

Solano v Ronak Med. Care

2015 NY Slip Op 32076(U)

September 16, 2015

Supreme Court, New York County

Docket Number: 108905/06

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY

ALICE SCHLESINGER

IA PART 16

PRESENT: Hon. ALICE SCHLESINGER

PART 16

Justice

ANGELA M. SOLANO as the ADMINISTRATRIX of the goods, chattels and credits of JULIAN SOLANO, deceased; and BELGICA SOLANO

INDEX NO. 108905/06

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MOTION SEQ. NO.: 005

RONAK MEDICAL CARE and GIRISH PATEL, M.D.

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

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s).

Answering Affidavits - Exhibits No(s).

Replying Affidavits - Exhibits No(s).

Based on the accompanying memorandum decision, it is hereby

ORDERED that plaintiff's motion is denied. Counsel for defendant shall serve a copy of this decision and order with notice of entry within 20 days of entry. The Clerk shall enter judgment in defendant's favor without costs or disbursements.

FILED

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NEW YORK

SEP 16 2015

Dated: September 16, 2015

[Signature] J.S.C.

ALICE SCHLESINGER

- 1. Check one:
2. Check if appropriate: MOTION IS:
3. Check if appropriate:

- CASE DISPOSED
GRANTED DENIED GRANTED IN PART OTHER
SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

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

-----X
ANGELA M. SOLANO as the ADMINISTRATRIX of
the goods, chattels and credits of JULIAN SOLANO,
deceased; and BELGICA SOLANO

Plaintiffs,

Index No. 108905/06
Motion Seq. No.005

-against-

RONAK MEDICAL CARE and GIRISH PATEL, M.D.,

Defendants.

-----X
SCHLESINGER, J.:

On November 17, 2004, the jury hearing this case unanimously found that the defendant, Girish Patel, M.D., did not depart from accepted standards of medical care "in his response to Julian Solano's April 2003 lab results" (question 1A), "in his response to Julian Solano's September 2003 lab results" (question 2A) or in his failure to perform "a mirror inspection of Julian Solano's throat" or by not "referring him to an ENT specialist to have such an inspection done" (question 3A).¹

Before the Court is a motion made by the plaintiff, Angela M. Solano as Administratrix of the estate of Julian Solano, Mr. Solano having died, pursuant to CPLR 4404(a), setting aside the verdict as being against the weight of the evidence and against the interests of justice and alternatively entering judgment in favor of Plaintiff or ordering a new trial.

¹The minutes of November 17 are included in the moving papers as Exhibit D. They are in error in recording the plaintiff's last name as "Serrano." Fortunately, the jury interrogatories, Court Exhibit VIII, given to the jury and answered by the jury contained the plaintiff's correct last name "Solano".

The motion relies almost exclusively on the testimony of Dr. Patel. First, counsel argues that the defendant himself acknowledged that it was the standard of care to regularly inspect a patient's throat if that patient had smoked cigarettes sometime in his past. At trial, counsel then elicited the converse of that, that it would be inconsistent with good practice not to perform such an examination. From that testimony, counsel urges that as to question 3a regarding a mirror inspection by Dr. Patel, the verdict errs. In other words, Dr. Patel, by stating that throat examinations are necessary, was acknowledging that he committed malpractice in not performing a mirror inspection.

The second rationale for this relief is the quality of the evidence given by Dr. Patel or rather, according to counsel, the lack of quality or in his words, the doctor's "incredulous testimony." This testimony concerned the issue of whether the length and/or duration of one's smoking were relevant to an increased risk of cancer. Dr. Patel opined that those things were not relevant.

Based on this response, which counsel characterizes as "misleading", "incredulous" and "shocking", the Court again should set aside the verdict in the interests of justice. In other words, allowing the verdict to persist in light of this opinion by the defendant would be against the interests of justice.

The defendant, not surprisingly, opposes the motion and claims that the verdict is definitely not against the weight of the evidence. Counsel points out that as to the references to Dr. Patel's opinion regarding inspection of the patient's oral cavity, that was not what question 3A dealt with. Rather the question concerned Dr. Patel's specific failure to do a mirror examination of Mr. Solano's throat. These examinations are very different as the latter concerns a mirror technique which allows the doctor to evaluate the entire

throat, the pharynx as well as the larynx. Further, counsel points out that each side produced experts who gave differing opinions as to this issue.

As to the second argument proffered by the plaintiff, defense counsel characterizes this as “absurd”, or rather “nothing short of absurd” (¶17 of the opposition). Counsel points to the absence of any question to the jury dealing with the duration and/or frequency of smoking which the second argument dealt with. That was the case, she urges, because there had been no evidence adduced at trial which connected any alleged failure to take a proper history with causation, which here was a failure to timely diagnose Mr. Solano's throat cancer.

Finally, opposing counsel advises that the “interests of justice standard” is extremely high. As it should be. It occurs when a party has been “deprived of substantial justice” (*Selzer v. New York City Tr. Auth*, 100 AD3d 157 (1st Dept 2012)). Counsel's position is that this certainly is not the case here.

In Reply, moving counsel argues that his interpretation of Dr. Patel's testimony regarding inspections of Mr. Solano's throat was accurate. However, given that the testimony highlighted for the Court never mentioned Dr. Patel's use of a mirror to examine the back portions of the throat, opposing counsel is correct that it is not necessarily inconsistent with the jury's findings on question 3A. The answer to that inquiry presupposed that Dr. Patel did not perform a mirror inspection of the patient's throat. But, was that failure a departure? The jury said, “No,” it was not.

Therefore, the Court does not find that Dr. Patel's answers as to the propriety of examining a patient's throat, even without stated complaints, refute the jury's response as to his not performing a mirror inspection. And even if it did, it probably would not matter. This is so because the jury may well have considered other evidence in coming to its

decision. That evidence included expert witnesses for both sides. For all anyone knows, the jury could have relied exclusively on the testimony and opinions of Dr. Charles Bardes, a physician specializing in Internal Medicine, who testified on behalf of the defendant. He testified that internists did not perform mirror examinations. Nor were they trained to do this. That could have been an opinion that the jury relied upon. And it would have been sufficient.

With regard to the "interests of justice" argument, plaintiff fares no better. The opinions by Dr. Patel as to the effects of duration and frequency of smoking may be "outlandish" as moving counsel describes them (¶128 in Reply) and may have affected the defendant's credibility with the jury, but those opinions were not related to the three distinct issues the jury was asked to consider.

In deciding motions of this type and on occasion granting them, this Court is concerned with the basic fairness of the trial. Did each party have a true opportunity to present its case? Was each party treated fairly and equally by the Court? Did anything interfere with the sanctity of the jury's deliberations? Those are the kind of concerns that can persuade a court to grant such extraordinary relief. That is not the situation here. Whatever the jury might have thought of Dr. Patel ultimately is not relevant. Rather, the questions are. Was the verdict understandable and rational and not offensive to concepts of justice? The answer to that is Yes and No. The verdict was rational and no it did not offend concepts of justice.

The plaintiff here had an opportunity to have his claims heard by an impartial jury. The verdict was an implicit rejection of those claims. But that does not mean that the verdict was either against the weight of the evidence or offensive to principles of justice. Therefore, the motion to set aside the verdict as against the weight of the evidence and in

the interests of justice is in all respects denied.

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion is denied. Counsel for defendant shall serve a copy of this decision and order with notice of entry within 20 days of entry. The Clerk shall enter judgment in defendant's favor without costs or disbursements.

Dated: September 16, 2015

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J.S.C.

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