

Larios v Gauthier

2023 NY Slip Op 34343(U)

December 7, 2023

Supreme Court, New York County

Docket Number: Index No. 805203/2022

Judge: Erika M. Edwards

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ERIKA M. EDWARDS

PART 10M

Justice

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JOSE LARIOS,

Plaintiff,

- v -

ARINXE RANDY GAUTHIER, SEBASTIAN VALDIVIESO
RUEDA AND NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION/ HARLEM,

Defendants.

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INDEX NO. 805203/2022

MOTION DATE 10/06/2023

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 78, 79, 80, 81, 84, 85

were read on this motion to/for REARGUE/DISQUALIFY COUNSEL.

Upon the foregoing documents, the court denies Plaintiff Jose Larios’ motion to disqualify defense counsel and to reargue the portion of his summary judgment motion regarding vicarious liability and upon reargument, for an order reversing the court’s previous decision denying this portion of the motion and for an order granting summary judgment in Plaintiff’s favor on this issue.

Plaintiff brought this medical malpractice and lack of informed consent action against Defendants Arinxe Randy Gauthier, Sebastian Valdivieso Rueda, Howard Katz (“Dr. Katz”) and New York City Health + Hospitals Corporation/Harlem (“HHC”) (collectively “Defendants).

In a previous decision and order, dated July 28, 2023, the court granted Defendant Dr. Katz’ motion to dismiss Plaintiff’s complaint against him for lack of personal jurisdiction, the court denied Plaintiff’s motion to strike some of Defendants’ affirmative defenses and for partial summary judgment in Plaintiff’s favor on the issue of whether Defendant HHC is vicariously liable for Dr. Katz’ acts and/or omissions. The court found that since there had not been any

depositions conducted and since discovery on this issue had not yet been completed, the order would be premature. However, the court stated that “it is clear that since Defendant Dr. Katz was an employee of Defendant HHC at the time of Plaintiff’s treatment, should Plaintiff demonstrate that Defendant Dr. Katz’s alleged acts and/or omissions giving rise to Plaintiff’s alleged injuries and damages occurred during the time of such employment and within the scope of such employment, then barring any unforeseen issues, Defendant HHC would be held vicariously liable for Dr. Katz’s acts and/or omissions. However, at this time, such circumstances have yet to be established.” Therefore, since Plaintiff had not yet established all of the prima facie elements of this allegation, the court denied Plaintiff’s request for summary judgment on this issue as premature.

Plaintiff now moves under motion sequence 005 for an order disqualifying Dopf, P.C. from representing Defendants in this action due to an alleged conflict of interest and for leave to reargue the portion of Plaintiff’s previous summary judgment motion regarding Defendant HHC’s vicarious liability for Dr. Katz’ conduct and/or omissions.

Plaintiff argues in substance that the court misinterpreted the law on vicarious liability and should have granted partial summary judgment in Plaintiff’s favor. Additionally, Plaintiff argues in substance that since the court indicated in substance that Plaintiff’s counsel would really have to convince the court to rule in favor of Plaintiff, the court’s subsequent decision to cancel the oral argument and decide the motions on the papers prejudiced Plaintiff by depriving Plaintiff’s counsel the opportunity to orally argue the motion.

Defendants oppose the motion.

Pursuant to CPLR 2221(d)(2), a motion for leave to reargue is left to the sound discretion of the court and may be granted only where the moving party contends that an issue of law or

fact had been overlooked or misapprehended by the court when deciding the original motion (CPLR 2221[d][2]). It is not designed to provide the unsuccessful party successive opportunities to reargue issues previously decided by the court or to present new evidence or different arguments than previously raised (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [internal citations and quotation marks omitted]).

Here, Plaintiff fails to demonstrate his entitlement to reargument on this issue and that the court misinterpreted or overlooked the law on vicarious liability or the fact that Dr. Katz was an employee of HHC when it declined to grant partial summary judgment in Plaintiff's favor prior to depositions and virtually no discovery on this issue. Plaintiff presented no affidavit, testimony or any evidence that Dr. Katz was performing work within the scope of his employment. This does not mean that there is any evidence to the contrary, or that there is a specific concern regarding whether Dr. Katz' conduct was within the scope of his employment. However, in virtually every medical malpractice case involving the issue of whether a hospital or facility is vicariously liable for an employee's acts or omissions, a Plaintiff must demonstrate that the employee was acting within the scope of his or her employment at the time of the alleged negligence. Defendants neither admitted, nor denied it. The court simply determined that Plaintiff failed to satisfy his burden as a matter of law at this early stage of discovery.

For some reason, Plaintiff now appears to interpret the court's determination as support for his argument that defense counsel has a conflict because there may be an issue as to whether Dr. Katz' conduct was outside the scope of his employment with HHC. This argument fails on numerous grounds. The court determines that Plaintiff failed to demonstrate that there is a conflict or potential conflict requiring disqualification of defense counsel. It is simply an element of vicarious liability. Furthermore, the complaint was already dismissed against Dr. Katz. Even

though defense counsel may continue to represent him as a non-party witness, the court finds no reason to disqualify counsel from representing Dr. Katz, HHC, or any of the defendants.

Additionally, once the case was fully submitted, neither party has a right to orally argue the motion. The court exercised its discretion and scheduled oral argument. Once defense counsel failed to appear, the court took advantage of the opportunity to further review the arguments and relevant cases and the court determined that oral argument was no longer necessary to decide the motion.

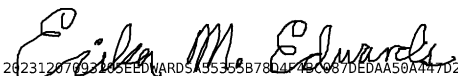
Therefore, the court finds that Plaintiff failed to demonstrate the existence of a conflict or potential conflict requiring disqualification of Dopf, P.C., or that reargument should be granted. Thus, the court denies the motion in its entirety.

The court has considered any additional argument raised by the parties which were not specifically discussed herein and the court denies any additional request for relief that was not expressly granted herein.

As such, it is hereby

ORDERED that the court denies Plaintiff's motion to reargue and to disqualify Dopf, P.C. in its entirety, filed under motion sequence 005, without costs to any party.

This constitutes the decision and order of the court.


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<u>12/7/2023</u> DATE			<u>ERIKA M. EDWARDS, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE