

Yan v Phelps Memorial Hosp.
2022 NY Slip Op 35210(U)
January 30, 2022
Supreme Court, Westchester County
Docket Number: Index No. 70292/2018
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

-----X
MARISOL YAN & JUANA MARTINEZ,

Plaintiff,

-against-

Decision and Order
Index No. 70292/2018
Sequence # 4

PHELPS MEMORIAL HOSPITAL and SECURITY AT
PHELPS,
Defendants

-----X
The following papers were considered on defendant motion to renew and reargue.

Notice of Motion/Affirmation/Affidavit/Exhibit	1-7
Affirmation/Affidavits in Opposition/Exhibit A-D	8-12
Affirmation/Affidavit in Reply	13

STATEMENT OF THE FACTS

The plaintiffs commenced this action on December 12, 2018, seeking monetary damages against the defendants with regard to an incident that occurred at Phelps Memorial Hospital on December 11, 2017. The complaint alleges that Marisol Yan ("Yan") was experiencing excruciating back pain that radiated down her leg. She was out of her medication and went to the Phelps Memorial Hospital ("Phelps") emergency room with her mother, Juana Martinez ("Martinez").

As per the hospital records, Yan was triaged at 6:55 a.m. She was evaluated and

at approximately 8:16 a.m., she was given acetaminophen, and other medications, which were not her usual medications prescribed by her doctor. Yan states in her complaint that she requested to speak with a psychologist because she was having suicidal thoughts, she spoke with a psychologist/psychiatrist and was cleared for discharge.

The hospital notes indicate that at 9:55 Yan was feeling more comfortable with the medications given, but then at or about 10:30 she complained that she was still having pain and 10mg/325 mg of Percocet was ordered for her, which she took after having something to eat. At 11:37, Yan's pain intensity was recorded at 4. The records indicate that at or about 12:31; discharge was attempted with instruction for follow up and pain management, but Yan emphatically and adamantly declined to leave and requested a neuro/ortho surgical doctor. The notes indicate that Yan was repeatedly advised that the services she required were not offered at the hospital and that her discharge instructions included follow-up and pain management. Yan alleges that she respectfully asked to be given twenty minutes for the pain to resolve. At 13:19, the notes indicate that Yan was still refusing to leave and refusing to let the registered nurse take out a saline lock.

The hospital records indicate that at 14:06, Yan was escorted out of the room by security and a nurse manager; that she ambulated to the waiting room with steady gait; she screamed and yelled at the nursing staff and security, stating that she was not going to leave; and when the police arrived, she agreed to have her IV lock discontinued.

Yan alleges that, although Martinez went outside of the room and told the

security personnel that they were going to leave the hospital, but they were just waiting for Yan to feel better, the security barged into the room and grabbed Yan by both arms, under her armpits and pulled her out of the room. She alleges that she pleaded with them to stop, but they continued to pull her into the hallway and she fell to the floor. Yan asserts that as she was being pulled by her arms, she felt something pop in her right shoulder. She states that Martinez called the police and after the police arrived, her IV was removed and she was allowed to get dressed. Yan alleges that Martinez recorded the incident with her cell phone, but the police asked Martinez to give them her phone so they could delete the video, which they did. The hospital on the other hand asserts that there is no video footage showing that Yan was pulled out of the room by Phelps security and the video footage shows Yan, Martinez, Phelps security and medical staff while she was escorted out of the emergency department. The defendant asserts that the footage shows Yan shoving a female nurse and shouting at a Phelps security guard and the police were called, with Yan walking out of the hospital on her own after the police arrived.

After leaving Phelps, Yan went to Westchester Medical Center, where she was medicated and discharged home, but did not report any shoulder pain. The following day, Yan went to her primary care office at Open Door and reported upper arm pain. Yan returned to Open Door on December 14, 2017, and was seen by Dr. Isentein, who made notes of his conversation with Dr. Patrone in the ER, but did not note any right shoulder pain by Yan. On December 26, 2017, however, Yan returned to Open Door complaining of arm and neck pain on her right side.

On March 5, 2018, Yan returned to Open Door reporting that her shoulder pain

had worsened and she was referred to an orthopedist, Dr. Daniel Zelazny, who referred her for an MRI of her shoulder after she had no relief from a corticosteroid injection. The MRI showed a high grade articular sided partial-thickness tear of the supraspinatus; posterior superior labral tear; increased edema signal noted within teres minor musculature. On March 12, 2018, Dr. Isenstein stated that an x-ray performed on January 29, 2018 showed severe narrowing of the acromioclavicular joint suggestive of osteoarthritis and was referred to orthopedics for possible further management.

On July 16, 2018, Dr. Zelazny documented that Yan reports continued shoulder pain as well as neck and right upper extremity pain with numbness radiating from the neck to her hand and that he is concerned about her symptoms and exam findings consistent with cervical radiculopathy.

On October 8, 2018, Yan was examined by Dr. Yigal Samocha, an orthopedic surgeon, who reported that Yan had tenderness to palpation in the right paraspinal musculature and some weakness noted of her right rotator cuff musculature, consistent with her tear. He also noted cervical range of motion limitation of 75% of normal and decreased sensation along the right C6, C7, and C8 dermatomal distribution and generalized 5-/5 weakness of the entire right upper extremity. Dr. Samocha noted that Yan had been complaining of the relevant pain since December 2017, noted no particular inciting event or injury, but stated a fairly acute onset of her symptoms. He also noted that Yan had a previous surgery on her right shoulder in 1996.

On December 17, 2018, Dr. Zelazny saw Yan and noted that the MRI documented right shoulder partial tearing and AC joint arthrosis. She had continued neck and shoulder pain and he noted that a cervical spine MRI had been obtained,

which prompted ordering of EMG's and nerve conduction studies. Dr. Zelazny stated that Van's status is post remote shoulder arthroscopy in 1998 by another surgeon and suggested surgical intervention in the form of arthroscopy for a possible rotator cuff debridement versus repair as well as distal clavicle resection and acromioplasty, but Yan does not wish to proceed with that suggestion.

Yan had the EMG studies done on April 1, 2019, Dr. Samocha noted that Yan continued to complain of severe pain in her right shoulder with radiation into her right upper arm and that the pain has been ongoing since she was restrained by the security guard at Phelps Hospital. Dr. Samocha assessed that Yan has a partial right rotator cuff tear as well as acromioclavicular arthritis, with C4-5 central disc protrusion with mild cord flattening and mild C5-6 disc degeneration and right upper extremity symptoms, most likely related to her shoulder pathology and much less likely related to cervical radicular syndrome. Dr. Samocha stated that Yan's pain is likely more related to her shoulder than her neck and recommended follow up with Dr. Zelazny for consideration of surgical intervention for her shoulder. Martinez has joined in the action with a claim for negligent infliction of emotional distress.

The defendants filed a motion seeking an order pursuant to CPLR 3211 (a)(7), dismissing the complaint for failure to state a cause of action; pursuant to CPLR 3012(a)(1), dismissing the plaintiffs' complaint for failure to provide a Certificate of Merit; and pursuant to CPLR 3212, granting summary judgment to the defendants, dismissing the claims. The Court by Decision and order dated September 30, 2021, and filed on October 12, 2021, granted the defendants' motion in all respect and dismissed plaintiff's complaint.

Plaintiff now moves for an Order pursuant to CPLR 2221 and 5015(5) granting the plaintiffs' motion for leave to reargue this Court's September 30, 2021 Decision and Order, and upon reargument, denying the defendants' motion for summary judgment and vacating judgment entered on November 9, 2021, and such other relief this Court might find just and proper.

DISCUSSION

A motion for reargument must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion", (CPLR 2221[d][2]). Such motions are addressed to the sound discretion of the Supreme Court, (*see Deutsche Bank Nat. Trust Co. v. Ramirez*, 117 A.D.3d 674, 985 N.Y.S.2d 616 [2nd Dept.2014]). A motion for leave to reargue is thus not one which provides an unsuccessful party with successive opportunities to reassert or propound the same arguments previously advanced. Nor is it one that provides a platform for the presentation of arguments different from those already presented, (*see V. Veeraswamy Realty v. Yenom Corp.*, 71A.D.3d 874, 895 N.Y.S.2d 860 [2nd Dept. 2010]; *Woody's Lumber Co., Inc. v. Jayram Realty Corp.*, 30 A.D.3d 590, 817 N.Y.S.2d 391[2d Dept. 2006]; *Williams v. Board of Educ. of City School Dist. of New York City*, 24 A.D.3d 458, 805 N.Y.S.2d 126 [2nd Dept. 2005]; *Simon v. Mehryari*, 16 A.D.3d 543, 792 N.Y.S.2d 543 [2nd Dept. 2005]).

The plaintiffs in their motion to reargue, state that the Court in its prior Decision misapprehended the facts and the law applicable to this case, in that, this Court determined that the defendants did not owe the plaintiff a duty of care because she was a trespasser. However, New York law no longer adopts the distinction among licenses,

trespassers and invitees in order to determine a landowner's duty of care, so even if the plaintiff was a trespasser, which she was not, the defendants still owed her duty of care, as admitted by the defendants' own witness. The plaintiffs also claim that the Court misapprehended the facts by holding that the plaintiffs did not dispute the defendants' argument that Yan was a physical threat to others and was appropriately removed by force from the defendants' premises. The plaintiffs specifically addressed the defendants' allegation and denied that Yan ever touched any of the defendants' employees, which by itself creates an issue of fact that should have precluded summary judgment in defendants' favor.

To support this contention that the defendants did not owe the plaintiffs a duty of care because Yan was a trespasser, the plaintiffs rely upon the holding in *Basso v. Miller*, 40 NY2d 233 (1976) for the proposition that there is no longer a distinction among licenses, trespassers and invitees, and therefore, Yan could not have been a trespasser relieving the defendants of liability. The sum and substance of the Court's prior holding is, "once Yan was medically discharged, expressly asked to leave on multiple occasions and refused to leave the hospital, she would then be considered a trespasser and the hospital no longer had a duty of care or to protect because she was no longer lawfully present on its premises."

The Court of Appeals in *Basso* held that a "single standard of care should be applied without distinction among licenses, trespassers and invitees; the duty of the landowner should not vary with the person using the property, but he should act reasonably to maintain safe conditions in view of all the circumstances....," (see *Basso v. Miller*, 40 NY2d 233 (1976)). The Court ruled that property owners must take reasonable

measures to maintain the safety of the property for whoever enters it. The property owner's duty is measured by the foreseeability of a visitor on the property, regardless of any status. As the Court opined in (*Scurti v. City of New York*, 40 N.Y.2d 433 [1976]), "[t]oday the court has held that the liability of a landowner to one injured upon his property should be governed, not by the ancient and antiquated distinctions between trespassers, licensees, and invitees decisive under common law, but rather by the standard applicable to negligence cases generally, i.e., the 'standard of reasonable care under the circumstances where by foreseeability shall be a measure of liability.'"

Therefore, the landowner has a duty of care to keep the premises safe, even towards trespassers. So if a patient has to be removed from a hospital, whether forceable or not the hospital has a duty to exercise reasonable care to prevent injury during the removal.

In opposition to Plaintiff's motion, defendants rely on the holding in (*Laluna v. DGM Partners*, 234 A.D.2d 519 [2d Dept.1996]), where the Court held that landowners do not always owe a duty of care to trespassing plaintiffs. In *Laluna*, however, the plaintiff was injured when he fell off the second floor after drinking three beers with five friends and entering a dark building. The court citing *Basso* held that, "[a] landowner has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries." The court in *Laluna* opined that the "dangerous condition inside the premises could have been observed by the plaintiff".

In the case at bar, however, the plaintiff was not harmed by a condition of the hospital's building that she could have easily observed, but by injuries she allegedly sustained from being forceably removed from the premises by the defendants' employees. There is no indication in the record that the plaintiff could have foreseen any

'risk of injury' by the defendants' employees. As the court opined in *Laluna* "the issue of whether accidents are foreseeable and what preventive measures should have been taken are ordinarily questions for the jury." (*Id.* @ 520; see *Basso v. Miller*, 40 NY2d 233 [1976]). This further begs the question, does being asked to vacate premises multiple times create a "risk of injury." The forceful acts of defendants' security personnel are not a condition that the plaintiff could have anticipated or foreseen when she entered the premises unlike the plaintiff in *Laluna*.

Yan also disputes that she "was threatening, boisterous, demanding medication and stating that she was not leaving until she received medication," which would indicate that she was a physical threat to others and justified the use of force to remove Yan from the premises. This creates issues of fact as to the circumstances surrounding Yan's forceful ejection from the hospital since both plaintiffs testified that Yan never touched or shoved any of the staff members at Phelps Memorial.

It is fundamental that "summary judgment should only be granted where there are no material and triable issues of fact" (see *Stretch v. Tedesco*, 263 A.D.2d 538, 693 N.Y.S.2d 203; see *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131, 320 N.E.2d 853) and that "issue finding, as opposed to issue determination, is the key to summary judgment" (see *Stretch v. Tedesco*, supra at 539, 693 N.Y.S.2d 203; see *Judice v. DeAngelo*, 272 A.D.2d 583, 709 N.Y.S.2d 427). Here, the defendants have failed to demonstrate the absence of triable issues of fact.

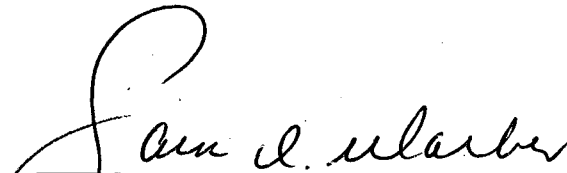
Therefore, based on the foregoing, it is

ORDERED that the plaintiffs' motion for reargument is granted and upon reargument, it is

ORDERED that the defendants' motion for summary judgment is denied in full and the judgment entered on November 9, 2021 is vacated.

The foregoing constitutes the Opinion, Decision and Order of the court.

Dated: White Plains, New York
June 30, 2022



HON. SAM D. WALKER, J.S.C.