

Padilla v Labow

2022 NY Slip Op 34243(U)

December 14, 2022

Supreme Court, New York County

Docket Number: Index No. 805098/2018

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY **PART** **56M**

Justice

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WILFREDO PADILLA,

Plaintiff,

- v -

DANIEL LABOW, M.D., ARZU BUYUK, M.D., GEORGE
LEE, CT, MOUNT SINAI HOSPITAL, MOUNT SINAI WEST,
and MOUNT SINAI HEALTH SYSTEM, INC.,

Defendants.

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INDEX NO. 805098/2018

MOTION DATE 09/23/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 148, 149, 150, 151, 152, 153, 154, 155, 156 were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

In this action to recover damages for medical malpractice based on departures from good and accepted medical practice, the defendant Mount Sinai West moves pursuant to CPLR 2221(d) and (e) for leave to reargue and renew its prior motion for summary judgment dismissing the complaint insofar as asserted against it, which had been denied, in part, by order dated May 4, 2022 (SEQ 001). The plaintiff cross-moves pursuant to CPLR 2221(d) for leave to reargue his opposition to the motion of the defendants Arzu Buyuk, M.D., George Lee, CT, and Mount Sinai West for summary judgment dismissing the complaint insofar as asserted against them, which had been granted, in part, by the same order. The motion and cross motion are denied.

In its May 4, 2022 order, this court awarded summary judgment to pathologist Buyuk and cytotechnician Lee, dismissing the complaint insofar as asserted against each of them. In this regard, the court concluded that, in opposition to Buyuk's prima facie showing of entitlement to judgment as a matter of law, the plaintiff failed to raise a triable issue of fact as to whether any

negligence she may have committed in classifying and characterizing biopsy samples was a proximate cause of the determination of the defendant Daniel Labow, M.D., to proceed with surgery to remove the plaintiff's pancreas. The court further concluded that, in opposition of Lee's prima facie showing of entitlement to judgment as a matter of law, the plaintiff failed to raise a triable issue of fact because his expert did not address Lee's conduct at all. In that order, the court also awarded summary judgment dismissing the complaint insofar as asserted against Mount Sinai West, but only to the extent of dismissing the claims against it premised upon its vicarious liability for the conduct of Buyuk and Lee. The order declined to award summary judgment to Mount Sinai West to the extent the claims against it were premised upon its vicarious liability for the conduct of Labow, who testified at his deposition that he was an employee of Mount Sinai West, as well as of the defendant Mount Sinai Hospital.

That branch of Mount Sinai West's motion seeking to leave to reargue, and the plaintiff's cross motion seeking leave to reargue, are denied, inasmuch as the court did not overlook or misapprehend any facts or relevant law (see *Sealy v Uy*, 132 AD3d 839 [2d Dept 2015]) that were presented to it in connection with the prior application (see CPLR 2221[d][2]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]). The purpose of a motion to reargue is not "to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971, 971 [1st Dept 1984], quoting *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]).

That branch of Mount Sinai West's motion seeking renewal also must be denied. A motion for leave to renew a prior motion must be based upon "new facts not offered on the prior motion that would change the prior determination" or must show that "there has been a change in the law that would change the prior determination" (CPLR 2221[e][2]; see *Melcher v Apollo Med. Fund Mgt., LLC*, 105 AD3d 15, 23 [1st Dept 2013]). In support of its request for renewal, Mount Sinai West submitted an affidavit from the Manager of Human Resources Information Systems for all of the separately incorporated hospitals operating within the Mount

Sinai network. She averred that, notwithstanding Labow's deposition testimony to the contrary, he did not work at Mount Sinai West in 2016, when he performed the subject surgery at the Mount Sinai Hospital, a facility distinct from Mount Sinai West, but only had admitting privileges at Mount Sinai West as a private attending physician. She further asserted that, although Labow testified at his December 2019 deposition that, as of 2019, he was the chief of surgical oncology at Mount Sinai West and had been the assistant chief in 2016, he actually "performed that role in the context of a private attending with admitting privileges, and not as a physician employed by the Hospital."

While Mount Sinai West's submission set forth facts that were not considered in connection with the initial motion, the submission nonetheless is insufficient to change the court's prior determination (*see Bronson v Jacobs*, 204 AD3d 531, 531 [1st Dept 2022]; *Justino v Santiago*, 116 AD3d 411, 411 [1st Dept 2014]), as it simply reflected that there are disputed issues of fact as to whether Labow was or was not an employee of Mount Sinai West in 2016. Simply stated, Labow testified that he was an employee of Mount Sinai West at that time, while the affiant asserted that he was not. "Such conflicting evidence precludes summary judgment in defendants' favor" (*Justino v Santiago*, 116 AD3d at 411).

Moreover, Mount Sinai West presented no reasonable justification for its failure to present the new facts on the prior motion. "[R]enewal is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Bronson v Jacobs*, 204 AD3d at 531, quoting *Rubinstein v Goldman*, 225 AD2d 328, 328-329 [1st Dept 1996] [some internal quotation marks omitted]; see CPLR 2221[e]).

Accordingly, it is

ORDERED that the motion of the defendant Mount Sinai West is denied; and it is further, ORDERED that the plaintiff's cross motion is denied.

This constitutes the Decision and Order of the court.

12/14/2022
DATE



JOHN J. KELLEY, J.S.C.

MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
CROSS MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
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