

Thomas v Klager

2019 NY Slip Op 31332(U)

April 29, 2019

Supreme Court, New York County

Docket Number: 805485/2016

Judge: Martin Shulman

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. MARTIN SHULMAN</u>	PART	IAS MOTION 1
	<i>Justice</i>		
-----X		INDEX NO.	<u>805485/2016</u>
VENICE THOMAS,		MOTION DATE	<u>02/19/2019</u>
Plaintiff,		MOTION SEQ. NO.	<u>004</u>

- v -

JOSEPH KLAGER, JEAN YVES-DASTAIN, MING CHEONG,
CARERITE CENTERS, LLC, MOUNT SINAI HEALTH SYSTEM,
INC.

Defendant.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 93, 94, 95

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

Plaintiff moves pursuant to CPLR 2221 to renew and reargue this court's decision dated December 5, 2018 (the "decision") which granted defendant Carerite Centers, LLC d/b/a The Riverside Premier Rehabilitation & Healing Center's ("Carerite") motion to dismiss and strike plaintiff's claim for punitive damages under the Public Health Law ("PHL") without opposition. Carerite opposes the motion.

Carerite's underlying motion was initially returnable on September 28, 2018. Thereafter, counsel for the parties stipulated to adjourn the motion to November 2, 2018. Plaintiff's counsel ultimately needed additional time to oppose the motion and on October 31, 2018 sent an email advising of his intention to seek additional time to respond. Inadvertently, the email was sent only to counsel for co-defendant Mount Sinai Health System, Inc. but not to counsel for movant Carerite or any of the other co-defendants. Plaintiff's counsel took no further action to adjourn the motion and it was submitted without opposition on November 2, 2018. This court's decision ensued.

This medical malpractice and wrongful death action stems from plaintiff's decedent's treatment at Carerite, a nursing home facility. The complaint alleges that the decedent developed multiple decubitus ulcers, leading to infection, above the knee amputation of his left leg and ultimately his death at the age of 90. Plaintiff's bill of particulars responsive to Carerite's demand adds that this defendant allegedly permitted the decedent to become dehydrated and malnourished and to develop aspiration pneumonia.

The complaint herein does not request punitive damages. Nonetheless, item 11 of Carerite's demand for a verified bill of particulars asks plaintiff to "[s]et forth the basis for the claim for punitive damages as alleged in the Verified Complaint." In response, plaintiff's bill of particulars states: "Punitive damages result from the gross negligence of the defendants in their care and treatment of the Decedent and in their flagrant, unconscionable disregard of the Decedent's needs."

Neither the complaint nor the bill of particulars alleges that Carerite's alleged malpractice evinced "a high degree of moral culpability, [or constituted] willful or wanton negligence or recklessness." *Hill v 2016 Realty Assoc.*, 42 AD3d 432, 433 (2d Dept 2007) (citations omitted); see also, PHL §2801-d (2) (punitive damages authorized where a residential health care facility deprives a patient of any right or benefit in willful or reckless disregard of such patient's lawful rights). The basis of Carerite's underlying motion was that plaintiff failed to plead any act or omission on its part rising to the level of intentional and deliberate conduct warranting punitive damages.

As recognized in Carerite's opposition, plaintiff's motion is actually a motion pursuant to CPLR 5015(a) to vacate her default in opposing the underlying motion

rather than a motion for renewal and reargument pursuant to CPLR 2221. CPLR 5015(a) provides that a court which renders a judgment or order may relieve a party from it on various grounds, including "excusable default." See CPLR 5015(a)(1). A party seeking to vacate a default under CPLR 5015(a) must demonstrate a reasonable excuse for the default and a meritorious defense or cause of action. *Eugene DiLorenzo, Inc. v A.C. Dutton Lumber Co., Inc.*, 67 NY2d 138, 141 (1986).

Plaintiff's motion must be denied inasmuch as she fails to establish a reasonable excuse for the default or a meritorious basis for a punitive damages award. The purported "understandable oversight in communications" regarding plaintiff's request for a further adjournment of the underlying motion is not compelling. Plaintiff's counsel did not take proper steps to obtain an adjournment, such as circulating a proposed stipulation. Moreover, although plaintiff's counsel promptly brought the within motion after this court issued the decision, counsel did not make any effort to confirm that his request for a second adjournment had been granted.

Nor does plaintiff establish any basis to claim punitive damages against Carerite. The complaint and bill of particulars contain no allegations of willful or wanton negligence or recklessness. Plaintiff notes that no depositions have been held and it appears only limited discovery has been conducted. In the event discovery yields proof of conduct arguably supporting an award of punitive damages, plaintiff retains the right to move to amend the complaint and/or bill of particulars. Accordingly, it is

ORDERED that plaintiff's motion is denied.

Counsel for the parties shall appear for a status conference on June 11, 2019 at 9:30 a.m., at Part 1MMSP, 60 Centre St., Room 325, New York, NY, as previously scheduled.

4/29/2019
DATE


MARTIN SHULMAN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE