

Brook v Zuckerman
2016 NY Slip Op 31934(U)
October 12, 2016
Supreme Court, New York County
Docket Number: 652265/2013
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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ADAM BROOK M.D. PH.D.,
ADAM BROOK M.D. PH.D., P.L.L.C.,
and BROOK CARDIOTHORACIC SURGERY LLC,

DECISION/ORDER
Index No. 652265/2013

Plaintiffs,

-against-

JAY ZUCKERMAN,
JOAN HOIL, R.N.
PECONIC BAY MEDICAL CENTER,
RICHARD KUBIAK, M.D.,
DANIEL MASSIAH, M.D.,
AGOSTINO CERVONE, M.D.,
GEORGE KECKEISEN, M.D.,
ANDREW MITCHELL,
DANIEL HAMOU, M.D.,
and JOHN DOES #1-5,

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action, plaintiff Adam Brook, M.D. Ph.D. ("Dr. Brook") moves to supplement the record on defendants' motion to dismiss (mot. seq. no. 001). Defendants oppose the motion and cross-move for sanctions.

For the purposes of this motion, familiarity with the facts and arguments made in the underlying motion to dismiss is assumed. Dr. Brook makes this motion after recently receiving documents pursuant to his Freedom of Information Act ("FOIA") requests to the United States Department of Health and Human Services and to the National Practitioner Databank. Dr. Brook submits five exhibits: (1) an April 19, 2012 email from Kerry Courson to Linda Redmond; (2) Dr. Brook's April 19, 2012 letter to Cynthia Grubbs; (3) Leonard Rosenberg's August 15, 2012 letter to

Judy Rodgers; (4) Judy Rogers's October 12, 2012 letter to Dr. Richard Kubiak; and (5) a June 7, 2012 email chain between Ivy Vedamuthu and Dr. Anastasia Timothy.

In addition to Dr. Brook's memorandum of law submitted in support of his motion, Adam Brook, M.D., Ph.D., P.L.L.C. ("Brook PLLC") and Cardiothoracic Surgery ("Brook LLC") submit a memorandum of law on the motion, joining Dr. Brook's arguments "for the reason that the information offered on the Motion is newly discovered and relevant to defendants' pending Motion to Dismiss." Brook PLLC and Brook LLC additionally state that "[they] adopt and incorporate by reference the arguments set forth in the PLAINTIFFS ADAM BROOK M.D., PH.D. P.L.L.C.'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO SUPPLEMENT THE RECORD, Index No. 650921/2012." Further, they argue that one of the documents that Dr. Brook seeks to add to the record supports the cause of action for "Fraud and Related Activity in Connection with Computers."

Defendants oppose the motion and cross-move for sanctions.¹ They argue that Dr. Brook's motion should be denied because Dr. Brook has not shown a valid reason to supplement the motion to dismiss, which has already been argued, the documents submitted are irrelevant, and Dr. Brook had most of the documents before the March 2016 argument on the motion. They also move for sanctions due to Dr. Brook's attack on defendants' counsel's character.

Discussion

Section 2214(c) of the CPLR states that "[t]he moving party shall furnish all other papers not already in the possession of the court necessary to the consideration of the questions involved."

Moreover,

¹ At the time that defendants submitted their opposition to the motion, Brook PLLC and Brook LLC had not yet joined Dr. Brook's motion. In a footnote, defendants state, "at the eleventh hour, [Brook PLLC] has filed a supporting memorandum of law in Dr. Brook's action under index no. 650921/2012. Should the corporate Plaintiffs file any such late papers in this case, Defendants respectfully request the right to respond to the extent necessary."

[* 3]

[w]here such papers are in the possession of an adverse party, they shall be produced by that party at the hearing on notice served with the motion papers. Only papers served in accordance with the provisions of this rule shall be read in support of, or in opposition to, the motion, unless the court for good cause shall otherwise direct.

CPLR § 2214(c); *see also Traders Co. v. AST Sportswear, Inc.*, 31 A.D.3d 276, 277 (1st Dep't 2006) (internal citation omitted) (“Defendants also belatedly submitted papers containing a security deposit argument without demonstrating good cause, which was improperly relied upon by the IAS Court.”). Litigants may not seek to supplement the record with documents they had at the time their earlier motion papers were submitted. *See, e.g., In re Schleifer*, 2016 WL 1180184, *1 (Sur Ct, NY County, Mar. 25 2016) (denying motion for leave to supplement record on pending motions to dismiss where movants sought to add documents that “were available to them at the time their opposition to the motions to dismiss was filed and thus the arguments petitioners advance based on those documents could have been made in those opposition papers”).

Here, in opposition to the motion, defendants argue that Dr. Brook had four out of the five documents that he seeks to add to the record on the motion to dismiss at the time of the March 2016 oral argument on that motion. Dr. Brook does not deny this fact, nor does he explain why he did not introduce these documents at an earlier time. Additionally, the one document that Dr. Brook did not have prior to the March 2016 oral argument—the April 19, 2012 email from Kerry Courson to Linda Redmond—does not affect the outcome on defendants’ motion to dismiss. *See In re Schleifer*, 2016 WL 1180184, at *1; *GSO Re Onshore LLC v. Sapir*, 29 Misc.3d 1234(A), 2010 WL 5071785, *6 (Sup Ct, NY County Nov. 24, 2010); *Nicoletti Gonson Spinner & Owen LLP v. York Claims Service, Inc.*, 2007 WL 3131002 (Sup Ct, NY County Oct. 4, 2007). Dr. Brook’s motion to supplement the record is therefore denied.

22 NYCRR 130-1.1 (a) allows a court to award sanctions for “frivolous conduct.” 22 NYCRR 130-1.1 (c) states that “[f]or purposes of this Part, conduct is frivolous if . . . (2) it is

undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another.” In defendants’ cross-motion, they request sanctions for Dr. Brook’s attacks on the character of defendants’ counsel, Leonard Rosenberg.

In their reply papers on the motion to dismiss in 650921/2012, defendants also requested that Dr. Brook be reprimanded for the statements related to defendants’ counsel that he made in his opposition memorandum of law in that index number. In the decision and order on that motion, which is being rendered with the decision and order on this motion, I discussed in greater detail the civility and collegiality required from all parties appearing before me. As set forth in more detail therein, at this time I decline to award sanctions against Dr. Brook.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Adam Brook, M.D. Ph.D.’s motion to supplement the record on defendants’ motion to dismiss is denied; and it is further

ORDERED that defendants’ cross-motion for sanctions is denied.

This constitutes the decision and order of the court.

DATE : 10/12/16


SALIANN SCARPULLA, JSC