

Gonzalez v New York Presbyterian Hosp.
2007 NY Slip Op 31842(U)
June 21, 2007
Supreme Court, New York County
Docket Number: 0104711/2004
Judge: Stanley L. Sklar
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT *Hon. Stanley L. Sklar*

PART 29

Index Number : 104711/2004

— GONZALEZ, MARIA

vs
PRESBYTERIAN HOSPITAL

Sequence Number : 001

DISMISS ACTION

JEX NO. _____

OTION DATE _____

OTION SEQ. NO. _____

OTION CAL. NO. _____

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

**MOTION DECIDED IN ACCORDANCE WITH
THE ATTACHED MEMORANDUM DECISION**

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

Dated: 6/21/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

-----X
MARIA GONZALEZ

Plaintiff,

Index No.: 104711/04

-against-

NEW YORK PRESBYTERIAN HOSPITAL a/k/a
"COLUMBIA PRESBYTERIAN MEDICAL CENTER"
and CHRISTOPHER B. MICHELSON, M.D.,

Defendants.
-----X

Sklar, J.:

Defendant Christopher B. Michelsen, M.D., s/h/a Christopher B. Michelson, M.D., moves for an order pursuant to CPLR 3216 (b) (3), dismissing the complaint as to him for want of prosecution and assessing motion costs.

Plaintiff, then represented by other counsel, commenced this medical malpractice action in March 2004. Dr. Michelsen's counsel served an answer as well as a demand for a bill of particulars and various discovery demands in May 2004. While plaintiff's counsel served some authorizations, plaintiff's counsel failed to respond to Dr. Michelsen's discovery requests and demand for a bill of particulars, despite the fact that followup letters were sent.

In September 2005 plaintiff's counsel, who were in the midst of Disciplinary Committee proceedings, were replaced by current counsel, an associate of former counsel. See *Matter of Fauci*, 28 AD 3rd 192 (1st Dept, 2006). Over six months later Dr. Michelsen's counsel wrote to plaintiff's current counsel by letter dated March 23, 2006, noted that discovery and the bill of particulars remained outstanding and asked counsel to respond to the outstanding demands. When nothing was forthcoming for six months Dr. Michelsen's counsel served a ninety-day

notice pursuant to CPLR 3216 (b) (3) on September 28, 2006. Apparently, all that plaintiff's counsel did when receiving that notice was to seek, by letters dated October 2, 2006, which letters appended authorizations obtained by that counsel about a year earlier, the records from several healthcare providers.

Not having heard from plaintiff's counsel, Dr. Michelsen's counsel served the instant motion on January 10, 2007 which prompted plaintiff's counsel to call movant's counsel on February 2, 2007 to request an adjournment of the motion, which request was denied by him. Ultimately on February 12, 2007 plaintiff's counsel served opposition papers, bills of particulars and responses to the discovery demands.

Plaintiff's counsel's apparent excuse for doing little on the case once he took it over in September 2005 is that he obtained almost forty-five cases from plaintiff's former counsel in a relatively short period. He further asserted that when he was served with the ninety-day notice he instructed his "office to calendar the date and to immediately obtain all missing records so that a bill of particulars could be served," but that there was a "calendar error" which caused the ninety-day period date to expire without plaintiff having filed a note of issue. Plaintiff's counsel asserted in his opposition papers that the records in his possession demonstrated that the case has merit, but that he should not be required to provide an affidavit of merit because he had not been provided with all the radiological films and medical bills.

Plaintiff's theory of the case is that Dr. Michelsen, an orthopedic surgeon, who performed knee replacement surgery on plaintiff, subsequently failed to properly removed a drain, thereby leaving a foreign object in place. Plaintiff's counsel also asserted that there are claims relating to the manner in which the knee was replaced. It is claimed that as a result of the alleged

malpractice plaintiff suffered injury to her knee and over a year later had to have the knee prosthetic, which was installed by Dr. Michelsen, replaced by Dr. Steven Stuchin, at the Hospital for Joint Diseases.

In reply defense counsel asserted that plaintiff had failed to provide a reasonable excuse for failing to provide discovery and comply with the ninety-day notice, and has failed to provide the requisite affidavit of merit. Thereafter, I gave plaintiff's counsel an opportunity to provide an affidavit of merit. By letter dated April 25, 2007, and "declare[d] under penalties of perjury," a Dr. Carl Austin Weiss noted that an x-ray taken immediately after the surgery of October 21, 2002 showed a drain in the knee and alleged that such drains are usually removed twenty-four to forty-eight hours after surgery unless bleeding were still active. Dr. Weiss asserted that the hospital records were devoid of a notation that the drain had been removed. Dr. Weiss then referred to an x-ray report of a Dr. Ronald Staron (which report was dated November 4, 2002) which recited that "a short linear density [was] noted anteriorly in the soft tissue above the patella which [was] not clearly seen on the previous study." The report then indicated that "[h]owever, this area was partially obscured by an overlying cast in the prior study. A radiopaque foreign body [cannot] be totally excluded." Dr. Weiss then without further explanation concluded that "[i]t is reasonable to believe that this represented "A RETAINED PORTION OF THE PLASTIC DRAINAGE TUBE," and that leaving a foreign body in the knee is a departure from accepted standards of medical practice.

By letter dated May 1, 2007 defense counsel asserted that Dr. Weiss' claim that none of the hospital's records mentioned the removal of the drain was erroneous because Dr. Staron's x-ray report relied on by Dr. Weiss specifically recited that the November 4, 2002 x-ray had been

compared with two views from an October 23, 2002 study and showed “interval removal of a surgical drain.” Defense counsel also observed that the report of pre-operative x-rays taken at the behest of Dr. Stuchin on December 16, 2003 noted a “small amount of lucency with sclerotic margins” which was “of questionable significance.” See radiology report of Sandra Moore. Dr. Stuchin, in reviewing those x-rays pre-operatively, stated that the lucency appeared well fixed. In his May 1 letter defense counsel pointed to the fact that Dr. Stuchin’s subsequent surgical report of the knee revision surgery detailed his findings and what was removed and made no mention of a drain having been left in during the initial knee replacement surgery.

By letter dated May 9, 2007 movant’s counsel advised that four x-rays taken of the knee at defendant hospital on December 17, 2002 merely showed the “usual appearance after” total knee replacement (see Zwass report of December 17, 2002). This was reiterated by counsel for the defendant hospital in a letter dated May 10, 2007.

By letter dated May 11, 2007 plaintiff’s counsel indicated that he was obtaining copies of films and records from both defense counsel and once obtained he intended to have them reviewed by Dr. Weiss so that Dr. Weiss could provide a “further narrative” to “address [inter alia] the foreign body issue.” Plaintiff’s counsel therefore requested two to three weeks to provide Dr. Weiss’ updated narrative. I adjourned the motion to give plaintiff’s counsel until June 1 to provide an updated affirmation from Dr. Weiss. By letter dated June 4, 2007, defense counsel advised that nothing had been forthcoming from plaintiff’s counsel and that therefore the motion should be considered fully submitted as of June 1 and granted. No response to the June 4 letter was received from plaintiff’s counsel.

The motion is granted. First plaintiff’s counsel has not demonstrated a reasonable excuse

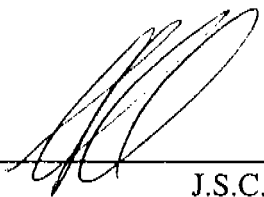
for failing to respond to the ninety-day notice or for that matter for neglecting discovery and the demand for a bill of particulars before the ninety-day notice was served. He does not identify any specific person in his office who was instructed to calendar and obtain unspecified records allegedly needed to prepare bills of particulars. It appears that the records sought in October 2006 were not those of defendant and that long before being served with the ninety-day notice, namely on March 14, 2006, plaintiff's counsel sought the records of the defendant hospital. Aff in opp, exh. E. So, it is unclear why the bills of particulars ultimately served in February 2007 could not have been served earlier. Nor, does plaintiff's counsel provide the affidavit of any person from his office indicating that he/she failed to comply with the alleged request.

Second the showing of merit is inadequate. Dr. Weiss inexplicably ignores the part of Dr. Staron's report which indicated that the drain was removed and speculates in a bald and conclusory manner that "[i]t is reasonable to believe" that the density represents part of the drain. Moreover Dr. Weiss did not address Dr. Stuchin's operative report or the x-rays taken in December 2002, nor did the plaintiff provide a further affirmation from Dr. Weiss in order to establish a meritorious case, although plaintiff's counsel was given ample time to do so.

Accordingly, the motion is granted and the action dismissed as to Dr. Michelsen with \$100 motion costs.

Settle order.

Dated: June 21, 2007
60 Centre Street
New York, NY



J.S.C.