Martin v Samel

2012 NY Slip Op 30261(U)

January 30, 2012

Supreme Court, Richmond County

Docket Number: 101227/08

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No. 101227/08
Motion No.: 5

JOANNE MARTIN, as Executor of the Estate of
JEAN CILENTO, Deceased,
and as Executor of the Estate of
ROBERT L. CILENTO, Deceased

Formerly:

ROBERT L. CILENTO, as Administrator of the Estate of
JEAN CILENTO, Deceased; and
ROBERT L. CILENTO, Individually

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

SHMUEL SAMEL, M.D.;
AHMED EL-SOURY, M.D.;
JAMES BRUNO, M.D.;
LEONARD LEFKOVIK, M.D.;
STATEN ISLAND UNIVERSITY HOSPITAL;
SATYAGNANI NAGUBAND, M.D.;
MURLIDHAR PAHUJA, M.D.; and
JOSEPH MASBAD, M.D.

Defendants

The following items were considered in the review of the following motions to renew or reargue and to remove a stay:

Papers	**Numbered**
Notice of Motions and Affidavits Annexed	**1**
Answering Affidavit	**2**
Exhibits	**Attached to Papers**
Memorandum of Law	**3**

Upon the foregoing cited papers, the Decision and Order on the Motion to renew or reargue and to remove a stay is as follows:

The plaintiffs nominally move to renew or reargue that part of a previous motion resulting in a decision granting summary judgment to James Bruno, MD and Leonard Lefkovik,

MD. The motion to renew and reargue is regarded as a motion to reargue and is denied. The plaintiffs also move to remove a stay imposed pending formal replacement of a deceased Executor. Following replacement of the deceased Executor, the motion to remove the stay is granted.

Facts

Mrs. Jean Cilento was an eighty-two year old woman with several existing illnesses whose status worsened on April 25, 2007. She went to the emergency room ("ER") of Staten Island University Hospital ("SIUH") on April 26, 2007 complaining of difficulty breathing and wheezing. In the ER, Mrs. Cilento related a history of hypertension, macular degeneration, chronic emphysema and a previous left mastectomy. On examination Mrs. Cilento had wheezing and used her accessory muscles to breathe. Mrs. Cilento received oxygen, inhalation treatments with the medications albuterol and atrovent. She also received intravenous corticosteroids, furosemide, and four baby aspirin. Mrs. Cilento then reported feeling better. Her diagnoses at the time of admission were mild chronic obstructive pulmonary disease, congestive heart failure and possible myocardial infarction. She was admitted to the medical service of Shmuel Samel, MD. In Mrs. Cilento's initial history recorded by Joseph Masbad, MD. She did not recount having abdominal pain or gastrointestinal symptomatology. Dr. Masbad's admitting physical examination showed a non-tender and soft abdomen. Mrs. Cilento's abdomen was not distended and normal bowel sounds were heard. Her initial chest x-ray was interpreted as showing hyperaeration, and her electrocardiogram showed sinus tachycardia. Dr. Samel reviewed Dr. Masbad's findings on April 27, 2007 and agreed with them and with Dr. Masbad's plan of care.

On April 27, 2007, Mrs. Cilento was seen by Dr. Lefkovik, a cardiologist, who recorded positive blood tests compatible a myocardial infarction. However, Dr. Lefkovik did not plan an immediate cardiac catheterization. Mrs. Cilento's cardiac and anti-hypertension medications were modified by deleting a beta blocker medication that may worsen emphysema. Cardizem was substituted. Her abdominal findings remained unchanged. During that day, Mrs. Cilento

developed worsening respiratory status. An echocardiogram showed mild mitral, mild tricuspid, and trace aortic regurgitation. Ultrasound evaluation for lower extremity venous thrombosis was negative. Dr. Masbad reviewed findings with Dr. Bruno, a pulmonary specialist, who saw Mrs. Cilento in consultation.

The following day, April 28, 2007, Dr. Masbad's examination of Mrs. Cilento's abdomen was unchanged, but a chest x-ray showed a lucency overlying the upper abdomen and upright views of the abdomen showed air-filled loops of the small and large bowel. Dr. Lefkovik's assessment of Mrs. Cilento was unchanged as well.

On April 29, 2007, Dr. Lefkovik assessed Mrs. Cilento's prognosis as being "guarded". On that date, Dr. Samel's examined her abdomen and recorded a soft abdomen with bowel sounds present. On April 30, 2007, Mrs. Cilento reported to her physicians that she felt better. Examination of her abdomen was documented as unchanged. However, x-rays again showed a lucency under the right hemidiaphragm. Clinical improvement continued on May 1, and May 2, 2007, although a chest x-ray again seemed to show a loop of bowel under the diaphragm. Mrs. Cilento was still wheezing, and her abdominal examination showed a soft, non-tender, non-distended abdomen with bowel sounds present. Dr. Masbad reported that Mrs. Cilento's chest x-ray showed no infiltrates or effusion. During deposition, Dr. Masbad states that Mrs. Cilento was discussed on rounds and the decision was made not to consult gastroenterology or to do an abdominal CT scan.

On May 3, 2007, Dr. Lefkovik saw Mrs. Cilento and recorded slightly elevated blood pressure, peripheral edema and exertional dyspnea. By 11:00 AM, she had a tympanitic (a drum like sound when tapped) and distended abdomen, and had decreased bowel sounds. Mrs. Cilento had already been given Senna and Colace which had failed to stimulate bowel movements, and the laxative Lactulose was added. When this failed to prompt a bowel movement, a rectal examination was performed that showed a small amount of firm stool in the rectal vault without detectable blood. A small amount of stool was manually removed. Mrs. Cilento continued to

complain of constipation to the nursing staff. Dr. Lefkovik suggested a computerized tomography scan ("CT scan") of the abdomen, which was ordered. Dr. Samel noted distension of the abdomen on that day. Dr. Masbad also noted Mrs. Cilento's abdominal distension and described her abdominal x-ray as showing colonic distension. Dr. Masbad ordered an oil retention enema which failed to prompt a bowel movement. That night, Mrs. Cilento was seen by Dr. Bruno who noted she had a stable pulmonary status, but also had a distended, painful abdomen associated with constipation. The pertinent findings on the abdominal CT scan were a distended abdomen, moderate diffuse small bowel distension and fecal material in the ileum. On May 4, 2007, Dr. Lefkovik noted Mrs. Cilento was still constipated despite prior efforts to relieve her. He suggested magnesium citrate, an evaluation of Mrs. Cilento's abdominal CT scan, and laboratory blood work.

By the morning of May 5, 2007, Dr. Lefkovik reported Mrs. Cilento's abdominal CT scan showed possible obstruction and intestinal perforation. Dr. Lefkovik suggested gastroenterological evaluation and consultation with a surgeon. Later that day, Mrs. Cilento was found out of bed, in a chair and unresponsive. She had agonal respiration and dilated pupils. Dr. Masbad noted Mrs. Cilento's worsening condition including low blood pressure, cyanotic coloring, and vomiting of "coffee-ground" material (characteristic of small, discrete particles of coagulated and partially digested blood). Mrs. Cilento required intubation to sustain her respirations. Her abdomen was distended, there were no bowel sounds, and she guarded her abdomen from palpation. Suctioning the gastric contents recovered fecal material. A surgical consultation was obtained. The surgeon assessed a surgical emergency and brought Mrs. Cilento into the operating room. Despite suspicion of a perforated intestine, only a non-focal bowel obstruction was found, and the small bowel was decompressed. A gastroenterologist evaluated Mrs. Cilento after surgery. Her medical status deteriorated with and she developed both acute renal and respiratory failure. A new cyanosis of her right hand developed on May 6, 2007. Her pulses were good and the color of the hand improved after nitrate therapy. Both Dr. Lefkovik and the consulting surgeon assessed Mrs. Cilento's prognosis as being grave. Moreover, during that day, nursing notes documented decreased cardiac output and hypotension. Mrs. Cilento

suffered a cardiac arrest during the evening. She could not be resuscitated.

Following Mrs. Cilento's demise, a New York State Department of Health, Statement of Deficiencies was created. The plaintiff presents the Statement of Deficiency as "presumptive evidence of the facts stated therein."[1] However, it is the written reports of State health inspectors, but not legal conclusions that are regarded as presumptive evidence.[2] The facts found in the Statement of Deficiencies includes a paraphrase of the findings of the hospital's Morbidity and Mortality Committee ("MMC"). Reported findings are those of the MMC, not those of a State health inspector. Findings of the MMC are confidential and inadmissible as evidence in themselves.[3] In this instance the facts in the Statement of Deficiencies merely indicate that an unidentified physician failed to obtain a timely surgical consultation. Additionally, the MMC concluded only that an unnamed physician would be observed and that the criteria for consultations would be evaluated and reported to the Medical Executive Committee. The Department of Health accepted the remedial measures proposed in the Statement of Deficiencies. No clues were provided to determine the identity of the unspecified single physician deemed remiss in the care she or he provided. Consequently, the Statement of Deficiencies is useless as evidence against any individual and was not considered in the court's previous decision.

The defendants previous motion for summary judgment was decided on November 16, 2011. In opposition, the plaintiffs relied upon an expert affirmation that treated a radiologist's recommendation as a mandatory obligation imposed on other physicians. When the radiologist indicated there was a likely perforation of the intestines resulting in free air seen in the abdomen, the plaintiff's expert opined that gastroenterological and surgical consultations were immediately required. The plaintiffs' expert reached this conclusion despite the absence of any intestinal

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[1]See Public Health Law § 10 (1.) and (2.).

[2]*Maldonado v. Cotter*, 256 AD 2d 1073, 1075 [4th Dept 1998].

[3]Public Health Law § 2805-m (1.) and (2.).

perforation found by the surgeon to justify his surgery. The plaintiffs' expert next attributed Mrs. Cilento's death to the delay in performing the surgery for the nonexistent condition. The plaintiffs' expert stated that medical residents and each medical consultant had overall responsibility and authority to direct the general medical care of a patient. Based on existing law and policy, the court determined that a subordinate or consulting sub-specialist physician's duty does not require each and every consultant to assume overall, all-inclusive responsibility for, and authority over the general care of a hospitalized patient. This court issued a Summary judgment releasing Drs. Masbad, Bruno, and Lefkovik from the action. On January 13, 2012, the plaintiffs moved to renew and reargue that decision.

A stay was in place pending appointment of an executor following the death of the previous executor. Since a new executor has now been appointed, there is no longer a need for a stay and it is lifted.

Discussion

The plaintiffs point to the court's authority to correct its own errors in the interest of justice even if all the evidence was previously available at the time of an original motion.[4] This authority should be sparingly invoked.[5] Here, the interests of justice do not indicate this court should exercise its discretion by disturbing the previous decision.

A motion to renew and to reargue should identify and support each item of relief sought and the court should make its determinations with the separate parts evaluated individually.[6] "A motion for leave to reargue: ... 2. shall be based upon matters of fact or law allegedly overlooked

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[4]*Cronwall Equities v. International Links Dev. Corp.*, 255 AD 2d 354, 355 [2d Dept 1998]; *Strong v. Brookhaven Mem. Hosp. Med. Ctr.*, 240 AD 2d 726 [2d Dept 1997]; *and Roseman v. Goldberg*, 181 AD 2d 873, 875 [2d Dept 1992].

[5]*Coccia v. Lotti*, 70 AD 3d 747, 752 [2d Dept 2010].

[6]CPLR § 2221 (f).

[* 7]

or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion."[7] Except for motions to reargue a decision by the Appellate Division or the Court of Appeals, a motion to reargue may be "made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry."[8] Granting leave to reargue lies within the discretion of the court.[9]

Upon careful review of all the available records, this court finds no material facts or pertinent laws that were overlooked or misapprehended in formulating the court's prior decision. Therefore, the motion to reargue is denied.

"A motion made to renew: 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change of law that would change the prior determination; and 3. shall contain reasonable justification for the failure to present such facts on the prior motion."[10] It is within the court's provenance to determine that a motion to renew and reargue is simply a motion to reargue.[11] Here the plaintiff has not offered any new facts or law. Instead the plaintiff merely implores the court to reconsider its previous decision. Where a motion nominally identified as a motion to renew and reargue is actually simply a motion to reargue, the court may regard that motion as only a motion to reargue.[12] When a motion is regarded as such, the decision is not appealable.[13] Here, without

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[7]CPLR § 2221 (d) (2).

[8]CPLR § 2221 (d) (3).

[9]*Matter of American Alternative Ins. Corp. v. Pelszynski*, ___ AD 3d ___, 2011 NY Slip Op *1, *1-*2 [2d Dept 2011].

[10]CPLR § 2221 (e) (2) and (3).

[11]*Gelobter v. Fox*, ____ AD 3d at ___, 2011 NY Slip Op 9268 *1, *5, [2d Dept 2011].

[12]*Gelobter v. Fox*, ____ AD 3d ___, 2011 NY Slip Op 9268 at *2.

[13]*Gelobter v. Fox*, ____ AD 3d ___, 2011 NY Slip Op 9268 at *2.

new facts or new law, the so-called motion to renew and reargue is simply a motion to reargue the decision that has been rendered.

It has been asserted without opposition during oral arguments that the deceased executor identified on the former caption has been supplanted. Accordingly, the stay on this action is lifted.

Accordingly, it is hereby:

ORDERED, that the motion made by Joanne Martin, as executor of the estates of Jean Cilento and of Robert L. Cilento to reargue the decision granting summary judgment to the defendants James Bruno, M.D., and Robert Lefkovik, M.D. is denied; and it is further

ORDERED, that the motion to lift the stay on this action is granted; and it is further

ORDERED, that the remaining parties shall return to **DCM Part 3, 130 Stuyvesant Place, Third Floor, Staten Island, New York** at **9:30 AM** on **February 29, 2012** for a conference.

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ENTER,

DATED: January 30, 2012

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Joseph J. Maltese
Justice of the Supreme Court