

Reiss v Abraham

2017 NY Slip Op 32792(U)

June 20, 2017

Supreme Court, Rockland County

Docket Number: 031809/2015

Judge: Thomas E. Walsh II

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This opinion is uncorrected and not selected for official publication.

COUNTY OF ROCKLAND
SUPREME COURT

-----X
GITTEL REISS & RAPHAEL REISS,

Plaintiffs,

-against-

DECISION & ORDER
Index No. 031809/2015

Motion # 1

MANOJ T. ABRAHAM MD AND FACIAL PLASTIC
RECONSTRUCTIVE & LASER SURGERY, PLLC,
Defendants.

-----X
Hon. Thomas E. Walsh II, J.S.C.

The following papers numbered 1 - 4 read on this motion by Plaintiff for an Order (a) granting Plaintiffs' full reinstatement of their emotional distress claims in connection with the medical malpractice and negligence claims to the extent said claims were deemed withdrawn by the Court, (b) vacating any and all Orders of preclusion of Plaintiff's emotional distress claims asserted in connection with the medical malpractice and negligence claims and (c) for such other and further relief as this Court just and proper::

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation of Jacob J. Schindelheim, Esq./Affidavit of Gittel Reiss/Exhibits (A-F)	1
Affirmation of Marsha S. Weiss/Exhibits (A-M)	2
Reply Affirmation of Jacob J. Schindelheim, Esq. ¹	3
Sur-Reply Affirmation of J. Peter Collins, Esq. ²	4

¹ As Defendants properly note, Plaintiff's Reply Affirmation was submitted on the return date as set by Plaintiff in their Notice of Motion. Therefore, Plaintiff's Reply Affirmation is untimely and will not be considered by the Court.

² The Court notes that there is nothing in the record in which the Court authorized Defendant to file a Sur-Reply. Therefore, Defendant's Sur-Reply will not be considered by the Court.

This action stems from a claim of medical malpractice, lack of informed consent and negligent hiring against Defendants. The action has been pending since 2015 and arises from a medical procedure that occurred in 2013. Plaintiff filed a Note of Issue on September 6, 2016 in which they certified that discovery was complete. At a court conference on October 19, 2016, the undersigned vacated the Note of Issue based on a representation that discovery was not complete. The Note of Issue was reinstated on October 21, 2016 after discovery issues were resolved and the matter was scheduled for trial.

On April 14, 2017 Plaintiff moved to reinstate her claim of emotional injuries which had been withdrawn previously. Plaintiff submits that the representations made by counsel were only intended to withdraw certain claims of psychological treatment regarding Dr. Stephen Friedman that involved "addiction issues" involving a family member, as that treatment was unrelated to the Plaintiff's instant claims. Further, Plaintiff argues that the Defendant refused to accept the Plaintiff's representations regarding the limited scope of the withdrawal of the emotional distress claim in the absence of a signed stipulation. Plaintiff's also assert that Defendant would not be prejudiced by the reinstatement of Plaintiff's claims for emotional injuries, as the Defendant sought the psychological records after the completion of Plaintiff's examination before trial (hereinafter EBT). Additionally, Plaintiff avers that she is not bound by her prior withdrawal of the claims for emotional distress since there was no consideration given in exchange for the withdrawal.

In opposition Defendant argues that Plaintiff misrepresents the withdrawal of the emotional distress claim as a qualified withdrawal rather than a total unqualified withdrawal. Defendant argues that the Plaintiff stated in letters to Defendant beginning in June 2016 that the claims for emotional distress were withdrawn and no qualification or limitation was placed on that withdrawal. According to Defendant the issue regarding the Plaintiff's claim of emotional distress arose after Plaintiff's first deposition on December 29, 2015 in which Plaintiff testified that she began treating with Dr. Stephen Friedman on or about August 2013 and continued for almost two (2) years due to the traumatizing and stressful nature of the medical care at issue in the instant action. Defendants assert that after the Plaintiff's first date of her EBT they began requesting authorizations for Dr. Friedman prior to the second date of her EBT and her husband's EBT. Further, Defendant provides letters from Plaintiff's counsel to Defendant's counsel

specifically indicating that the Plaintiff's claims of emotional distress were withdrawn with no qualifications or limitations. The letters are dated June 2, 2016, July 8, 2016, September 7, 2016 and September 15, 2016 and all are surrounding discovery compliance, outstanding authorizations and other documents. Defendants assert that as a result of the numerous statements of Plaintiff withdrawing her emotional distress claims they sought a stipulation withdrawing the previously pled emotional distress claims, but Plaintiff's counsel refused to execute the stipulation. Additionally, Defendants submit that per diem counsel for Plaintiff stated on the record in front of the undersigned during a court appearance on October 19, 2016 that the Plaintiff's claims for emotional distress were withdrawn, again not qualifying or limiting the withdrawal.

Upon review of the letters sent from Plaintiff's counsel to Defendant's counsel it is apparent that the intent of Plaintiff was not to qualify or limit the withdrawal of the emotional distress claims to only records regarding "addiction" from Dr. Friedman. There is no limitation or qualification provided in any of the statements within the aforementioned letters in which Plaintiff's counsel sought to maintain the Plaintiff's claim for emotional distress based on the submission of any records from any other mental health providers. Further, upon the undersigned's own questioning regarding the withdrawal on October 19, 2016 there was no representation to the Court that the withdrawal of the Plaintiff's emotional distress claims were limited to the records and treatment of Plaintiff by Dr. Friedman. As such, the Plaintiff has failed to demonstrate a basis upon which the Court should allow reinstatement of the Plaintiff's claims for emotional distress on the eve of trial

Accordingly, it is hereby

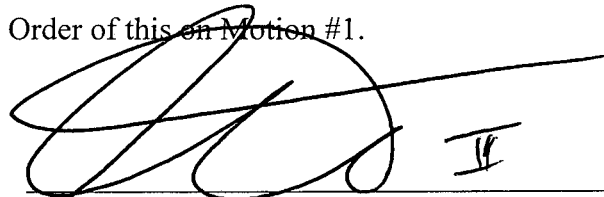
ORDERED that Plaintiff's Notice of Motion to reinstate Plaintiff's claims for emotional distress and to vacate all orders precluding the emotional distress claim is denied in its entirety; and it is further

ORDERED that all parties, including the counsel will be conducting the trial, are to appear for a pre-trial conference on WEDNESDAY JULY 5, 2017 at 9:30 a.m.; and it is further

ORDERED that all parties are to appear for a trial on MONDAY JULY 17, 2017 at 9:30 a.m.

The foregoing constitutes the Decision and Order of this on Motion #1.

Dated: New City, New York
June 20, 2017



Hon. Thomas E. Walsh II, J.S.C.

To:

KOSS & SCHONFELD, LLP
Attorney for Plaintiff
(via e-file)

FELDMAN, KLEIDMAN, COFFEY, SAPPE & REGENBAUM, LLP
Attorney for Defendant
(via e-file)