2006 (the day after the extended summary judgment deadline expired) and Dr. Cargan's schedule prevented its counsel from meeting with Dr. Cargan until March 28, 2007. Defendant also argues that plaintiff would not be prejudiced by an extension of the deadline as the "grounds upon which defendant will move are already known to plaintiff, and plaintiff's counsel has already demonstrated his capability to vigorously respond." (Reply Affirmation, ¶ 6).

While the court appreciates defendant's desire to present its most persuasive arguments, nothing prevented defendant from timely moving for summary judgment on the basis of the opinion it had already obtained from the initial expert defendant consulted or from consulting before December 11, 2006 with the neuroradiology expert who confirmed the initial expert's

conclusion. Moreover, as is pointed out by plaintiffs in opposition to this motion, the infant was examined on October 27, 2006 by Dr. Regina DeCarlo, a pediatric neurologist designated by defendant, who apparently did not opine that the infant suffered from a congenital defect, despite having had (or had access to) the same medical records and radiology films that defendant now claims form the basis of Dr. Cargan's opinion. As both Dr. DeCarlo and Dr. Cargan are pediatric neurologists, this alone raises an issue of fact, which most likely will defeat summary judgment. In any event, even if defendant believed that a meeting with Dr. Cargan was essential before it could decide whether to move for summary judgment, defendant does not explain why it did not make that known during the several pretrial conferences after the December 11, 2006 deadline. Three such conferences were held on December 14, 2006, January 11, 2006 and March 8, 2007. Rather, defendant waited until plaintiffs had submitted their opposition to the other defendants' motion brought on different grounds. Such a piecemeal approach to summary judgment prejudices plaintiffs, who should have to submit only one set of opposition papers to all motions for summary judgment.

In sum, the court is not persuaded that defendant Mount Sinai has demonstrated good cause for seeking to bring its untimely summary judgment motion or that plaintiff is not prejudiced thereby. Accordingly, defendant Mount Sinai's motion is denied.

Dated: May 1, 2007

FILED
 MAY 08 2007
 NEW YORK
 COUNTY CLERK'S OFFICE

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE