

Puglisi v Musso
2024 NY Slip Op 35322(U)
March 21, 2024
Supreme Court, Queens County
Docket Number: Index No. 717052/2020
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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ANDREW PUGLISI as Executor of the Estate of
LORI S. PUGLISI,

Index No. 717052/2020

Part MDP

Plaintiff,

Motion Date: March 6, 2024

-against-

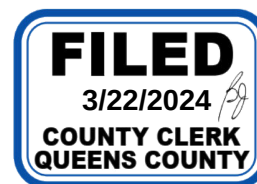
Calendar No. 21

Sequence No. 4

MARIA N. MUSSO, D.O., HEATHER M. RIBAUDO,
PA-C, and ANNA K. NAQVI, PA-C,

Defendants.

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The following papers numbered EF-176 to EF-182 read on this motion by plaintiff to reargue the November 14, 2023 Decision and Order pursuant to CPLR §2221(d), and upon reargument, deny defendant Heather M. Ribaudo, PA-C's motion for summary judgment.

Papers

Numbered

Notice of Motion, Affirmation.....EF176-EF177

Affirmation in Opposition.....EF180-EF181

Reply Affirmation.....EF182

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Plaintiff's motion to reargue the November 14, 2023 Court Order pursuant to CPLR §2221(d) is granted. (*See generally Bacalan v. St. Vincents Catholic Med. Ctrs. of N.Y.*, 179 A.D.3d 989 [2d Dept. 2020].) Upon reargument, defendant Heather M. Ribaudo, PA-C's motion for summary judgment is still granted, as defendant Ribaudo eliminated all triable issues of fact with respect to whether she departed from good and accepted medical standards and proximately caused decedent plaintiff's injuries and death. (*See generally Pirri-Logan v. Pearl*, 192 A.D.3d 1149 [2d Dept. 2021].)

Plaintiff commenced this medical malpractice and wrongful death action by filing the Summons and Complaint on September 29, 2020, and issue was subsequently joined by defendant Ribaudo on November 12, 2020. Defendant Ribaudo moved for summary judgment, arguing that

there are no issues of fact as to whether defendant Ribaudo's failure to notify decedent Lori C. Puglisi of her CT scan results and failure to refer her for subsequent testing and treatment resulted in Puglisi's injuries and ultimate death. Defendant's motion was granted by Court Order dated November 14, 2023, for which plaintiff now moves to reargue.

Plaintiff argues that he is entitled to reargument because the Court misapprehended and overlooked the facts and law in rendering the November 14, 2023 Decision and Order. Plaintiff argues that the issue is not whether defendant PA Ribaudo was aware of the CT findings, but rather whether she *should* have been aware of them. Plaintiff further argues that based upon his expert affirmation of PA Podd, he demonstrated that PA Ribaudo failed to properly undertake the preoperative medical clearance process by failing to review the CT scan that detected the condition for which plaintiff decedent was having surgery, and that the presence of the lung nodule was "undoubtedly relevant to PA Ribaudo's medical clearance process." Plaintiff also argues that the Court improperly reviewed the experts' opinions separately rather than collectively. Plaintiff argues that PA Podd's expert opinion was offered to address defendant Ribaudo's departures and Dr. Richard I. Whyte's expert affirmation was offered to address causation. Therefore, plaintiff argues that the Court overlooked the experts' opinions and misapprehended the law by finding PA Podd's opinion was insufficient because it failed to address causation and by finding that Dr. Whyte's opinion was conclusory because it failed to address the departures. Plaintiff also argues that the Court misapprehended the law by finding that Dr. Whyte's opinion that plaintiff decedent was deprived of a substantial opportunity for successful treatment and survival was speculative because the standard does not require plaintiff to demonstrate that the chances at survival would have been 100% successful, but rather that plaintiff was deprived of an earlier opportunity for treatment and the delay in treatment resulted in unnecessary pain and suffering, some reduction in the chance at survival, and/or a reduced lifespan. Plaintiff further argues that he did not need to prove that plaintiff decedent would have even gone for treatment after she was notified of the nodule, but rather plaintiff only needs to demonstrate that plaintiff decedent was deprived of the mere *opportunity* for treatment. Based upon the foregoing, plaintiff argues that reargument is warranted, and upon reargument, defendant Ribaudo's motion for summary judgment should be denied.

Defendant Ribaudo opposes plaintiff's motion and argues that reargument is not warranted. Defendant Ribaudo argues that the Court did not misapprehend or overlook the facts or the law with respect to the CT scan, as the Court acknowledged whether PA Ribaudo should have reviewed the CT scan by holding that plaintiff failed to demonstrate she departed from accepted standards of medical care in not reviewing the imaging prior to the pre-surgical clearance evaluation. Defendant Ribaudo also argues that the Court properly found that plaintiff's experts' opinions were conclusory. Defendant Ribaudo argues that even taken collectively, plaintiff's experts failed to sufficiently rebut defendant Ribaudo's expert findings, as they failed to address and refute Dr. Charles Bardes' expert affirmation and failed to lay a proper foundation for their opinions. Based

upon the foregoing, defendant Ribaudo argues that reargument is not warranted.

A motion to reargue pursuant to CPLR §2221 shall 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 previously offered on the prior motion. (*Ahmed v. Pannone*, 116 A.D.3d 802, 805 [2d Dept. 2014], *leave to appeal denied* 26 N.Y.3d 944 [2015].) While the determination to grant a motion to reargue rests within the sound discretion of the trial court, a motion to reargue is not designed to grant an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those presented in the initial papers. (*Id.*; see also *Williams v. Abiomed, Inc.*, 173 A.D.3d 1115 [2d Dept. 2019].)

Plaintiff's motion to reargue is granted, to the extent that the Court overlooked plaintiff's experts' affirmations by reviewing them separately rather than collectively, and by finding that PA Podd's expert affirmation was insufficient because it did not address causation. However, even viewing the opinions of PA Podd and Dr. Whyte together, plaintiff failed to sufficiently rebut defendant Ribaudo's prima facie case and raise triable issues of material fact.

PA Podd opined that PA Ribaudo departed from applicable standards of care by failing to review and consider the October 13, 2017 CT report in connection with the preoperative evaluation, and failing to ensure that Lori Puglisi knew about the subject lung nodule finding. She further notes that a proper preoperative evaluation includes a review of medical records and tests results, comprehensive medical history, physical examination of the cardiovascular system, pulmonary system and airway, but does not opine that the standard of care requires a review of diagnostic testing. PA Podd also opined that PA Ribaudo had an independent duty to ensure the long nodule finding was communicated to the patient and properly investigated, but does not demonstrate that this was the standard of care in 2017. PA Podd also failed to sufficiently rebut defendant's expert in rendering the opinions and thereby failed to raise an issue of fact in dispute. Therefore, unlike in *Polanco v. Reed*, 105 A.D.3d 438 (1st Dept. 2013), upon which plaintiff relied, the expert affidavits are not of "equal strength" and supported by the facts in the record, and therefore did not raise an issue of fact. (*Id.* at 441.)

Dr. Whyte opined within a reasonable degree of medical certainty that the failure of PA Ribaudo to ensure that Lori Puglisi and Dr. Musso were made aware of the lung nodule finding during the October 13, 2017 medical clearance exam deprived Puglisi of a substantial opportunity for successful treatment and survival. In rendering this opinion, Dr. Whyte does not sufficiently address or refute the evidence that Dr. Musso and her staff informed Puglisi of the CT scan. Further, Dr. Whyte assumed that a follow-up scan would have been done in January 2018 and treatment would likely have been undertaken a few weeks after and she would likely have surgery no later than approximately February 2018, one year prior to the actual treatment. He further assumed that had a January 2018 follow up scan been performed, it likely would have

shown a significant increase in the size of the tumor prompting earlier intervention and treatment.

However, Dr. Whyte's affirmation, even read in conjunction with PA Podd's opinions, was speculative and conclusory in addressing causation, as Dr. Whyte failed to demonstrate how PA Ribaudo's failure to review the CT findings proximately caused plaintiff decedent's injuries and death. Plaintiff's argument that the Court misapprehended the standard of law with respect to the CT findings is without merit. It is undisputed that PA Ribaudo did not review the CT findings and the issue rather was whether she *should* have reviewed them, which the Court addressed by finding that plaintiff failed to demonstrate that PA Ribaudo departed from accepted standards of medical care in not reviewing the imaging prior to the pre-surgical clearance evaluation. Plaintiff's argument that the Court misapprehended the law by finding that Dr. Whyte's opinion that plaintiff was deprived of a substantial opportunity for successful treatment and survival is speculative is similarly without merit. The Court did not raise plaintiff's burden, but rather found that Dr. Whyte's opinion regarding whether plaintiff was deprived of an earlier opportunity for treatment was conclusory and speculative, as it was based upon a number of assumptions with regard to future follow up treatment, any one of which may or may not have occurred. (*See Hoffman v. Taubel*, 208 A.D.3d 1099, 1100 [1st Dept. 2022][doctor's affirmation was insufficient as it was speculative and argued a number of possibilities with regard to the plaintiff's injuries].)

Accordingly, plaintiff's motion to reargue pursuant to CPLR §2221(d) is granted, but upon reargument, defendant Ribaudo's motion for summary judgment is granted and plaintiff's Complaint is dismissed as to defendant Heather M. Ribaudo, PA-C.

This constitutes the decision and Order of the Court.

Dated: March 21, 2024


Hon. Tracy Catapano-Fox, J.S.C.

