

Roberts v New York City Health & Hosps. Corp.

2019 NY Slip Op 33156(U)

October 22, 2019

Supreme Court, Kings County

Docket Number: 507744/14

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

-----X

**KHARY ROBERTS and KIMBERLY ROBERTS,
as Co-Guardians of the Person and Property of
CARLYLE ROBERTS,**

Plaintiffs,

-against-

**NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,**

Defendant.

-----X

DECISION / ORDER

**Index No.: 507744/14
Motion Seq. No.: 5
Submitted: 10/3/19**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion pursuant to CPLR 4404 (a)

Papers	NYSCEF Doc.
Order to Show Cause, Affirmation and Exhibits Annexed	<u>93-144</u>
Affirmation in Opposition	<u>145-148</u>
Reply	<u>149</u>

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendant moves pursuant to CPLR 4404(a) to set aside the verdict and for an order setting the case down for a new trial, and for related relief, based upon plaintiffs' counsel's multiple improper statements during his summation. For the reasons which follow, the motion is granted.

A unified trial was held before a jury in this medical malpractice action from May 13, 2019 to June 5, 2019. Defendant's attorney timely moved for a mistrial immediately after the plaintiffs' summation (see 105 NY Jur Trial §370; *Smith v Rudolph*, 151 AD3d

58 [1st Dept 2017]). Counsel averred that the summation was inflammatory, was designed to invoke sympathy, improperly spoke about the physicians who worked at the defendant hospital, implying that those who did not come to court did not come because they would have to lie if they came to testify, and improperly vouched for the plaintiffs. The court, having noted some of the more outrageous statements made by counsel in the court's trial notebook, did not think this was a frivolous motion. Further, there was no curative instruction that could appropriately address the numerous improper statements counsel made to "cure" the improprieties. Nonetheless, rather than make a decision on the spot and discharge the jury, the court asked for a transcript of the summation and reserved decision until after the verdict, in light of the number of days that had been spent on the trial, the number of medical witnesses and the incapacitated plaintiff Carlyle Roberts' advanced age (73). The jury was then brought into the courtroom and the court read the jury the charges. The jury deliberated for about an hour and then unanimously awarded the plaintiffs the exact amount plaintiffs' attorney requested in his summation. As the court reporter did not have time to transcribe the summation, the court then requested that the defendant's motion be made in writing and include a copy of the summation transcript. A date for the motion was given by the court, and this motion was timely filed pursuant to the court's instructions.

The court is convinced that plaintiffs' counsel's denigration of defendant, its employees, and its witnesses, and his unsupported inflammatory comments throughout the trial, most significantly during the summation, "appear[] to have been calculated to influence the jury by considerations which were not legitimately before them, and cannot be dismissed as inadvertent, thoughtless or harmless" (*Smith v Rudolph*, 151

AD3d 58, 63 [1st Dept 2017], citing *Kohlmann v City of New York*, 8 AD2d 598, 598 [1st Dept 1959]). Because of the cumulative effect of so many improper and prejudicial remarks which clearly contaminated the jury, a new trial is warranted (see *Caraballo v City of New York*, 86 AD 2d 580 [1st Dept 1982]).

It is improper to disparage witnesses or the other attorney during a summation (see *O'Neil v Klass*, 36 AD 3d 677 [2d Dept 2007; *Pagano v Murray*, 309 AD 2d 910 [2d Dept 2003]; *Weinberger v New York*, 97 AD2d 819 [2d Dept 1983]). A summation is supposed to be a summary of the evidence. A comment or two can be disregarded if they do not "cross the line," or the judge can provide a curative instruction. But remarks that "so violate the rights of the other party to the litigation and may have substantially influenced or been determinative of the outcome, will not be condoned" (see *Steidel v County of Nassau*, 182 AD2d 809 [2d Dept 1992]). It is error for trial counsel to bolster his case by accusations that the witnesses for the other side are liars (see *Clarke v New York City Transit Authority*, 174 AD 2d 268 [1st Dept 1992]). It is also error to accuse medical experts of being willing to testify falsely for a fee (see *Clarke v New York City Transit Authority*, 174 AD 2d 268 [1st Dept 1992]; *Berkowitz v Marriott Corp.*, 163 AD 2d 52 [1st Dept 1990]). *Ad hominem* attacks on witnesses in a summation are improper, such as calling an expert a "hired gun" or was "shading the truth" (see *Hardwick v Fensterstock*, 258 AD2d 330 [1st Dept 1999]; *Steidel v County of Nassau*, 182 AD2d 809 [2d Dept 1992]).

The first, in no particular order, of egregious comments here were directed at nonparty employees who worked at the defendant hospital when plaintiff was a patient (in 2013) but were not called by counsel for defendant to testify at trial, nor were they

subpoenaed by plaintiffs' counsel. One of these, Dr. Weiss, was deposed by plaintiffs' counsel and a portion of his deposition testimony was read into the record by plaintiffs' counsel. He was an attending physician at the hospital and one of his residents, at all relevant times, Dr. Daniel Fung, testified in court for almost a whole day. It is unknown if he still works at Kings County Hospital or if could have contributed anything new or anything that was not duplicative of Dr. Fung's testimony. Nonetheless, plaintiffs' counsel made these comments about Dr. Weiss and other hospital employees who did not testify on defendant's case:

Again, we are in court saying, basically, that he [Dr. Weiss] was negligent. He is the one who is supposed to order the test. Why didn't he take the witness stand? Think about that. He can't subject himself to the oath or cross-examination because he knows he should have. And he is not here. Don't you think that defense would have called him? Don't you think Dr. Weiss would have wanted to defend himself? [P 1578]

And guess what, how many questions did defense counsel ask him [Dr. Fung], zero. Remember he said, I reserve my right to question him on his case. Guess what, we had his case, one expert. Dr. Fung never came back. Why is that? The same reason why there is no Dr. Weiss. There is no Carmela Bravo. . . why aren't these people coming in to testify and explain themselves. They can't subject themselves to the oath. They can't withstand cross-examination. He [defendant's counsel] knows they are negligent, otherwise he would have asked Dr. Fung questions about what happened. [P 1584]

[W]hy didn't any of these people come into the courtroom. We are saying that the professionals from neurosurgery, ICU, patient relations, nursing, I can go on. That they did something, basically, illegal. We are questioning their integrity as individuals and as professionals. Why did they not take the witness stand and say that is not true? . . . It is because they cannot subject themselves to the oath. They cannot take the witness stand and say, I swear to tell the truth because what they did is wrong. [P 1571]

An attorney may not turn him or herself into an unsworn witness and place his or her credibility on the side of a party. This is black letter law (see 105 NY Jur Trial §354,

362, 263). It is also a violation of the Rules of Professional Conduct, Rule 3.4(d)(2).¹

Here, plaintiffs' counsel said the following about his clients:

All of these things, I am telling you, are designed to smear Mr. Roberts and his kids, who in my opinion, are heroes. . . . this case is an incredible story. It is an incredible story. You are all going to be a part of it and you have the power to right a wrong and create the appropriate end to this story. [P 1566] They raised two kids. One went to the University of Pennsylvania, the Wharton School of Business, who like I said, dedicated his life to his father. . . . Kim does project management. Got a certificate from NYU and a degree from Pace. This is a good family. A really good family. And I am telling you the smear campaign started at Kings County Hospital and it continued into this courtroom. . . . I am telling you, it is your job to speak out against this injustice because that is what we have been witnessing in this courtroom. [Page 1567-1568].

Finally, comments based on race, gender or other forms of discrimination are not permitted during a trial, including as part of a summation. Similarly, "during summation counsel must not appeal to the jury's racial prejudice or impute racial or religious prejudice to the opposing side where the existence of such prejudice is not an issue in the case" (see 105 NY Jur Trial §361).

Defendant's counsel argues in his motion and stated at oral argument that not only did plaintiffs' counsel improperly argue in summation that the Carlyle Roberts' care at Kings County Hospital, defendant's hospital, was inadequate because he was black, quoting Martin Luther King, Jr. twice, but that plaintiffs' counsel described the

¹ 22 NYCRR §1800, Rule 3.4 Fairness to opposing party and counsel.

A lawyer shall not:

(d) in appearing before a tribunal on behalf of a client:

- * * * *
- (2) assert personal knowledge of facts in issue except when testifying as a witness;
- (3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

defendant's efforts to defend the case as a "cover up." The court agrees that plaintiffs' counsel did both of these things, which were totally improper.

In his summation, plaintiffs' counsel made the following statements:

This is why it is so important serving on a jury, because it evens the playing field. When you have a powerful institution against someone from the Caribbean who is painted as an alcoholic unkept black male, I am telling you this is your job to get involved and right the wrong. This is unjust. It is completely unjust. And if I came across angry during the trial or upset at certain times it is because I am. I have been living with this case for a long time. I knew what was going to play out during this trial. I am the attorney that was seeing these things. So my anger before and my upsetness before you even heard the evidence was because I knew what was coming. [P 1564]

Defense for the New York City Health and Hospitals Corporation got up here and said, I didn't bring up alcohol to smear him in any way. Yes, he did. We saw in the hospital records that he was being documented in July as an unkempt black male with no known reachable family. Being described as an alcoholic from the Caribbean. I will let you decide what impact that had on his care at the time. [P 1564]

The reason they are bringing these things up to smear Mr. Roberts, smear his daughter and his son is because they have no defense. They don't have a defense to this case. The things that we heard, do you remember on cross examination about Mr. Roberts appearing unkempt. Unkempt means disheveled. Alcoholics are usually disheveled. I was sitting there thinking to myself, what are we talking about? [P 1565]

You have the power to fix what is written in the hospital records about an unkempt black male with no known reachable family. A Caribbean man who is being described as an alcoholic. You have to power to change that with your verdict because they are still saying it in court. They are still painting him that way. But what makes it so much more appalling is because it is not true. Mr. Roberts worked for the Transit Authority for 20 years. [P 1567]

I am telling you, Carlyle Roberts and his family are good people. It makes a very big deal to me and to the family that this is the way they chose to defend this case. [P 1569]

Realize what we are saying here. Kim said it was a fake healthcare proxy. Khary said the same thing in sum and substance. Realize what we are saying. They documented it, neurosurgery, ICU, nursing, patient relations. Why are they writing that? They are covering

themselves. They are documenting it. All these people are here [in the chart] because they knew one day someone would read this. They knew this day was coming, because they knew that they were negligent. [P 1570]

I am telling you their actions afterwards is evidence that they thought they were negligent, because they thought they violated the standard of care and that it caused harm. And in a case like this when the stakes are so high, when we are talking permanent brain damage, you're damn right, they are going to start to cover things up. That is what happened in this case and it is unjust, just like the smear campaign they have go[ing] on about Kim, Khary and Carlyle. . . . I go home every single night and think about this case. No matter how tired I am, I will keep fighting because it is unjust what happened to this family. [P 1570]

I know it is a lot to comprehend, it is crazy to me. That is why I get so upset and angry about this case, but it is true. This is what happened. And it is continuing to happen and I am telling you as a jury this is your job to fix this wrong. Fix this injustice because again, to quote from Martin Luther King Jr, Dr. Martin Luther King, Jr. "injustice anywhere is a threat to justice every where". This case is unjust and it is your job as the jury to fix it, to get involved and speak up for Carlyle for Kim and Khary. [P 1572]

Further, the court notes that the amount awarded by the jury exceeds what would be reasonable compensation for the injuries sustained. However, as the summation was so totally improper and inflammatory, clearly "crossing the line" of what is permissible, thereby tainting the verdict and depriving defendant of a fair trial, the branch of the motion which seeks a new trial on damages only or an order reducing the verdict cannot even be considered. Finally, the branch of the motion which seeks an order setting aside the verdict and dismissing the complaint is denied.

Accordingly, the defendant's motion is granted to the extent that the jury verdict is vacated and a new trial is directed.

The parties' attorneys shall come to chambers for a pre-trial conference, to pick new trial dates and to discuss settlement, on Friday, November 15, 2019 at 10:00 a.m.

This constitutes the decision and order of the court.

Dated: October 22, 2019

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**