

Cracolici v Guy

2015 NY Slip Op 32718(U)

January 5, 2015

Supreme Court, Rockland County

Docket Number: 032514/2012

Judge: Margaret Garvey

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X

HELGA C. CRACOLICI and SALVATORE CRACOLICI,

Plaintiffs,

-against-

ALI E. GUY, M.D. and GRAMERCY PARK PHYSICAL
MEDICINE & REHABILITATION, P.C.,

Defendants.

-----X

Margaret Garvey, J.S.C.

DECISION AND ORDER
(Motion #1)

Index No. 032514/2012

The following papers, numbered 1 to 3, were considered in connection with Defendants' Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, granting summary judgment and dismissing the Complaint and for such other and further relief deemed just and proper:

PAPERS

NUMBERED

NOTICE OF MOTION/AFFIRMATION OF ARI I. BAUER, ESQ. DATED SEPTEMBER 9, 2014/EXPERT AFFIRMATION OF CRAIG H. ROSENBERG, M.D. DATED AUGUST 28, 2014/EXHIBITS (A-L)	1
AFFIRMATION OF GEORGE G. COFFINAS, ESQ. DATED NOVEMBER 18, 2014 IN OPPOSITION /AFFIRMATION OF EVANS S. LEVINE, M.D. DATED NOVEMBER 18, 2014 IN OPPOSITION/AFFIDAVIT OF HELGA C. CRACOLICI DATED NOVEMBER 19, 2014/EXHIBIT (A)	2
REPLY AFFIRMATION OF ARI I. BAUER, ESQ. DATED DECEMBER 1, 2014/EXHIBITS (1-7)	3

Upon the foregoing papers, the Court now rules as follows:

Plaintiffs commenced the instant medical malpractice action with the filing of a Summons and Verified Complaint through the NYSCEF system on May 5, 2012. The Verified Complaint states three causes of action: (1) medical malpractice; (2) lack of informed consent; and (3) loss of consortium. Issue was joined as to Defendants ALI E. GUY, M.D. and GRAMERCY PARK PHYSICAL MEDICINE AND REHABILITATION, P.C. with the service and filing of a Verified

Answer, filed through the NYSCEF system on June 21, 2012.

Defendants filed the instant motion through the NYSCEF system on September 9, 2014, seeking an Order pursuant to Civil Practice Law and Rules § 3212, granting summary judgment in their favor and an Order dismissing the Verified Complaint. The instant motion was originally returnable on October 10, 2014. Pursuant to Civil Practice Law and Rules § 2214(b), opposition papers were due on or before October 3, 2014 (7 days before the return date).

On October 9, 2014, after the time for opposition had already passed, Plaintiffs' counsel filed a letter through the NYSCEF system requesting an adjournment of the motion. The October 9, 2014 letter stated: "Please be advised that our office is respectfully requesting an adjournment of the motion, currently returnable on October 10, 2014, to November 7, 2014 on consent of all sides. The Affirmation in Opposition will be served by October 24, 2014."

On November 4, 2014, at 9:19 a.m., Defendants' counsel filed a letter through the NYSCEF system advising the Court and opposing counsel that the date for opposition papers had passed, and the motion remained unopposed. Specifically, the November 4, 2014 letter states, in relevant part: "As of the date of this letter, no opposition has either been received or ECF filed by plaintiffs, and their time to submit opposition papers expired (11) day (sic) ago. Moreover, plaintiffs have not contacted this office nor requested any further adjournments. Based on the foregoing, it is respectfully requested this Court grant Dr. Guy's motion for summary judgment without opposition." Defendants' counsel's November 4, 2014 letter was sent to Plaintiffs' counsel through the NYSCEF system on November 4, 2014 at 9:19 a.m. (Mavigliav@neimarklaw.com).

Later that same day, at 2:50 p.m., Plaintiffs' counsel filed a letter through the NYSCEF system requesting another adjournment of the motion. Specifically, Plaintiffs' counsel's November 4, 2014 letter states: "We are in receipt of our adversary's letter which was e-filed earlier today. Our office is respectfully requesting another adjournment of the motion, currently

returnable on November 7, 2014 to December 5, 2014. This adjournment request is being made due to the difficulty with scheduling meetings with doctors to obtain Affirmations."

On November 5, 2014, Defendants' counsel filed a letter through the NYSCEF system objecting to Plaintiffs' adjournment request. Defendants' counsel notes that his consent to the first adjournment was on the express condition, memorialized in writing in Plaintiffs' counsel's October 10, 2014 letter, that opposition papers would be filed no later than October 24, 2014. Defendants' counsel also noted that Plaintiffs' counsel had not contacted their office to request consent for the second adjournment of the motion.

Over Defendants' counsel's objection, the Court granted Plaintiffs' counsel's request for the adjournment in part, and adjourned the motion a final time to November 21, 2014. That adjournment was memorialized in a November 5, 2014 letter filed through the NYSCEF system by Plaintiffs' counsel, and clearly stated that the motion was adjourned to November 21, 2014 and marked "final." Pursuant to Civil Practice Law and Rules § 2214(b), opposition papers were due no later than November 14, 2014 (7 days before the return date).

On November 17, 2014, Defendants' counsel filed a letter through the NYSCEF system, informing the Court once again that the opposition date had passed and the motion remained unopposed. The November 17, 2014 letter was sent to Plaintiffs' counsel through the NYSCEF system on November 17, 2014 at 12:04 p.m. (Mavigliav@neimarklaw.com).

On November 19, 2014, at approximately 1:39 p.m., Plaintiffs' counsel filed opposition papers through the NYSCEF system. The opposition papers do not address the fact that they were not filed timely, nor do they address Defendants' counsel's November 17, 2014 letter that the motion was not opposed. The Court will note that Plaintiffs' counsel was never given leave to file the late opposition papers. Further, the Court will note that the attorney affirmation, the expert affirmation and the client affidavit are all dated after November 17, 2014 (the date of Defendants' counsel's letter).

That same day, at approximately 4:05 p.m., Defendants' counsel filed a letter

through the NYSCEF system advising Plaintiffs' counsel that the untimely opposition papers were being rejected. On November 20, 2014, Defendants' counsel filed another letter directed to the Court, detailing the untimeliness of the opposition, and confirming counsel's objection to the Court's consideration of the untimely submission. The November 20, 2014 letter further requested clarification on how counsel should proceed with a reply submission. Counsel was advised that he could raise the timeliness issue in his reply, and said reply must be filed no later than December 1, 2014. The reply submission schedule was memorialized in a November 20, 2014 letter by Defendants' counsel and filed through the NYSCEF system.

Defendants' counsel filed the reply papers on December 1, 2014, in compliance with the Court's directives, and properly raised the timeliness issue in said reply.

To date, Plaintiffs' counsel has offered absolutely no explanation for the failure to timely submit opposition papers. Further, in light of the fact that Defendants' counsel raised the failure to timely submit opposition papers in the November 17, 2014 letter (prior to the unauthorized late submission of opposition papers), Plaintiffs' counsel should have addressed the lateness in the opposition papers submitted to the Court, but did not.

In light of the history of the instant motion, and the multiple opportunities given to Plaintiffs for the submission of opposition papers, the Court is not considering the opposition papers that were untimely, and filed without authorization for a late submission. Again, as noted previously, to date, there has been no excuse proffered by Plaintiffs for their failure to comply with Civil Practice Law and Rules § 2214(b).

Turning now to Defendants' motion, the proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. [Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986)]. The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. [Lacagnino v. Gonzalez, 306

A.D.2d 250 (2d Dept. 2003)]. However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. [*Gonzalez v. 98 Mag Leasing Corp.*, 95 N.Y.2d 124 (2000), citing *Alvarez*, supra, and *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851 (1985)]. Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. [*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966 (1988); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)].

In this matter, Defendants have established their entitlement to judgment as a matter of law with the submission of an expert affirmation of Dr. Craig H. Rosenberg, who avers that there were no departures from the standard of care, and even if the alleged conduct of Dr. Guy was a departure, it was not a substantial factor in causing any of the alleged injuries, which all predated the alleged conduct. Dr. Rosenberg states that he reviewed the relevant medical records and the deposition transcripts, and states unequivocally that the care and treatment rendered by Dr. Guy was in accordance with good and accepted medical practice and not a proximate cause of the injuries alleged by Plaintiff. Dr. Rosenberg is a licensed physician and is Board Certified in the field of Physical Medicine and Rehabilitation. Dr. Rosenberg further opined that Dr. Guy actively saw Plaintiff HELGA C. CRACOLICI on a regularly scheduled basis and carefully monitored her, making appropriate referrals for pain management and psychological care. Finally, Dr. Rosenberg avers that Dr. Guy's prescription of Valium to the Plaintiff was within the appropriate dosage and appropriate intervals, and further that he appropriately advised her of the risks associated with taking Valium (or its generic counterpart). The Court will further note that the record before it reveals that Plaintiff HELGA C. CRACOLICI has had a long history of various diagnosed psychiatric disorders, including but not limited to clinical depression, anxiety, anorexia and suicidal tendencies.

Additionally, in support of the motion, Defendants provided copies of the pleadings, the March 11, 2014 and May 7, 2014 transcripts of Plaintiff HELGA C. CRACOLICI's

deposition, the May 7, 2014 transcript of Plaintiff SALVATORE CRACOLICI's deposition, the June 6, 2014 transcript of Defendant DR. GUY's deposition, the July 9, 2014 IME report of the Neuropsychological Examination conducted by Dr. Baer, and Plaintiff HELGA C. CRACOLICI's medical records from her treatment with Defendants.

The burden then shifted to Plaintiffs to produce admissible evidence showing one or more genuine issues of material fact. [*Fleet Credit Corp. V. Harvey Hutter & Co. Inc.*, 207 A.D.2d 380 (2d Dept. 1994)]. As noted previously, despite the fact that Plaintiffs were given ample opportunity to submit timely opposition papers to the instant motion, Plaintiffs' failed to do so. Therefore, the motion remains unopposed.


The Court will further note that even if it were to accept Plaintiffs' late submission of opposition papers, the expert affirmation of Dr. Levine submitted by Plaintiffs does not raise any triable issues of fact. Specifically, Dr. Levine is a licensed physician who completed a residency in internal medicine, and a fellowship in cardiology. Dr. Levine does not state his familiarity with the standard of care in the relevant practice area at issue in this case. Further, while Dr. Levine states in conclusory fashion that Dr. Guy deviated from good and accepted medical practice, he fails to set forth what the applicable standard of care was. Further, Dr. Levine fails to address specific factual recitations and opinions cited by Dr. Rosenberg.

Accordingly, it is hereby

ORDERED that Defendants' Notice of Motion is granted in its entirety and the matter is dismissed with prejudice.

The foregoing constitutes the Decision and Order of this Court on Motion # 1.

Dated: New City, New York
January 5, 2015



HON. MARGARET GARVEY
Justice of the Supreme Court

TO:

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