Heinze v New York Presbyt. Hosp./Weill Cornell Med. Ctr.
2019 NY Slip Op 31107(U)
April 15, 2019
Supreme Court, New York County
Docket Number: 161032/13
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK —NEW YORK COUNTY
PRESENT: GEORGE J. SILVER
Justice

JOY DEVRIES HEINZE and JOHN HEINZE,

Plaintiffs,

INDEX NO. 161032/13

- v -

MOTION DATE
MOTION SEQ. NO. 002

NEW YORK PRESBYTERIAN HOSPITAL/WEILL CORNELL MEDICAL CENTER,

Defendant.

Cross-Motion: ☐ **Yes** ■ **No**

Plaintiffs JOY DEVRIES HEINZE ("plaintiff") and JOHN HEINZE (collectively "plaintiffs") move for an order, pursuant to CPLR § 2221(d), granting leave to reargue this court's decision dated July 21, 2018. Plaintiffs also seek an order, upon reargument, vacating the grant of summary judgment to defendant and denying defendant's motion for summary judgment. Defendant opposes plaintiffs' motion. For the reasons discussed below, the court denies plaintiffs' motion.

BACKGROUND

On January 12, 2012, plaintiff was visiting her husband, John Heinze, in the post-anesthesia care unit at the Presbyterian Hospital/Weill Cornell Medical Center. Mr. Heinze was recovering from a medical procedure he underwent earlier in the day. Plaintiff alleges that while she was visiting her husband, his attending physician, Dr. Benjamin Talei ("Dr. Talei"), requested that she hold a flashlight in place while he sutured and reinforced a drain near her husband's surgical site. While holding the flashlight, plaintiff claims that she became nauseous. As she subsequently stepped away from her husband's bedside to regain her composure, she fainted and fell to the

ground, fracturing her ankle. On July 21, 2018, the court issued a decision, granting defendant summary judgment.

In the instant motion, plaintiffs argue that the court "misapprehended and misapplied the principles of law concerning the core issues before it." Specifically, plaintiffs contend that defendant's request that plaintiff hold the flashlight is an independent and stand-alone allegation of negligence, "regardless of whether the court accepted or entertained an allegation of whether or not the lights should have dimmed." According to plaintiffs, even if the lights had not dimmed, and Dr. Talei asked plaintiff to further illuminate her husband's neck wound, a negligence claim would nonetheless exist. Thus, plaintiffs argue that there a viable "flashlight claim," which is contained in their complaint and bills of particulars.

Plaintiffs also assert that the court's determination with respect to duty and foreseeability are against applicable law. Plaintiffs proffer that this case requires the court to extend the physician's duty beyond physician-patient relationship since Dr. Talei asked plaintiff to not only hold the flashlight over the surgical site, but to also adjust the flashlight closer so he could see better. In that regard, plaintiffs submit that this case is distinguishable from *Urciuoli v. Lawrence Hosp Ctr.*, on which the court relied in its July 21, 2018 decision (89 A.D.3d 533 [1st Dept. 2011]). According to plaintiffs, the plaintiff's mother in *Urciuoli* asked that her daughter remain present during a procedure as comfort, but the daughter did not actively participate in the administration of medical care to her mother, whereas here, plaintiff was not merely an observer, but was an "actively enlisted participant" in the medical care. As such, plaintiffs maintain that *Urciuoli* is not controlling on the issue of duty, and should not have been grounds for granting defendant summary judgment.

Additionally, plaintiffs assert that because it is common knowledge that some people may be sickened by the sight of blood, an expert affidavit is not required. Plaintiffs contend that this issue must be left to the trier of fact, not the court, since it addresses the issue of foreseeability. Plaintiffs also aver that because defendant's expert concedes that most people would not have fainted under these circumstances, leaving open the possibility that some may have fainted, a jury is needed to decide this issue.

Lastly, plaintiffs argue that foreseeability cannot be decided as a matter of law, but must be decided by a jury. Specifically, plaintiffs contend that there is a material question of fact precluding summary judgment as to the issue of "what affect watching her husband's oozing, gurgling, open neck wound being suture, all the while illuminating the site at Dr. Talei [sic] request and instructions would have on plaintiff as a lay person."

In opposition, defendant argues that plaintiffs' motion for leave to reargue is untimely and should not be considered by the court. According to defendant, the court's order was filed on July 20, 2018, and defendant served the order with notice of entry on July 23, 2018. As such, defendant argues that plaintiff should have moved for leave to reargue by August 22, 2018, but because plaintiffs did not file their motion until September 5, 2018, their motion must be denied.

Substantively, defendant argues that the court did not overlook or misapprehend any issues of law or fact in its July 21, 2018 decision. Defendant contends that plaintiffs improperly attempt to reargue the same issues previously raised in their opposition to defendant's motion for summary judgment, which the court has already considered and rejected. Defendant points out that the court has already ruled that a physician's duty does not extend to a patient's family members, and even if a duty existed, liability could not be imposed as a matter of law because the events were

unforeseeable since Dr. Talei's request was reasonable and most people would not have fainted under these circumstances.

Additionally, defendant refutes plaintiffs' argument that the court misapplied *Urciuoli, supra*. Defendant contends that similar to *Urciuoli*, plaintiff here was not asked to actively participate in the administration of medical care since holding a flashlight "[does] not require medical technique." Defendant also avers that contrary to plaintiffs' contention, the court did not base its decision on plaintiffs' assertion of a new claim in her opposition to summary judgment regarding the dimming of the lights. Rather, defendant points out that the court decided the motion based on the lack of duty and foreseeability. Nonetheless, defendant argues that plaintiffs' motion to reargue fails to demonstrate that the court misapplied any law or fact with respect to its ruling that plaintiffs inappropriately attempted to assert a new claim of negligence in their opposition.

DISCUSSION

As an initial procedural matter, plaintiffs' motion for leave to reargue is late. CPLR §2221(d)(3) provides that a motion for leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." Because plaintiffs' time to move for leave to reargue expired on or about August 23, 2018, 30 days after defendant served the order with notice of entry, plaintiffs' motion filed on September 5, 2018 is late. Accordingly, plaintiffs' application must be denied.

Assuming *arguendo* that plaintiffs timely moved for leave to reargue, plaintiffs' application is nonetheless without merit. CPLR § 2221(d) provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." "A motion for leave to reargue pursuant to CPLR [§] 2221 is addressed to the

sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equip. Corp.*, 182 A.D.2d 22, 27 [1st Dept. 1992]). "Its purpose is *not* to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*Foley v. Roche*, 68 A.D.2d 558, 567 [1st Dept. 1979] [emphasis added]).

Here, plaintiffs have failed to demonstrate that the court overlooked or misapprehended the facts or law in granting defendant summary judgment in its July 21, 2018 decision (*300 W. Realty Co. v. City of New York*, 99 A.D.2d 708, 709 [1st Dept. 1984] [denying reargument where plaintiff made no showing or finding that the court overlooked or misapplied the statute]; *Spinale v. 10 W. 66th St. Corp.*, 193 A.D.2d 431, 432 [1st Dept. 1993] [denying leave to reargue where there was "no showing that the court overlooked or misapprehended relevant facts or misapplied controlling law in the prior decision, nor did plaintiffs offer any evidence on that motion that was unavailable to them upon the court's original consideration of the case"]). Indeed, plaintiffs advance the same, if not identical, arguments they previously asserted in their opposition to defendant's motion for summary judgment. For example, the court already considered and decided the issues of duty and foreseeability as a matter of law. In its decision, the court held that Dr. Talei did not owe a duty to plaintiff as Dr. Talei's actions comported with reasonable care and plaintiff's injury was unforeseeable.

Similarly, the court previously considered and dismissed plaintiffs' allegation of ordinary negligence rather than malpractice, finding that plaintiffs never asserted certain claims of ordinary negligence in their bill of particulars, and first raised such claims in opposition to defendant's motion for summary judgment. Moreover, the court also considered and denied plaintiffs' claim that defendant's negligence is premised on the fact that defendant allowed the lights in the recovery

room to dim, and that Dr. Talei was negligent in not asking for the lights be raised. The court held that these new theories of liability which were never addressed in plaintiffs' complaint, amended complaint, or bills of particulars are insufficient to defeat an otherwise proper motion for summary judgment. As defendant correctly argues, plaintiffs fail to establish that the court misapplied any facts or law in coming to these conclusions, but simply rehash arguments that were already heard and denied by the court (*William P. Pahl Equip. Corp.*, 182 A.D.2d at 28, *supra* [denying reargument where plaintiffs "repeated" the same argument made in their opposition to the motion to dismiss the original complaint]; *Foley*, 68 A.D.2d at 567, *supra*).

Indeed, plaintiff's motion is briefed in an appeal-like manner, in which plaintiffs express their disagreement with the court's consideration of the facts and interpretation of the law as to the parties' respective positions on summary judgment. However, this fails to meet plaintiffs' burden of demonstrating that the court overlooked or misapprehended the facts or law so as to warrant reargument. Accordingly, plaintiffs' motion for leave to reargue must be denied in its entirety.

Consequently, it is hereby

ORDERED that plaintiffs' motion for leave to reargue is DENIED; and it is further

ORDERED that plaintiffs' application to vacate the grant of summary judgment to defendant upon reargument is DENIED as moot; and it is further

ORDERED that plaintiffs' application to deny defendant's motion for summary judgment upon reargument is DENIED as moot.

This constitutes the decision and order of the court.

Dated: 4/15/19

George J. Silver
HON. GEORGE J. SILVER

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**