

Gulizia v All Is. Gastroenterology

2011 NY Slip Op 33547(U)

December 23, 2011

Supreme Court, Nassau County

Docket Number: 17609/10

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____x

CELIA GULIZIA,

Plaintiff(s),

-against-

Index No. 17609/10

**Motion Submitted: 10/12/11
Motion Sequence: 003, 004**

**ALL ISLAND GASTROENTEROLOGY and
LIVER ASSOCIATES, P.C., HAROLD LIPSKY,
M.D., LARRY GOOD, M.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.....XXX
- Reply.....XX
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Motion by defendant Larry I. Good, M.D. ("Dr. Good") for an order pursuant to CPLR § 2221(d) granting him leave to reargue his prior motion for summary judgment dismissing the complaint as against him, which was denied by this Court by order dated April 15, 2011, is denied. Cross-motion by defendant South Nassau Communities Hospital ("the hospital") for an order pursuant to CPLR § 2221(d) granting it leave to reargue its prior motion for summary judgment dismissing the complaint as against it, which was denied by this Court by order dated April 15, 2011, is likewise denied.

Plaintiff commenced this action to recover damages for medical malpractice, negligent hiring and retention and lack of informed consent. Specifically, plaintiff asserts that she required a right above the knee amputation due to the defendants' failure to timely diagnose and treat an arterial clot.

For the sake of brevity, a detailed recitation of the pertinent facts of this action was set forth in the prior order and will not be repeated herein. In said order, this Court held that Dr. Good and the hospital established their entitlement to judgment as a matter of law dismissing the complaint as against them. However, summary judgment was denied to Dr. Good and the hospital on the ground that factual issues existed requiring a jury's resolution. Briefly, the factual issues were set forth, in pertinent part, as follows:

More specifically, she alleges that these defendants failed to properly examine and monitor the plaintiff's physical condition; failed to heed her daughter's alerts regarding the deteriorating condition of her mother's leg; failed to obtain expert consults, which would have led to a more timely diagnosis of the plaintiff's arterial blood clot; failed to advise the plaintiff of the possibility of a clot, which would have prompted her to procure more definitive care; and, failed to follow through with Dr. Good's ordering of the venous Doppler study which, although it would have been negative, in light of the plaintiff's continuing condition, would have prompted an arterial Doppler study and concomitantly, the discovery and treatment of her arterial blood clot sooner thereby averting the need for amputation of the plaintiff's leg.

The plaintiff's allegations that the defendants failure to obtain expert consults and to advise her of the possibility that she had a blood clot proximately caused the amputation of her right leg fails to raise an issue of fact regarding the propriety of the defendants' care of the plaintiff. Such a conclusion is too speculative. Nevertheless, there is evidence that she may not have been regularly appropriately examined and her condition reported to her treating doctor, especially her pedal push readings or lack thereof as well as her daughter's complaints and observations. Her condition as repeatedly reported by her daughter may not have been heeded and appropriately responded to. And, the defendants' failure to follow through on Dr. Good's order of a venous Doppler study may have been contrary to good and accepted medical standards and may have caused or at least contributed to the need for the above the knee amputation of the plaintiff's right leg.

That the plaintiff's daughter's testimony is contrary to some of the hospital records regarding the plaintiff's condition and the defendants' examination of her does not render her daughter's testimony unreliable. That merely gives rise to factual issues requiring a jury's resolution.

In support of his motion, Dr. Good submits that plaintiff's medical expert failed to appropriately identify alleged departures as against each co-defendant separately, and then explain how departures of each individual co-defendant was the proximate cause of the injury alleged by plaintiff. Dr. Good opines that this Court misapprehended the facts of this case, and his motion for summary judgment should be reconsidered.

In support of its cross-motion, the hospital also argues that plaintiff failed to differentiate between defendants in his opposition to the underlying motions.

In response thereto, plaintiff notes, *inter alia*, that defendants "Good and SNCH argue that because plaintiff submitted a single expert affidavit in opposition to both underlying motions for summary judgment (defendants, Good & SNCH) that said expert lumped the defendants together and thus failed to delineate in said expert's professional opinion the acts and/or omissions constituting departures from accepted practice of each defendant which were a proximate cause of plaintiff's injury. * * * A review of plaintiff's expert's affidavit reveals quite the contrary, as the entire scenario is thoroughly analyzed and opinions rendered in detail with respect to each defendant, although expressed in one document, clearly individualizing same with respect to each defendant." (§ 19 of Elliot Taub's Affirmation in Opposition to SNCH's cross-motion).

Overall, plaintiff concludes that "the Court's original decision and order was well founded and based upon a careful and thoughtful analysis of the proof including those of all of the experts contained in their respective affidavits. Defendants' experts hinged their various opinions predicated upon entries in the SNCH record, some of which may have been entered without any evaluation ever being performed as a shortcut for busy overworked and perhaps even per diem nurses on a weekend shift while plaintiff's expert relied in part upon the observations of plaintiff's family members, one of whom is a practicing pediatric nurse practitioner, observing a constant and daily deterioration of plaintiff's right leg with discoloration developing on a continuum over five days from mildly pink through purplish, and finally resulting in obvious gangrenous condition which ultimately necessitated an above the knee amputation. Despite plaintiff having submitted a single expert's affidavit for both underlying motions, said affidavit clearly delineates precisely the individual departures from accepted medical practice by each defendant, based upon proof and not surmise or conjecture, each of which was a proximate cause of plaintiff's injury. As such, plaintiff has

met her burden and should the Court even reach the merits of this instant motion, its underlying decision should not be disturbed as it is based upon facts and law not misapprehended or misconstrued by the Court.” (*Id.* at ¶ 20).

No basis for reargument exists here.

“Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at the earlier decision (*Barnett v. Smith*, 64 A.D.3d 669, 883 N.Y.S.2d 573 (2d Dept., 2009), quoting *E.W. Howell Co., Inc. v. S.A.F. La Sala Corp.*, 36 A.D.3d 653, 654, 828 N.Y.S.2d 212 (2d Dept., 2007); see *CPLR § 2221[d]*). “[A] motion for leave to reargue ‘is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented’ ” (*Veeraswamy Realty v. Yenom Corp.*, 71 A.D.3d 874, 895 N.Y.S.2d 860 (2d Dept., 2010), quoting *McGill v. Goldman*, 261 A.D.2d 593, 594, 691 N.Y.S.2d 75 (2d Dept., 1999); see *Woody’s Lbr. Co., Inc. v. Jayram Realty Corp.*, 30 A.D.3d 590, 592-593, 817 N.Y.S.2d 391 (2d Dept., 2006); *Foley v. Roche*, 68 A.D.2d 558, 567-568, 418 N.Y.S.2d 588 [1st Dept., 1979], *app den.* 56 N.Y.2d 507 [1982]). Here, defendants’ motion is another attempt to reargue the same issues and facts previously decided by this Court (see *Foley v. Roche, supra*).

The Court finds that in their motions for leave to reargue, Defendants have failed to demonstrate that this Court overlooked or misapprehended any matters of law or fact applicable to this action in determining the original motions. (CPLR 2221(d)(2); *McGill v. Goldman*, 261 A.D.2d 593, 691 NYS2d 75 (2d Dept. 1999); *Amato v. Lord & Taylor*, 10 A.D.3d 374, 781 N.Y.S.2d 125 [2d Dept., 2004]). The Court has considered the applicable law and facts and adheres to its original decision.

In view of the foregoing, the motion and cross-motion are denied.

The foregoing constitutes the Order of this Court.

Dated: December 23, 2011
Mineola, N.Y.


J. S. C.

ENTERED
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