

**Velez v New York Presbyt. Hosp.**

2015 NY Slip Op 32122(U)

February 25, 2015

Supreme Court, New York County

Docket Number: 800173/2011

Judge: Martin Shulman

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This opinion is uncorrected and not selected for official publication.

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2/23/15  
MML

# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. MARTIN SHULMAN, J S C  
Justice

PART 1

Index Number : 800173/2011  
VELEZ, JULIA  
vs  
NEW YORK PRESBYTERIAN HOSPITAL  
Sequence Number : 002  
REARGUMENT/RECONSIDERATION

INDEX NO. 800173/11  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to renew/reargue

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	<u>A-F</u>	No(s) <u>1, 2, 3</u>
Answering Affidavits — Exhibits	_____	No(s) <u>4, 5</u>
Replying Affidavits	_____	No(s) <u>6, 7</u>
<u>Sur-reply Aff</u>	_____	No. <u>8</u>

Upon the foregoing papers, it is ordered that this motion is decided  
in accordance with the attached  
decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

**FILED**  
FEB 27 2015  
NEW YORK  
COUNTY CLERK'S OFFICE

**RECEIVED**  
FEB 27 2015  
GENERAL CLERK'S OFFICE  
NYS SUPREME COURT - CIVIL

Dated: Feb. 25, 2015

[Signature], J.S.C.  
HON. MARTIN SHULMAN, J S C

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 1

-----X  
JULIA VELEZ and ANTONIO CORTORREAL,

Plaintiffs,

Index No. 800173/2011

-against-

**Decision & Order**

NEW YORK PRESBYTERIAN HOSPITAL,  
RALPH LAUREN CENTER FOR CANCER  
CARE AND PREVENTION, MEMORIAL  
SLOAN KETTERING CANCER CENTER, AND  
JOHN DOES 1-10 INTENDING TO  
DESIGNATE PHYSICIANS, NURSES AND  
STAFF AFFILIATED WITH OR EMPLOYED  
BY THE NAMED DEFENDANTS,

**FILED**

Defendants.

FEB 27 2015

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**NEW YORK  
COUNTY CLERK'S OFFICE**

MARTIN SHULMAN, J.:

In this medical malpractice action alleging a failure to diagnose and treat decedent and former plaintiff Julia Velez's (Velez) breast cancer, Antonio Cortorreal (Cortorreal), co-plaintiff and widower, who was issued limited letters of administration, moves for an order: 1) reinstating the complaint; 2) pursuant to CPLR 2221(d) granting leave to reargue his prior motion to substitute himself as the administrator of Velez's estate; 3) pursuant to CPLR 2221(d) granting renewal of plaintiffs' prior motion; 4) upon granting renewal and reargument, substituting Cortorreal as administrator in place of Velez; and 5) striking defendant New York Presbyterian Hospital's (NYPH) answer or, alternatively, compelling disclosure. Defendants the New York and Presbyterian Hospital (NYPH), s/h/a New York Presbyterian Hospital and Ralph Lauren Center for Cancer Care and Prevention's (RLC) oppose the motion.

This court's decision and order dated August 1, 2014 (8/1/14 decision) denied plaintiffs' prior motion for substitution and granted defendants NYPH and RLC's separate cross-motions to dismiss this action pursuant to CPLR §1021. The 8/1/14 decision provides that the dismissal was "without prejudice to any prompt application plaintiff is advised to make, upon a proper showing, to seek reinstatement of the complaint." The relevant factual background is set forth in the 8/1/14 decision and will not be repeated.

In support of the instant motion, plaintiffs claim that defendants improperly failed to provide copies of Velez's medical records, thereby hindering plaintiffs' counsel's ability to obtain a physician's affidavit of merit, which ultimately resulted in the action being dismissed. No affidavit of merit was included in plaintiffs' present motion, which was served on September 9, 2014. However, approximately six (6) weeks after serving this motion, plaintiffs' counsel served an "Affirmation in Further Support" dated October 29, 2014 which includes an affidavit from Robert H. Dropkin, M.D. (Dropkin affidavit) sworn to on October 2, 2014. Defendants object to this supplemental affirmation as procedurally improper and implore this court to disregard it.

Defendant RLC's opposition raises the following points: 1) plaintiffs still fail to provide a reasonable excuse for the over 20 months delay in seeking substitution; 2) no affidavit of merit from a medical expert has been proffered despite the fact that

plaintiffs' counsel has had RLC's records<sup>1</sup> since August 25, 2011;<sup>2</sup> 3) reargument should be denied because plaintiffs point to no error of fact or law in this court's 8/1/14 decision; and 4) renewal should be denied because plaintiffs cite no new facts previously unavailable.

Defendant NYPH reiterates RLC's foregoing arguments and additionally responds as follows in opposition to plaintiffs' motion: 1) plaintiffs have failed to provide a proper HIPAA authorization allowing defense counsel to release plaintiff Velez's records to plaintiffs' counsel's new firm;<sup>3</sup> 2) because this action has been dismissed it is procedurally improper to move to strike this defendant's answer; 3) plaintiffs seek to strike NYPH's answer based upon the alleged failure of physicians not in NYPH's employ or control to provide records to plaintiffs' counsel; 4) plaintiffs' counsel should have obtained Velez's records and conferred with a medical expert prior to commencing this action, as CPLR §3012-a requires; and 5) even if the Dropkin affidavit of merit had been included in plaintiffs' motion, it fails to establish that plaintiffs' case against NYPH is meritorious by virtue of the fact that Dr. Dropkin offers no opinion as to the care Velez

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<sup>1</sup> RLC maintains that plaintiffs' motion misleadingly states that both defendants improperly failed to provide requested medical records. Plaintiffs do not dispute RLC's position in their reply papers.

<sup>2</sup> RLC's opposition predates plaintiffs' October 29, 2014 Affirmation in Further Support. Upon receipt of same, RLC's counsel sought and obtained permission from this court to interpose a sur-reply addressing the issues raised therein.

<sup>3</sup> NYPH's counsel cites various infirmities with the authorizations plaintiffs have provided from 2011 to date, such as authorizations permitting the release of records to plaintiffs' counsel's prior firm, authorizations not executed by Velez's estate representative after her death, and authorizations which do not permit defense counsel's firm to release records to plaintiffs' counsel.

received from NYPH due to his admitted lack of records,<sup>4</sup> and as an obstetrician-gynecologist (rather than a pathologist), he “is not qualified to speak to the standard of care, indications for and analysis of tissue by a pathologist.”<sup>5</sup>

Responding to RLC’s opposition, plaintiffs argue that: 1) reargument is proper because the cases cited in the 8/1/14 decision do not support the drastic penalty of dismissal under this case’s circumstances; 2) renewal is proper because this court was unaware that delays in this case were due to NYPH’s failure to provide records needed to obtain an affidavit of merit; and 3) neither defendant demonstrates that it will be prejudiced if reinstatement is granted.

Responding to NYPH’s opposition, plaintiffs argue that this court should disregard those portions thereof which oppose granting renewal/reargument and reinstatement of the complaint because, by letter dated October 24, 2014 NYPH’s counsel stated that NYPH would not oppose these branches of plaintiffs’ motion. As explained in NYPH’s opposition, its counsel felt compelled to oppose the entire motion because plaintiffs continued to pursue the branch of their motion seeking to strike NYPH’s answer based upon alleged discovery defaults. As justification for this change in position, NYPH emphasizes that it demonstrated good faith by diligently attempting to provide Velez’s medical records to plaintiffs’ counsel even after this case had been dismissed.

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<sup>4</sup> Dr. Dropkin avers that he was not provided with NYPH’s records and thus states “I defer comment on the care rendered by NYPH . . . until I have had an opportunity to review the complete relevant records.” Dropkin Aff. at pp. 3-4.

<sup>5</sup> NYPH’s counsel notes that the only thing stated in the Dropkin affidavit as to NYPH is that a specimen was not sent to Pathology.

Plaintiffs further deny NYPH's claim that the numerous authorizations provided to date have all been insufficient. Plaintiffs note that NYPH's position as to the authorizations' validity is inconsistent with its counsel's purported prior assurance that the requested records would be released upon payment of the invoice for same. However, this court notes that NYPH's counsel's letter to plaintiffs' counsel dated September 16, 2014 requests both payment for copying the records and a further authorization. See Exh. E to Nikiciuk Aff. in Opp.

### Discussion

At the outset, it is unnecessary to address the parties' arguments concerning renewal and reargument. The 8/1/14 decision specifically granted plaintiffs leave to bring a prompt motion to reinstate the complaint. A motion for reargument was neither suggested nor contemplated as, based upon the record then before it, this court neither misunderstood the relevant facts nor misapplied the controlling law in issuing the 8/1/14 decision. Nor was renewal contemplated.<sup>6</sup> Rather, the 8/1/14 decision indicates this court's willingness to reconsider its determination, effectively granting plaintiffs a second bite at the apple, conditioned upon their bringing a "prompt application" for reinstatement based upon "a proper showing." Plaintiffs' prior motion was denied and

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<sup>6</sup> Plaintiffs' basis for renewal is not readily discernable from the moving papers. In reply, plaintiffs clarify that renewal is proper because this court was unaware that delays in this case were due to NYPH's failure to provide records needed to obtain an affidavit of merit. This is not a new fact unknown to plaintiffs at the time they moved for substitution and no justification is given for plaintiffs' failure to present such facts on the prior motion. See CPLR 2221(e).

defendants' cross-motions granted because plaintiffs made no showing of merit and gave no excuse for the delay in seeking appointment of an estate representative.<sup>7</sup>

Although plaintiffs' service of the Affirmation in Further Support and the attached Dropkin affidavit six (6) weeks after serving this motion was not authorized by the CPLR or this court, nonetheless, it will be accepted as part of the record on this round of motion practice. It is apparent that plaintiffs' counsel served this motion at the time he did based upon the incorrect assumption that he was required to serve the motion within 30 days of notice of entry as required for reargument motions. Defendants will not be prejudiced because they were granted the opportunity to respond to plaintiffs' new claims via sur-reply and at oral argument.

However, even with the Dropkin affidavit, plaintiffs again fail to make a showing of merit and the motion must be denied. As to NYPH the attached Dropkin affidavit is admittedly insufficient. Dr. Dropkin concedes he has not reviewed NYPH's records and must defer comment. Plaintiffs' misguided attempt to shift blame to NYPH for not supplying Velez's medical records is unavailing. The record indicates that defense counsel was unable to release these records as a result of plaintiffs' own failure, after multiple attempts over a three (3) year period, to provide a proper HIPAA compliant authorization.

As to RLC, the Dropkin affidavit concludes that RLC failed to meet the standard of care in treating Velez based upon its alleged failure to follow up with her to ensure

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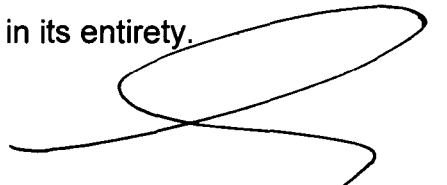
<sup>7</sup> The 8/1/14 decision rejected defendants' claims that they had been prejudiced by plaintiffs' two (2) year delay in having an estate representative appointed and moving for substitution.

she underwent further testing (such as a recommended ultrasound and MRI). However, Dr. Dropkin is an obstetrician-gynecologist and his affidavit fails to indicate his qualifications to opine as to the standard of care for radiology and/or pathology. See *Mustello v Berg*, 44 AD3d 1018, 1019 (2d Dept 2007)(“where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered [citations omitted]”). Accordingly, plaintiffs fail to make a showing of merit with respect to RLC and their motion must be denied.

In light of the foregoing, it is unnecessary for this court to address the sufficiency of plaintiffs’ excuse for the delays in prosecuting this action and seeking to appoint an estate administrator.<sup>8</sup> Similarly, it is unnecessary to address the branch of plaintiffs’ motion seeking an order striking NYPH’s answer. For all of the foregoing reasons it is

ORDERED that the plaintiffs’ motion is denied in its entirety.

Dated: New York, New York  
February 25, 2015




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Martin Shulman, J.S.C.

**FILED**  
FEB 27 2015  
NEW YORK  
COUNTY CLERK'S OFFICE

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<sup>8</sup> Cortorreal submits an affidavit acknowledging such delays and vaguely states that “[t]his was caused, at least in part, by my son’s refusal to cooperate in the litigation, and in having me appointed as administrator.” No further details are given and Cortorreal avers that he never intended to abandon this action and is now ready to resume prosecution should the complaint be reinstated.