

Stoopler v O'Leary

2023 NY Slip Op 34079(U)

November 17, 2023

Supreme Court, Kings County

Docket Number: Index No. 523332/2020

Judge: Consuelo Mallafre Melendez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 15 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17th day of November 2023.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
AMANDA STOOPLER,

Plaintiff,

-against-

PATRICK F. O’LEARY, M.D., SIMONE SPRING, PA-C,
JUSTIN C. BATTLE, P.A., and HOSPITAL FOR SPECIAL
SURGERY,

Defendants.

-----X
HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.

DECISION & ORDER

Index No. 523332/2020
Mo. Seq. 2

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: 46 – 48, 49 – 69, 74 – 75, 76 – 79, 80

Defendants, PATRICK F. O’LEARY, M.D., SIMONE SPRING, PA-C, JUSTIN C. BATTLE, P.A., and HOSPITAL FOR SPECIAL SURGERY (hereinafter “HSS”), move this court for an order pursuant to CPLR § 3212(a) extending defendants time to make dispositive motions on good cause shown; and for an order pursuant to CPLR § 3212 granting summary judgment to SIMONE SPRING, PA-C and JUSTIN C. BATTLE, P.C. and dismissing Plaintiff’s complaint as against them with prejudice; and for an order pursuant to CPLR § 3212 granting partial summary judgment to HSS on claims/causes of action related to the alleged negligence of defendants SIMONE SPRING, PA-C and JUSTIN C. BATTLE, P.C. and the cause of action for lack of informed consent; and for an order pursuant to CPLR § 3212 granting partial summary judgment to PATRICK F. O’LEARY, M.D. on the cause of action for lack of informed consent and dismissing the cause of action with prejudice; and for an order pursuant to CPLR § 3124 compelling plaintiff’s production of outstanding discovery.

This case involves treatment of plaintiff at Hospital for Special Surgery (HSS) on September 21, 2018. Amanda Stoopler was admitted to HSS for lumbar spine surgery under the care of Dr. O’Leary. Ms. Stoopler was treated by Simone Spring, PA-C and Justin C. Battle, P.A.

during her admission. Plaintiff alleges PA Spring and PA Battle deviated from the standard of care by discharging plaintiff with an undiagnosed wound hematoma that became infected leading to further surgeries and serious complications including vision loss.

Plaintiff does not oppose Defendants' motion seeking to dismiss Plaintiff's cause of action for negligent hiring/retention. In addition to their opposition to the other relief requested in this summary judgment motion, Plaintiff objects to its untimeliness as beyond 60 days of the filing of the Note of Issue.

As to this late summary judgment motion, review of the discovery in this case reveals that the last party deposition, which was of Defendant HHS by witness Dr. Pompeu, was held on October 14, 2022. Following that deposition, Plaintiff filed their Note of Issue on October 20, 2022. In response to Defendants' motion to strike the Note of Issue, by Order dated December 2, 2022, the Central Compliance Part ("CCP") court declined to strike same and directed that discovery be completed on or before January 6, 2023. The Order further states, "(t)hat part of the motion seeking extension of time to file summary judgment is denied with leave to renew before the IAS Judge in accordance with Brill v City of New York..." As such, the court clearly deferred the ruling regarding an extension of time to file a summary judgment motion to the undersigned, the IAS judge. Also evident is that the court differentiated non-party discovery from party discovery, the latter constituting pertinent discovery usually required to be completed prior to the filing of a Note of Issue. In no uncertain terms the Order states "(p)lease note that the issue of non-party depositions has not been considered on this motion as the Note of Issue is relevant only to party discovery." It is also noted that the instant motion was filed by Defendants on March 7, 2023, approximately 138 days after the filing of the Note of Issue.

Defendants argue that they made a good faith effort to file the instant motion without undue delay. They state that it was filed within 60 days of completion of the last deposition in this case: the non-party deposition of plaintiff's father, Evan Stoopler, on January 10, 2023. In support of this request for an extension of time, Defendants argue that the deposition of the plaintiff's father was essential to their summary judgment motion. They also claim that Plaintiff's parents' deposition testimony was critical to this dispositive motion as it addresses plaintiff's claims that the PAs allegedly ignored her complaints during the admission and that, as a result, she was improperly discharged. Further it is their position that these non-party depositions were critical to the informed consent cause of action since the parents were present

during pre-surgical visits to Dr. O’Leary. In addition, the movants claim that they sent letters to Plaintiff’s counsel seeking documentary discovery, some of which they state is still outstanding. They also indicate that a Demand for Authorizations and a new Notice of Discovery dated January 17, 2023 was outstanding.

Defendants also refer to the Court Order of December 2, 2022 which resulted from their motion to extend time to file a summary judgment motion due to claims of outstanding discovery. In support of that motion, they claimed that the deposition transcript of HSS witness Dr. Pompeu had not been received as of the filing of the Note of Issue on October 20, 2022. Additionally, they argued that plaintiff had not responded to all paper discovery demanded by defendants, that the non-party depositions of plaintiff’s parents who were both present during the post-operative admission at issue were outstanding, and that, in sum, discovery remained incomplete.

The Kings County Supreme Court Uniform Civil Term Rules, Part C6 states, in relevant part, that “motions for summary judgment may be made no later than sixty (60) days after the filing of a Note of Issue...the above time limitation may only be extended by the Court upon good cause shown. See CPLR § 3212(a).” Referring to the aforementioned, the Second Department holds that “a party is required to make its motion for summary judgment no more than 60 days after the note of issue is filed, unless it obtains leave of the court on good cause shown.” See *Popalardo v. Marino*, 83 A.D.3d 1029, 1030 [2d Dept. 2011]; *Kennedy v. Bae*, 51 A.D.3d 980, 981 [2d Dept. 2008]; *Gonzalez v. Pearl*, 179 A.D.3d 645 [2d Dept 2020]; see also *Torres v Serlin Bldg. Ltd. Partnership*, 208 AD3d 1195 [2d Dept 2022]. The Court of Appeals holds that a showing of good cause for the delay in filing a motion for summary judgment is required by CPLR 3212(a). *Brill v. City of New York*, 2 N.Y.3d 648, 652 [2004]; see Kings County Supreme Court Uniform Civil Term Rules, part C, rule 6; *Gonzalez v. Pearl*, 179 A.D.3d at 646. In the absence of such a “good cause” showing, the court has no discretion to entertain even a meritorious, nonprejudicial motion for summary judgment. *Thompson v. New York City Bd. of Educ.*, 10 A.D.3d 650, 657 [2d Dept. 2004]. Furthermore, “[n]o excuse at all, or a perfunctory excuse, cannot be ‘good cause.’” See *Brill*, 2 N.Y.3d at 652; *Lanza v. M-A-C Home Design and Construction Corp.*, 188 A.D.3d 855 [2d Dept. 2020].

“While significant outstanding discovery may, in certain circumstances, constitute good cause for a delay in making a motion for summary judgment, the movant must establish that the

discovery was ‘essential to its motion.’” *Ragoonanan v 43-25 Hunter, LLC*, 214 AD3d 831, 832 [2d Dept 2023] quoting *Navarro v Damac Realty, LLC*, 202 AD3d 1100, 1101 [2d Dept 2023] [internal quotation marks, citations, references, and alterations omitted]; see also *Greenpoint Props., Inc. v. Carter*, 82 A.D.3d 1157, 1157-1158 [2d Dept. 2011]. “‘This standard generally requires that the discovery be relevant to resolving disputed issues of fact’ (*Fuczynski v 144 Div., LLC*, 208 AD3d 1153, 1155 [2d Dept 2022]; see *Johnson v Peconic Diner*, 31 AD3d 387, 388 [2d Dept 2006])”. *Ragoonanan*, 214 A.D.3d at 832.

As mentioned above, Defendants’ excuse for the late filing of the instant summary judgment motion is that discovery is outstanding. However, there is little to no support that any of the outstanding documentary discovery is essential to the medical issues in the motion, or to the lack of informed consent claim. Significantly, they have not established that the deposition of Plaintiff’s father, a non-party witness, was essential to the issues relevant in this summary judgment motion.

In this case, summary judgment is sought on behalf of two Physician Assistants involved in the treatment of the adult plaintiff during her admission at HSS. Contrary to Defendants’ assertion, Defendants’ expert does not rely on the testimony of plaintiff’s father in formulating any of his medical opinions, including those relating to lack of informed consent. Further, the testimony of Mr. Stoopler did not add any substantial information to factual issues, if any, in the underlying motion. The transcript of Evan Stoopler is noted in the Statement of Facts only to the following extent:

“61. Plaintiff’s father testified that he did not recall any care provided by PA Spring during plaintiff’s September 21, 2018 admission. (Exhibit “L”, pp. 50-51).

62. Plaintiff’s father testified that he had conversations with PA Spring about plaintiff being in a lot of pain, but he did not remember anything PA Spring said in response. (Exhibit “L”, p. 50).”

Indeed, the court finds no instance where the testimony of the father serves as a basis in establishing defendant’s burden on summary judgment as to either the treatment involved in this matter or the lack of informed consent cause of action. Furthermore, the only mention of

Plaintiff's mother¹ by Defendant's experts is that "Dr. O'Leary allowed plaintiff and plaintiff's mother to ask him questions about the surgery". NYSCEF #49 Para. 13. Nothing in this statement is essential to the lack of informed consent claim. Thus, the claimed outstanding discovery was not relevant to resolving disputed issues of fact nor essential to the substance of the summary judgment motion. In conclusion, movant's explanations do not constitute good cause to excuse the late summary judgment motion.

Additionally, Defendants do not proffer an excuse for seeking an extension to file the summary judgment approximately two months after the non-party deposition and almost 5 months after the Note of Issue was filed. The Second Department holds that "[e]ven if the discovery is essential, good cause for the delay will only exist if the party promptly moves for summary judgment after securing such discovery" *Ragoonanan*, 214 A.D.3d at 832. In *Ragoonanan v. 43-25 Hunter, LLC*, the plaintiff movant claimed an outstanding deposition was essential to the summary judgment motion and that it served as good cause for the delay in filing the motion. In that case, the motion for summary judgment was filed approximately two months after the deposition was held. The Court held that "plaintiff did not promptly seek an extension and failed to articulate any reason for his delay of approximately two months in moving for summary judgment after the deposition (*see Torres v Serlin Bldg. Ltd. Partnership*, 208 AD3d 1195 [2022])." *Id.*

In this matter, while the CCP court granted permission to seek an extension of time to file a summary judgment motion on December 2, 2022, such motion was not filed until March 7, 2023 - over three months after that court order, four months after the Note of Issue was filed and almost two months after the non-party deposition was held. No reason was given to explain why the request under *Brill* was not made until March 2023.

In sum, good cause is not shown for the late filing of this summary judgment motion and the court rejects the excuses proffered by the movants for the reasons stated herein. Absent a showing of good cause, this court is precluded from entertaining Defendants' untimely summary judgment motion without regard to potential merit of the application and/or lack of prejudice to the non-moving party. *See* CPLR § 3212[a]; *Brill*, 2 N.Y.3d at 652; *Thompson*, 10 A.D.3d at 657.

¹ The deposition of Plaintiff's mother took place on November 17, 2022 and is thus not offered as an excuse for the late filing.

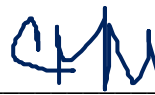
As Plaintiff does not oppose summary judgement on the negligent hiring/retention cause of action, this claim is dismissed without addressing the merits of the underlying motion in compliance with *Brill*.

The parties are reminded that all discovery issues are to be addressed in CCP and that pursuant to the December 2, 2022 CCP order, the Note of Issue remains in place.

Accordingly, the motion is DENIED.

This constitutes the decision and order of the court.

ENTER.



**Hon. Consuelo Mallafre Melendez
J.S.C.**