

Duffy v Vogel

2007 NY Slip Op 34280(U)

February 27, 2007

Supreme Court, New York County

Docket Number: 0120794/2002

Judge: Donna Marie Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 21

DUFFY, ELEANOR

Plaintiff,

-v-

VOGEL, JAMES M., DR., ET AL.

Defendants.

INDEX NO. 120794/02

MOTION DATE _____

MOTION SEQ. No. 008

MOTION CAL No. _____

The following papers, numbered 1 to 3 were read on this motion for Trial De Novo.

PAPERS NUMBERED

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

1, 1A

Answering Affidavits- Exhibits _____

2, 2A

Replying Affidavits _____

CROSS-MOTION: _____ YES NO

FILED

MAR 07 2007

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISIONS OFFICE
NEW YORK

Dated: 2-27-07

Donna M. Mills
J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

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

 ELEANOR DUFFY,

INDEX NO.
 120794/02

Plaintiff,

- against -

DR. JAMES M. VOGEL, et al.,

DECISION/ORDER

Defendants.

DONNA M. MILLS, J:

Pursuant to CPLR § 4404, plaintiff moves for an Order setting aside the verdict of the jury as inconsistent, against the weight of the evidence, and the failure of the court to poll the jury, in addition to various evidentiary trial rulings. Defendants' oppose the motion.

BACKGROUND

This medical malpractice action was tried before this court from October 26, 2006 to November 17, 2006. Plaintiff initiated this action against two defendants, Dr. James Vogel and Dr. Allan Jacobs. The verdict sheet also included non parties, Dr. Martin Feuer and Dr. Arie Liebeskind as to their possible culpability. The jury unanimously found that the named defendants were not liable for plaintiff's injuries. The verdict sheet clearly instructed the jury to not continue to the non party Dr.'s if they found the named defendants not liable. However, the jury continued to answer the questions on the verdict sheet in disregard of the instructions, and found the non-party Dr.'s culpable. The entire verdict was read in open court, and counsel for plaintiff immediately asked that the jury be polled. This court denied counsel's application which now forms the basis for this motion to set aside the verdict.

APPLICABLE LAW AND DISCUSSION

It has been established that the parties have an absolute right to have the jury polled, and the refusal to do so is error (see Muth v J & T Metal Prods. Co., 74 AD2d 898

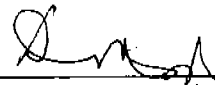
[2d Dept. 1980]). Moreover, the trial court has the duty "to see to it that the work of the jury is culminated by a true report of their intentions and decision" (see Goines v Pennsylvania R.R. Co., 208 Misc. 103, 111 [Sup. Ct. N.Y. County, 1955]). In light of the jury not following the instructions, which were clearly written on the verdict sheet, and apportioning liability to the non party doctors after not finding negligence on the part of the named defendants, this court should have had the jury polled to make certain of their intentions.

Accordingly, plaintiff's motion to set aside the verdict and declaring a mistrial is granted. Plaintiff is directed to serve a copy of this Order with Notice of Entry on the Clerk of the Trial Support Office (Room 158 at 60 Centre Street) to place the matter on the appropriate trial calendar. The Court need not address the other branches of plaintiff's motion in light of the granting of the mistrial.

This constitutes the decision and order of the Court.

Dated: 2-27-07

So Ordered



Donna M. Mills, J.S.C.

FILED
MAR 07 2007
COUNTY CLERK'S OFFICE
NEW YORK