

**Reustle v Petraco**

2015 NY Slip Op 32795(U)

March 3, 2015

Supreme Court, Nassau County

Docket Number: 1507-12

Judge: Arthur M. Diamond

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND  
Justice Supreme Court

-----X  
BARBARA REUSTLE,

Plaintiffs,

-against-

DOUGLAS PETRACO, M.D., ST. CHARLES HOSPITAL,  
SMITHTOWN CENTER FOR REHABILITATION, ANUJA  
KORLIPARA, M.D., AND MARY ELLEN SENNERT, M.D,  
Defendants.

TRIAL PART: 10

NASSAU COUNTY

INDEX NO: 1507-12

MOTION SEQ. NO: 4,5

SUBMIT DATE: 1/16/15

-----X  
SMITHTOWN HEALTHCARE MANAGEMENT LLC d/b/a  
SMITHTOWN CENTER FOR REHABILITATION AND  
NURSING CARE s/h/a SMITHTOWN CENTER FOR  
REHABILITATION

Plaintiffs,

-against-

TENDER TOUCH PHSYCIAL THERAPY P.C.,  
Defendants.

-----X  
The following papers having been read on this motion:

Notice of Motion.....	1
Notice of Cross Motion.....	2
Opposition.....	3
Memorandum of Law.....	4
Reply.....	5

Motion pursuant to CPLR§ 2221(d) by third-party defendant Tender Touch Physical Therapy (Tender Touch) to reargue its prior motion for summary judgment dismissing the third-party complaint is denied.

Cross motion pursuant to CPLR §2221(d) by plaintiff Barbara Reustle to reargue her prior cross motion for leave to amend the bill of particulars as to defendant Douglas Petraco, M.D. to permit the court's consideration of the affidavit of Richard A. Matza, M.D., and the opposition to

the cross motion submitted on behalf of defendant Petraco, is granted and upon reargument the court adheres to its prior decision.

Pursuant to the decision of this court entered October 21, 2014, the motion by third-party defendant Tender Touch for summary judgment dismissing the third-party complaint was denied. Third-party defendant Tender Touch seeks reargument predicated on the grounds that the court misapprehended the content of the affirmation of plaintiff's medical expert, Jeffrey M. Gross, M.D., and mistakenly concluded that his findings/opinion conflicted with the opinions submitted by third-party defendant Tender Touch's expert, Michael D. Leibowitz, M.D.

Third-party defendant Tender Touch argues that, since Dr. Korlipara, the rehabilitation attending physician at Smithtown Healthcare Management LLC d/b/a Smithtown Center for Rehabilitation and Nursing Care s/h/a Smithtown Center for Rehabilitation (Smithtown Center), knew of plaintiff's leg length discrepancy from the onset of plaintiff's admission to Smithtown Center, and through the duration of her treatment<sup>1</sup>, and since the differential was repeatedly referenced in plaintiff's chart throughout the course of her treatment, there is no basis to sustain a claim against third-party defendant Tender Touch for malpractice.

A motion to leave to reargue is based upon matters of fact or law allegedly overlooked, misapprehended or misapplied by the court in reaching the decision on the prior motion but shall not include any matters of fact not offered on the prior motion (*Grimm v Bailey*, 105 AD3d 703, 702 [2d Dept 2013]). While such a motion is addressed to the sound discretion of the court, it is not designed to provide an unsuccessful party with successive opportunities to revisit issues previously decided, or to present arguments different from those originally presented (*Ahmed v*

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<sup>1</sup>The discrepancy was noted in plaintiff's medical chart on December 4, December 9, December 21, December 23, December 28, 2009 and January 4, 2010.

*Pannone*, 116 AD3d 802 [2d Dept 2014]). The motion may be granted upon a showing that the court overlooked or misapprehended the facts or the law or for some other reason mistakenly arrived at its earlier decision (*Mudgett v Long Is. R.R.*, 81 AD3d 614 [internal quotation marks and citation omitted]).

Third-party defendant Tender Touch contends that plaintiff's injury was caused by the failure of the administrative staff of defendant/third-party plaintiff Smithtown Center to schedule plaintiff's follow-up appointment with her orthopedic surgeon, defendant Dr. Petraco. Secondly, it was not the duty of Tender Touch therapists to render a medical opinion *vis-a-vis* plaintiff's condition, i.e., whether the leg length discrepancy was true or apparent.

Notwithstanding, third-party defendant Tender Touch's assertions to the contrary, this court did not erroneously conclude that the conflicting medical opinions of Dr. Gross and third-party defendant Tender Touch's expert, Dr. Liebowitz, present a credibility question requiring resolution by the fact finder.

Summary judgment may not be awarded in a medical malpractice action where, as here, the parties adduce conflicting opinions of medical experts. When experts offer conflicting opinions, a credibility question is presented requiring resolution by the fact finder (*Roca v Perel*, 51 AD3d 757, 758 [2d Dept 2008]; *Shields v Baktidy*, 11 AD3d 671, 672 [2d Dept 2004]). Third-party defendant Tender Touch places great emphasis on Dr. Gross' statement that, as a practical matter and standard of practice, he would

“have no issue with Physical Therapy care on the leg length issue if they had appreciated worrisome symptoms in a post THR (total hip replacement) patient and raised their concerns with Dr. Korlipara.”

The statement, however, cannot be read to exculpate Tender Touch physical therapists. Dr. Gross

opined that if they had done a proper assessment of plaintiff's leg discrepancy, they would have found a real, as opposed to apparent, leg discrepancy which should have specifically been discussed with the attending physician, as opposed to simply assuming an apparent discrepancy or simply noting the ongoing existence of an undefined discrepancy in the chart. Dr. Gross states:

"It is also my opinion that Mrs. Reustle had a leg length discrepancy during her stay at Smithtown Rehabilitation that was not properly evaluated by either Physical Therapy staff or by Dr. Korlipara at Smithtown. And, had this been properly evaluated, it is my opinion that standards of care required such a discrepancy to be raised with the Orthopedic surgeon, which did not occur in this case.

\* \* \*

"When, as in the case of Barbara Reustle, a leg length discrepancy is observed (which no one disputes), the therapy staff or Rehabilitation Attending is expected to (a) determine if it is 'true' i.e., a function of different leg bone lengths, or 'apparent' (a function of pelvic asymmetry), and (b) quantify the extent of the leg length difference.

"[These assessments] are done routinely in modern, physical therapy and Rehabilitation Medicine, and are part of the required standard of care when a 'significant leg length discrepancy is easily visualized as it was in this case."

In reaching its decision on third-party defendant Tender Touch's original motion for summary judgment, the court did not rely on the affidavit of plaintiff's orthopedic expert, Richard A. Matza, M.D., given that it focused primarily on the care and treatment rendered by orthopedic surgeon, defendant Douglas Petraco, M.D. With respect to defendant to defendant Smithtown Center, Dr. Matza states as follows:

"It is also my opinion that the Rehabilitation phase of care (Smithtown Rehabilitation) admission fell below applicable standards of care. I will address the contribution of Dr. Petraco specifically, from the perspective of Orthopedic Surgery. I

[\* 5]

understand that another physician is addressing the specific actions of staff of Smithtown Rehabilitation, and the Rehabilitation Attending Dr. Korlipara for purposes of this motion."

With respect to plaintiff's cross motion, the court notes that plaintiff correctly argues that the fact that an expert's affidavit, which was notarized outside of New York State, was not accompanied by a certificate authenticating the authority of the notary who administered the oath (CPLR 2309[c]), is not a fatal defect (*Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955, 960 [2d Dept 2013]; *Smith v Allstate Ins. Co.*, 38 AD3d 522, 523 [2d Dept 2007]). Plaintiff, therefore, may properly be afforded the opportunity to cure the defect.

The affidavit of expert Richard A. Matza, M.D. is relevant on the issue of the multiple ways in which Dr. Petraco deviated from the accepted standards of orthopedic care in his treatment of plaintiff.

In reaching its decision on plaintiff's prior motion pursuant to CPLR 3025 to amend the bill of particulars, the court erroneously stated that "defendants do not oppose plaintiff's cross motion, when, in fact, opposition was submitted by defendant Petraco's attorney who argued that Dr. Petraco would be severely prejudiced by the amendment since the original bill of particulars never specifically challenged either the decision to perform the initial surgery or the surgical technique utilized by Dr. Petraco.

Under the circumstances, given the affidavit of Dr. Matza wherein he opines that:

"the deviations from standards of care by Dr. Petraco were a substantial factor in causing injury to Barbara Reustle; namely, the 'acetabular component' of her THR initially placed on November 30, 2009 becoming displaced, in the absence of significant post operative trauma, which necessitated a second ('revision') surgery to replace the prosthesis on January 7, 2010"

and further opines that:

"in addition to subjecting her to a displaced acetabulum, and second surgery, this deviation [failure to properly medialize the acetabulum] by Dr. Petraco was a substantial factor in compromising the functional outcome of THR for Mrs. Reustle, including her ongoing difficulty walking and painful ambulation"

Plaintiff's request to amend the bill of particulars to more specifically allege the acts of malpractice by defendant Petraco is appropriate. It is well settled that leave to amend a bill of particulars shall be freely given in the absence of prejudice or surprise, unless the amendment is sought on the eve of trial (*Yong Soon OH v Hua Jin*, 124 AD3d 639 [2d Dept 2015]; *Alvarado v Beth Israel Med. Ctr.*, 78 AD3d 873, 874 [2d Dept 2010]), or is palpably insufficient or patently devoid of merit (*Rodgers v New York City Tr. Auth.*, 109 AD3d 535, 536 [2d Dept 2013]).

Accordingly, third-party Tender Touch having failed to demonstrate that the court erroneously reached its prior decision denying said third-party defendant's motion for summary judgment dismissing the third-party complaint, third-party defendant Tender Touch's motion to reargue is denied.

The cross motion by plaintiff to reargue its prior motion to amend the bill of particulars as to defendant Petraco is granted and upon reargument the court adheres to its prior decision having considered the affidavit of Richard A. Matza, M.D. and the opposition to the original motion submitted by defendant Petraco.

This constitutes the Decision and Order of the Court.

DATED: March 3, 2015

ENTER

  
HON. ARTHUR M. DIAMOND

J. S.C.

**ENTERED**

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MAR 05 2015

NASSAU COUNTY  
COUNTY CLERK'S OFFICE