Index №. 31144/2018E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 19A

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RODNEY CAPERS **Index №. 31144/2018E**

Plaintiff

-against-

BRIAN FAHNRICH, WESTCHESTER SQUARE MEDICAL CENTER, INC. and MONTEFIORE MEDICAL CENTER,

Defendants

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HON. GEORGE J. SILVER:

In this action, defendants BRIAN FAHNRICH, M.D. ("Dr. Fahnrich") and MONTEFIORE MEDICAL CENTER s/h/a MONTEFIORE WESTCHESTER SQUARE MEDICAL CENTER, INC. ("Montefiore")(collectively, "defendants") move for an order, pursuant to CPLR §§3211(a)(1)(5)-(7) and 3212, dismissing plaintiff RODNEY CAPERS' ("plaintiff") complaint based upon the existence of a release that defendants argue absolves them of any potential liability. Plaintiff opposes defendants' respective applications.

BACKGROUND

The controversy in this medical malpractice action derives its origins from plaintiff's departure from the emergency department at defendant Westchester Square Medical Center (hereinafter "Westchester Square") on April 24, 2017. Plaintiff had presented to Westchester Square with complaints of abdominal issues. After having an abdominal CT scan taken, but before results were in, plaintiff left Westchester Square. Before doing so, plaintiff was required to sign a form stating he was leaving against medical advice. Specifically, prior to departing Westchester Square on April 24, 2017, and again on May 10, 2018, plaintiff executed a release that stated as follows:

> "A patient in the above named medical center, having requested discharge and removal from the medical center against the advice of my attending physician(s), hereby release Montefiore Medical Center, its physicians, offices and employees, severally and individually from any and all liability of any nature whatsoever for any injury harm or complication of any kind that may result directly or indirectly, by reason of my terminating my stay as a patient at Montefiore Medical Center and my departure from said medical center, and hereby waive any and all rights of action I may now have or later acquire as a result

> of my voluntary departure from said medical center, and hereby waive any and all rights of action I may now have or later acquire as a result of my voluntary departure from said medical center and the termination of my stay as a patient therein."

Subsequent to leaving Westchester Square, plaintiff's abdominal CT scan came back suspicious for cancer, and the record reflects that Dr. Fahnrich did not contact plaintiff thereafter to inform him of the results of his CT scan. Approximately a year later, plaintiff returned to Westchester Square on May 10, 2018 and was informed for the first time of the finding of possible cancer. Plaintiff then chose to treat elsewhere, which he did the following day.

In accordance with the above-cited release, Dr. Fahnich and Montefiore argue in their separate motions that the release, by its terms, is a clear indication that plaintiff voluntarily released Montefiore and Dr. Fahnrich, and waived "any and all rights of action" as a result of his voluntary departure from Westchester Square, one of Montefiore's facilities. As such, defendants submit that plaintiff cannot maintain the current lawsuit against Montefiore or Dr. Fahnich for their alleged failure to contact him about the results of an April 24, 2017 CT scan. Specifically, defendants argue that they had no duty to stop plaintiff from leaving Westchester Square against medical advice. As no such duty existed, defendants make the logic leap that plaintiff should be estopped from maintaining a lawsuit premised on his voluntary departure from Westchester Square.

In opposition, plaintiff contends that this court's enforcement of such a release would run afoul of public policy and standing case law within the Appellate Division, First Department. In addition, plaintiff contends that this is particularly true where, as here, the alleged malpractice occurred after, rather than before, plaintiff's departure.

DISCUSSION

"[I]t is firmly established that a valid release which is clear and unambiguous on its face and which is knowingly and voluntarily entered into will be enforced as a private agreement between parties'" (*Skluth v. United Merchants & Mfrs., Inc.*, 163 AD2d 104, 106 [1st Dept 1990], *quoting Appel v. Ford Motor Co.*, 111 AD2d 731, 732 [2d Dept 1985]). "The meaning and extent of coverage of a release 'necessarily depend, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given'" (*Rotondi v. Drewes*, 31 AD3d 734, 735-36 [2d Dept 2006], *quoting Cahill v. Regan*, 5 NY2d 292, 299 [1959]; *see also Apfel v. Prestia*, 41 AD3d 520, 521 [2d Dept 2007][where "'[i]f from the recitals therein or otherwise, it appears that the release is to be limited to only particular claims, demand or obligations, the instrument will be operative as to those matters alone [citations omitted]'"). "Furthermore, 'a release may not be read to cover matters which the parties did not desire or intend to dispose of'" (*Morales v. Solomon Mgt. Co., LLC*, 38 AD3d 381, 382 [1st Dept 2007], *quoting Cahill v. Regan*, 5 NY2d at 299, *supra*).

A release, like any contract, must be "read as a whole to determine its purpose and intent," and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous (*W.W.W.*

Associates, Inc. v. Giancontieri, 77 NY2d 157, 162 [1990]; *see also Goldberg v. Manufacturers Life Ins. Co.*, 242 AD2d 175, 181 [1st Dept 1998]). "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion'"(*Greenfield v. Philles Records, Inc.*, 98 NY2d 562, 569-570 [2002], *quoting Breed v. Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]).

The law frowns upon agreements intended to exculpate parties from the consequences of their own negligence and requires that such contracts be subjected to close judicial scrutiny (*Gross v. Sweet*, 49 NY2d 102 [1979]). Exculpatory provisions are strictly construed against the reliant party and must be unambiguously expressed in unmistakable language that is clear and explicit in absolving from negligence the party seeking to be insulated (*Ash v. N.Y. Univ. Dental Ctr.*, 165 AD2d 366, 368 [1st Dept 1990]). Exculpatory agreements that implicate "both the State's interest in the health and welfare of its citizens, as well as the special relationship between physician and patient" are invalid as a matter of public policy (*id.* at 369).

In *Ash*, *supra*, the plaintiff went to a dental clinic for a reduced rate and signed an exculpatory agreement allegedly waiving any claims of negligence as a result of the treatment rendered. Beyond reaching the conclusion that the agreement at issue in the case violated public policy, the court in *Ash* held that the public policy considerations were "buttressed by the independent obligations owed by defendants to plaintiff arising from the physician-patient relationship between them. This relationship imposes upon the health care provider greater responsibilities than that required in the ordinary commercial marketplace. In the context of that professional relationship 'a provision avoiding liability is peculiarly obnoxious'" (*Ash*, 164 AD2d at 371, *supra*).

Here, the court finds that the holding in *Ash* is not only applicable to the facts at issue, but is binding as precedent from the Appellate Division, First Department. Indeed, the facts in the instant case are perhaps even stronger than those in *Ash*, as one could argue that the plaintiff in *Ash* at least received consideration for the signed agreement in the form of a reduced rate at the dental clinic. In the instant case, plaintiff received no such consideration for the release signed as he left Westchester Square.

Defendants cite several cases that are inapposite to the instant matter. To be sure, the majority of defendants' cases either deal with non-medical situations, a prior settlement for consideration, or cases that involved an injury that was a direct result of the plaintiff prematurely leaving the hospital where the hospital was arguably under an obligation to retain the plaintiff (i.e. in a psychiatric or rehabilitation facility).

Defendants correctly state, however, as former Associate Justice of the Supreme Court of the United States Anthony Kennedy once observed, that choice, by definition, "is the ordinary course in a free society." It follows therefore that save for limited exceptions, a person cannot be held against their will. Thus, where a plaintiff sues based on the fact that he or she was not prevented from leaving, and is injured as a direct result of that – say for instance in a car accident – that plaintiff may rightfully be barred from suing (*Kowalski v. St. Francis Hosp. and Health Center*, 21 NY3d 480 [2013]). But contrary to defendants' assertions, that is not the claim that plaintiff is advancing in the instant lawsuit. Critically, plaintiff is not stating that defendants derogated from their duty to keep plaintiff within the confines of Westchester Square. Rather,

plaintiff is advancing a malpractice claim premised on defendants' failure to properly treat and contact him after his departure. Under such a circumstance, it is axiomatic that defendants cannot waive their alleged professional negligence. Arguing, for instance, that Dr. Fahnich or employees at Montefiore had no obligation to inform plaintiff of CT scan results that revealed a cancerous growth would not only undermine public policy, but the very nature of choice associated with the decision to pursue legal action. After all, while it critical not to ignore the self-evident truth that we live in a free society, it is equally important not to forget, as Plato once said, that "[j]ustice in the life and conduct of the State is possible only as first it resides in the hearts and souls of the citizens." Here, justice does not necessarily require that plaintiff ultimately prevail on his claims, but it does require that he have the freedom to pursue those claims. In other words, plaintiff was not only free to leave Westchester Square, he was manifestly free to embrace the notion that his decision to leave would not subsequently infringe upon his right to pursue subsequent legal action, if occasioned by defendants' action or inaction after his departure.

Beyond these considerations, it is worth highlighting that Dr. Fahnrich is arguably not an employee of Montefiore, nor is he named in the purported release at issue. Likewise, Westchester Square is not explicitly named in the release, even though the release's effect may be debatably imputed to it on account of its relationship to Montefiore. As such, there is a colorable basis under which the release, by its very terms, may not even apply to the very parties seeking to avail themselves of its fruits.

But perhaps most fundamentally, the fact that the alleged malpractice here took place *after* the exculpatory statement was signed suggests that defendants cannot insulate themselves from acts of alleged malpractice that had not even occurred at the time of the release's signing.[1] Hence, afar from running athwart of public policy, defendants' instant applications belie logic, as they seek to absolve defendants of duties that existed independent of the timing of the signing of the instant release.

Accordingly, it is hereby

ORDERED that defendants' respective motions are denied in their entirety; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference before the court on July 31, 2019 at 9:30 AM at the courthouse located at 851 Grand Concourse, Room 600 (Part 19A);

This constitutes the decision and order of the court.

Dated:

George J. Silver
GEORGE J. SILVER
J.S.C.

[1] The fact that the release at issue was signed on two separate dates is immaterial as plaintiff merely returned to Westchester Square on May 10, 2018 to receive the results of his CT scan, and subsequently left to get treatment at another facility. To be sure, plaintiff is not advancing separate malpractice claims premised on actions or inaction that occurred on May 10, 2018.