

Diresta v Brackman

2008 NY Slip Op 32369(U)

August 21, 2008

Supreme Court, Nassau County

Docket Number: 3846-06/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

TOBY A. DIRESTA, as Administratrix of the
Goods, Chattels and Credits which were the
Estate of RONALD PATSY DIRESTA,
deceased, and on behalf of his distributes and
Individually,

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 3846/06

Motion Sequence No. 010

Plaintiffs,

- against -

MATTHEW BRACKMAN, M.D., WILLIAM M.
LIPSKY, M.D. and LONG BEACH MEDICAL
CENTER,

Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2, 3</u>
Replying Affidavits	_____
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The plaintiff moves for an order pursuant to CPLR 2221 (d) granting leave to reargue the prior motion of the plaintiff which was decided by the order of this Court on April 24, 2008, which denied that portion of the prior motion seeking to compel the defendant Matthew Brackman, M.D. to answer questions which were posited to but not answered by this defendant at an examination before trial, pursuant to CPLR 2221 (e) granting leave to renew that prior motion of the plaintiff which was decided in that prior

order of this Court which denied the relief sought, and upon granting the motion directing this defendant to appear for further deposition on a specific date and time to answer the improperly blocked questions pertaining to the complaint by this defendant to Risk Management about Dr. Valentin's and possibly other physicians care and treatment of the plaintiff's decedent and any questions that may naturally flow from the answers to those questions. The plaintiff's attorney submits, in a supporting affirmation dated June 12, 2008, the Court's denial of the plaintiff's motion was improperly based on a test of relevance, and improperly overlooked or misapprehended the applicable law, to wit Part 221 of the Uniform Rules for the Trial Courts, CPLR 3101 (a), and appellate authority. The plaintiff's attorney points out the Second Department permits flexibility with regard to granting renewal. The plaintiff's attorney asserts a key piece of discovery was provided to the plaintiff's subsequent to the prior motion which constitutes a new fact that must change the Court's determination because it provides a new basis to question this defendant about the circumstances of the complaint to Risk Management. The plaintiff's attorney avers that piece of discovery shows there were nonparty physicians who thought the decedent was suffering from an abscess in contrast to the defendant Matthew Brackman, M.D.'s opinion, and those other physicians either potentially interfered with the defendant Matthew Brackman, M.D.'s care of the decedent with a breakdown in the chain of command with regard to which physician was directing the care and treatment of the decedent.

The defendant Matthew Brackman, M.D. opposes the motion in an affirmation dated July 1, 2008, by counsel. The attorney for the defendant Matthew Brackman, M.D. states this defendant seeks the denial of the plaintiff's request for reargument and renewal together with costs pursuant to 22 NYCRR § 130-1.1 (1). The attorney for the defendant Matthew Brackman, M.D. asserts the Court appropriately ruled the plaintiff did not demonstrate the complaint by this defendant was relevant to the issues here. The attorney for the defendant Matthew Brackman, M.D. notes the record is clear Dr. Valentin's consult did not alter the treatment plan of this defendant, the attending physician, so any conversation this defendant had with Risk Management regarding Dr. Valentin, a nonparty, has no bearing on the issues of the instant case. The attorney for the defendant Matthew Brackman, M.D., avers Dr. Valentin did not render any treatment nor have any impact on the treatment plan or the patient's ultimate outcome. The attorney for the defendant Matthew Brackman, M.D., contends the plaintiff's assertion is erroneous that the Court failed to cite Part 221 of the Uniform Rules for the Trial Courts, CPLR 3101 (a), and *Allen v. Crowell-Collier Publishing*, 21 NY2d 403, 288 NYS2d 449 [1968] in denying the prior motion because that averment simply reiterates the arguments set forth in the original motion papers. The attorney for the defendant Matthew Brackman, M.D., states the plaintiff relies on a fallacious argument and misinterprets the meaning of the legal authority regarding the nature of this defendant's complaint leading to evidence about any interference with or delay in this defendant's treatment of the decedent. The

attorney for the defendant Matthew Brackman, M.D. claims the new fact assertion by the plaintiff flowing from a requisition form dated February 24, 2005, for the performance of a CT scan of the abdomen and pelvis, which indicates Dr. Valentin requested a CT scan of the abdomen and pelvis to rule out an intra-abdominal abscess, a condition with which the decedent was later diagnosed misleads the Court. The attorney for the defendant Matthew Brackman, M.D. explains, although the requisition slip was provided to the plaintiff by counsel for Long Beach Medical Center after service of the plaintiff's initial motion, the information contained in it was already known to the plaintiff by Dr. Valentin's surgical consult dated February 25, 2005, where Dr. Valentin noted a CT scan showed pelvic fluid, and an abscess had to be ruled out. The attorney for the defendant Matthew Brackman, M.D. argues there is no new fact to support a motion for renewal of this Court's April 24, 2008 decision since Dr. Valentin was informed as to the results of the CT of the abdomen and the pelvis, and considered an abscess as part of the differential diagnosis.

The defendant Long Beach Medical Center opposes the motion in an affirmation dated July 2, 2008, by counsel. The attorney for the defendant Long Beach Medical Center notes a review of deposition of the defendant Matthew Brackman, M.D. reveals the plaintiff questioned that defendant extensively regarding the patient's condition, including fevers during the hospital stay. The attorney for the defendant Long Beach Medical Center cites Part 221 of the Uniform Rules for the Trial Courts, and contends

when such statements are made which do not relate to the subject matter of the litigation, such statements are privileged. The attorney for the defendant Long Beach Medical Center points out the discussions of the defendant Matthew Brackman, M.D. with Risk Management, at the hospital, concerning another doctor practicing at that same hospital, are surely consistent with the hospital's quality assurance function under the Education Law § 6527 (3) and Public Law § 2805-m, however these statements concern nonparty witness, to wit Dr. Valentin, and do not relate to the subject matter of the litigation. The attorney for the defendant Long Beach Medical Center avers Dr. Valentin's role in the decedent's care was ancillary at best, and there is no indication Dr. Valentin's single altered the treatment plan in any way nor had any significant impact on the decedent's hospital course. The attorney for the defendant Long Beach Medical Center postulates the subject matter of this litigation concerns the defendants' alleged failures to diagnose and treat c-difficile infection and abscess with complications, including colitis, and the relief sought with this motion is irrelevant to the litigation, so disclosure should not be compelled. The attorney for the defendant Long Beach Medical Center states the February 24, 2005 requisition form contains absolutely no new facts on which the plaintiff's motion can be based since the plaintiff was aware the report of the CT scan conducted on February 24, 2005 stated the radiologist discussed the CT findings with Dr. Valentin, and the plaintiff had a copy of Dr. Valentin's consultation record dated February 25, 2005, which contained the note, "CT Scan - pelvic fluid to f/u to r/o

abscess.” The attorney for the defendant Long Beach Medical Center points to the fact that the requisition form simply requisitioned the very CT scan that Dr. Valentin mentions in the consultation record, so the plaintiff had the documentation from the hospital chart that informed plaintiff’s counsel of the same information contained in the requisition form, so there are no new facts that were revealed subsequent to the original plaintiff’s motion.

The Court has carefully reviewed and considered all of the papers submitted by the parties on this motion. CPLR 2221 (f) provides:

A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination.

This Court determines the plaintiff has not met the requisite requirements of CPLR 2221 (d) (2). The plaintiff has not shown any misapprehension nor overlook of fact nor law.

A motion for leave to reargue “shall be based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include matters of fact not offered on the prior motion” (CPLR 2221 [d] [2]; *see Amato v Lord & Taylor, Inc.*, 10 AD3d 374 [2004]). The motion does not offer an unsuccessful party, as here, successive opportunities to present arguments not previously advanced (*see Amato v Lord & Taylor, Inc., supra; Frisenda v X Large Enters.*, 280 AD2d 514 [2001])

Pryor v. Commonwealth Land Title Ins. Co., 17 A.D.3d 434, 435,436, 793 N.Y.S.2d 452 [2nd Dept., 2005]).

This Court also determines the plaintiff has not met the requisite requirements of CPLR

2221 (e) (2). Renewal is not warranted because the plaintiff's motion is unsupported by new facts, instead the purported new facts were available to the plaintiff at the time of the original motion.

A motion for leave to renew must be “based upon new facts not offered on the prior motion that would change the prior determination,” and must set forth a “reasonable justification for the failure to present such facts on the prior motion” (*see* CPLR 2221 [e]; *Yarde v New York City Tr. Auth.*, 4 AD3d 352 [2004]; *Riccio v DePeralta*, 274 AD2d 384 [2000]). While it may be within the court's discretion to grant renewal upon facts known to the moving party at the time of the original motion (*see J.D. Structures v Waldbaum*, 282 AD2d 434 [2001]; *Cronwall Equities v International Links Dev. Corp.*, 255 AD2d 354 [1998]), a motion for leave to renew “is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (*see Rubinstein v Goldman*, 225 AD2d 328, 329 [1996] [internal quotation marks omitted]; *see also O'Dell v Caswell*, 12 AD3d 492 [2004]; *Hart v City of New York*, 5 AD3d 438 [2004]; *Carota v Wu*, 284 AD2d 614 [2001]). *Renna v. Gullo*, 19 A.D.3d 472, 473, 797 N.Y.S.2d 115 [2nd Dept., 2005]).

22 NYCRR § 130-1.1 (a) provides:

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.

22 NYCRR § 130-1.1 (c) provides:

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. Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

This Court determines, under the circumstances here , the plaintiff's conduct did not rise to the level of harassment nor prolonging the resolution of the litigation constituting frivolous conduct (*see Glenn v. Annunziata*, 53 A.D.3d 565, --- N.Y.S.2d ---- [2nd Dept.,2008]).

Accordingly, the motion is denied without sanction nor cost.

So ordered.

Dated: August 21, 2008

ENTER:



J. S. G. ANTONIO I. BRANDVEEM

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED
AUG 25 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE