

Kelly v Lenox Hill Hosp.
2012 NY Slip Op 31025(U)
April 13, 2012
Supreme Court, New York County
Docket Number: 113413/09
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART **IA** PART 16

Suzanne Kelly
- v -
Lenox Hill Hospital, et al.

INDEX NO. 113413/09
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ *cross-motion* to dismiss by defendants is denied in accordance with the accompanying memorandum decision.

FILED
APR 18 2012
NEW YORK
COUNTY CLERKS OFFICE

Dated: APR 13 2012

Alice Schlesinger
ALICE SCHLESINGER *c.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X
SUZANNE KELLY, as Executor of the Estate of
JOHN KELLY, deceased,

Plaintiff,

Index No. 113413/09
Motion Seq. No. 001

-against-

LENOX HILL HOSPITAL, GADY HAR-EL, M.D.,
FRED NOBAN, M.D., FARIBORZ NOBANDEGANI, M.D.,
HARRISON MU, M.D., ELISALYNSKEY, M.D.,
CAMERON BUNDEZ, M.D., ROBERT CHUFA, M.D.,
JOHN MILLER, M.D., ROBERT HOLTZMAN, M.D.,
STEVEN A. HERMMERDINGER, M.D., ELMO F.
DESLANDES, M.D., JANE A. LEE, M.D., LUC MORRIS,
M.D., JOHN/JANE DOES, M.D., (1-10) and JOHN/JANE
DOES, R.N. (1-10), names being fictitious and unknown
but described as physicians and nurses who treated
plaintiff's decedent, John Kelly, at Lenox Hill Hospital on
or about March 23, 2007 and continuing thereafter,

Defendants.

-----X
SCHLESINGER, J.:

Before the Court is a cross-motion by several defendant doctors (Harrison Mu, John Miller, Gady Carrel, and Fariborz Nobandegani) to dismiss this medical malpractice and wrongful death action based on the plaintiff's repeated failure to provide all counsel with proper Bills of Particulars. In an affirmation supporting the motion, counsel details the multiple directives by this Court to counsel for plaintiff to provide individualized Bills of Particulars or Supplemental Bills, as well as at least eight letters from defense counsel to plaintiff's counsel outlining deficiencies and asking for more and specific information.

What should be noted here, because it is of singular importance, is that the cross-motion also constitutes partial opposition to the motion by Parker Waichman, LLP, counsel for plaintiff Suzanne Kelly, which had sought permission to withdraw from further

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representation. It is clear to me that the reason for the two years of countless discovery evasions is that the attorney who took on this case and was the one in charge of it, Andrew Alonso, who finally appeared in court for the plaintiff on January 11, 2012, after the Court had issued an Order to that effect because different lawyers ignorant of the case had kept appearing, completely failed in his professional obligations to everyone.

Mr. Alonso was the individual recommended to Mrs. Kelly to represent her with regard to the circumstances surrounding her husband's final illness and death.¹ She saw no one else. Mr. Alonso accepted this very complicated, tragic case, a case that involved multiple surgeries for cancer in the sinuses, multiple hospitalizations, and finally the death of John Kelly in December 2007. The alleged malpractice began in March of that year.

Alonso accepted this case and then, it appears, did virtually no work on it. As stated earlier, he served one Bill of Particulars regarding at least ten separate defendant doctors and Lenox Hill Hospital and failed to individualize the claims against each. Because of this, no progress was made. Alonso rarely came to court, except upon a court order, and then when he did he promised to provide discovery but did not. Rather, what he did do was to leave the firm one week later, on January 18, 2012, leaving this case (among others) with the firm. He also failed to even obtain successive CT scans taken in March 2007, vital to an understanding of the case.

I have discussed this situation with Raymond Silverman. Again, he brought the motion after Alonso left the firm, which I granted on February 8, 2012. He acknowledged

¹There seems to have been some personal relationship between Mrs. Kelly's brother and Mr. Alonso's brother, according to Alonso's former colleague Raymond Silverman. Mr. Silverman is the person who brought the motion to withdraw by Order to Show Cause on February 1, 2012.

* 4]
that while he had done a quick review of the file, there was nothing to indicate that Alonso had ever consulted with an expert. Nor did Silverman. Neither did Alonso and Silverman ever talk to each other about the case.

Unfortunately, Mrs. Kelly, though noticed, did not come to court on February 8, when the motion to be relieved as counsel was heard. But she did appear on April 11, the adjourned date, along with family members. I spoke with her then and ascertained the complex and tragic facts of the case. She told me that she had been given what she thought were all the records but had discovered the absence of the March CT scan films, which she knew existed as she had been shown them while her husband was in the hospital. Mrs. Kelly wanted to continue the action but was uncertain how to do this. She did see Alonso once after February 8. But clearly this was ill advised. He is the last person she should turn to as he violated his professional obligations to her, to the defendants, and perhaps to his firm as well.

On the following day April 12, I had a long talk with Mr. Silverman, a partner at Parker Waichman. He understood that the mishandling of this case by a former colleague was responsible for a waste of two years and an uncertain status for the action. He offered to expeditiously obtain the CT scan films and pay for them and get them to Mrs. Kelly. He should do this. He should also give the plaintiff the names of attorneys with whom he is acquainted who are qualified to handle complicated cases such as this one.

I am at this time denying the defendants' cross-motion to dismiss, but without prejudice to renewal if events warrant it. Everyone connected with this action has been ill served by Alonso. But Mrs. Kelly, John Kelly's widow, has been the most ill served. She trusted her attorney to diligently pursue the matter and he betrayed that trust. At the least,

she should be given an opportunity, with a complete set of records, to attempt to obtain new counsel.

Accordingly, it is hereby

ORDERED that the cross-motion to dismiss is denied. All parties or their counsel are directed to appear in Room 222 for a status conference on Wednesday, June 13, 2012 at 10:00 a.m.

Dated: April 13, 2012
APR 13 2012



J.S.C.

ALICE SCHLESINGER

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