

Ferguson v Laffer

2014 NY Slip Op 32269(U)

August 19, 2014

Sup Ct, Suffolk County

Docket Number: 18641/2012

Judge: Jerry Garguilo

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO. 18641/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 47 - SUFFOLK COUNTY

PRESENT:

HON. JERRY GARGUILO
SUPREME COURT JUSTICE

VIEDYA SABRINA FERGUSON, as the
 Administratrix of the Estate of RAYMOND
 FERGUSON, JR., DECEASED and VIEDYA
 SABRINA FERGUSON, Individually,

Plaintiffs,

- against -

DAVID LAFFER, MELINDA BRADY, COUNTY
 OF SUFFOLK, SUFFOLK COUNTY POLICE
 DEPARTMENT, STAN XUHUI LI, ERIC
 JACOBSON, ERIC JACOBSON, M.D., P.C., MARK
 C. KAUFMAN, and FAMILY MEDICAL
 PRACTICE OF BAYSHORE, P.C.,

Defendants.

DEFENDANT'S ATTORNEY:

Attorneys for Family Medical
 GARBARINI & SCHER, P.C.
 432 PARK AVENUE SOUTH
 NEW YORK, NEW YORK 10016-8013

DEFENDANT'S ATTORNEY:

Attorney for Defendant Li, MD
 BELAIR & EVANS, LLP
 61 BROADWAY, SUITE 1320
 NEW YORK, NEW YORK 10006

ORIG. RETURN DATE: 1/8/14, 4/2/14 & 4/14/
FINAL SUBMISSION DATE: 7/9/2014
MOTION SEQ#004, 007 & 008
MOTION: MOTNDECD

PLAINTIFFS' ATTORNEY:

ADDABBO & GREENBERG
 118-21 QUEENS BOULEVARD, SUITE 306
 FOREST HILLS, NEW YORK 11375

DEFENDANT PRO SE:

DAVID LAFFER, DIN 11A5124
 C/O CLINTON CORRECTIONAL FACILITY
 1156 ROUTE 374, P.O. BOX 2000
 DANNEMORA, NEW YORK 12929-2000

DEFENDANT PRO SE:

MELINDA BRADY DIN 11G1019
 C/O BEDFORD HILLS CORRECTIONAL
 247 HARRIS ROAD
 BEDFORD HILLS, NEW YORK 10507-2400

DEFENDANT'S ATTORNEY:

Attorney for Kaufman, M.D.
 LUBELL & ROSEN, LLP
 6400 JERICHO TURNPIKE, SUITE 101
 SYOSSET, NEW YORK 11791

DEFENDANT'S ATTORNEY:

Attorney for Jacobson, M.D.
 CALLAN, KOSTER, BRADY & BRENNAN
 ONE WHITEHALL STREET
 NEW YORK, NEW YORK 10004

RR

Three separate petitions are presented for consideration and determination. Family Medical Care of Bayshore, P.C. s/h/a Family Medical Practice of Bay Shore, P.C. petitions the Court for an order pursuant to CPLR § 3212 granting summary judgment dismissing all claims against it. Mark C Kaufman, M.D., petitions the Court for an order pursuant to CPLR § 3212 granting summary judgment dismissing all claims. Stan X. Li, M.D., petitions the Court for an order pursuant to CPLR § 3211(a)(7) dismissing the Complaint for failure to state a cause of action upon which relief may be granted; or, in the alternative, dismissing individually, for failure to state a cause of action upon which relief may be granted as to that branch of the Complaint which alleges that Stan X. Li, M.D. was negligent in the treatment of David Laffer and Melinda Brady; and that branch of the Complaint which, alleges a violation of General Obligations Law § 11-103. It should be noted that the Plaintiffs have been granted summary judgment against the Defendants, David Laffer and Melinda Brady. Prior hereto, the County of Suffolk, and the Suffolk County Police Department presented petitions seeking dismissal. Said petitions were granted.

As to the petition of Family Medical Care of Bay Shore, the Court has considered the original petition, Counsel's Affirmation in Support with Exhibits 1 through 9; Plaintiffs' Affirmation in Opposition with Exhibits A and B; and Defendant's Reply Affirmation.

As to the petition of Mark C. Kaufman, M.D., the Court has considered the original petition; Counsel's Affirmation In Support with Exhibits A through G; Plaintiffs' Attorney's Affirmation In Opposition with Exhibits A and B; and Defendant's Reply Affirmation and Modification of Motion for Summary Judgment with Exhibit H.

The petition of Stan X. Li, M.D., Counsel's Affirmation in Support with Exhibits A through E; Plaintiffs' Affirmation in Opposition with Exhibits A and B; and the Reply Affirmation with Exhibits A and B.

This action arises out of multiple murders occurring on June 19, 2011 when the Defendant, David Laffer, shot and killed four people in the course of a robbery at Haven Drugs Pharmacy in Medford, New York. Laffer was ultimately convicted by way of a plea of guilty to Murder in the First Degree and is currently in prison. The Defendant, Melinda Brady, was charged as an accomplice with Laffer and was convicted upon her plea of guilty to Robbery in the First Degree. She is currently serving her sentence. One of the victims, was Plaintiffs' decedent, Raymond Ferguson, Jr. Plaintiffs commenced this action recover damages for conscious pain and suffering and wrongful death of decedent, Raymond Ferguson Jr. and individually.

FERGUSON v. LAFFER, BRADY, ET AL.
INDEX NO.: 18641/2012
PAGE 3

Another civil action was filed in connection with the crimes of June 19, 2011. An action was filed on behalf of Jennifer Mejia, a victim. That action is assigned to the Honorable William B. Rebolini (pleading the same causes of action against Mark C. Kaufman, M.D. and Family Medical Practice of Bay Shore, P.C.). In the course of the Mejia litigation, disclosure of Laffer's and Brady's medical records was sought in order to determine what treatment, if any, was rendered to Laffer and/or Brady. Neither Laffer nor Brady consented to the release and disclosure of their medical records. In fact, in the matter at bar the Court is presented with a letter purportedly from David Laffer which reads as follows:

I am contacting your firm today, in an effort to clear up any misunderstanding, regarding my "HIPPA" [sic] authorizations/releases. I have never, and have no intention of granting requests for release of any of my pertinent medical records. This is the case, for not only this litigation (Index No.: 18641-12), but for all pending actions, as well. Thank you, Respectfully David Laffer.

As noted by Mr. Justice Rebolini in the matter of Mejia, et al. against David Laffer, Melinda Brady, et al. at Index No. 10778/2012

Among the allegations set forth in the complaint against defendants Kaufman and Family Medical are claims that both Laffer and Brady were patients of Kaufman, that Kaufman was an employee or agent of Family Medical, and that Laffer and Brady were prescribed "an excessive number of prescription pain medications known to be addictive" by Kaufman. It is also alleged that defendant Kaufman failed to properly diagnose and treat Laffer and Brady and that he failed to counsel Laffer and Brady on the use of prescription pain medications. Thus, plaintiff has named Kaufman and Family Medical as defendants in this action on the basis of claims that the medical care of Laffer and Brady was improper and negligent, and that such medical care and treatment caused and/or contributed to the defendants' addiction and commission of the heinous murders. In the course of discovery proceedings, defendants Kaufman and

Family Medical sent requests for HIPAA authorizations to the respective correctional facilities where defendant Laffer and defendant Brady are confined to obtain their medical records. Both Laffer and Brady failed and/or refused to execute the authorizations. Thereafter, defendant Kaufman moved for an order compelling disclosure of medical records pertaining to Laffer and Brady, and by order of the Court dated December 6, 2012 the motion was denied. Defendant Kaufman now moves and defendant Family Medical cross-moves for an order awarding summary judgment in their favor on the ground that plaintiff cannot establish a *prima facie* case against them without the medical records of Laffer and Brady in evidentiary form. In support of his application, Kaufman submitted his own affirmation in which he states that he has "no personal knowledge of medical care and treatment rendered, if such care and treatment [were] in fact rendered, to either David Laffer or Melinda Brady" and that he is "not in possession of any medical record(s) related to the medical care and treatment, if such record(s) exist, of either David Laffer or Melinda Brady."

As noted by Mr. Justice Rebolini, the disclosure of a patient's confidential medical information is prohibited by statute, unless the patient waives the privilege of confidentiality. A patient's medical information is shielded from disclosure pursuant to CPLR § 4504(a) (*Suchonepka v Mukhtarzad*, 103 AD3d 878, 960 NYS2d 157 [2d Dept 2013]), and a defendant's medical records, which are protected by the doctor-patient privilege (*citations omitted*).

Clearly, the case before the bench presents an unintended consequence of a statute designed to protect the privacy interests of patients. Although it appears abhorrent to allow the convicted felons to block Plaintiffs' access to the courts by operation of the HIPAA laws, a modification of the law by the legislature to address these draconian consequences is in order.

As Defendants Laffer and Brady have neither expressly waived the statutory privilege of confidentiality, nor have they implicitly done so by placing their physical condition at

issue, their medical records are not discoverable. In short, and as noted by Mr. Justice Rebolini, “despicable as their acts were, Defendants Laffer and Brady have not waived their privilege of confidentiality that is protected under New York law.”

Therefore, based upon the allegations in the Complaint it is clear that the medical condition, care and treatment of Defendants Laffer and Brady are at the core of the allegations against Dr. Kaufman and Family Medical. As neither Laffer nor Brady have waived their statutory privilege of confidentiality or have they consented to the disclosure of their medical records, a *prima facie* case cannot be established against either Kaufman or Family Medical. This Court is without authority to compel disclosure absent a waiver and, accordingly a *prima facie* case against Kaufman and Family Medical cannot be established. The Petition of Mark C. Kaufman, M.D. and Family Medical Practice of Bay Shore is **GRANTED**, without prejudice as both Laffer and/or Brady may change their minds within the applicable period of limitations.

The final motion before the Court is filed on behalf of Stan X Li, M.D. In the action against Dr. Li, the fourth cause of action alleges that Dr. Li prescribed an “excessive” amount of pain medication to Laffer and Brady. Furthermore, these medications were known by Dr. Li to be addictive, and that Dr. Li failed to determine that Laffer and Brady were receiving similar prescriptions from other sources. Additionally, it is alleged that Dr. Li knew or should have known that Laffer and Brady were addicted to pain medication and he failed to counsel them about the risks related to pain medications. The Complaint goes on to allege that Dr. Li deviated from accepted standards of care in the medical community and was negligent.

In another claim, the Plaintiffs’ allege a violation of section 11-103 of the General Obligations Law. It is argued that a review of the Complaint fails to disclose an assertion that Dr. Li owed any cognizable duty to the decedent, Raymond Ferguson, Jr. It is alleged that Laffer and Brady were “actively intoxicated or inebriated while committing the crimes in question.”

The Defendant does not claim in his moving papers the impossibility of the claims by virtue of David Laffer and Melinda Brady’s resistance to issuing HIPAA compliant authorizations.

In a companion action Malone, et al. v. Stan Xuhui Li, M.D., Mr. Justice Rebolini denied Dr. Li’s petition seeking dismissal of the Complaint.

Mr. Justice Rebolini correctly noted that Plaintiffs seek recovery of damages for pain and suffering of decedent and wrongful death against Dr. Li upon allegations that he "prescribed approximately 2,500 narcotic pills to David Laffer between 2009 and 2010" and that Dr. Li "knew or should have known that prescribing narcotics to a drug addict would increase David Laffer's dependency on said narcotics and therefore result in drastic attempts to procure said narcotics by David Laffer, including robbery of pharmacies/drug stores and the murder of those inside" and that Dr. Li "recklessly disregarded his obligation and duty not to over-prescribe narcotics to a narcotics abuser..." It is also alleged that Dr. Li "created a public nuisance in allowing drug addict and criminal, Laffer, to have access to the prescription narcotics and to fail to prevent drug addict and criminal Laffer from re-filling his stash of prescription narcotics..." It appears that plaintiffs make no claim that Dr. Li is liable in medical malpractice; to the extent that such a claim is asserted, however, the absence of a doctor/patient relationship between plaintiffs and defendant precludes a cause of action based on medical malpractice (see Fox v Marshall, 88 AD3d 131, 135, 928 NYS2d 317[2d Dept 2011]).

This Court adopts the analysis presented by Mr. Justice Rebolini. To wit:

The license to write prescriptions for opioid drugs carries with it important responsibilities. Here, plaintiffs claim that Dr. Li recklessly and negligently prescribed opioid substances to Laffer without taking necessary precautions. The claims in this case are distinguishable from those cases in which a medical provider is alleged to have failed to perceive a risk of danger and failed to exercise control to prevent harm to others. Instead, plaintiffs in this case contend that Dr. Li recklessly helped to create the danger by feeding Laffer's addiction. The distinction is significant. In the opinion of this Court, under certain factual circumstances there exists a duty to the general public not to supply prescriptions to maintain an addict or habitual user of controlled substances. A medical provider may owe a duty to protect the public from the actions of a drug addict and he may be found to have breached that duty if he creates or maintains the addiction through his own egregious conduct.

This Court concurs with the finding of Justice Rebolini and the Plaintiffs should be afforded the opportunity to proceed against Dr. Li and to explore through the discovery

FERGUSON v. LAFFER, BRADY, ET AL.
INDEX NO.: 18641/2012
PAGE 7

process the level of his involvement, if any, his knowledge or lack thereof of Laffer's addiction and/or whether Dr. Li had reason to suspect Laffer was presenting a risk of harm. The Court acknowledges that ultimately the proximate cause requirements of tort liability must be resolved.

Accordingly, the motion for dismissal of the Complaint against Dr. Li is ***DENIED***.

The foregoing constitutes the decision and ***ORDER*** of this Court.

Dated: August 19, 2014


HON. JERRY GARGUILO, JSC