

Lee v Lefkovic

2008 NY Slip Op 30984(U)

April 3, 2008

Supreme Court, Richmond County

Docket Number: 0013654/2003

Judge: Anthony Giacobbe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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PAULINE LEE, as Executrix of the Estate of
DANIEL H. LEE, Deceased, and PAULINE LEE,
Individually,

Plaintiff,

Trial Part 9
Present:
Hon. Anthony I. Giacobbe

Decision and Order
Index No. 13654/03

-against-

LEONARD LEFKOVIC, M.D. and
REGAN & MCGINN, M.D., P.C.,

Defendants.

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The following papers, numbered 1 to 3, were submitted on this motion this 14th day of
September, 2007:

Notice of Motion with supporting papers (dated July 16, 2007)	1
Affirmation in Opposition with supporting papers (dated August 28, 2007)	2
Reply Affirmation (dated September 11, 2007)	3

Upon the foregoing papers and due deliberation thereon, plaintiff’s motion to set aside the
jury’s verdict and for related relief is denied.

This is an action to recover compensatory damages allegedly arising from defendant
Lefkovic’s negligence and medical malpractice that resulted in the pain and suffering of Daniel
H. Lee and his eventual death. The basis of plaintiff’s complaint against defendant encompasses
the failure to provide adequate medical care to the decedent, including, *inter alia*, a failure to
refer decedent for heart surgery to address his long-standing condition of aortic stenosis. The
case was tried before a jury, which returned a verdict in defendant’s favor. Plaintiff now moves
“for an Order pursuant to CPLR §4404(a) to set the jury verdict in the above captioned action
aside and:

- 1) Enter Judgment in favor of the plaintiff on the issue of liability and order a new trial on the issue of damages, or
- 2) In the alternative, to order a new trial on the grounds that the verdict was against the weight of the evidence and/or in the interest of justice and for such other and further relief as to this Court may deem just and proper.”¹

It is well settled that an act or omission constituting medical malpractice must be the proximate cause of an injury, *i.e.*, a substantial factor in bringing about the injury. *See, e.g., Perez v. St. John’s Episcopal Hospital South Shore*, 19 AD3d 389 (2nd Dept. 2005), *lv. denied*, 6 NY3d 715 (2006); *Bloom v. City of New York*, 202 AD2d 465 (2nd Dept. 1994). In the instant case, plaintiff presented expert evidence that defendant’s care of the decedent proximately caused his pain and suffering and his eventual death. In stark contrast, defendant presented expert evidence that Mr. Lee’s death was not attributable to the medical care provided by defendant. There were questions of fact, highlighted by the conflicting medical opinions of the parties’ experts, as to whether the defendant doctor negligently treated the plaintiff, and whether that and the other acts or omissions of defendant doctor, as submitted to the jury on the verdict sheet for its consideration, were a substantial factor in bringing about Mr. Lee’s death. Contrary to plaintiff’s assertion, in essence, that the opinions proffered by plaintiff’s expert witnesses with respect to Mr. Lee’s cause of death are undisputed and uncontroverted, and that there was no

¹ The Court notes that plaintiff has submitted only truncated excerpts of the trial transcript in support of her motion. Plaintiff has also failed to attach a true copy of the verdict sheet considered by the jury, which was marked as Court Exhibit 19 at trial. While not fatal to the instant application, these omissions have made a meaningful review of issues raised therein inordinately time consuming and difficult. *See, generally*, CPLR Rule 2214; 22 NYCRR §202.8.

Parenthetically, the trial minutes reflect that following the Court’s discharge of the jury on June 6, 2007, plaintiff’s counsel orally moved “to set the verdict aside as contrary to the evidence, contrary to law, against the weight of the evidence and inconsistent.” This motion was orally opposed by the defense, and denied by the Court without further argument.

competent evidence upon which the jury could have reached its ultimate determination on the issue of substantial factor, there is factual record support for the opinions rendered and conclusions reached by defendant's expert witnesses, and the jury was entitled to accept those opinions, and reject the opinions of plaintiff's experts. Furthermore, here, it cannot be said there is no "valid line of reasoning and permissible inferences which could lead rational people to the conclusion reached by the jury based on the evidence presented at trial ... [and moreover], the verdict was supported by a fair interpretation of the evidence" *Blanar v. Dickinson*, 296 AD2d 431 (2nd Dept. 2002). Simply put, the evidence adduced at trial is not so preponderated in favor of plaintiff that the jury could not have reached a verdict in favor of defendant on any fair interpretation of the evidence. *See, e.g., Lalanne v. Nyack Hospital*, 45 AD3d 645 (2nd Dept. 2007); *Salmeri v. Beth Israel Medical Center - King Highway Division*, 39 AD3d 841 (2nd Dept. 2007); *Bobek v. Crystal*, 291 AD2d 521 (2nd Dept. 2002), *lv denied*, 100 NY2d 505 (2003); *Kiker v. Nassau County*, 175 AD2d 99 (2nd Dept. 1991); *Kwasny v. Feinberg*, 157 AD2d 396 (2nd Dept. 1990); *Nicastro v. Park*, 113 AD2d 129 (2nd Dept. 1985); *Gamiel v. University Hospital*, 216 AD2d 80 (1st Dept. 1995), *lv dismissed*, 87 NY2d 911 (1996); *Giambona v. Stein*, 265 AD2d 775 (3rd Dept. 1999).

Moreover, the Court has carefully scrutinized all answers to the questions on the verdict sheet, and to the extent that the arguments set forth by plaintiff in her post-trial motion urge the Court to set aside the jury's verdict due to inconsistency, the Court finds such arguments to be similarly unpersuasive. Here, it is not implausible, unreasonable, irrational or logically impossible, based upon the trial evidence, for the jury to have found that, although defendant Lefkovic departed from good and accepted standards of medical practice by not referring

decedent to a cardiothoracic surgeon in June 2002 and by not accurately eliciting symptoms when taking a medical history of decedent (*see*, Court Exhibit 19, Questions 1A and 2A), neither of these two departures was a substantial factor in causing the decedent's death (*see*, Court Exhibit 19, Questions 1B and 2B). There is no indication that the jury was substantially confused or unable to make a proper determination after the Court's charge, in weighing the conflicting medical expert opinions and upon consideration of all the evidence. The jury's answers were clear, and are supported by ample record evidence. As reflected on the verdict sheet, in the Court's view, the jurors' responses were not the result of substantial confusion, nor is there any degree of internal inconsistency in their findings, as would warrant a new trial. *See, generally, Barry v. Manglass*, 55 NY2d 803 (1981), *rearg denied*, 55 NY2d 1039 (1982); *Palmer v. Walters*, 29 AD3d 552 (2nd Dept. 2006); *Ferrante v. County of Nassau*, 301 AD2d 565 (2nd 2003); *Brezinski v. Island Medical Care*, 291 AD2d 366 (2nd Dept. 2002); *Borovskaya v. Herskovic*, 2001 WL 1359846 (Sup. Ct. Kings Co.), *aff'd*, 300 AD2d 331 (2nd Dept. 2002); *Ledogar III v. Giordano*, 122 AD2d 834 (2nd Dept. 1986).

Thus, insofar as plaintiff seeks an order either setting aside the jury's verdict and entering judgment on liability in plaintiff's favor or setting it aside as against the weight of the evidence and granting a new trial, the motion is denied.

With regard to that part of plaintiff's motion which seeks an order granting a new trial in the interests of justice based upon the conduct of defense counsel and upon the alleged misconduct of an alternate juror, this application is also denied. It is not apparent to this Court, which presided over the approximately three-week-long trial, that the deliberating jurors were unable to consider all the admissible evidence and evaluate the facts and the law in a fair and

impartial manner. In the Court's opinion, the jurors competently followed all the Court's instructions and admonitions and remained focused solely upon their duty in reaching a just verdict.

The conduct of defense counsel cited by plaintiff did not divert the jurors' attention from the issues or deprive defendant of a fair trial, nor does the Court equate such conduct with a continual and deliberate effort to do so. *See, e.g., Vassura v. Taylor*, 117 AD2d 798 (2nd Dept.), *app dismissed*, 68 NY2d 643 (1986); *Weinberger v. City of New York*, 97 AD2d 819 (2nd Dept. 1983); *Mercurio v. Dunlop, Ltd.*, 77 AD2d 647 (2nd Dept. 1980); *Rodriguez v. New York City Housing Authority*, 209 AD2d 260 (1st Dept. 1994); *Kohlman v. City of New York*, 8 AD2d 598 (1st Dept. 1959). The Court finds that the conduct now complained of, including some cross examination of a plaintiff's expert by defense counsel, was either not objected to at trial, or was the subject of timely objections made by plaintiff's counsel which were sustained (acknowledged by counsel in his moving papers), and which prompted the Court to deliver effective curative instructions to the jurors. *Blonar v. Dickinson, supra*; *Bacigalupo v. Healthshield, Inc.*, 231 AD2d 538 (2nd Dept. 1996); *Kiker v. Nassau County, supra*; *Beth Israel Hospital North v. Castle Oil Corp.*, 220 AD2d 257 (1st Dept.), *lv denied in part, dismissed in part*, 87 NY2d 891 (1995); *Dennis v. Capital District Transportation Authority*, 274 AD2d 802 (3rd Dept. 2000); *cf., Serota v. Kaplan*, 127 AD2d 648 (2nd Dept. 1987). Notably, plaintiff's counsel did not request a mistrial based upon any purported egregious conduct by the defense, nor did plaintiff's counsel request any additional curative instructions. Under such circumstances, plaintiff should not now be heard to complain. *See, e.g., Torrado v. Lutheran Medical Center*, 198 AD2d 346 (2nd Dept. 1993); *Kamen v. City of New York*, 169 AD2d 705 (2nd Dept. 1991); *Scott v. Mason*, 155 AD2d

655 (2nd Dept. 1989); *Dunne v. Lemberg*, 54 AD2d 955 (2nd Dept. 1976), *lv denied*, 40 NY2d 809 (1977); *Schein v. Chest Service Co., Inc.*, 38 AD2d 929 (1st Dept. 1972); *cf.*, *Grasso v. Koslowe*, 11 Misc3d 1086(A) (S. Ct. Richmond Co. 2006), *aff'd*, 38 AD3d 599 (2nd Dept. 2007); *Berkowitz v. Marriott Corp.*, 163 AD2d 52 (1st Dept. 1990).

Finally, in support of her motion, plaintiff has submitted an affidavit wherein she alleges, in sum and substance, that approximately 3-4 weeks post-verdict, she had a conversation with Spiro Antypas, regular juror number 3.² According to plaintiff, Mr. Antypas informed her that alternate juror Susan Conlon had, at some point prior to deliberations, learned from the internet and told the regular jurors that defendant Lefkovic “had previously been ‘convicted of malpractice.’” Furthermore, Mr. Antypas told plaintiff the jurors “were afraid to tell the trial judge, Justice Giacobbe, about this information as they thought by telling him this, a ‘mistrial’ would result,” and that “he has been uneasy about the verdict since the time of the trial.”

First, it must be pointed out that the claims in plaintiff’s self-serving affidavit are based upon pure hearsay, and such affidavit is therefore inadequate. *Putchlawski v. Diaz*, 192 AD2d 444 (1st Dept.), *lv denied*, 82 NY2d 654 (1993); *People v. Salaam*, 187 AD2d 363 (1st Dept. 1992), *aff'd*, 83 NY2d 51 (1993). Second, such circumstances, even accepted as accurate and true, would not, in the Court’s opinion, be sufficient to impeach the jury’s verdict, nor would it be sufficient to make a finding that the deliberations of the regular jurors were so impermissibly tainted that plaintiff did not receive a fair trial. Moreover, contrary to plaintiff’s speculative and conclusory assertion that this information from an alternate juror influenced deliberations, here,

² The circumstances under which this meeting occurred, either by chance or by design, are not set forth.

assuming the regulars jurors all heard this information as plaintiff contends, there is no evidence that there was a substantial breach of the Court's instructions with respect to juror conduct or that there was any improper influence, either for or against plaintiff, as a result.³ *See, generally, Alford v. Sventek*, 53 NY2d 743 (1981); *compare, Ryan v. Orange County Fair Speedway*, 227 AD2d 609 (2nd Dept. 1996); *Maslinski v. The Brunswick Hospital Center, Inc.*, 118 AD2d 834 (2nd Dept. 1986); *23 Jones Street Associates v. Beretta*, 280 AD2d 372 (1st Dept. 2001); *Rodriguez v. Baker*, 91 AD2d 143 (1st Dept. 1983), *aff'd*, 61 NY2d 804 (1984). Thus, the application for a new trial based upon attorney or juror misconduct is also denied.

In short, for all the foregoing reasons, the application pursuant to CPLR 4404(a) for an order setting aside the verdict is denied.

Accordingly, it is

ORDERED that motion is denied; and it is further

ORDERED that the jury's verdict shall not be disturbed.

ENTER

Dated: April 3, 2008

J.S.C.

³ At the request of plaintiff's counsel, the jury was polled with respect to verdict sheet Question 2B only, confirming its determination: "Was that departure [*i.e.*, Question 2A, defendant Lefkovic departed from good and accepted standards of medical practice by not accurately eliciting symptoms when taking a medical history of Daniel H. Lee] a substantial factor in causing the death of Daniel H. Lee on January 3, 2003?" Edward M. Gerry, juror no.1, responded "Yes," Sumi Okamoto, Spiro Antypas, Angela Bacenet, Katherine Bas and Amanda Burbano, juror nos. 2-6, respectively, responded "No."