

Rivers v Mt. Sinai Med. Ctr.

2019 NY Slip Op 31066(U)

April 9, 2019

Supreme Court, New York County

Docket Number: 805237/14

Judge: Martin Shulman

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

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DARYL RIVERS,

Plaintiff,

Index No. 805237/14

-against-

Decision & Order

MT. SINAI MEDICAL CENTER and SCOTT Q.
NGUYEN, M.D.,

Defendants.

-----X

Hon. Martin Shulman:

Plaintiff Daryl Rivers moves pursuant to CPLR 2221 to reargue this court's bench decision issued after oral argument on the record on September 17, 2018 (the decision) and the judgment thereon which was entered on December 6, 2018. The decision granted defendants Mt. Sinai Medical Center and Scott Q. Nguyen's (Dr. Nguyen) motion for summary judgment dismissing this action. Defendants oppose plaintiff's motion.

The complaint herein alleges medical malpractice. Plaintiff's claims arise from defendants' alleged failure to properly diagnose an abdominal mass consisting of muscle, fat and calcified bone and, upon performing laparoscopic surgery, failed to remove the entire mass.

Reargument

A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. *Foley v Roche*, 68 AD2d 558 (1st Dept 1979). Motions for leave to reargue are not designed to provide an

unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 (1st Dept 1984); *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 (1st Dept 1992).

In support of his motion to reargue, plaintiff contends that defendants' motion was not supported by sufficient factual proof. Specifically, in opposing the motion, plaintiff submitted his own affidavit while defendants' motion contained no affidavit from an individual having personal knowledge, such as Dr. Nguyen. For the first time on reargument, plaintiff contends that Dr. Nguyen's deposition testimony, which the decision references and upon which defendants' expert witnesses relied, was inadmissible because the transcript thereof was unsigned. Plaintiff's counsel further states that: "An unsigned transcript can otherwise be used in evidence because it is an admission, but an admission is only available to the opposition, here the Plaintiff, not the Defendants."

Plaintiff also argues that issues of fact precluded summary judgment because plaintiff's opposing affidavit contradicts defendants' factual arguments. For example, Mr. Rivers states in his affidavit that immediately after surgery Dr. Nguyen told him he removed all of the tissue growth he found, thus contradicting Dr. Nguyen's testimony that he deliberately left part of it in Mr. Rivers. Plaintiff claims that this testimony is not supported by the medical records. Plaintiff further argues that this court discounted his affidavit and did not accept his proof and consider it in the light most favorable to him. Other factual issues plaintiff cites include whether or not: (1) defendants properly diagnosed plaintiff; (2) all of the tissue mass growth was removed; (3) all of the growth

deliberately was not removed; (4) plaintiff's unresolved symptoms necessitated a subsequent surgery; (5) plaintiff still experienced pain and an abdominal "bulging" at the time of his post-operative visit to Dr. Nguyen, and reported such symptoms to Dr. Nguyen; and (6) the second surgery cured such pain and bulging.

In opposition, defendants accurately note that plaintiff's motion is untimely, having been made 31 days after service of notice of entry rather than 30 days as required by CPLR 2221(d)(3). However, given the delay of only one day and the lack of prejudice to the defendants, this court will exercise its discretion to reconsider its prior ruling. See *Garcia v Jesuits of Fordham, Inc.*, 6 AD3d 163 (1st Dept 2004).

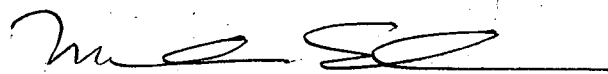
Defendants dispute that Dr. Nguyen's deposition transcript was inadmissible because he had not signed it, noting that this argument was not raised in plaintiff's opposition on the underlying motion. Even if plaintiff had raised this issue during the first round of motion practice, it nevertheless lacks merit. First, pursuant to CPLR 3116(a), where a party is served with a transcript of their testimony and does not sign and return it in 60 days it is deemed signed. Second, in *Bennett v Berger*, 283 AD2d 374, 375 (1st Dept 2004), defendant established its prima facie case where, as here, its summary judgment motion was supported by defendant's own unsigned deposition transcript, which had been certified by the reporter and plaintiff had not challenged it as being inaccurate. See also, *Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543 (1st Dept 2013) (unsigned and uncertified deposition transcript was admissible where it was submitted by the deponent himself and thus was deemed to have been adopted by the deponent as accurate). Plaintiff's attempt to distinguish these cases is unavailing.

This court's decision found that plaintiff's expert's affirmation was insufficient to rebut defendants' prima facie showing of entitlement to summary judgment. The "issues of fact" plaintiff identifies upon reargument do not change this court's finding as to the deficiencies of his expert's affirmation. Given the foregoing, the weight to be given to plaintiff's opposing affidavit is irrelevant in the context of this medical malpractice action. For the foregoing reasons and for the reasons stated in the decision, plaintiff's motion to reargue is denied.

Accordingly, it is

ORDERED that plaintiff's motion is denied.

Dated: April 9, 2019



Hon. Martin Shulman, J.S.C.