

Henry v Chopra

2020 NY Slip Op 32743(U)

August 19, 2020

Supreme Court, New York County

Docket Number: 805298/14

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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MARLENE HENRY, as Administratrix of the Estate of LYNETTE ALLAN, Deceased,
Plaintiff, Index No. 805298/14

-against-

RAJBIR S. CHOPRA, M.D, and JAMAICA
HOSPITAL MEDICAL CENTER,

Defendants,

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JOAN A. MADDEN, J.:

Defendant Jamaica Hospital Medical Center (“Jamaica Hospital”) moves for an order granting it leave to reargue the court’s decision and order dated February 3, 2020 (“the original decision”) to the extent that it denied its motion for summary judgment dismissing the medical malpractice claim against it and, upon reargument, granting Jamaica Hospital such relief.¹

Plaintiff opposes the motion.

Background

This action involves allegations of malpractice and wrongful death arising out of the care and treatment of plaintiff’s decedent Lynette Allan (“Mrs. Allan” or “decedent”), at Jamaica Hospital during her admission from October 7, 2012 to October 10, 2012.

¹ The original decision granted summary judgment dismissing the claim against Jamaica Hospital for lack of informed consent and dismissed the complaint against Jamaica’s Hospital’s employee Nagaraj D. Rao, M.D, on the ground that the alleged departures were not specifically addressed to him.

Mrs. Allan underwent left knee replacement surgery at the Hospital for Joint Diseases on September 18, 2012. Following her surgery, Mrs. Allan was treated at two rehabilitation facilities and at St. John Episcopal Hospital (“St John’s). On October 7, 2012, Mrs. Allan was transferred from the second rehabilitation facility to Jamaica Hospital for a workup due to abdominal distension, abdominal pain, nausea, and vomiting. On October 10, 2012, she underwent an exploratory laparotomy, and was diagnosed with necrotic small bowel and colon. Later that day, she died at age 74 of complications from clostridium difficile colitis (“C. difficile”).

In this action, plaintiff alleges, *inter alia*, that Jamaica Hospital and its employees, departed from the applicable standard of care in failing to timely and properly diagnose Mrs. Allan with, and test for, C. difficile and by improperly delaying surgical treatment, and that these departures caused and/or contributed to Mrs. Allan’s complications, including the development of a small bowel obstruction, the need for a colectomy and exploratory laparotomy, sepsis, renal failure, coagulopathy and death.

Jamaica Hospital moved for summary judgment and in support of its motion submitted the expert affirmation of Henry Partridge, M.D., a physician licensed to practice medicine in the State of New York, who was board certified as a surgeon prior to his retirement in 2018. In opposition to Jamaica Hospital’s motion, plaintiff submitted the affirmation of a physician licensed to practice medicine in New York State and New Jersey who is board certified in internal medicine and gastroenterology, and whose identity was redacted.

In the original decision, the court found that although Dr. Partridge’s opinion was sufficient to meet Jamaica Hospital’s burden on summary judgment, that plaintiff’s expert

controverted this showing and thus denied Jamaica Hospital's motion. Specifically, the court wrote:

[P]laintiff has met [her] burden with respect to the medical malpractice claim, based on her expert's opinion that Mrs. Allan's condition upon admission to Jamaica Hospital including her elevated white blood count, abdominal distention and abdominal pain, the results of a CT scan, and a history of nausea and vomiting for 2 weeks, required that exploratory surgery be done earlier (by October 7th or 8th as opposed to October 10th) and that she did not need to be stabilized before such surgery. As for causation, plaintiff's expert also raises an issue of fact as to whether the delay in diagnosing Mrs. Allan's condition ... caused and/or contributed to an overgrowth of bacterial resistant organisms in Mrs. Allan's intestinal tract, resulting in her prolonged suffering and her death.

Jamaica Hospital now moves for reargument, asserting that the court overlooked that plaintiff's expert failed to address Dr. Partridge's opinion that on October 7 and 8, "there was no reason to include *C. difficile* as part of the differential diagnosis ... since the patient was constipated as opposed to having diarrhea which is a primary indicator of *C. difficile* colitis," and that Dr. Partridge's opinion that the only way to diagnose *C. difficile* is by having laboratory testing done to stool samples to confirm the presence of a specific bacterial toxin and that "not only was the patient's constipation inconsistent with the hallmark of symptom of *C. difficile*, diarrhea, but it also necessarily prevented her from producing stool to send to be tested for *C. difficile*." Jamaica Hospital also points to Dr. Partridge's opinion that decedent was timely tested, diagnosed and treated for the infection on October 9, when she had diarrhea and her stool samples were tested for *C. difficile*. Jamaica Hospital argues that plaintiff's expert opinion not only failed to address these portions of its expert affirmation, but that plaintiff's expert's opinions were vague, conclusory and unsupported by the record.

Plaintiff opposes the motion, asserting that the court did not overlook any facts or misapprehended the law, and that the court properly held that there were triable issues of fact based on conflicting affidavits of the parties' experts.

A motion for reargument is addressed to the discretion of the court and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts or misapplied a controlling principle of law. Foley v. Roche, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22, appeal denied in part dismissed in part 80 N.Y.2d 1005 (1992).

Under this standard, reargument is granted as the original decision did not discuss the failure of plaintiff's expert to specifically address Dr. Partridge's opinion that Jamaica Hospital did not depart from the standard of care in not treating and testing decedent for including C. difficile before October 9th, based on decedent's lack of diarrhea, which was described by Dr. Partridge as "a hallmark presentation" of C. difficile until that time.

Upon reargument, the court adheres to its original decision denying summary judgment with respect to the malpractice claim, as the lack of diarrhea is not dispositive, since plaintiff's expert opinion, which, contrary to Jamaica Hospital's position, is supported by the medical record, raises issues of fact as to whether Jamaica Hospital departed for accepted medical practice in failing to diagnose Mrs. Allan with C. difficile earlier based on evidence of an infectious process. Specifically, as noted by plaintiff's expert, when Mrs. Allan was admitted to Jamaica Hospital on October 7, 2012, she had an elevated blood count, abdominal distention and pain, and a history of nausea and vomiting for two weeks, and that a CT scan done at 4:19 am on October 8, 2012, showed severe colitis of the recto-sigmoid and a distal bowel obstruction.

Moreover, the hospital chart indicates that Jamaica Hospital included *C. difficile* in its differential diagnosis on October 8, 2012, despite the lack of diarrhea, and included a reference to a possible exploratory laparotomy for Mrs. Allan that afternoon.

Furthermore, as stated in the original decision, plaintiff's expert addressed Dr. Partridge's opinion that the decedent's constipation prevented an earlier diagnosis. Specifically, in this regard, plaintiff's expert opined that "[t]he opinion of Jamaica [Hospital's] medical expert that because no stool sample was available on October 7th or October 8th to confirm the diagnoses of [*C. difficile*], surgery was not indicated before October 10th, is simply wrong (This was apparently recognized by some Jamaica personnel on October 8th, when the entry was made in the Jamaica record about a possible 'ex lap later in the afternoon.' This was, of course, before the availability of a stool sample, which was not obtained until October 9th)."

Finally, while Jamaica Hospital argues that contrary to plaintiff's expert opinion, the note in the hospital chart on October 8th reflects that exploratory surgery was only being considered on that date as the scan showed a partial and not a full bowel obstruction, this argument is insufficient to eliminate issues of fact as to whether it was a departure not to perform an exploratory surgery on October 8th.

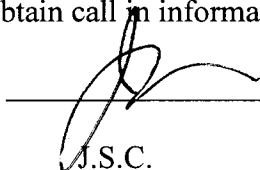
Conclusion

In view of the above, it is

ORDERED that Jamaica Hospital's motion for reargument is granted and, upon reargument, the court adheres to its original decision; and it is further

ORDERED that a pre-trial conference shall be held via telephone on September 17, 2020 at 11 am, and, on or before September 14, 2020, counsel for the remaining parties shall email the court at SFC-PART11@nycourts.gov to obtain call in information for the conference.

Dated: August 19, 2020



J.S.C.

HON. JOAN A. MADDEN
J.S.C