

Estate of Jerry Fernandez v Wyckoff Hgts. Med. Ctr

2022 NY Slip Op 31733(U)

May 24, 2022

Supreme Court, Kings County

Docket Number: Index No. 9090/2015

Judge: Bernard J. Graham

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36

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ESTATE OF JERRY FERNANDEZ by RAYMOND
SALISBURY, Successor Executor,

Index No.: 9090/2015

Plaintiff,

DECISION/ORDER

-against-

Hon. Bernard J. Graham
Supreme Court Justice

WYCKOFF HEIGHTS MEDICAL CENTER, MAYAT
SAN, M.D., SAMII MOSHEN, M.D., MIGUEL RANEY,
M.D., MILLENIUM UROLOGY, PLLC, PAYAM
HAKIMIAN, M.D., BAISLEY MEDICAL SERVICES
P.C., and CATHY DE-LERME PAGAN, M.D.,

Defendants,
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Recitation, as required by CPLR §2219(a), of the papers considered on the review of this motion : by defendants Dr. San and Wyckoff motion to dismiss pursuant to CPLR §3211(a)(5), and plaintiff's motion to reargue and renew a decision of this Court pursuant to CPLR §2221(d) and (e):

Papers	NYSEF Doc. #
Notice of Motion and Affidavits Annexed.....	(seq. 14) 90-110 (seq. 15) 112-113 (seq. 16) 114-137
Affidavits in Opposition.....	(seq. 14) 141-150 (seq. 15) 151-153 (seq. 16) 154-155 (seq. 16) 156-159
Aff. in Reply.....	(seq. 14) 160-164 (seq. 16) 165-166 (seq. 14) 167
Other:	_____

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Counsel for defendant Myat San, M.D. ("Dr. San") has moved (seq. 14), pursuant to CPLR §3211(a)(5), to dismiss plaintiff's complaint as against Dr. San based on the decision/order of this Court dated December 3, 2021 (the "December 3, 2021 Decision") and the

theories of *res judicata* and “law of the case.” Counsel for defendant Wyckoff Heights Medical Center (“Wyckoff”) has likewise moved (seq. 15) to dismiss plaintiff’s complaint, as against Wyckoff, for any actions attributable to Dr. San, should Dr. San be awarded summary judgment.

Counsel for plaintiff has opposed each of the motions by Dr. San and Wyckoff and has submitted a motion (seq. 16) to reargue and renew the December 3, 2021 Decision pursuant to CPLR §2221(d) and §2221(e). The December 3, 2021 Decision granted motions (seq. 8-10) for summary judgment filed on behalf of defendants Millennium Urology, PLLC (“Millennium”) and Payam Hakimian, M.D. (“Dr. Hakimian”), defendant Moshen Samii, M.D. s/h/a Samii Moshen, M.D. (“Dr. Samii”), and defendant Wyckoff Heights Medical Center (“Wyckoff”).

The instant motion filed on behalf of the plaintiff is referred to as a motion to reargue and renew. In view of the fact that the motion does not offer any new evidence which was unavailable at the time the primary motions were filed, the Court will consider the instant motion to be a motion for reargument.

It is alleged by plaintiff’s counsel that the Court has misapprehended or overlooked certain facts or law and that the Court has improperly granted the defendant’s motions for summary judgment in favor of defendants Millennium, Dr. Hakimian, Dr. Samii, and Wyckoff. The motion has been opposed by counsel for the defendants and argument was heard before this Court on Microsoft Teams on April 14, 2022.

After a review of the Court’s December 3, 2021 Decision, the Court grants the plaintiff’s motion to reargue (seq. 16) and concludes, based on the facts of this matter and the applicable law, that the Court has incorrectly awarded summary judgment to defendants Dr. Hakimian and Millennium and, accordingly, plaintiff’s complaint is hereby reinstated as to Millennium and Dr. Hakimian.

The motion for summary judgment (seq. 14) on behalf of Dr. San and Wyckoff is premised, inter alia, on the theory that the award of summary judgment to defendant Millennium and defendant Dr. Hakimian constitutes *res judicata*, or law of the case, in regard to the actions of Dr. San and Wyckoff. Counsel for Dr. San and Wyckoff argues that the actions of Dr. San and Wyckoff are closely tied to the actions of Millennium and Dr. Hakimian, and these defendants

should likewise be dismissed.¹ Based on the conclusion reached herein (granting reargument and reinstating the case against Dr. Hakimian and Millenium), the motion brought by defendants, Dr. San and Wyckoff, must fail as there can no longer be a viable *res judicata* or law of the case argument.

As to the portion of plaintiff's motion to reargue the Court's decision in dismissing the action against Dr. Samii and Wyckoff (to the extent that they are vicariously liable for Dr. Samii), the Court finds that the Decision correctly granted summary judgment based on the evidence.

Discussion:

A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. CPLR §2221(d), McGill v Goldman, 261 AD2d 593 [2d Dept 1999].

The Court has reviewed the December 3, 2021 Decision as it relates to the conflicting opinions offered by the medical experts for each party. The Court has determined that it has mistakenly relied on portions of the defendant's expert's opinion to the exclusion of the issues raised by the plaintiff's medical expert. Specifically, the Court accepted the opinion of Dr. Rutman (defendants' expert) that Dr. Hakimian would not have been required to review the kidney ultrasound, as it was unrelated to the lower urinary tract symptoms the decedent presented with, and failure to be aware of and review said ultrasound was not a departure. In addition, the Court accepted Dr. Rutman's opinion that the decedent did not lose any chance for cure or prolonged lifespan by virtue of the delay in diagnosing his stage 4 renal cancer, as it had already metastasized to his lungs at the point that he was treating with Dr. Hakimian.

Upon reviewing the facts of this matter, the Court has determined that there was sufficient evidence available to find the existence of questions of fact based on the symptoms the decedent was experiencing and the timeline of his course of treatment. The record reflects that Dr. Hakimian was aware that the decedent had been admitted to Wyckoff two months prior and was treated for left pyelonephritis, but was unaware of the kidney ultrasound that was performed

¹ The motion to reargue on behalf of defendant Wyckoff is solely related to the possible vicarious liability that may be attributable to Dr. San.

while the decedent was at Wyckoff. Plaintiff's expert claims that pyelonephritis does not rule out a diagnosis of renal cell cancer, and that an investigation of the renal mass by further testing to rule out malignancy was mandated. This raises a question of fact as to whether Dr. Hakimian departed from the standard of care by failing to consider the decedent's diagnosis of left pyelonephritis in conjunction with his symptoms upon presentation, as well as failing to review the decedent's medical records to the extent that the ultrasound study and report were discovered, which would have indicated a solid mass that was possibly malignant. In addition, plaintiff's expert sufficiently refuted Dr. Rutman's opinion that the "nodule" at the base of the decedent's right lung depicted on the CT scan performed on March 11, 2013 was malignant and a metastasis of the decedent's later diagnosed renal cancer. Plaintiff's expert opined that the "nodule" did not act like a renal cell carcinoma, in that it did not grow as a fast-growing cancer would be expected to grow and was not visible on the May 20, 2013 chest x-ray. In addition, plaintiff's expert asserted that even if the "nodule" was a renal cell carcinoma metastasis, the decedent's cancer would have been oligometastatic (presenting with few or little metastases) and thus would have been treatable by surgery or radiation/chemotherapy. As such, the issues of whether the "nodule" was a metastasis, as well as whether the delay adversely affected the decedent's chance for a better outcome, are also questions that should be submitted to the trier of fact.

Conclusion:

After review of this Court's December 3, 2021 Decision, the Court grants the plaintiff's motion for reargument pursuant to CPLR §2221(d). Upon reargument, the Court recognizes that it had not properly considered the arguments raised by plaintiff's medical expert, thereby resulting in a dismissal of plaintiff's claim against defendants Millennium and Dr. Hakimian. Sufficient facts were alleged by plaintiff's counsel and medical expert to raise a question as to whether Dr. Hakimian had failed to diagnose the decedent's stage 4 renal cancer. The fact that defendants' medical expert poses a different opinion as to the standard of care is not dispositive and simply raises a question of fact for trial. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions". Feinberg v Feit, 23 AD3d 517, 519 [2d Dept. 2005]; (see also Magel v John T. Mather Mem. Hosp., 95 AD3d 1081, 1083 [2d Dept. 2012]).

Accordingly, that portion of the December 3, 2021 Decision which dismissed the plaintiff's complaint against Millennium and Dr. Hakimian is vacated. Plaintiff's complaint as against Millennium and Dr. Hakimian is hereby reinstated. Millennium and Dr. Hakimian shall remain defendants in this action.

In addition, the motions to dismiss by defendants Dr. San and Wyckoff (to the extent that Wyckoff may be vicariously liable for the negligence of Dr. San) are denied. Counsel's argument for dismissal against Dr. San is premised on a *res judicata* or law of the case concept, wherein Counsel points to the Court's dismissal of the case against Dr. Hakimian. Defendant's counsel argues, inter alia, that the role of Dr. San and Dr. Hakimian were essentially similar and, therefore, both should be dismissed from the case. However, in granting the plaintiff's motion to reargue and restoring the complaint against Dr. Hakimian, the argument based on *res judicata* or law of the case is inapplicable. The Court finds that there are questions of fact raised by Dr. San's treatment of the decedent that prevent an award of summary judgment and dismissal to Dr. San and Wyckoff (to the extent that Wyckoff may be vicariously liable for Dr. San). Dr. San and Wyckoff shall continue as Defendants in this action.

As for the portion of the December 3, 2021 Decision which granted the motion by defendants to dismiss plaintiff's complaint as against Dr. Samii and Wyckoff (to the extent that Wyckoff may be vicariously liable for the negligence of Dr. Samii), said determination shall remain in full force and effect. Evidence supports the conclusion that Dr. Samii did not depart from good and accepted practice in interpreting the radiological films. That portion of plaintiff's motion to reargue is denied. Dr. Samii and Wyckoff are no longer defendants in this action.

The Court further notes that the action as against Cathy De-Lerme Pagan, M.D., had been previously discontinued, and Dr. Pagan is no longer a defendant in this action.

Based on the foregoing, the caption is amended to read as follows:

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ESTATE OF JERRY FERNANDEZ by RAYMOND
SALISBURY, Successor Executor,

Plaintiff,

-against-

WYCKOFF HEIGHTS MEDICAL CENTER, MAYAT
SAN, M.D., MIGUEL RANEY, M.D.,
MILLENIUUM UROLOGY, PLLC, PAYAM HAKIMIAN,
M.D., and BAISLEY MEDICAL SERVICES P.C.,

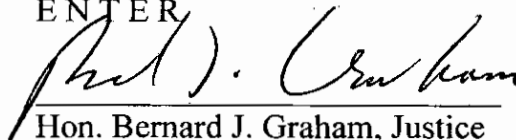
Defendants,

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This shall constitute the decision and order of this Court.

Dated: May 24, 2022
Brooklyn, NY

ENTER



Hon. Bernard J. Graham, Justice
Supreme Court, Kings County

HON. BERNARD J. GRAHAM