

Klass v Haltrecht
2020 NY Slip Op 34065(U)
December 9, 2020
Supreme Court, New York County
Docket Number: 155698/14
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

----- X Index No.: 155698/14

RICHARD KLASS, as Executor of the Estate of
BERNARD WOLBERG and EVA KLASS-WOLBERG,
Plaintiff,

-against-

MARK HALTRECHT, D.O., ARSENIO MEDICAL, P.C.,
THE MOUNT SINAI HOSPITAL, EDWARD KIM, M.D.,
FRANCIS S. NOWAKOWSKI, M.D., and DANIEL
M. LABOW, M.D.,

Defendants,

----- X
JOAN A. MADDEN, J.:

Defendants Mark Haltrecht, D.O and Arsenio Medical, P.C. move for reargument and renewal of the court's decision and order dated July 20, 2020 and entered on July 21, 2020 ("original decision"), which denied defendants' summary judgment motion. Plaintiff opposes the motion, which is denied for the reasons below.

In this medical malpractice action, plaintiff asserts that defendants departed from the standard of care in treating plaintiff's decedent Bernard Wolberg ("Mr. Wolberg" or "decedent") by failing to adequately screen him for liver cancer and to recognize the risk of liver cancer based on Mr. Wolberg's long standing Hepatitis C.

The Haltrecht defendants moved for summary judgment, arguing based on the opinions in the affirmation of their expert, Elias G. Sakalis, M.D., that they did not deviate from the standard of care in connection with their treatment of Mr. Wolberg from February 2011 through October 2013, and that none of the actions taken by them were a proximate cause of the alleged injuries and Mr. Wolberg's death. The Haltrecht defendants also argued that as Dr. Haltrecht was the decedent's primary care physician, he owed no duty to Mr. Wolberg to treat his Hepatitis

C. In support of their argument, the defendants cited Dr. Sakalis opinion that Dr. Haltrecht was under “no obligation to monitor [Mr. Wolberg’s] chronic Hepatitis C, which had been diagnosed in 1993, [since] decedent advised Dr. Haltrecht that he was under the care of Melissa Palmer, a gastroenterologist and hepatologist for his Hepatitis C, and that when Dr. Haltrecht asked Mr. Wolberg about his Hepatitis C on three occasions, he refused to see a gastroenterologist.”

In the original decision, the court denied defendants’ summary judgment motion, finding that Dr. Haltrecht owed a duty of care to Mr. Wolberg in light of the record showing that Dr. Haltrecht was involved in monitoring and managing Mr. Wolberg’s overall care, including his liver function and his awareness of Mr. Wolberg’s long standing Hepatitis C. The court also found that while based on the affirmation of their expert, the Haltrecht defendants made a prima facie showing entitling them to summary judgment, that plaintiff controverted this showing based on the opinions of his expert.

The Haltrecht defendants now move for renewal and reargument of the original decision. In support of their request for renewal, defendants submit the supplemental affirmation of their expert Dr. Sakalis regarding screening guidelines of the American Association of the Study of Liver Disease (“the Guidelines”), for individuals like Mr. Wolberg with Hepatitis C. Significantly, the Guidelines were referenced in Dr. Sakalis’ original affirmation in paragraphs 54 and 55. It is only after the denial of their motion for summary judgment that the Haltrecht defendants seek reargument and renewal based on the Guidelines.

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. See Foley v. Roche, 68 A.D.2d 558, 567 (1st Dept 1979). However, reargument is not designed to afford the unsuccessful party

successive opportunities to reargue issues previously decided. William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, 27 appeal denied in part dismissed in part 80 NY2d 1005 (1992).

A motion to renew...is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention." Id

Under these standards, the Haltrecht defendants fail to provide a legally sufficient basis for consideration of Dr. Sakalis' supplemental affirmation, as the Guidelines were in issue in the original motion. While plaintiff submits opposition to the motion to reargue and renew and also submits a supplemental expert affirmation, that affirmation like that of the defendants is not properly considered.¹

In reaching its decision, the court notes that the Guidelines relied on by Dr. Sakalis in his supplemental affirmation are not dispositive of the issues on this motion since although "[g]uidelines are a factor be considered with respect to the standard of care...they are recommendations regarding treatment and compliance with guidelines 'do not constitute the standard of care.'" Kljyan v. Kaminetsky, 57 Misc3d 1222(A), *6 (Sup Ct NY Co. 2017), quoting Halls v. Kiyici, 104 AD3d 502, 504 (1st Dept 2013). Instead, "the standard of care for physicians is one established by the medical profession." Id, citing Toth v. Community Hospital at Glen Clov, 22 NY2d 255, 262 (1968).

Next, there is also no basis for granting reargument of the court's finding that Dr. Haltrecht owed Mr. Wolberg a duty with respect to monitoring his Hepatitis C. First, although the Haltrecht defendants supported their argument as to lack of duty with Dr. Sakalis' affidavit,

¹ At a conference held on October 22, 2020, the court denied a letter request by counsel for the Haltrecht defendants for permission to submit reply papers in response to the supplemental expert affidavit submit by plaintiff in opposition..

as the court noted in the original decision, “[w]hether a duty is owed in the first instance is a question for the court, and generally not an appropriate subject for expert opinion” Dallas-Stephenson v Waisman, 39 AD3d at 307 (internal citations omitted). Moreover, as pointed out by plaintiff in opposition, the record shows that although Mr. Wolberg had treated for his Hepatitis C with a specialist, Dr. Palmer, since the early 1990’s, by the time Mr. Wolberg began treating with Dr. Haltrecht in 2008, he had stopped seeing Dr. Palmer. In addition, evidence that Mr. Wolberg refused to be treated by a specialist for his Hepatitis in 2011 and 2012, does not negate the duty owed to Mr. Wolberg by Dr. Haltrecht as his primary care physician, who was aware of his Hepatitis C and monitoring his liver function. See Lindenbaum v Federbush, 144 AD3d 869, 870 (2d Dept 2016) (holding that defendant primary care physician owed plaintiff a duty of care when he spoke with plaintiff about test results and advised him to continue taking the prescribed medication).

In view of the above, it is

ORDERED that the Haltrecht defendants’ motion for reargument and renewal is denied.

DATED: December 9, 2020

J.S.C.

HON. JUAN A. MADDEN
J.S.C.