

Dunn v Khan

2008 NY Slip Op 30795(U)

March 11, 2008

Supreme Court, Nassau County

Docket Number: 6494-05/

Judge: Karen Veronica Murphy

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Amended
Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 22 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

MITCHELL DUNN, as Administrator of the Estate
of PAULINE DUNN, Deceased,

Index No. 6494/05

Plaintiff(s),

-against-

Motion Submitted: 11/28/07
Motion Sequence: 006,007

AIJAZ KHAN, M.D., CESAR DUMAYAS
FLORITA, M.D., ETHEL CWIBEKER, PSY.D.,
AND SOUTH NASSAU COMMUNITIES
HOSPITAL,

Defendant(s).

X

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XX
- Answering Papers.....XX
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....X

Motion [sequence #6] by defendant, Ethel Cwibeker, Psy.D., pursuant to CPLR § 8303-a, for an Order awarding her costs, sanctions and attorneys' fees; and,

Cross motion [sequence #7] by plaintiff, Mitchell Dunn, as Administrator of the Estate of Pauline Dunn, pursuant to 22 NYCRR § 130-1.1 for an Order awarding him attorneys' costs and sanctions for the making of the within motion; are determined as follows:

This case arises out of the death of Pauline Dunn on August 25, 2003. Plaintiff, Administrator, Mitchell Dunn ("Dunn"), husband of Pauline, brings this action for medical and psychiatric malpractice against, *inter alia*, Ethel Cwibeker ("Dr. Cwibeker"), a psychologist.

By an Order dated September 28, 2007, this Court awarded the movant, Dr. Cwibeker, summary judgment and dismissed the plaintiff's complaint as asserted against her. More specifically, this Court found that the defendant, Dr. Cwibeker, had submitted ample proof, which established that no doctor-patient relationship had ever been formed between her and Pauline Dunn. Plaintiff failed to present any opposing papers or raise a material triable issue of fact as to whether Pauline Dunn was in fact a patient of the defendant, or whether defendant had ever treated, advised or agreed to undertake Pauline's care. Accordingly, this Court granted the defendant's motion and plaintiff's complaint was dismissed against Dr. Cwibeker.

In bringing this motion for costs, sanctions and attorneys' fees, "former" defendant, Ethel Cwibeker, maintains that despite her previous assertions and the fact that at the outset she provided the plaintiff's attorney with documentary evidence, including letters, denying any relationship with the plaintiff's decedent, plaintiff's attorney nevertheless commenced and continued the underlying action. Defendant submits that plaintiff's commencement and subsequent refusal to withdraw his complaint constitutes bad faith and renders the underlying action "frivolous" under CPLR § 8303-a and 22 NYCRR 130-1.1. Defendant claims that the action was based upon material factual statements that were known to be false by the plaintiff and there was no reasonable basis in law or fact to commence or continue the action against her. Defendant submits that her defense of the frivolous actions entitles her to an award of costs, sanctions and attorneys' fees.

Plaintiff opposes the defendant's motion and cross moves, pursuant to 22 NYCRR 130-1.1 for an Order awarding him attorneys' fees, costs and sanctions against the defendant, Ethel Cwibeker and/or her attorney, for making the instant frivolous motion. Plaintiff maintains that defendant's motion for attorneys fees and sanctions is made in bad faith without any reasonable basis and law of fact (*22 NYCRR 130-1.1*).

It is noted at the outset that a judgment has not yet been entered in this case against the defendant, Ethel Cwibeker, Psy. D., thus, defendant's motion, pursuant to CPLR § 8303-a, for costs and fees is timely made (*Rose Valley Joint Venture v. Apollo Plaza Associates*, 191 A.D.2d 874, 595 N.Y.S.2d 122 [3d Dept., 1993]).

Furthermore, it is noted that while defendant's unopposed motion for summary judgment dismissal of plaintiff's complaint was granted [Sequence #4], that judgment, in and of itself, does not necessarily automatically entitle her to sanctions herein (*cf. Kpach v. Olympia & York*, 215 A.D.2d 304, 627 N.Y.S.2d 12 [1st Dept., 1995]). The party seeking sanctions under CPLR § 8303-a must be held to the burden of demonstrating entitlement to relief (*see Schulz v. Washington County*, 157 A.D.2d 948, 949, 550 N.Y.S.2d 446 [3d Dept., 1990]).

Pursuant to CPLR §8303-a:

(a) If in an action to recover damages for personal injury, injury to property or wrongful death . . . such action or claim is commenced or continued by a plaintiff . . . and is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs and reasonable attorney's fees not exceeding ten thousand dollars.

* * *

(c) In order to find the action, claim, counterclaim, defense or cross claim to be frivolous under subdivision (a) of this section, the court must find one or more of the following:

(i) the action . . . was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another;

(ii) the action . . . was commenced or continued in bad faith without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law. If the action . . . was promptly discontinued when the party or the attorney learned or should have learned that the action . . . lacked such a reasonable basis, the court may find that the party or the attorney did not act in bad faith.

Thus, CPLR § 8303-a requires "a showing that the plaintiff and counsel knew or should have known that the action lacked merit" (*McGill v. Parker*, 179 A.D.2d 98, 111, 582 N.Y.S.2d 91 [1st Dept., 1992]).

Similarly, 22 NYCRR 130-1.1, states, in pertinent part, as follows:

Section 130-1.1 Costs; sanctions.

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart.

* * *

(c) For purposes of this Part, 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;
- (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.

Statutes authorizing an award of costs and sanctions are in derogation of the common law and, therefore, must be strictly construed (*Gottlieb v. Kenneth D. Laub & Co.*, 82 N.Y.2d 457, 626 N.E.2d 29, 605 N.Y.S.2d 213 (1993); *Ocasio v. City of Middletown*, 148 A.D.2d 431 [2d Dept., 1989]). However, based upon the papers presented for this Court's consideration herein, this Court finds that plaintiff and plaintiff's counsel's conduct herein was, in fact, frivolous as defined in CPLR 8303-a [c][ii] or 22 NYCRR 130-1.1[c][1], [3] (*see also Broich v. Nabisco, Inc.*, 2 A.D.3d 474, 768 N.Y.S.2d 489 [2d Dept., 2003]). The record confirms the following:

On February 18, 2005, plaintiff's counsel wrote a letter addressed to "Ethel Cwibeker, M.D." requesting a copy of her office records regarding the treatment of Pauline Dunn. Attached to that letter was an authorization for release that specifically *excluded* "psychotherapy notes." By letter dated February 28, 2005, Dr. Cwibeker responded to plaintiff's counsel's letter advising that (i) she is not a medical doctor and (ii) she had met Pauline Dunn "on only two occasions. Once while she was still in the hospital and once the day following her release from the hospital (the day before her death)" (*Motion*, Ex. B).

Subsequently, on or about March 7, 2005, plaintiff's counsel sent another letter to the defendant demanding a copy of her "psychotherapy and counseling notes" regarding the "treatment" of Pauline Dunn (*Motion*, Ex. C). By letter dated April 8, 2005, defendant Dr. Cwibeker produced said records and again advised plaintiff's counsel that she had only met with Mrs. Dunn once after her release from the hospital, that she was never a patient of Dr. Cwiebeker, and there was no treatment (*Id.*, Ex. D).

On or about April 26, 2005, plaintiff commenced the underlying action by service of the Summons and Complaint in which he alleged that the defendant rendered "medical and/or psychological care and services to the decedent, Pauline Dunn, from on or about October 2002

continuously up through and including August 25, 2003" (*Id.*, Ex. E [Complaint], ¶32). In response, defendant served and filed a Verified Answer with Cross Claims, Counter Claims and Third Party Complaint demanding that plaintiff's Complaint be dismissed on the grounds that it lacks merit. Defendant/third-party plaintiff, Ethel Cwibeker, also claimed that she was entitled to attorney's fees (*Id.*, Ex. F).

Significantly, defendant, Dr. Cwibeker's Third Party Complaint also advanced an allegation that she first met with the decedent, Pauline Dunn, on or about August 22, 2003 (*Id.*, Ex. F [Third Party Complaint], ¶64). In his Answer to Cwibeker's Third Party Complaint, plaintiff/third-party defendant, Mitchell Dunn, "[d]enie[d] knowledge or information sufficient to form a belief as to the truth of the allegation[]" that the defendant Ethel Cwibeker met the decedent Pauline Dunn for the first time on August 22, 2003 (*Id.*, Ex. G, ¶ 11).

Subsequently, by Summons and Complaint dated February 10, 2006, plaintiff instituted an additional action against Dr. Cwibeker, making the same allegations of medical and psychiatric malpractice (*Id.*, Ex. J). Again, defendant Dr. Cwibeker served and filed an Answer denying the allegations in the Complaint (*Id.*, Ex. K).

On or about April 18, 2006, defendant Dr. Cwibeker served a Notice for Discovery and Inspection demanding the production of, *inter alia*, "[d]ocuments that refer to or evidence Plaintiff's statement in Paragraph 18 of the Complaint that Cwibeker rendered medical and/or psychological care to Pauline Dunn continuously from October 2002 through August 25, 2003" (*Id.*, Ex. H, ¶9). In response, plaintiff stated that there are no such records (*Id.*, Ex. I, ¶9).

Thereafter, on July 25, 2006 and on August 4, 2006, Mitchell Dunn was deposed. At his deposition, Dunn admitted that he and his wife, Pauline, met the defendant Dr. Cwibeker for the first time on August 15, 2003 concerning his daughter's suicide attempt and that prior to August of 2003, the decedent Pauline Dunn had never met the defendant (*Id.*, Ex. L [Dunn Tr.] pp. 86, 158-160).

Upon completion of discovery and based upon the lack of evidence of her involvement in the care and treatment of plaintiff's decedent, defendant Dr. Cwibeker made a motion for summary judgment dismissal of plaintiff's complaint on the grounds that, *inter alia*, no doctor-patient relationship had formed between Pauline Dunn and Dr. Cwibeker. Notably, plaintiff did not oppose the motion; and, as stated above, this Court dismissed plaintiff's complaint as against Dr. Cwibeker.

In opposition to Cwibeker's instant motion, plaintiff's counsel maintains that he was not obligated to unconditionally accept Dr. Cwibeker's blanket denials as to her involvement

in Pauline Dunn's care and treatment. While this may be so under some circumstances, absent a scintilla of evidence to the contrary, plaintiff was indeed obligated to accept as true defendant's denials regarding her involvement in Pauline Dunn's care and medical treatment. Plaintiff had no evidence to support his allegations that the defendant was the decedent's therapist or that defendant had met and rendered "medical or psychological care and services to the decedent . . . from on or about October 2002 continuously up through and including August 25, 2003."

Prior to the commencement of litigation, counsel for plaintiff requested from Dr. Cwibeker her psychotherapy and counseling records regarding the Dunn family. These records were produced along with a letter from Dr. Cwibeker. These records established that the first time Cwibeker met with Pauline Dunn was in August 2003

Even if commenced in good faith, this psychiatric malpractice action against Dr. Cwibeker was continued long after the record establishes it became clear that there was no basis to hold the defendant Ethel Cwibeker at fault for any part of the plaintiff's cause of action. Plaintiff's action should have been unconditionally withdrawn and discontinued against Ethel Cwibeker, Psy. D. (*Fritze v. Versailles*, 158 A.D.2d 669, 551 N.Y.S.2d 854 [2d Dept., 1990]); *Jacobson v. Chase Manhattan Bank, NA*, 174 A.D.2d 709, 571 N.Y.S.2d 559 ([2d Dept., 1991]).

Therefore, defendant, Ethel Cwibeker, Psy. D.'s instant motion for sanctions in the form of costs and attorney's fees is herewith granted and the cross motion by plaintiff, Mitchell Dunn, as Administrator of the Estate of Pauline Dunn, is, accordingly, denied.

Having determined that the continuation of this action against Dr. Cwibeker was frivolous, this Court is mandated to grant Dr. Cwibeker's application for costs, sanctions and reasonable attorney's fees (**CPLR 8303-a**; *Mitchell v Herald Co.*, 137 A.D.2d 213, 219-220, 529 N.Y.S.2d 602 (4th Dept., 1988) *app. dismissed* 72 N.Y.2d 952, 529 N.E.2d 427, 533 N.Y.S.2d 59 (1988); *Jacobson v. Chase Manhattan Bank, NA, supra*).

The issue of defendant's costs, sanctions and attorney's fees and, based upon the circumstances, whether the sanction should be imposed against the Plaintiff, his attorney or both (**CPLR 8303-a(b)**) is however respectfully referred to the Calendar Control Part (CCP) for a hearing.

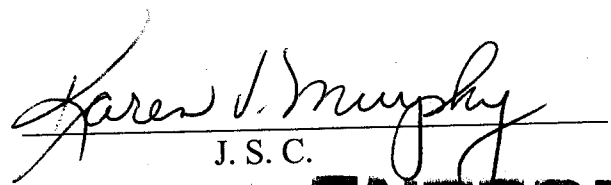
Subject to the approval of the Justice there presiding, and provided that a note of issue has been filed at least ten days prior thereto, this matter shall appear on the calendar of CCP for March 25, 2008, at 9:30 a.m.

A copy of this order shall be served on the calendar clerk and accompany the note of issue when filed. The failure to file a note of issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

This shall constitute the decision and order of this Court.

Dated: March 11, 2008
Mineola, N.Y.


J. S. C.

ENTERED

MAR 17 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**