

Savage v Kredentser
2019 NY Slip Op 34051(U)
September 9, 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 THOUGH 50,
Defendants.

APPEARANCES:

Savage Law Group 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.,

The facts and procedural history underlying this protracted medical malpractice litigation have been discussed in detail in multiple prior decisions and will not be repeated herein, other than to note that the parties have filed more than two dozen motions over the course of this litigation resulting in the Court's most recent decision imposing sanctions upon plaintiffs' counsel for frivolous motion practice. Plaintiffs filed a Note of Issue on October 3, 2018 and the trial in this matter is scheduled to commence on October 21, 2019. Plaintiffs now move for an order pursuant

to CPLR 2201 staying the trial pending the resolution of the parties' cross appeals from a September 27, 2018 decision and order (Connolly, J.) denying their respective motions for summary judgment. Plaintiffs also cross-move for an order granting permission to serve a second amended complaint. Defendants St. Peter's Hospital of Albany and St. Peter's Nursing and Rehabilitation Center Inc. cross-move for an order disqualifying plaintiffs' counsel Denise Savage and her law firm Savage Law Group PLLC from representing plaintiffs at trial. A cross motion to disqualify Savage and Savage Law Group has also been filed by defendants Women's Cancer Care Associates LLC and Daniel C. Kredentser. The motions and cross motions are opposed.

First addressing plaintiffs' motion for a stay of the trial, CPLR 2201 provides that "the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just" (CPLR 2201). The decision to issue a stay is within the broad discretion of the trial court (see, Research Corp. v Singer-General Precision, 36 AD2d 987 [1971]). Here, the October 21, 2019 trial date was established by the Court more than six months ago on February 28, 2019. Although the parties' cross appeals were pending at that time, plaintiffs did not request a stay of the trial until July 9, 2019, when plaintiffs' counsel verbally requested a stay or adjournment during a telephone conference with the Court. Defendants objected and the Court denied the request, advising plaintiffs' counsel that any application for a stay pending appeal could be made to the Appellate Division. Nevertheless, plaintiffs proceeded to file the present motion in this Court without seeking a stay from the Appellate Division. In light of plaintiffs' delay in seeking the stay, the already protracted nature of this litigation, and the fact that plaintiffs may seek the requested relief in the appellate forum, the Court deems it an appropriate exercise of discretion to deny plaintiffs' request for a stay.

Next addressing the motion for permission to serve a second amended complaint, although CPLR 3025(b) states that permission to amend a pleading “shall be freely given upon such terms as may be just”, whether the proposed amendment is appropriate is a matter entrusted to the discretion of the trial court (see, Thibeault v Palma, 266 AD2d 616, 617 [1999]; Murray–Gardner Mgt. v Iroquois Gas Transmission Sys., 251 AD2d 954, 955–956 [1998]). Moreover, while mere delay alone is not justification for the denial of leave to serve an amended pleading (see, Edenwald Contr. Co., Inc. v City of New York, 60 NY2d 957, 959 [1983]), the failure to provide an excuse for the delay along with resulting prejudice is sufficient reason to deny leave (see, Edenwald Contr. Co. v City of New York, 60 NY2d at 958 [1983]; Thibeault v Palma, 266 AD2d at 617 [1999]).

Here, contrary to plaintiffs’ contention, the proposed second amended complaint does not merely clarify the allegations of the first amended complaint, but instead contains significant substantive changes. Specifically, the proposed second amended complaint adds defendants St. Peter’s Hospital, St. Peter’s Nursing and Rehabilitation Center, Dr. Kredentser and Women’s Cancer Care to the fourth, fifth and sixth causes of action, and also adds defendant Women’s Cancer Care to the First, Second and Third causes of action. These proposed amendments are being advanced nearly five years after the commencement of the action, almost one year after plaintiff filed the Note of Issue, and a mere six weeks prior to trial. Plaintiffs offer no excuse for the delay in asserting these new allegations, nor is any explanation offered as to why the motion was made on the eve of trial. To permit plaintiffs to once again amend their complaint to include allegations that would necessitate further disclosure and potential motion practice at this late stage in the proceedings would surely result in prejudice to defendants. For these reasons, the motion to serve a second amended complaint is denied (see, Falvo v Leonelli, 274 AD2d 896,898 [2000]; Thibeault v Palma, 266 AD2d at 617

[1999]).

Finally, the Court will address the cross motions to disqualify Denise Savage Esq. and the Savage Law Firm as counsel for plaintiffs at trial on the ground that Savage's continued representation would violate the advocate-witness ethical rule set forth in 22 NYCRR 1200.21 (a). This ethical rule prohibits an attorney from representing a client when it becomes apparent that the attorney "ought to be called as a witness" in the action (Code of Professional Responsibility DR 5-102 [a] [22 NYCRR 1200.21 (a)]). Because the right to counsel of one's own choosing is a valued right which may not be restricted without careful scrutiny (see, Matter of Advent Assoc. v Vogt Family Investment Partners, 56 AD3d 1023, 1024 [2008]), the party seeking to disqualify an opponent's counsel because he or she "ought to be called as a witness" must demonstrate that the attorney's testimony is necessary (see, S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d 437, 444 [1987]; Matter of Advent Assoc. v Vogt Family Invets. Partners, 56 AD3d at 1024 [2008]). A finding of necessity requires more than a mere showing that the attorney was personally involved in the circumstances giving rise to the action, or that the attorney's testimony may be useful or even highly relevant (see, S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d at 444 [1987]; Matter of Advent Assoc. v Vogt Family Invets. Partners, 56 AD3d at 1024 [2008]). Rather, after considering the nature of the testimony and the availability of other evidence, the Court must find clear evidence to show that the attorney's testimony is strictly necessary to the client's case (see, S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d at 444 [1987]).

Here, the moving defendants contend that Savage "ought to be called as a witness" for plaintiffs because she is the daughter of decedent Joyce Savage, and in that capacity she was actively involved in managing the medical care that gave rise to this litigation. Two prior motions to

disqualify Savage and Savage Law Group were denied without prejudice on the ground that, despite Savage's involvement in managing decedent's medical care, defendants had not demonstrated that Savage's testimony was necessary in this action¹. On the present motion, the moving defendants have offered no new facts or circumstances that would justify a different finding. The mere fact that Savage may have discussed the details of her mother's medical care with Kredentser on several occasions, or that she may have personal knowledge of certain events that gave rise to this action, this at the most establishes that Savage may have potentially relevant testimony to offer. However, considering the nature of the potential testimony and the availability of other evidence to establish the necessary elements of plaintiffs' medical malpractice claim, the Court concludes that the moving defendants have not meet their burden to demonstrate that Savage's testimony is strictly necessary such that she "ought to be called as a witness" within the meaning of 22 NYCRR 1200.21 (a). Accordingly, the cross motions to disqualify are denied. However, this denial does not preclude defendants from renewing their respective motions to disqualify if it becomes evident that Savage must testify at trial.

For the foregoing reasons, it is

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

ORDERED that plaintiffs' motion for leave to serve a second amended complaint is denied, without costs, and it is further

ORDERED that the cross motion to disqualify filed by defendants St. Peter's Hospital of

¹ The first order (Connolly, J.), dated August 11, 2014, was issued in the context of a predecessor action (Index No. 1475-14) that was later dismissed due to improper substitution of decedent's estate representative. The second order (Connolly, J.), dated December 18, 2015, was issued in the context of the present action.

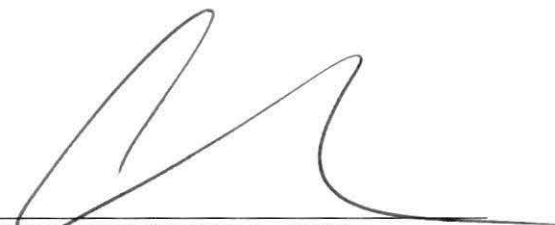
Albany and St. Peter's Nursing and Rehabilitation Center Inc. is denied, without prejudice, and it is further

ORDERED that the cross motion to disqualify filed by defendants Women's Cancer Care Associates LLC and Daniel C. Kredentser is denied, without prejudice.

This shall constitute the Decision and Order of the Court. This Decision and Order is being returned to the attorney for the St. Peter's Hospital Center and St Peter's Nursing and Rehabilitation Center Inc. Defendants. A copy of the Decision and Order is being transferred to the Albany County Clerk's Office. 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.

SO ORDERED.
ENTER.

Dated: September 9, 2019



HON. CHRISTINA L. RYBA
Supreme Court Justice