Macias v Ferzli
2013 NY Slip Op 33980(U)
August 23, 2013
Supreme Court, Kings County
Docket Number: 500000/06
Judge: Marsha L. Steinhardt
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At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of May, 2013.

PRESENT:

HON. MARSHA L. STEINHARDT,
Justice

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MILTON MACIAS and GLADYS RIVERA, as Co-Administrators of the Estate of JACQUELINE ANDRADE, for the Benefit of her Infant Sons, MILLER AND ERICKSON,

Plaintiffs,

- against -

GEORGE FERZLI, M.D., GEORGE FERZLI, M.D., P.C., ARMANDO CASTRO, M.D., PETER GERARD BAUER, M.D., PAMELA BOWEN, M.D., "MARY" NALBANDIAN, M.D., EVELYN ANSA, M.D., "JOHN" MURALI, M.D., HUSAN RIMAWI, M.D., GHAZALI CHAUDRY, M.D., and LUTHERAN MEDICAL CENTER,

Defendants.

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COMBINED DECISION/ORDER ON REARGUMENT; AMENDMENT OF PRIOR DECISION/ORDER

Index No. 500000/06

Mot. Seq. #18

2013 AUG 23 AM 6:49

The following papers numbered 1 to 6 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Plaintiffs' Opposing Affidavits (Affirmations)	3, 4, 5
Defendants' Reply Affidavits (Affirmations)	6

Plaintiffs Milton Macias and Gladys Rivera, as Co-Administrators of the Estate of Jacqueline Andrade, for the Benefit of her Infant Sons, Miller and Erickson (collectively, plaintiffs), move for an order, pursuant to CPLR 2221 (d), for leave to reargue the branches of the prior motions for summary judgment of defendants Lutheran Medical Center, Kannan Muralikrishnan, M.D. (incorrectly sued herein as "John" Murali, M.D.), Peter Gerard Bauer, M.D., Armando Castro, M.D., George Ferzli, M.D., and George Ferzli, M.D., P.C. (collectively, defendants), and, upon reargument, denying these branches of the prior motions in their entirety.* Defendants oppose plaintiffs' motion.

By decision and order, dated Oct. 3, 2012 (the prior decision and order), the Court granted the branches of the prior motions at issue and dismissed the aforementioned defendants from this action. The Court issued its prior decision and order after (1) reviewing the medical record, (2) reading the pretrial deposition testimony, (3) reconstructing the chronology of events, (4) studying the defense experts' opening and reply affidavits, (5) analyzing plaintiffs' expert's initial and supplemental affidavits in opposition, and (6) applying relevant law. The Court's factual and legal analysis was constrained by the narrow parameters in which plaintiffs have litigated this action; namely: (1) plaintiffs' failure to depose Allen Coopersmith, M.D., the anesthesiologist in charge of the recovery room in which the patient was administered ice chips and who approved her transfer from the recovery room to the general floor, albeit without continuing to maintain her on

* Plaintiffs seek no leave to reargue the remaining branch of the defendants' motion which sought summary judgment dismissing defendant "Mary" Nalbandian, M.D., from this action.

supplemental oxygen, (2) plaintiffs' belated decision, while the prior motions were pending, to depose Nurse Weber who administered the ice chips to the patient while she was in the recovery room, (3) plaintiffs' use of a single medical expert to opine on the departures and causation in the discrete fields of anesthesiology, surgery, emergency medicine/resuscitation, gastroenterology, obstetrical/pre-natal care, general post-operative care, and general hospital procedures, (4) plaintiffs' expert's failure to address the propriety and dosage of a combination of Demerol, Phenergan, and Vistaril which the patient received both before and after her surgery under general anesthesia, and (5) plaintiffs' expert's failure to address (a) about an hour's long wait for the ventilator to be available while the patient remained Ambu-bagged on the general floor, (b) the propriety of the initial ventilator settings that, for reasons unexplained in the record, were thereafter reset, and (c) the cause(s) for the barotrauma that the patient subsequently experienced while on ventilator support and before her ensuing demise. These and many other shortcomings in plaintiffs' expert initial and supplemental affidavits in opposition (as are more fully described in the Court's prior decision and order) were no match to the strong prima facie showing that each defendant made by way of an expert affidavit. Defendants' dismissal from this action was, therefore, inevitable as a matter of law.

But plaintiffs' errors do not end here. Plaintiffs' instant motion for leave to reargue is procedurally defective for failure to include with their opening papers a copy of the prior motions, as required by CPLR 2214 (c)* and by the Second Department's recent decision in

* CPLR 2214 (c) provides, in relevant part, that "[e]ach party shall furnish to the court all papers served by him. The moving party shall furnish at the hearing all other papers not already in the possession of the court necessary to the consideration of the questions involved. . . . Only papers served in accordance with the provisions of this rule shall be read in support of, or in opposition to, the motion, unless the court for good cause shall otherwise direct."

Biscone v JetBlue Airways Corp. (103 AD3d 158, 180 [2012], *appeal dismissed* 2013 NY Slip Op 68372 [Ct App 2013]).* Accordingly, the Court, in its discretion, denies plaintiffs leave to reargue the branches of defendants' prior motions.

Even if the Court were to grant plaintiffs' leave to reargue, the Court would adhere to its original determination for the reasons stated above. Plaintiffs, in their motion, isolate a single paragraph starting on page 23 and continuing on page 24 of the prior decision and order in support of their argument that the Court misapprehended the facts. This 136-word paragraph is unnecessary to the Court's 11,428-word, 42-page prior decision and order, and, accordingly, the Court hereby amends its prior decision and order to delete it in its entirety. Additionally, the Court deletes the first two words in the next ensuing paragraph. Accordingly, pages 23 and 24 of the prior decision and order are hereby amended and restated in their entirety to read as follows (the deleted language is indicated by a strike-through, and an asterisk is added to each footnote to preserve the original footnote numbering in the prior decision and order):

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* Although the First Department's earlier decision in *Rostant v Swersky* (79 AD3d 456, 456-457 [1st Dept 2010]) is to the contrary, the Second Department's later decision in *Biscone* constitutes a binding authority which this Court must follow. Moreover, *Rostant* was incorrectly decided because, unlike *Biscone*, it did not rely on CPLR 2214 (c). Moreover, sister courts in this department had reached the same conclusion as *Biscone* did, even before it was handed down (*see Kayel v Fath*, 2011 WL 2323252 [Sup Ct, Suffolk County 2011]; *Pollock v Town of Ossining*, 2010 WL 4806112 [Sup Ct, Westchester County 2010]).

Replacement Page 23 of the Prior Decision and Order:

symptoms suggesting an obstruction and Dr. Rivito's recommendation to consider removal of the gastric band – was a deviation from the standard of care (*see Helfer v Chapin*, 96 AD3d 1270, 1272 [3d Dept 2012]).

First, plaintiffs' expert affirmation neglects to consider the patient's history of abdominal complaints following the placement of a gastric band. Plaintiffs' expert affirmation ignores the undisputed fact that the patient had been uncomfortable with her gastric band as early as March 2004 when, after more than a year's absence and three "no shows," she returned to the physicians' office where she initially saw Dr. Castro and later Dr. Ferzli. Plaintiffs' expert affirmation misses the crucial fact that the patient complained of abdominal pain in the location of her gastric band during her initial visit to LMC on June 8, 2004, that she complained of abdominal pain and nausea/vomiting in her subsequent visit to LMC on June 10, 2004, and that she continued to so complain until her surgery six days later.

Second, ~~contrary to the position of plaintiffs' expert, the results of the patient's upper endoscopy did not foreclose surgery. As an initial matter, plaintiffs' expert affirmation glibly passes over the fact that the patient's upper endoscopy was performed with a *pediatric* endoscope, which is obviously thinner and shorter than a regular endoscope that is used on adults. The fact that a pediatric scope passed all the way through to the patient's duodenum merely ruled out a *complete* obstruction. Indeed, the upper endoscopy revealed a "[l]arge amount of fluid in the body proximal to [*i.e.*, above] the banding." It stands to reason that,~~

Replacement Page 24 of the Prior Decision and Order:

~~if the patient experienced no obstruction whatsoever, she would not have had so much fluid collected in her esophagus and, as a result, the endoscopist would not have recommended removal of her gastric band.~~

~~More fundamentally,~~ plaintiffs' expert affirmation focuses on distractions and grasps at straws in an attempt to bolster plaintiffs' untenable position that surgery was unnecessary and unwarranted. According to their expert affirmation (in ¶ 16), "*[a]pparently* unbeknownst to her [the patient], this surgery was both unnecessary and unwarranted . . . ." (emphasis added). However, Dr. Castro's entries in the hospital records, coupled with the patient's consent form, indicate that the patient preferred surgery over the placement of a feeding tube.[8*] In this regard, the Court considers plaintiffs' position that surgery was not medically indicated as evidence of the allegedly negligent treatment and that they do not have a separate claim for lack of informed consent (*see Benfer v Sachs*, 3 AD3d 781, 783 [3d Dept 2004]).[9*]

Next, plaintiffs' expert affirmation places undue emphasis on Dr. Castro's pretrial testimony (at pages 67-69 of his deposition) that the two alternatives which he presented to

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[8] Plaintiffs have submitted no deposition testimony, if any, from the patient's boyfriend (the father of her unborn child) or her sister, both of whom visited the patient throughout her hospitalization.

[9] Moreover, plaintiffs failed to raise a triable issue of fact on the issue of informed consent, since they do not address this cause of action in their opposition papers (*see Brady v Westchester County Healthcare Corp.*, 78 AD3d 1097, 1099 [2d Dept 2010]).

the patient – either surgery or a feeding tube – had an equal chance of success, even though surgery was obviously riskier than a feeding tube. Plaintiffs' expert affirmation posits (in

[text continues on page 25 of the prior decision and order]

* * *

The remainder of the Court's prior decision and order remains unchanged.

This constitutes the decision, opinion, and order of the Court.

ENTER,

J. S. C.

HON. MARSHA L. STEINHARDT