Rodriguez v Dean
2018 NY Slip Op 30642(U)
April 10, 2018
Supreme Court, New York County
Docket Number: 805280/16
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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ROSALIA RODRIGUEZ and ROGER MICHALA,

Plaintiffs,

-against-

CHRISTOPHER R. DEAN and DELL & DEAN, PLLC,

Defendants.

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Index No. 805280/16
Motion Sequence 002

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

This is a legal malpractice action alleging that defendants failed to timely commence a medical malpractice action on plaintiffs' behalf. The facts of this case are set forth in detail in the court's November 27, 2017 order.[1] Briefly, plaintiff Rosalia Rodriguez allegedly underwent corrective surgery at NYU Hospital in New York on February 12, 2012 which allegedly resulted in injuries to her leg. Ms. Rodriguez alleges that she then signed a retainer agreement with the law firm of Dell & Dean, PLLC to prosecute a medical malpractice action on her behalf. This alleged retainer has not been produced to the court.

Plaintiffs' complaint accuses Dell & Dean of failing to timely file a medical malpractice action. Defendants moved to dismiss the complaint after plaintiffs failed to comply with two court orders requiring them to file a certificate of merit pursuant to CPLR 3012-a.[2] In opposition plaintiffs' counsel submitted a certificate of merit, declaring that "he has consulted with a physician

[1] My prior order is incorporated into this decision by reference.

[2] CPLR 3012-a(1) provides that the complaint in a medical malpractice action must be accompanied by a certificate of merit declaring that "the attorney has reviewed the facts of the case and has consulted with at least one physician in medical malpractice actions, at least one dentist in dental malpractice actions or at least one podiatrist in podiatric malpractice actions who is licensed to practice in this state or any other state and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action . . . ."

. . . [and] on the basis of this consultation [concludes] that there is a reasonable basis for commencement of this action." As part of its November 27, 2017 order the court found plaintiffs' counsel's belated certificate of merit to be insufficient, since, at that point in the litigation, plaintiffs were required to present an affidavit from a medical expert to avoid dismissal. Notwithstanding, the court afforded plaintiffs one final extension and directed them to "E-file and serve a certificate of merit from a medical expert no later than January 15, 2018, failing which Defendant's motion will be granted and the case dismissed."[3]

On January 16, 2018, one day *after* the court's deadline to file a certificate of merit, plaintiffs e-filed a proposed order to show cause for additional time to serve a certificate of merit. Plaintiffs' counsel asserts that he needs an extension because he is a single practitioner who was unavailable during the holidays between the November 27, 2017 Prior Order and the court's January 15, 2018 deadline. He also asserts that Ms. Rodriguez only recently received her medical records from NYU and that these records are necessary to procure a certificate of merit from a medical professional. Defendants argue that the record on this motion proves that plaintiffs did not even begin to seek out Ms. Rodriguez' medical records until eight months after this action started. Defendants thus argue that plaintiffs had no basis to commence this action in the first place and that plaintiffs still have no medical evidence to support their claims almost twenty months later.

Procedurally, the court agrees with defendants' counsel that the court's Prior Order was self-effectuating. And while the court certainly has the inherent authority to modify or vacate its own orders, the court is not persuaded by plaintiffs' counsel explanation as to why he could not have sought an extension of the January 15, 2018 deadline. The court is mindful that plaintiffs' counsel is a single practitioner and that January 15, 2018 was a court holiday, namely Martin Luther King Jr. Day, but under the circumstances plaintiffs should have sought an extension earlier.

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[3] Prior Order, p. 3.

Moreover, plaintiffs do not submit any evidence to counter defendants' assertion that there is no medical basis for Ms. Rodriguez' underlying medical malpractice claim. To be sure, the certificate of merit provided on the prior motion indicates that plaintiffs' counsel consulted with a physician who was not identified. For this reason it was the court's belief that plaintiffs were in possession of at least some medical information to support a cognizable medical malpractice claim.

Plaintiffs' claim that NYU's initial discovery responses excluded the pertinent X-rays is unavailing. In this regard, the motion papers do not contain any evidence to show when NYU first responded to plaintiffs' document request or when plaintiffs realized that their medical files were incomplete. Defendants posit that this realization only came as a response to their motion to dismiss. It is interesting that plaintiffs have not responded to, much less discredited this claim. Furthermore, the court rejects plaintiffs' claim that their medical expert requires the full medical file, including the pertinent NYU x-rays, before addressing a certificate of merit. At the very least plaintiffs should have identified their medical expert and obtained an affidavit from same attesting to the fact that he/she needed the missing x-rays to proceed.

CPLR 3012-a was "designed to warn lawyers away from bringing [medical malpractice] actions at all unless they have consulted appropriate experts in the field to ascertain that the claim has at least arguable merit." Connors, Practice Commentaries, McKinneys Cons Laws of NY, Book 7B, C3012-a:1, at 141. Given the facts and circumstances of this case, and despite affording plaintiffs several opportunities to do so over the course of several years, there is no evidence to justify the continuation of this action. At this point, defendants are being prejudiced, and it would be unjust to allow this case to proceed any further. *See Horn v Boyle*, 260 AD2d 76 (3d Dept 1999); *see also Grad v Hafliger*, 68 AD3d 543, 544 (1st Dept 2009); *DeLeon v Sonin & Genis*, 303 AD2d 291, 292 (1st Dept 2003); *George v St. John's Riverside Hosp.*, 162 AD2d 140, 140 (1st Dept 1990); *Kolb v Strogh*, 158 AD2d 15, 22 (2d Dept 1990).

Accordingly, it is hereby

ORDERED that plaintiffs' motion is denied; and it is further

ORDERED that, in furtherance of my November 27, 2017 order, the complaint is hereby dismissed.

The Clerk of the court is directed to enter judgment and mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 4-10-18

SHERRY KLEIN HEITLER, J.S.C.