

**Fennon v Sala's Cobblestone, Inc.**

2014 NY Slip Op 32878(U)

July 31, 2014

Sup Ct, Westchester County

Docket Number: 53053/2011

Judge: James W. Hubert

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR §5513(a)), you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
Valerie M. Fennon, as personal representative of the  
Estate of Victor J. Fennon and Valerie Fennon,

Plaintiffs,

-against-

Sala’s Cobblestone, Inc. *d/b/a* The Cobble Stone  
Restaurant,

Defendant.

-----X  
Hubert, A.J.S.C.

**DECISION & ORDER**

Index No. 53053/2011

Motion Seq. 002

This is a motion filed by Plaintiff for leave to reargue Defendant’s motion for summary judgment that was granted by this Court on April 14, 2014. The underlying action seeks to recover for personal injuries suffered by Victor J. Fennon when he allegedly tripped and fell on Plaintiff’s property. As noted in this Court’s original Decision, the complaint alleges that as Mr. Fennon was exiting the Cobble Stone Restaurant in Purchase, New York, he fell down a “decrease in elevation” outside of the doorway onto a brick walkway. At the time of the accident, Mr. Fennon was 69 years old. He died after this action was commenced, but before he could be deposed. Defendant therefore moved for summary judgment on the ground that Plaintiff was unable to identify the exact cause of the decedent’s fall. *See Morgan v. Windham Realty, LLC*, 68 A.D.3d 828, 829, 890 N.Y.S.2d 621 (2d Dep’t 2009)(plaintiff’s inability to establish the cause of his or fall is fatal to a cause of action based on negligence). This Court granted the motion, dismissing the complaint. Plaintiff now moves for reargument.

A motion for leave to reargue, which is addressed to the sound discretion of the motion court, *Matter of Carter v. Carter*, 81 A.D.3d 819, 820, 916 N.Y.S.2d 821 (2d Dep't 2011), must "be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered in the prior motion." CPLR § 2221(d) (2). A motion for leave to reargue is not based on new proof, nor is it "designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented." *McGill v. Goldman*, 261 A.D.2d 593, 594, 691 N.Y.S.2d 75 (2d Dep't 1999); also see *Spatola v. Tarcher*, 293 A.D.2d 523, 739 N.Y.S.2d 848 (2d Dep't 2002). Instead, the movant must demonstrate that the Court, in rendering its original determination, overlooked or misapprehended relevant facts or law. *Nicolia v. Nicolio*, 84 AD3d 1327, 1329, 924 N.Y.S.2d 509 (2d Dep't 2011).

In support of the instant motion, Plaintiff contends that the Court erroneously determined that certain statements made by the deceased, as recorded in his medical records, did not qualify as an exception to the hearsay rule. As noted in the Court's earlier decision, hearsay statements may be used to oppose summary judgment motions, but cannot constitute the only evidence submitted to raise a triable issue of fact. *Phillips v. Kantor & Co.*, 31 N.Y.2d 307, 313-314, 338 N.Y.S.2d 882 (1972). Plaintiff argues that the statements made by the decedent in his medical records should not have been considered to be hearsay statements, and instead constituted admissible evidence upon which the Court should have denied Defendant's summary judgment motion.

Statements made to medical professions and recorded for purposes of diagnosis and treatment can qualify as an exception to the hearsay rule. This exception is premised on the

notion that “a statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility.” *White v. Illinois*, 502 U.S. 346, 356, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992); *see also People v. Ortega*, 15 N.Y.3d 610, 917 N.Y.S.2d 1(2010)(Smith, J. concurring) (“[s]tatements to one’s own doctor or other health care professional have an intrinsic guarantee of reliability, for only a foolish person would lie to his or her own doctor when seeking medical help”)(internal citation omitted). A patient’s statements describing how an injury occurred may therefore be pertinent to a physician’s diagnosis and treatment. However, such statements concerning the cause of an accident are not admissible under CPLR § 4518 unless they are germane to diagnosis or treatment.

Here, Plaintiff contends that decedent’s description of the cause of the alleged accident enabled the doctors to “understand the modality of the injury and to diagnose the additional specific risks that someone with a significant medical history may have relative to the recommended course of treatment.” The fact that the decedent fell on his right hip is, of course, germane to diagnosis and treatment. However, the statement recorded in the medical records that decedent “walked outside of the restaurant to answer a phone call when he missed a step at the entrance” has no bearing on the diagnosis of his alleged hip injury, nor does it aid in determining his course of treatment. Plaintiff has thus failed to show that the medical doctors needed to know what caused Mr. Fennon to fall in order to determine what testing and treatment he required upon his admission to the hospital. *See Stock v. Otis El. Co.*, 52 A.D.3d 816, 861 N.Y.S.2d 722 (2d Dep’t 2008), *see also Nelson v. Friends of Associated Beth Rivka School for Girls*, 987 N.Y.S.2d 907, 2014 NY Slip. Op. 4908 (2d Dep’t 2014)(medical records indicating that preschool-aged

plaintiff told emergency room doctor that she fell from monkey bars should have been admitted at trial; issue of whether plaintiff fell from monkey bars, as opposed to a ladder, vital to plaintiffs' proof; statement also fell within exception to the hearsay rule since it was germane to infant plaintiff's medical treatment on date of incident).

Defendant next argues that the statements recorded in the medical records are admissible under the excited utterance exception to the hearsay rule. Inasmuch as this legal theory was not advanced in support of the original motion or in opposition, it has been improperly raised on reargument. *V. Veeraswamy Realty v. Yenom Corp.*, 71 A.D.3d 874, 895 N.Y.S.2d 860 (2d Dep't 2010). In any event, there is no evidence that the deceased was still under the stress of the alleged accident or otherwise in shock when he made the statements. The accident allegedly occurred at 12:30 p.m.; the statements at issue were not made and/or recorded until 4:43 p.m. No immediacy can be inferred from the records, and there is not other evidence to suggest that the statements at issue constitute an excited utterance.

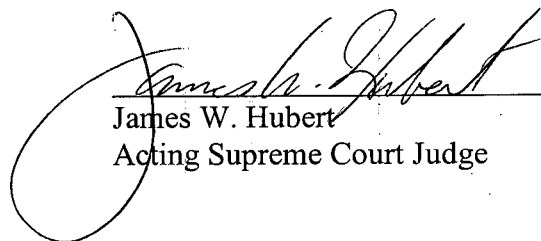
Defendant also contends that the statements recorded in the medical records are admissible under the "residual exception" to the hearsay rule. Defendant did not originally present this argument and thus it is improper to raise it on this motion. *V. Veeraswamy Realty v. Yenom Corp.*, 71 A.D.3d 874, 895 N.Y.S.2d 860 (2d Dep't 2010). In any event, this doctrine is not applicable in this case. Rule 807 of the Federal Rules of Evidence provides a "residual" exception to the rule against hearsay. A hearsay statement may be admitted under the residual exception if (1) it has equivalent circumstantial guarantees of trustworthiness as hearsay admissible under Federal Rules of Evidence 803 and 804; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence

that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice. Fed. R. Evid. 807(a). This rule is applied “in the rarest of cases,” *United States v. DeVillio*, 983 F.2d 1185, 1190 (2d Cir. 1993), and there is no such express exception under New York law. *People v. Nieves*, 67 N.Y.2d 125, 501 N.Y.S.2d 1 (1986). Defendant cites no case law or other authority in support of its position that such an exception is applicable under the facts of this case.

For all of the above reasons, the Court finds that Plaintiff has failed to show that the Court overlooked or misapprehended any matters of fact or law or “for some other reason mistakenly reached its earlier decision.” *Vaughn v. Veolia Transp., Inc.*, 117 A.D.3d 939, 986 N.Y.S.2d 504 (2d Dep’t 2014). Defendant’s motion for leave to reargue is therefore denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
July 31, 2014

  
James W. Hubert  
Acting Supreme Court Judge