

Savage v Kredentser
2019 NY Slip Op 34049(U)
April 16, 2019
Supreme Court, Albany County
Docket Number: 900156-2015
Judge: Christina L. Ryba
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ESTATE OF JOYCE SAVAGE, HOWARD
ALVIN SAVAGE, Individually and as the Estate
Representative,

Plaintiffs,

-against-

DECISION/ORDER
Index No. 900156-2015
RJI No. 01-15-17128

DR. DANIEL C. KREDENTSER, WOMEN'S
CANCER CARE ASSOCIATES LLC. ST. PETER'S
HOSPITAL CENTER OF THE CITY OF ALBANY,
INC., ST. PETER'S NURSING AND REHABILITATION
CENTER INC., and JOHN DOES 1 THROUGH 50,
Defendants.

APPEARANCES:

Savage Law PLLC
For Plaintiffs
705 Greene Street
Beauford, South Carolina 29902

Maguire Cardona, P.C.
For Defendants St. Peter's Hospital Center and
St. Peter's Nursing and Rehabilitation Center Inc.
22 Clinton Avenue
Albany, New York 12207

Thorn Gershon Tymann & Bonanni LLP
For Defendants Dr. Daniel C. Kredentser and
Women's Care Associates LLC.
5 Wembley Court, P.O.B. 15054
Albany, New York 12212

RYBA J.,

Plaintiffs commenced this medical malpractice action in February 2015 seeking to recover damages for personal injuries sustained by decedent Joyce Savage as the alleged result of the

negligent medical care and treatment rendered by defendants in connection with a debulking surgery performed to treat decedent's ovarian cancer in August 2011. Plaintiffs claim that as an alleged result of complications associated with the surgery and defendants' improper post-operative care, decedent suffered internal bleeding and renal failure which, in turn, delayed the commencement of her chemotherapy treatment. Decedent ultimately passed away in March 2013.

The facts and procedural history of the underlying matter were discussed in detail in the previous decisions issued by the Court (Connolly, J.) in response to the extensive motion practice between the parties, which consists of 21 motions involving various issues ranging from discovery disputes to motions for summary judgment. Among the motions filed in this case are motions by the respective defendants to dismiss the complaint pursuant to CPLR 3211 (a) (4) on the ground that plaintiffs commenced a duplicative action in Federal Court alleging virtually identical claims and seeking virtually identical relief against the same parties. By decision and order dated April 20, 2018, this Court (Connolly, J.) stayed the action pending resolution of the Federal action, which was thereafter voluntarily discontinued by plaintiffs. Plaintiffs thereafter moved for an order granting, inter alia, summary judgment in their favor on the issue of liability, an order holding defendants liable for negligence *per se* and reckless conduct warranting an award of punitive damages, costs and attorneys fees. Defendants St. Peter's Hospital Center of the City of Albany Inc. and St. Peter's nursing and Rehabilitation Center Inc. (hereinafter the St. Peter's defendants) opposed the motion, and defendants Dr. Daniel D. Kredentser and Women's Cancer Care Associates LLC (hereinafter the Kredentser defendants) cross-moved for summary judgment dismissing the complaint.

Upon receipt of defendants' papers, however, plaintiffs filed a motion to withdraw their motion for summary judgment. Soon thereafter, plaintiffs filed another motion seeking to withdraw

the motion to withdraw the summary judgment motion that they had just filed. Plaintiffs then requested permission to file a sur-reply with respect to the Kredentser defendants' cross motion for summary judgment, which was denied by the Court. The motion and cross motion were ultimately submitted to the Court, which issued an exhaustive 51-page decision dated September 14, 2018 which examined in detail the conflicting expert opinions and medical evidence offered by the parties. In that decision, the Court denied plaintiffs' motion in its entirety and granted the Kredentser defendants' cross motion in part, dismissing only those claims of medical malpractice that related to the performance of the surgery itself.

Plaintiffs have now filed a motion for an order pursuant to 22 NYCRR § 130-1.1 et seq. imposing sanctions for frivolous conduct upon the Kredentser defendants, the St. Peter's defendants, and their respective attorneys. Plaintiffs' motion for sanctions is premised upon allegations that defendants and their respective attorneys knowingly signed false, misleading and perjures affidavits with the Court in relation to the previous summary judgment motions. Specifically, plaintiffs allege that the affidavit of the nursing expert submitted by the St. Peter's defendants in opposition to plaintiffs' motion contained opinions which were based on false and misleading information, and that therefore, the expert committed perjury by submitting the affidavit. Plaintiffs further argue that by reiterating the facts and opinions set forth by the expert in his own supporting affirmation, Anthony Cardona Jr., counsel for the St. Peter's defendants, also committed perjury. Finally, plaintiffs contend that counsel for the Kredentser defendants, Kathleen Ryan, committed perjury by submitting an affidavit in which she allegedly mischaracterized and misstated certain facts contained in decedent's medical record.

In response to plaintiffs' motion for sanctions, the Kredentser defendants and the St. Peter's

defendants have filed separate cross motions, each seeking an award of costs and sanctions against plaintiffs' counsel on the ground that her motion for sanctions is frivolous. The Kredentser defendants and the St. Peter's defendants have also filed separate motions for an order compelling plaintiffs to respond to outstanding demands for HIPAA compliant authorizations permitting them to interview decedent's treating physicians prior to trial. Plaintiffs oppose the cross motions for sanctions and the motions to compel. Trial in this matter is scheduled to commence on October 21, 2019.

First addressing the competing motion and cross motions for sanctions, pursuant to 22 NYCRR part 130, a court has discretion to impose sanctions upon any party or attorneys for frivolous conduct in connection with a civil action or proceeding (see, 22 NYCRR 130-1.1[a]); Conduct is considered frivolous if it "(1) is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (22 NYCRR 130-1.1[c][1]). In deciding whether the conduct at issue is frivolous, the Court must consider various factors including the circumstances under which the conduct took place and whether or not the conduct continued when its lack of legal or factual basis should have been apparent. The authority to impose sanctions is committed to the court's sound discretion (see, Navin v Mosquera, 30 AD3d 883, 884 [2006]; First Deposit Natl Bank v Van Allen, 277 AD2d 858, 860 [2000]).

First addressing plaintiffs' motion for sanctions, plaintiffs allege that the underlying cross motion papers submitted by the respective defendants were perjurous and frivolous because they contained certain alleged misstatements of facts and evidence. However, the majority of the

plaintiffs' allegations of perjury are nothing more than reiterations of arguments that were asserted in their previous request to submit a sur-reply to defendants' underlying summary judgment cross motion, which was rejected by the Court. Not only is this an impermissible attempt to circumvent the Court's directive prohibiting a sur-reply, but plaintiffs' arguments themselves do not provide any legal basis for a finding of perjury or frivolous conduct. Contrary to plaintiffs' contention, the alleged factual and evidentiary discrepancies in the expert and attorney affidavits submitted by the respective defendants are either nonexistent, irrelevant, or merely relate to the expert's expression - - and the attorney's reiteration - - of a medical opinion. In short, plaintiffs have failed to demonstrate that the respective defendants' summary judgment submissions were completely without merit in law, were undertaken primarily to delay or harass, or contained false statements of material fact. Accordingly, plaintiffs' motion for sanctions is denied.

Turning to the cross motions by the respective defendants, considering the lack of any legal basis for plaintiffs' motion for sanctions as well as the underlying circumstances and history of this action, the Court concludes that they have demonstrated that the imposition of sanctions against plaintiffs' counsel is warranted. Not only is plaintiffs' motion for sanctions wholly without merit, but it exemplifies a distinct pattern of conduct aimed at delaying this already protracted litigation with unnecessary motion practice and other requests for Court intervention. Notably, plaintiffs' counsel commenced a duplicative Federal action, only to voluntarily discontinue it after defendants were forced to engage in unnecessary motion practice and a stay was imposed. Similarly, plaintiffs' counsel then filed a motion for summary judgment, only to seek to withdraw the motion after defendants interposed their opposing and cross-moving papers. When the Court denied her informal request to withdraw her fully submitted summary judgment motion, plaintiffs' counsel filed a

voluminous motion to withdraw the summary judgment on the ground that she wished to “clarify” the motion with supplemental proof. However, before the motion to withdraw was decided, plaintiffs’ counsel filed a motion to withdraw said motion. Plaintiffs’ counsel has persisted in creating needless litigation, which in turn has caused unnecessary costs to defendants and unreasonable delays to the resolution of this action. It is further apparent that plaintiffs’ counsel has persisted in this behavior despite being given notice that it was causing needless delay.

In view of the length of time that this pattern of conduct has detracted from the attention that the merits of this action deserves, the gravity of the accusations that plaintiffs’ counsel has frivolously aimed at defendants and their counsel, and her apparent inattention to prior complaints of undue delay and expense, the Court determines that an award of sanctions against plaintiffs’ counsel is appropriate in the amount of \$2,500 in favor of the Kredentser defendants and \$2,500 in favor of the St. Peter’s defendants (see, Flanigan v Smyth, 148 AD3d 1249, 1253–54 [2017], leave to appeal dismissed in part, denied in part, 29 NY3d 1046 [2017]). Such amounts shall be paid by plaintiffs’ counsel within 30 days from the date of this decision. Any request for further costs and expenses is denied at this time. With regard to the request for an order requiring plaintiffs’ counsel to seek leave of Court prior to filing any future motions in this action, the Court declines to issue such an order at this juncture. However, the Court cautions that any future application for relief will of course be subject to a potential motion for sanctions in the event that the application is frivolous.

Finally, the Court will address the respective motions by the Kredentser defendants and the St. Peter’s defendants to compel plaintiffs to respond to their demands for HIPAA compliant authorizations, thereby allowing their respective attorneys to interview specifically identified treating physicians prior to trial. These demands for authorizations were served in February 2015 by the

Kredentser defendants and in February 2016 by the St. Peter's defendants, well in advance of plaintiffs' filing of the Note of Issue. Supplemental demands for authorizations were thereafter served upon plaintiffs in 2018. Plaintiffs have failed to fully respond to these demands despite good faith letters forwarded by counsel seeking to obtain compliance. It is well established that pursuant to the Court of Appeals' decision in Arons v Jutkowitz (9 NY3d 393, 401–402 [2007]), a Court may order a plaintiff who has placed her medical condition at issue to execute HIPAA compliant authorizations to permit her physician to submit to an interview with the opposing party. This interview may occur after the Note of Issue is filed, without the showing of "unusual and unanticipated circumstances" required for other post-note of issue discovery (see, Arons v Jutkowitz 9 NY3d at 411 [2007]; Poser v Varnovitsky, 46 AD3d 1295, 1296 [2007]). In opposition to the motions to compel, plaintiffs contend that compliance is not required because defendants have failed to move to vacate the Note of Issue. This argument is without merit inasmuch as Arons clearly permits service of demands for authorizations, and the physician interviews, to occur after the Note of Issue is filed. Plaintiff is therefore directed to fully comply with all previously served demands for Arons authorizations within 30 days from the date of this decision.

For the foregoing reasons, it is

ORDERED that plaintiffs' motion is denied, without costs, and it is further

ORDERED that the motion by the Kredentser defendants to sanction counsel is granted in part, to the extent that plaintiffs' counsel Denise Savage Esq. is sanctioned in the amount of \$2,500 and directed to pay said amount to the law firm of Thorn, Gershon, Tymann and Bonanni, LLP within 30 days from the date of this decision, and the motion is otherwise denied, and it is further

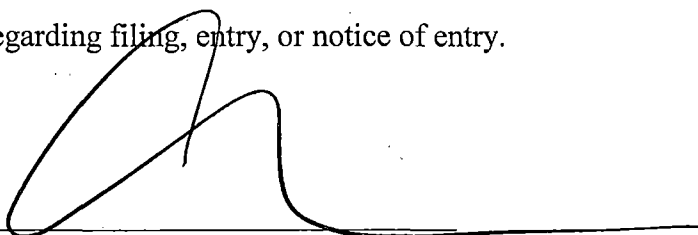
ORDERED that the motion by the St. Peter's defendants to sanction counsel is granted in part, to the extent that plaintiffs' counsel Denise L. Savage Esq. is sanctioned in the amount of \$2,500 and directed to pay said amount to the law firm of Maguire Cardona, PC within 30 days from the date of this decision, and the motion is otherwise denied, and it is further

ORDERED that the motion by the Kredentser defendants to compel plaintiffs to serve responses to demands for Arons authorizations is granted, without costs, and plaintiffs are directed to furnish said authorizations within 30 days from the date of this decision, and it is further

ORDERED that the motion by the St. Peter's defendants to compel plaintiffs to serve responses to demands for Arons authorizations is granted, without costs, and plaintiffs are directed to furnish said authorizations within 30 days from the date of this decision.

This shall constitute the Decision and Order of the Court. The original Decision and Order is being returned to the counsel for the Kredentser defendants who is directed to enter this Decision and Order and to serve all other parties with a copy of this Decision and Order with notice of entry. The Court will transmit a copy of this Decision and Order and the papers considered to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

Dated: April 16, 2019



HON. CHRISTINA L. RYBA
Supreme Court Justice

