

Khass v New York Presbyt. Brooklyn Methodist Hosp.

2020 NY Slip Op 32786(U)

August 20, 2020

Supreme Court, Kings County

Docket Number: 516861/2019

Judge: Kathy J. King

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 64 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of August, 2020.

PRESENT:

HON. KATHY J. KING,

Justice.

-----X
WALID KHASS, MD.

Plaintiff,

- against -

NEW YORK PRESBYTERIAN BROOKLYN
METHODIST HOSPITAL, DOCTOR PRAMOND
NARULA, MD, DOCTOR BRANDE BROWN, MD,
SAINT GEORGE'S UNIVERSITY SCHOOL OF
MEDICINE, DOCTOR RICARD LIEBOWITZ, MD,
DOCTOR STEPHEN WEITZMAN, MD,

Defendants.
-----X

DECISION/ORDER

Index No.
516861/2019

The following papers numbered 1 to 11 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

1-2

Opposing Affidavits (Affirmations) _____

3

Reply Affidavits (Affirmations)

Defendant New York-Presbyterian Brooklyn Methodist Hospital ("the Hospital"), moves by order to show cause for leave to renew its opposition to plaintiff's order to show cause dated August 14, 2019, pursuant to CPLR 2221(e), and upon renewal, vacating this Court's Decision/Order dated February 13, 2020. Plaintiff Walid Khass M.D. ("Dr. Khass") opposes the requested relief.

Plaintiff moved by order to show cause dated August 14, 2019, seeking immediate placement into the Hospital's Pediatric Residency Program ("the Program") pursuant to the terms of the 2019 National Resident Matching Program ("NRMP"), together with a stay pending a hearing, to preclude the Program from awarding plaintiff's pediatric residency position to any other resident applicant. Upon the signing of the order to show cause (J. Motsofsky), the Court denied plaintiff's application for a stay as moot since the Program hired another candidate to fill plaintiff's residency position. In opposition to plaintiff's order to show cause, the Hospital argued that unbeknownst to the Program, plaintiff had been under disciplinary suspension at the time he matched into the Program, which deprived it of the opportunity to assess plaintiff's character and qualifications prior to the match. On January 8, 2020, the Court heard oral argument on plaintiff's application, which resulted in the Court's February 13, 2020 order. The Court's order found that: (1) only the NRMP could waive the match commitment pursuant to the respective Match Participation Agreements of the Hospital and Dr. Khass and (2) the Program breached the Match Participation Agreement by its refusal to hire plaintiff, since the NRMP denied the Hospital's initial waiver request based on applicant ineligibility on May 30, 2019, and the Hospital's subsequent request for reconsideration on July 1, 2019. As a result, the Court converted plaintiff's requested relief to a petition for mandamus and directed the Hospital to comply with the Match and allow Dr. Khass to begin his residency as of July 1, 2020. Defendant indicates that by letter dated June 16, 2020, the NRMP reversed and negated its prior determination denying the waiver and granted the Program a waiver of the match commitment to plaintiff *nunc pro tunc* "effective as of May 30, 2019." According to the affirmation in support of defendant's counsel, Christopher Porzio, Esq., the letter resulted from the settlement of an Article 78 proceeding, commenced by the defendant on October 25, 2019, bearing Index No. 523432/2019. The Article 78 proceeding challenged NRMP's denial of the Hospital's waiver request as arbitrary and capricious. Mr. Porzio's affirmation also indicates that the NRMP subsequently moved to dismiss

the Article 78 proceeding. Oral argument on the defendant's petition and the NRMP's motion was heard by J. Debra Silber on June 11, 2020, after which the Hospital and the NRMP entered into settlement discussions, resulting in the June 16, 2020 letter. As part of the settlement, the parties also stipulated to the dismissal of the Hospital's Article 78 petition with prejudice and withdrawal of the NRMP's motion to dismiss.

The Hospital now contends that the June 16, 2020 letter in which the NRMP granted the Hospital's waiver request *nunc pro tunc*, is a new factual development pursuant to CPLR 2221 (e) and serves as the basis for the Hospital's instant motion for leave to renew its opposition to plaintiff's order to show cause.

It is well settled that "...[A] motion to renew shall be based upon new facts not offered on the prior motion that would change the prior determination...and shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [1] and [e] [3]).

A review of the record shows, however, that the June 16, 2020 letter resulting in the NRMP's grant of the waiver, is not a *new* fact, but instead is an *undisclosed* fact by defendant and its counsel. Dr. Khass was not noticed in the Article 78 proceeding, although he was an indispensable party whose rights were directly affected by the relief sought in the Article 78 proceeding. The Court finds that Mr. Porzio's argument that plaintiff's counsel was aware of the Article 78 proceeding and failed to intervene is simply disingenuous. While defendant Hospital filed its Article 78 petition on October 25, 2019, there was no mention whatsoever of the Article 78 petition in defendant's opposition filed on October 30, 2019. Additionally, the Hospital failed to advise the Court of the existence of an Article 78 proceeding at oral argument of plaintiff's order to show cause on January 8, 2020, which was dispositive on the issue of the waiver, and is now the subject of the instant renewal motion. Mr. Porzio's argument is particularly disturbing in light of the fact that the affirmation contained in the

Request for Judicial Intervention filed with the Article 78 proceeding omits reference to the instant proceeding and states that there were no related actions or proceedings. Indeed, the omission of this material fact can be considered sanctionable conduct under NYCRR 130-1.1, however, the Court declines to institute sanctions, since Dr. Khass has begun the Program pursuant to the Court's February 13, 2020 order.

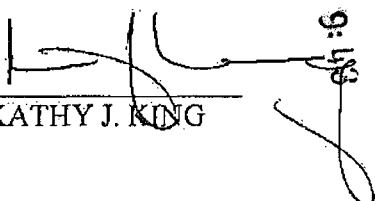
Further, consistent with the arguments raised by plaintiff, in opposition, the Court finds that the Hospital did not provide a reasonable justification of the requested relief pursuant to CPLR 2221(e). In support of its application, the Hospital asserts that "this state of affairs did not exist at that time," which the Court finds is a feeble attempt to explain away the Hospital's failure to present the facts that it now wishes the Court to consider. The Second Department has consistently ruled that "[t]he Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion" (*Sobin v. Tylutki*, 59 AD3d 701, 702 [2d Dep't 2009] [internal citations omitted]).

Based on the foregoing, defendant New York-Presbyterian Brooklyn Methodist Hospital's motion to renew is denied in its entirety, and it is hereby,

ORDERED, that defendant is directed to serve a copy of the within Order via, e-file, and/or email, on plaintiff, defendant Saint George's University School of Medicine, and counsel for the National Residency Matching Program, within twenty (20) days of the date of this order.

This constitutes the decision/order of the Court.

ENTER,


HON. KATHY J. KING
J.S.C.

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