

Royal v Cohen

2022 NY Slip Op 34089(U)

November 18, 2022

Supreme Court, Kings County

Docket Number: Index No. 512984/2016

Judge: Bernard J. Graham

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At an IAS Part 36 of the Supreme Court of The State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 18th day of November, 2022.

PRESENT:
Hon. Bernard J. Graham, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

KENNETH ROYAL,

Plaintiffs,

Index No.: 512984/2016

DECISION/ORDER

-against-

ANDERS COHEN, M.D., JUAN CARLOS FUENTES-ROSALES, M.D., and WYCKOFF HEIGHTS MEDICAL CENTER,

Defendants.

Recitation, as required by CPLR §2219(a), of the papers considered on the review of this motion to: grant reargument of the Order of this Court dated February 17, 2022, and upon reargument awarding summary judgment, pursuant to CPLR §2221(d)and §3212.

Papers	NYSCEF Doc. #
Notice of Motion and Affidavits Annexed.....	(seq. 8) 150-160 (seq. 9) 163-165
Order to Show Cause and Affidavits Annexed.....	
Answering Affidavits.....	(seq. 8) 178 (seq. 9) 167-169 (seq. 9) 170 (seq. 9) 177
Replying Affidavits.....	(seq. 8) 180 (seq. 9) 179
Exhibits.....	
Other.....	

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

Defendant Anders Cohen, M.D., (“Dr. Cohen”) has moved (seq. 8), pursuant to CPLR §2221(d), for an Order granting reargument of this Court’s Order dated February 17, 2022, and upon reargument awarding summary judgment and a dismissal of plaintiff’s complaint as against Dr. Cohen on all of plaintiff’s claims as against him.

Counsel for plaintiff has opposed Dr. Cohen’s motion for reargument upon the grounds that this Court, in denying in part Dr. Cohen’s motion for summary judgment, did not misapprehend the facts or law in rendering its Decision and Order.

Counsel for the plaintiff, has also moved (seq. 9), pursuant to CPLR §2221(d), for an Order granting reargument of this Court’s Order dated February 17, 2022, and upon reargument reinstating plaintiff’s causes of action as against defendants Alexander Rances, D.O., (“Dr. Rances”), Hudson Spine and Pain Medicine, P.C., (“Hudson Spine”), Yasser El-Hennawy, M.D., (“Dr. El-Hennawy”), and Harold Matos-Cassano, M.D. (“Dr. Matos-Cassano”).

Counsel for defendants Dr. Rances and Hudson Spine, Dr. El-Hennawy, and Dr. Matos-Cassano have opposed plaintiff’s motion for reargument upon the grounds that this Court, in granting these defendants’ motions for summary judgment, did not misapprehend the facts or law in rendering its Decision and Order.

Facts:

Plaintiff began treating at Hudson Spine on April 10, 2014, with complaints of back pain and issues with his left foot following surgery¹ to address a vertebral disc injury sustained in a workplace accident in 2006. Plaintiff was first seen by Dr. Rances at Hudson Spine on May 1, 2015, on which date a physical exam was performed and plaintiff’s medications were changed.² Plaintiff had further office visits with Dr. Rances on June 3, July 2, August 3, September 3, and October 2, 2015, during which plaintiff was examined and counseled on the importance of taking his medications as prescribed.

¹ The surgery (laminectomy and decompression) was performed at The Brooklyn Hospital Center on August 4, 2006.

² Plaintiff’s medications were changed from Methadone to Oxycontin, and his Gabapentin prescription was refilled.

On October 2, 2015, Dr. Rances referred plaintiff to a neurologist and noted in the chart that plaintiff was to have no further appointments at Hudson Spine due to his non-compliance with Dr. Rances' specific instructions, as his urine screenings reflected that he was not taking his medication as prescribed, as well as the presence of other unprescribed medications.

On October 6, 2015, plaintiff was taken by ambulance to Wyckoff Heights Medical Center ("Wyckoff") due to excruciating pain radiating from his buttocks down to his toes, decreased sensation in his legs, as well as inability to move them. Plaintiff was evaluated in the emergency department by Dr. Vukasinov, who assessed that plaintiff was suffering from an acute radiculopathy/back pain and planned on prescribing pain medication and a muscle relaxant and releasing him.

The plaintiff was not released, and on October 7, 2015, plaintiff was admitted to Wyckoff by Juan Carlos Fuentes-Rosales, M.D., ("Dr. Fuentes-Rosales"), the on-call attending physician. That day, plaintiff was examined by non-party resident Syed Quadri ("Dr. Quadri"), who noted plaintiff complained of urinary incontinence, bilateral leg weakness (more pronounced on left side), chronic back pain (10/10 severity) radiating down his legs, and an inability to sit or stand unassisted. An x-ray of plaintiff's lumbar spine was performed by non-party Dr. Fischbein, who did not identify any abnormalities and recommended additional studies if plaintiff's symptoms persisted.

On October 8, 2015, Dr. Quadri requested a neurology consult at 2:31 pm, which was countersigned by Dr. Fuentes-Rosales. At 4:10 pm a progress note signed by Dr. Quadri and Dr. Fuentes-Rosales noted plaintiff was experiencing urinary incontinence and to follow up with a neurosurgery consult. At 6:09 pm, a progress note by Dr. Fuentes-Rosales recommended full admission with neurology evaluation, stat Dexamethasone (steroid medication), MRI, monitoring of neurologic symptoms, as well as a physical therapy/occupational therapy evaluation. Dr. Matos-Cassano, a house physician in the Neurology Department, allegedly did not receive communication from Dr. Quadri on October 8th and did not receive a consult request until the following morning.

On October 9, 2015, Dr. Matos-Cassano performed a neurological exam of the plaintiff and reported his findings to Dr. Cohen, the on-call neurologist, who directed the immediate performance of a CT and MRI of the lumbar spine. A lumbar spine CT was performed later that day and revealed critical central canal stenosis at L3-L4, which is suggestive of cauda equina syndrome. Due to plaintiff's large size, he was unable to fit in the MRI machine at Wyckoff and was transferred to Columbia Presbyterian Hospital ("Columbia"). However, plaintiff was also unable to fit in the MRI machine at Columbia and was transferred back to Wyckoff.

The following day (October 10, 2015), plaintiff was transferred to North Shore Long Island Jewish Hospital ("North Shore"), for an immediate MRI of the lumbar spine, which revealed severe narrowing of the spinal canal and neural foramen at the L3-L4 levels. Plaintiff was diagnosed with cauda equina syndrome and underwent emergency laminectomy (decompression) that day. Plaintiff remained at North Shore until October 21, 2015, at which time he was discharged to North Shore Glen Cove Hospital for rehabilitation and was later transferred to Cobble Hill Health Center ("Cobble Hill") for further rehabilitation.

Since October 2015, plaintiff claims that he requires the use of a wheelchair and walker, has lacked control of his bowels (requiring the use of adult diapers), and continues to require prescription narcotics for his severe back pain. Plaintiff also claims to suffer from urinary incontinence, bilateral foot drop, complete loss of sensation from the waist down, and erectile dysfunction.

Parties' Contentions:

Here the Court is presented with the issue of whether defendant Dr. Cohen and plaintiff should be granted leave to reargue the defendants' motion to dismiss plaintiff's complaint as against Dr. Cohen, Dr. Rances, Hudson Spine, Dr. Matos-Cassano, and Dr. El-Hennawy.

In support of the motion by defendant Dr. Cohen, counsel argues that the Court's February 17, 2022 decision incorrectly found that plaintiff's expert raised a question of

fact regarding whether Dr. Cohen should have performed emergent surgery on plaintiff following the results of the CT scan (which demonstrated the presence of cauda equina syndrome). Counsel asserts that Dr. Cohen was never advised that a CT scan was performed before plaintiff was transferred from Wyckoff to Columbia, and thus could not have performed emergency surgery based upon those results. In addition, counsel argues that Dr. Cohen ordered the immediate transfer of the plaintiff to Columbia for an MRI and did not know plaintiff was not transferred immediately.

Counsel for plaintiff has opposed Dr. Cohen's motion to reargue and has submitted a motion on behalf of plaintiff to reargue the Court's February 17, 2022 decision, in which counsel argues that the Court misapprehended the opinions presented by plaintiff's expert, which conflicted with those of defendants' experts, and thereby created issues of fact regarding the alleged departures of all defendants which must be resolved by the jury.

In opposition to plaintiff's motion to reargue this Court's February 17, 2022 decision, counsel for Dr. Matos-Casano asserts that this Court did not misapprehend the law in reaching the conclusion that Dr. Matos-Casano could not be held liable for medical malpractice because he exercised no independent medical judgment. Counsel further argues that Dr. Matos-Casano was never notified or informed of the neurosurgery consult requests he allegedly failed to respond to.

Counsel for Dr. Rances and Hudson Spine also opposes plaintiff's motion, arguing that this Court did not misapprehend the law when it concluded that plaintiff failed to demonstrate that these defendants' alleged failure to refer plaintiff for earlier surgical evaluation and earlier neurology evaluation proximately caused plaintiff's injuries. In addition, counsel argues that the period³ indicated by plaintiff in which the care at issue was rendered does not include the treatment (prior to October 6, 2015) rendered by Dr.

³ Plaintiff allegedly stated that the care at issue commenced on October 6, 2015 (when plaintiff was taken by ambulance to Wyckoff) and ended in December of 2015 (when plaintiff was discharged from Cobble Hill).

Rances at Hudson Spine. As such, counsel maintains that the motion on behalf of Dr. Rances and Hudson Spine for summary judgment was properly granted.

Counsel for Dr. El-Hennawy also opposes plaintiff's motion, arguing that this Court did not misapprehend the facts or law in finding that plaintiff failed to demonstrate that Dr. El-Hennawy was involved in plaintiff's care prior to October 9, 2015. Counsel argues that Dr. Vukasinov admitted that his note (indicating he conferred with Dr. El-Hennawy on October 7th) was an error, and that he instead had spoken with Dr. Fuentes-Rosales. In addition, counsel asserts that Dr. El-Hennawy did not depart from the standard of care by ordering a CT scan, neurological consult, and transfer to a tertiary hospital where an MRI and potential surgery might be performed.

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]. It is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. McGill v Goldman, 261 AD2d at 594.

This Court has considered the merits of the arguments of counsel as well as their submissions. In doing so, this Court evaluated defendants' assertions that the February 17, 2022 decision misapprehended the facts with respect to the alleged failure of Dr. Cohen to perform emergency surgery based upon the results of the CT scan. Although counsel for Dr. Cohen claims that he never knew the results of the CT scan, Dr. Cohen was the on-call neurologist and was responsible for plaintiff's treatment from the period immediately preceding his failed transfer from Wyckoff to Columbia, as well as the period when plaintiff returned to Wyckoff pending transfer to North Shore. As there are conflicting expert opinions as to whether Dr. Cohen departed from the standard of care

during this period, and it is well settled that conflicting expert opinions create a question of credibility which must be resolved by a jury, defendant's motion to reargue is denied.

This Court has also considered the plaintiff's assertions that the February 17, 2022 decision misapprehended the facts and law with respect to the dismissal of plaintiff's complaint as against Dr. Rances and Hudson Spine, Dr. Matos-Casano, and Dr. El-Hennawy. This Court still finds that plaintiff failed to demonstrate any acts or omissions on the part of these defendants. Accordingly, plaintiff's motion to reargue is denied.

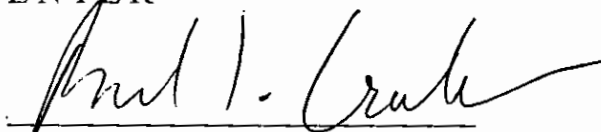
Conclusion:

The motions by counsel for defendant Dr. Cohen (seq. 8) as well as counsel for plaintiff (seq. 9) for an Order granting reargument of the February 17, 2022 decision of the undersigned has been granted by the Court. Upon reargument the decision of the Court dated February 17, 2022 shall remain in full force and effect.

This shall constitute the decision and order of this Court.

Dated: November 18, 2022
Brooklyn, NY

ENTER



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

HON. BERNARD J. GRAHAM