

<b>Savage v Kredentser</b>
2018 NY Slip Op 33868(U)
August 29, 2018
Supreme Court, Albany County
Docket Number: 900156-2015
Judge: Gerald William Connolly
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT COUNTY OF ALBANY



ESTATE OF JOYCE SAVAGE, HOWARD ALVIN SAVAGE, INDIVIDUALLY AND AS THE ESTATE REPRESENTATIVE,

**DECISION AND ORDER**  
Index No.: 900156-2015  
RJI No.: 01-15-117128

Plaintiffs,

-against-

DR. DANIEL C. KREDENTSER, WOMEN'S CANCER CARE ASSOCIATES, LLC, ST. PETER'S HOSPITAL CENTER OF THE CITY OF ALBANY, INC., ST. PETER'S NURSING AND REHABILITATION CENTER, INC. and JOHN DOES 1 THROUGH 50,

Defendants.

---

(Supreme Court, Albany County, All Purpose Term)

APPEARANCES: Denise L. Savage, Esq.  
Savage Law PLLC  
*Attorneys for Plaintiffs*  
500 Carteret Street  
Beaufort, South Carolina 29902

Marshall Broad, Esq.  
Thorn, Gershon, Tymann & Bonanni, LLP  
*Attorneys for Defendants Kredentser and Women's Cancer Care Associates, LLC*  
5 Wembley Court, P.O. Box 15054  
Albany, New York 12212-5054

Randall Ezick, Esq.  
Maguire Cardona, P.C.  
*Attorneys for Defendants St. Peter's Hospital of the City of Albany and St. Peter's Hospital and Nursing Rehabilitation Center*  
16 Sage Estate  
Albany, New York 12204

Connolly, J.:

Defendants St. Peter's Hospital Center of the City of Albany, Inc. and St. Peter's Nursing and Rehabilitation Center, Inc. (the "St. Peter's Defendants") and Dr. Daniel C. Kredentser and Women's Cancer Center Associates, LLC (collectively, the Kredentser Defendants) each moved for an order granting leave to amend their Answers pursuant to CPLR §3205(b) and dismissing the complaint pursuant to CPLR §3211(a)(4).<sup>1</sup> The Kredentser Defendants also moved for an award of costs pursuant to 22 NYCRR §130-1.1 in this medical malpractice action.

The plaintiffs commenced this action by the filing of a summons and complaint on February 10, 2015 which complaint was amended on February 26, 2015. The Amended Complaint seeks to recover monetary damages for personal injuries sustained by Joyce Savage (the "Decedent") as a result of alleged medical malpractice committed by Dr. Kredentser and Women's Cancer Care Associates, LLC between August 8, 2011 and August 24, 2011. Defendants argued that they were entitled to dismissal of the action as against them pursuant to CPLR §3211(a)(4) on the ground that on December 18, 2017, plaintiffs commenced another action in the United States District Court for the Northern District of New York between the same parties via the filing of a Summons and Complaint seeking damages for personal injuries of plaintiffs' decedent and derivative losses allegedly sustained by the plaintiffs resulting from the same debulking surgery performed by defendant Daniel C. Kredentser on August 8, 2011 and subsequent care and treatment provided at St. Peter's Hospital and St. Peter's Nursing and Rehabilitation Center.

On April 12, 2018 via letter to the Court the Kredentser Defendants represented that the plaintiffs voluntarily dismissed the federal action against the Kredentser Defendants and

---

<sup>1</sup> As discussed below, the St. Peter's Defendants subsequently withdrew their motion via letter dated June 27, 2018.

accordingly, there was no federal action pending by plaintiffs against such defendants. The Kredentser Defendants represented that it was their position that their pending motion to dismiss pursuant to CPLR 3211(a)(4) was moot, however, included in their motion to dismiss was a request for the Court to award costs based on plaintiffs' cancellation of out-of-state depositions. This Court stayed the instant litigation by Decision and Order of April 20, 2018. Subsequently, on June 21, 2018 a decision was issued granting the St. Peter's Defendants' motion to dismiss the federal court action and, based upon such federal court decision and order, the St. Peter's Defendants, via letter dated June 27, 2018, withdrew the instant motion seeking, *inter alia*, dismissal pursuant to CPLR 3211(a)(4).

The St. Peters Defendants' motion to dismiss is marked withdrawn and the papers submitted have been returned to such defendants. Based upon the record, that portion of the Kredentser Defendants' motion seeking dismissal pursuant to CPLR 3211(a)(4) is moot based upon the actions in the federal court. To be addressed is the Kredentser Defendants' request for costs based on the cancellation of depositions. Plaintiffs, in opposition, seek, without adequate explanation, sanctions against the Kredentser defendants and their counsel under 22 NYCRR §131-1.1 for the "frivolous filing of the portion of the motion seeing an award of costs against the plaintiffs".

#### **Kredentser Defendants' Request for Costs pursuant to 22 NYCRR 130-1.1**

The Kredentser Defendants assert that by Order dated October 6, 2017, this Court required that all depositions be completed within 120 days of such order (i.e. by February 2, 2018). The Kredentser Defendants assert that by letter dated November 2, 2017 they served plaintiffs' counsel with a subpoena to take the deposition testimony of Dr. Edward Savage, a non-party witness. They

assert that plaintiffs' counsel had consented to accept service on behalf of Dr. Savage. By December 14, 2017 the parties had agreed to depose non-party witnesses Dr. Howard Savage and plaintiffs' counsel Denise Savage on January 11th and 12, 2018 in Fort Lauderdale, FL for the convenience of Dr. Savage.

The Kredentser Defendants advised the Court by letter dated December 20, 2017, that on Monday December 18, 2017 they had been notified by plaintiffs' counsel that she filed a proposed complaint with the United States District Court. The Kredentser Defendants requested by such letter that the Court either stay the scheduled depositions or that a conference be held to discuss potential issues due to the recently filed federal complaint, which requests the Court denied by letter dated January 4, 2018.

On January 3, 2018, a motion was served, in this action, by the St. Peters' Defendants seeking, *inter alia*, an order granting dismissal of the plaintiffs' complaint pursuant to CPLR 3211(a)(4) on the ground that plaintiff had commenced an identical action in federal court on December 18, 2017. Such motion was stamped filed by the Clerk's Office on January 5, 2018.

By letter dated January 3, 2018, the St. Peter's Defendants notified plaintiffs' counsel that they filed<sup>2</sup> and served a motion for summary judgment in the pending State Court action, that pursuant to CPLR 3214(b) such service statutorily stays all discovery however, that they were also willing to proceed with the continued depositions of plaintiffs' counsel and Dr. Edward Savage if plaintiffs' counsel was amenable. The St. Peter's Defendants were unwilling to provide their motion papers electronically.

---

<sup>2</sup> Such date may have been the date of mailing to the Clerk's Office, however the motion was stamp filed on January 5, 2018.

The Kredentser Defendants assert that by email dated January 8, 2018 the plaintiffs' counsel "unilaterally adjourned" the scheduled depositions (Broad Aff., ¶53). The Kredentser Defendants assert that as a result of such last-minute cancellation, counsel is "now unable to receive a refund of the costs to travel and take two days' worth of depositions in Florida" (Broad Aff., ¶54).

22 NYCRR §130-1.1, in pertinent part, authorizes the Court to award "costs in the form of reimbursement for actual expenses reasonably incurred ... resulting from frivolous conduct". The Kredentser Defendants assert that frivolous conduct is conduct that "is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another". The Kredentser Defendants have asserted that plaintiffs' conduct was frivolous as there was nothing stopping plaintiffs' counsel from adjourning the scheduled depositions upon receiving notice of the motion even if she was unaware of the content of such motion. Further, the Kredentser Defendants argue that plaintiffs' counsel ignored the directive of the Court to proceed with depositions. The Kredentser Defendants seek payment of the costs incurred by their counsel with respect to the cancelled depositions, which include the costs of the flights to and from Fort Lauderdale and the cost of the hotel expenses.

In opposition, plaintiffs' assert that pursuant to CPLR 3214(b), service of a notice of motion under CPLR 3211, 3212 or 3213 stays disclosure until determination unless the Court orders otherwise. She notes that the St. Peters' Defendants noted such provision in their January 3, 2018 letter. Plaintiffs argue that St. Peters' counsel would not disclose the basis of such defendants' motion and plaintiffs' counsel did not receive such information until late afternoon on Monday January 8, 2018 nor did the Kredentser Defendants seek an order from the Court revoking

the CPLR 3214 statutory stay. Plaintiffs' counsel argues that plaintiffs did not engage in frivolous or bad faith conduct.

The St. Peters' Defendants have submitted an affidavit in support of the Kredentser Defendants' motion, including that portion seeking sanctions against the plaintiffs. The St. Peters' Defendants argue that they advised plaintiffs' counsel on January 3, 2018 that a motion for summary judgment had been served which stayed discovery and that she was requested to respond as soon as possible as to whether she wished to proceed with the pending scheduled depositions but instead, requested a copy of the papers to be emailed to her. The St. Peters' Defendants' counsel noted that "[i]n view of weather conditions and the fact that I was not going to be in the office for the next couple of days I advised her that if she did not receive the papers by Monday they would be sent to her. In two separate emails on January 4, 2018 I again requested that she advise her intentions regarding the January 11<sup>th</sup> and 12<sup>th</sup> depositions so people could make plans and avoid unnecessary expenses. Counsel refused to respond stating that without seeing the motion papers she could not address the deposition issues" (Ezick Aff., ¶18). The St. Peters' Defendants' counsel argues that the motion papers and the grounds for the summary judgment motion were totally irrelevant to whether plaintiffs' counsel wished to proceed with the depositions. The St. Peters' Defendants assert that on Monday, January 8, 2018 a copy of the motion papers was emailed to plaintiffs' counsel and were immediately responded to by plaintiffs' counsel with cancellation of the depositions. The St. Peters' Defendants assert that such decision could "easily have been made for the reasons stated when she was first advised that the motion had been made" (Ezick Aff., ¶21).

In reply, the Kredentser Defendants' counsel note, *inter alia*, that they adopt and incorporate the arguments contained within the Ezick Affidavit, as set forth above, and that as a

result of plaintiffs' counsel's failure to clearly articulate her positions regarding the scheduled depositions the moving defendants are seeking extremely limited costs only for the costs of travel and lodging that were incurred.

### **Discussion**

Based upon the record, the Court will not order costs in favor of the Kredentser Defendants pursuant to 22 NYCRR 130-1.1 based upon plaintiffs' counsel's adjournment of depositions. 22 NYCRR §130-1.1 authorizes the Court to award "costs in the form of reimbursement for actual expenses reasonably incurred ... resulting from frivolous conduct". The Court does not find that such adjournment of depositions was "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another".

CPLR 3214 provides that service of a notice of motion under, *inter alia*, CPLR rules 3211 or 3212 stays disclosure until determination of the motion unless the court orders otherwise. The Kredentser Defendants' have not demonstrated that plaintiffs' counsel's actions were frivolous, as they have not demonstrated when plaintiffs' counsel received notice of Attorney Ezick's motion of January 3, 2018 (according to the Affidavit of Service upon plaintiffs' counsel and the Kredentser Defendants' counsel), nor that they were not themselves on notice of such motion based upon Attorney Ezick's copy to Ms. Ryan in his January 3, 2018 letter to plaintiffs' counsel. Further, the Kredentser Defendants have not demonstrated that any party sought and received Court approval lifting such CPLR 3214 statutory stay.

To the extent the Kredentser Defendants attempt to rely upon the Court's January 4, 2018 letter to demonstrate the Court lifted such CPLR 3214 stay, by letter dated December 20, 2017, the Kredentser Defendants' counsel advised the Court that on December 18, 2017 they were

notified by email of plaintiffs' counsel that a proposed complaint had been filed with the United States District Court and noted that Attorney Savage "graciously provided a copy of the proposed Complaint ....". At such time, the depositions at issue herein had been scheduled. Attorney Ryan requested a stay of the defendants' depositions until there was a determination of the status of the federal court action. The Court, via letter dated January 4, 2018, denied such request. However, such letter, by its terms, only addressed the request for a postponement/stay based on the filed federal action, not with regard to any filed motion in the instant action. The Court did not issue any determination lifting the statutory stay of CPLR 3214 after the St. Peters' Defendants served their motion on January 3, 2018 (which was received and stamp-filed on January 5, 2018) nor was there any request by any party to do so. Accordingly, the Plaintiffs' counsel did not ignore any directive of the Court to proceed with depositions after the St. Peters' Defendants filed their motion pursuant to CPLR 3211(a)(4).

Accordingly, as such discovery was statutorily stayed, it cannot be found that plaintiffs' counsel's action in subsequently cancelling the deposition was frivolous conduct subject to the requested sanctions. Under the circumstances presented, the Court would not find based upon the facts, that plaintiffs' counsel had engaged in frivolous conduct subject to sanctions via her January 8, 2018 cancellation of the scheduled January 10, 2018 and January 11, 2018 scheduled depositions.

The record submitted by the Kredentser Defendants includes at Exhibit G, an email of December 14, 2017 from Attorney Ryan to Attorney Savage which provides that Attorney Ryan was making her travel arrangements for the depositions of January 11, 2018 and January 12, 2018 at such time. The record demonstrates that according to an email sent from Attorney Ryan to

plaintiffs' attorney on January 8, 2018, the last day for Attorney Ryan to cancel her airplane and hotel reservations was Saturday, January 6, 2017 [sic].

It cannot be ignored however, that on January 3, 2018, the St. Peters' Defendants sent a letter "VIA EMAIL AND REGULAR MAIL" to plaintiffs' counsel notifying her that on such date they "filed and served a motion for summary judgment in the pending State Court action" and requesting that plaintiffs' counsel advise of her intentions concerning the subject depositions as soon as possible<sup>3</sup> and that such letter was cc:ed via email and regular mail to Attorney Ryan and appears to have been sent at 4:32PM.

The Kredentser Defendants' submissions also demonstrate that at 9:08 AM the following day (January 4, 2018), plaintiffs' counsel sent an immediate request by email to the St. Peters' Defendants' counsel's office (i.e. Maguire Cardona) which was cc:ed to Attorney Ezick and Attorney Ryan (at Thorn Gershon) requesting, due to inclement weather conditions in South Carolina, that the summary judgment motion and attachments be forwarded via email "asap". Attorney Ezick refused to do so at such time but continued to ask about the status of the scheduled depositions. In response, within the same hour, plaintiffs' counsel again requested whether Mr. Ezick's or another firm attorney or her assistant could forward the documents by email. At 10:02 AM, Attorney Ezick again refused to do so arguing, *inter alia*, that the substance of the motion

---

<sup>3</sup> Such letter further provided, in pertinent part, as follows: "[p]ursuant to CPLR Rule 3124(b) the service of our motion statutorily stays all discovery in the action until determination of the motion. Notwithstanding the foregoing, in view of previous scheduling and travel arrangements, and in order to avoid any prejudice, we are willing to proceed with your continued deposition and the deposition of Dr. Edward Savage currently set for January 11th and 12th, 2018 in Florida. If you wish to proceed with these depositions it will be with the understanding that all further discovery is stayed pending the determination of our motion. Please advise your intentions concerning the subject depositions as soon as possible so that appropriate arrangements can be made and/or confirmed."

does not effect the stay of discovery. “Either you want to proceed with the depositions or you don’t I would appreciate an answer, so people can make plans and avoid unnecessary expense”. Attorney Ezick argues that he had no obligation to advise the plaintiffs’ attorney that the St. Peters’ Defendants’ motion for summary judgment had been served on January 3, 2018 or to give her the opportunity to proceed with depositions.

Ultimately however, the St. Peters’ Defendants motion papers were emailed on January 8, 2018 to plaintiffs’ counsel and within minutes, plaintiffs’ counsel sent an email (on such date) to, *inter alia*, Attorney Ryan and cc:ed to Attorney Ezick noting that such St. Peters’ Defendants’ motion (now withdrawn based upon subsequent federal proceedings) sought to dismiss the state court action as being duplicative of the federal court action. Plaintiffs’ counsel noted that she could not imagine a more dispositive motion to justify adjourning the depositions until the state court rules on such motion and that such depositions were precluded by CPLR 3214. Plaintiffs’ counsel further noted that as Attorney Ryan was in possession of the St. Peters’ Defendants’ motion “last week”, refundable travel arrangements should have been made.

Based upon the record, the Kredentser Defendants’ counsel have not demonstrated that plaintiffs’ counsel was aware that Attorney Ryan’s airplane and hotel reservations became non-refundable on January 6, 2018 and purposefully adjourned such depositions after such point. They have also not demonstrated that they were unaware that despite the requests of the St. Peters’ Defendant’s counsel<sup>4</sup>, plaintiffs’ counsel had not agreed to the depositions going forward or that they were unaware of plaintiffs’ counsel’s continued attempts to make an informed determination

---

<sup>4</sup> The record demonstrates that as of January 4, 2018 plaintiffs’ counsel had emailed the St. Peters’ Defendants’ counsel that without seeing their motion, she could not address whether she would agree to the depositions going forward.

(which would possibly only have required a courtesy copy of the two-page notice of motion) as concerning the subject matter of the summary judgment motion and its effect on the decision whether to consent to the depositions despite the statutory stay.

Based upon the record, the Kredentser Defendants have not demonstrated their entitlement to their requested costs. Further, to the extent the plaintiffs' counsel has requested costs pursuant to 22 NYCRR 130-1.1, there has been no motion made and accordingly, such request is not properly before the Court for consideration (see 22 NYCRR 130-1.1(d)). Moreover, under the circumstances presented, including Mr. Ezick's requests for response as to the scheduling of the deposition (and Ms. Savage's appropriate decision to refrain from making such determination until she had reviewed the St. Peters' motion), as well as the Court's letter of January 4, 2018 regarding such depositions, the Court would not find the instant motion frivolous.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Accordingly, it is hereby

**ORDERED** that the portion of the Kredentser Defendants' motion seeking leave to amend their answer and pursuant to CPLR 3211(a)(4), dismissing plaintiff's complaint is denied as moot; and it is further

**ORDERED** that the portion of the Kredentser Defendants' motion seeking an award of costs pursuant to 22 NYCRR 130.1-1 is denied; and it is further

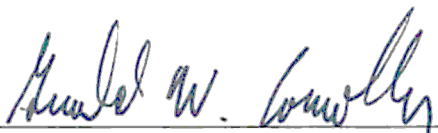
**ORDERED** that plaintiffs' counsel's request for costs is denied.

This shall constitute the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the plaintiffs. A copy of the decision and order and the below referenced original papers have been delivered to the County Clerk for placement in the file. The signing of this decision and order, and delivery of a copy of the Decision and Order

shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED.  
ENTER.

Dated: August 29, 2018  
Albany, New York

  
Gerald W. Connolly  
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion dated January 11, 2018; affidavit of Marshall Broad, Esq., sworn to January 11, 2018 with exhibits A-O annexed thereto; and Memorandum of Law dated January 11, 2018;
2. Notice of Motion dated January 3, 2018 of Maguire Cardona; Affidavit of Service dated January 3, 2018
3. Affirmation of Denise L. Savage, Esq., dated January 16, 2018, with exhibits 1-2 annexed thereto;
4. Responding Affidavit of Randall J. Ezick, sworn to January 22, 2018 in support of Motion for Leave to Amend and for Summary Judgment by Co-Defendants;
5. Reply Affidavit of Marshall Broad, Esq., sworn to January 26, 2018;
6. Affirmation of Denise L. Savage, Esq., dated February 14, 2018;
7. Letter Order of Court dated April 10, 2018;
8. Letter from Marshall Broad dated April 12, 2018, with attachment;
9. Letter from Denise L. Savage dated April 12, 2018, with attachments 1-4; and
10. Letter from Maguire Cardona dated June 27, 2018.