

Jones v Alliance Health Operations, L.L.C.

2024 NY Slip Op 30443(U)

February 6, 2024

Supreme Court, Kings County

Docket Number: Index No. 509707/2017

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 6th day of February 2024.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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RENEE JONES, as Executrix of the Estate of DOLORIS JONES, deceased,

Plaintiff,

-against-

ALLIANCE HEALTH OPERATIONS, L.L.C. d/b/a LINDEN CENTER FOR NURSING AND REHABILITATION, MOSTAQUE AHMED, M.D., TONIANN M. STONE, D.O., WYCKOFF HEIGHTS MEDICAL CENTER and MAHALINGAM SIVAKUMAR, M.D.,

Defendants.

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

DECISION & ORDER

Index No. 509707/2017
Mo. Seq. 8

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

NYSCEF #s: 251 – 253, 254 – 262, 263 – 264, 267

Defendant Toniann M. Stone, D.O. (hereinafter “Dr. Stone”) moves for an Order pursuant to CPLR §3212 and CPLR §2215, for summary judgment in favor of defendant, dismissing all claims against Dr. Stone (Sequence 8).

Renee Jones, as Executrix of the Estate of Plaintiff’s Decedent, Doloris Jones (hereinafter “Decedent”), alleges medical malpractice/negligence against several physicians for failure to properly care for Decedent’s existing pressure injuries in 2015, leading to the development of sepsis and death.

On September 20, 2023, Dr. Stone filed her first cross motion seeking summary judgment and dismissal of plaintiffs’ complaint against her. On October 12, 2023, Dr. Stone’s cross-motion was denied with prejudice on the merits, with this Court finding that the defendant did not establish their prima facie showing for summary judgment. Dr. Stone’s cross motion for summary judgment relied solely on the expert witness opinion of Dr. Prisco, submitted in support of co-defendant Dr. Ahmed’s motion for summary judgment. Plaintiff made similar but

nonidentical allegations against defendants, such that separate expert witness opinions were appropriate, as each defendant-physician respectively carried different and nonoverlapping burdens therein. Still, Dr. Stone did not submit an independent expert opinion in support of their unique position. This Court found that Dr. Stone had a distinct and different duty of care to the Decedent as a general internist, whereas Dr. Prisco's opinions referred to Dr. Ahmed's duty of care to the Decedent as a wound care specialist. This Court also noted that in his expert witness testimony, Dr. Prisco did not opine on whether Dr. Stone's acts and omissions were in conformance with the standard of care, nor whether any alleged breaches were the proximate cause of Decedent's injuries, both of which are pertinent issues to determine Dr. Stone's liability, if any. Thus, this court denied Dr. Stone's cross motion for summary judgment with prejudice, on the merits, by Order dated October 12, 2023, filed with Notice of Entry October 23, 2023.

Pursuant to CPLR §2221, after receiving notice of this court's decision on October 23, 2023, defendants had 30 days to file a Notice of Appeal or Motion to Renew or Reargue. Defendant did not choose to file a Notice of Appeal nor Motion to Renew/Reargue within 30 days, that is by November 23, 2023, and thus both deadlines passed. Instead, on December 15, 2023, after the court ruled on the initial cross motion denying summary judgement, Defendant Stone refiled a second, successive motion for summary judgment seeking to dismiss the plaintiff's complaint.

When a summary judgment motion is denied with prejudice, the decision signifies that the court intended the decision to be "on the merits," or to bring the issue to a final conclusion. Restatement of Judgments § 53, comment c; Restatement [Second] of Judgments § 20, comment d; 27 CJS, Dismissal Nonsuit, §73. In evaluating a summary judgment motion to dismiss all claims against her, Dr. Stone as an individual co-defendant has the burden of "establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby." *Barnaman v. Bishop Hucles Episcopal Nursing Home*, 213 A.D.3d 896, 898-899 [2d Dept 2023]. In order to meet this burden, Dr. Stone must provide sufficient evidence via an expert affirmation to fill the gaps that were left between Dr. Ahmed's expert's opinions such as, but not necessarily limited to, the standard of care referable to Dr. Stone as a general internist and whether Dr. Stone's acts and omissions were in conformance with their standard of care. Indeed, this Court

found that defendant Stone did not provide sufficient evidence to meet their burden and denied defendant's cross motion for summary judgment with prejudice, on the merits.

“Successive motions for summary judgment should not be made based upon facts or arguments which could have been submitted on the original motion for summary judgment.” *Hillrich Holding Corp. v. BMSL Mgt., LLC*, 175 A.D.3d 474, 475 [2d Dept 2019] [internal quotation marks omitted]. “Successive motions for summary judgment should not be entertained in the absence of good cause, such as a showing of newly discovered evidence.” *Deutsche Bank Natl. Trust Co. v. Elshiekh*, 179 A.D.3d 1017, 1020 [2d Dept 2020]. “However, evidence is not newly discovered simply because it was not submitted on the prior motion; rather, the evidence must not have been available to the party at the time it made its initial motion and could not have been established through alternate evidentiary means.” *Id.* at 1020; *See Vinar v. Litman*, 110 A.D.3d 867, 869 [2d Dept 2013]; *Coccia v. Liotti*, 101 A.D.3d 664, 666 [2d Dept 2012]; *P.J. 37 Food Corp. v. George Doulaveris & Son, Inc.*, 189 AD3d 858, 859 [2d Dept 2020].

Multiple summary judgment motions in the same action should be discouraged in the absence of a showing of newly discovered evidence or other sufficient cause. *See Valley Natl. Bank v. INI Holding, LLC*, 95 A.D.3d 1108 [2d Dept 2012]; *Burbige v. Siben & Ferber*, 152 A.D.3d 641, 642 [2d Dept 2017]. Absent “extraordinary circumstances,” it is improper to file successive motions following a denial with prejudice on the merits. *Frankson v. Brown & Williamson Tobacco Corp.*, 67 A.D.3d 213, 218 [2d Dept 2009]. “Extraordinary” circumstances that could allow for such successive motions can include seeking to admit subsequent evidence that affects a prior ruling, or seeking to admit evidence after a change in relevant law that affects a plaintiff's position while their trial is ongoing. *Frankson v. Brown & Williamson Tobacco Corp.*, 67 A.D.3d 213 [2d Dept 2009].

Here, no “extraordinary circumstances” have been shown to justify the successive motion filed, and an affirmation of Dr. Stone's expert opinion is not “newly discovered” such that the evidence could not have been established through evidentiary means at the time that the initial motion was served. *Tolpygina v. Teper*, 63 AD 3d 722, 722-23 [2d Dept 2009]. In order to establish a prima facie entitlement to summary judgment, Defendant Stone should have timely filed her own expert opinion in the initial motion, instead of relying on an expert witness from a physician that could not substantively opine as to the claims against Dr. Stone. As Dr. Stone had previously cross-moved seeking relief pursuant to CPLR §3212, contrary to their contention, their motion for

summary judgment “violated the general proscription against successive summary judgment motions absent ‘a showing of newly discovered evidence or other sufficient cause.’” *Lapadula v. Sang Shing Kwok*, 304 A.D.2d 798 [2d Dept 2003].

Dr. Stone is now seeking a second bite out of the same apple. Defendants “deliberately charted a summary judgment course” in choosing to file a second, successive motion for summary judgment, with additional exhibits that are not newly discovered evidence and could have been annexed to the first motion for summary judgment. *Mancuso v Rubin*, 52 A.D.3d 580 [2d Dept 2008]. The initial cross motion for summary judgment on the merits was denied with prejudice, thus the inquiry ends there. Although successive summary judgment motions may upon certain circumstances be permissible, here it cannot be allowed.

Were Dr. Stone’s motion to be viewed as a Motion to Renew or Reargue, it must also be denied. This motion is not identified specifically as a Motion to Renew in the Notice of Motion. Further, the deadline for a Motion to Renew was thirty days following the decision, which would have been on November 23, 2023. This motion, having been filed on December 15, 2023, is untimely as a Motion to Renew.

Not only would a Motion to Renew be denied due to its untimeliness, but it must also be denied because the evidence submitted is not newly found. Pursuant to CPLR §2221, a motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination” and “shall contain reasonable justification for the failure to present such facts on the prior motion” CPLR §2221(e). The Appellate Division holds that “a motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation,” and that “where the party seeking renewal fails to provide a reasonable justification for not presenting the new facts on the prior motion, the court lacks discretion to grant renewal.” *Caronia v Peluso*, 170 A.D.3d 649 [2d Dept 2019]. Here, the evidence submitted in support of Dr. Stone’s request for summary judgment cannot truly be considered as newly found evidence because defendants had the opportunity to submit same when the initial summary judgment motion was filed, and/or to seek an adjournment if they required more time. As described above, defendant did not submit a satisfactory reason why they were prevented from submitting an expert’s affirmation in support

of their original cross motion, and thus defendant failed to provide a reasonable justification for not procuring same prior to making the original motion for summary judgment.

In accordance with the above, the motion of Defendant Stone is DENIED with prejudice.

This constitutes the decision and order of the court.¹

ENTER.



Hon. Consuelo Mallafré Meléndez
J.S.C.

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¹ This decision was drafted with the assistance of legal intern Jessica Ramsawak, Brooklyn Law School.