Arena v Shaw
2018 NY Slip Op 31113(U)
June 5, 2018
Supreme Court, New York County
Docket Number: 850095/2017
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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GIANFRANCO ARENA, Administrator of the Estate of CHRISTINE L. ARENA, and GIANFRANCO ARENA, Individually,

Plaintiff,

Index No. 850095/2017

DECISION and ORDER

- against -

Mot. Seq. 002

LESTER NOAH SHAW, M.D.,

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Gianfranco Arena commenced this medical malpractice action by Summons and Complaint on April 24, 2017 on behalf of himself and the estate of his late wife Christine L. Arena ("Christine"). Plaintiff alleges that defendant Lester Noah Shaw, M.D. ("Shaw") departed from accepted standards of medical practice by prescribing medication to Christine who subsequently committed suicide. Christine sought Shaw's professional care on April 2, 2015, and committed suicide on April 30, 2015. On October 3, 2017, Shaw interposed his Answer.

Presently before the court is plaintiff's motion pursuant to CPLR 2221 for leave to reargue and/or renew Shaw's motion dated October 3, 2017, which sought to strike the complaint for failure to comply with Shaw's discovery demands or in the alternative to compel plaintiff to produce all documents produced in *Gianfranco Arena v. Riversource Life Insurance Co.* (2:16-cv-05063-JLL-SCM). In a Decision and Order dated January 31, 2018, this Court granted Shaw's motion to the extent that plaintiff is to produce all documents produced in the federal

action and Christine's employment file unless plaintiff sought a protective order.[1] Plaintiff argues that this Court, in granting Shaw's motion, misconstrued the facts involved in the present action and the relevant law. Shaw opposes.

Relevant Background

Shaw sought documents that Christine produced in the federal action entitled *Gianfranco Arena v. Riversource Life Insurance* ("Riversource") ("Federal Action") currently pending in the District Court of New Jersey.

In the Federal Action, plaintiff alleges that Riversource improperly refused to pay the death benefit of $3.5 million upon Christine's death on the grounds that Christine's suicide within two years of issuance of the policy is a disqualifying event. Plaintiff produced over 17,000 documents in the discovery of that action which purportedly include Christine's private emails, text messages, social media posts and accounts, and mortgage records that cover a period of 8 years.

On September 28, 2017, Shaw received a subpoena to testify as a nonparty witness in the Federal Action. On September 28, 2017, Shaw requested from plaintiff the documents that had been previously produced in the Federal Court Action. Shaw sought to compel those same documents in his motion dated October 3, 2017. Shaw asserted that the documents sought bear on "Ms. Arena's mental state at the time of her death and the comparison of this mental state before she began taking medication" prescribed by him. Shaw argued that he "is entitled to discovery that shows Ms. Arena's mental state before she began taking medication to argue, neither he, nor the medication, caused Ms. Arena to commit suicide." Plaintiff, in turn, contended that the request was overly broad and not relevant. The Court, in its decision dated January 31, 2018, held:

> Ms. Arena's mental state before and during treatment by Dr. Shaw are relevant to both Mr. Arena's claims in the Federal Court Action and Dr. Shaw's defense to Mr. Arena's malpractice claims. Here, where Mr. Arena has already willingly produced documents related to Ms. Arena's mental state in one action and has placed them in the public arena without requesting any limitations or

[1] Plaintiff is not seeking to reargue the portion of the decision that directed plaintiff to produce Christine's employment file.

> protections in the Federal Court, there is no reason these documents should not be turned over to Dr. Shaw.

In the pending motion, Plaintiff argues that "[t]he court erred in finding that decedent's mental state before treatment by Dr. Shaw is relevant in the medical malpractice action." Plaintiff further argues that "[t]he defendant did not make the required factual predicate establishing the relevance of the 17,0000 documents in the medical malpractice action." Plaintiff argues:

> At issue in the medical malpractice action is whether the defendant doctor's treatment of decedent deviated from accepted medical practice. Specifically, whether decedent's complaints to the doctor during the month long treatment and decedent's history as contained in the doctor's medical record, warranted him prescribing the powerful concoction of drugs which was ordered. Decedent's prior state of mind, concededly not known to defendant and not relied on when making his diagnosis and treatment plan, is not relevant to whether the doctor prescribed the appropriate drug cocktail knowing what he did then. There was absolutely no contention by defendant that any of the items in the 17,000 documents produced in the federal court discovery order were known to the doctor when he made his diagnosis and prescribed the drug cocktail . . .

Plaintiff further advises the court that "the documents produced in the Federal Action were in fact subject to a Discovery Confidentiality Order and not placed in the public arena." Plaintiff provides a copy of the Discovery Confidentiality Order issued in the federal action. Plaintiff states, "It should again be noted that the instant attorneys are not counsel for plaintiff in the federal action, and only recently learned of and received a copy of the Confidentiality Order issued in the federal action." (Affirmation of Cindy Moonsammy, at page 5).

Shaw opposes plaintiff's motion, and contends that the court properly determined that the documents produced in the Federal Court, including Christine's social media posts, text messages, emails, and mortgage applications are relevant because they relate to Christine's mental state.

"A motion for leave to reargue pursuant to CPLR 2221…may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.'" *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27, 588 N.Y.S.2d 8, 11 (App. Div. 1992) (quoting *Schneider v Solowey*, 141 AD2d 813 (App. Div. 1988)). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." *Id.* (citing *Pro Brokerage v Home Ins. Co.*, 99 AD2d 971 (App. Div. 1984); *Foley v Roche*, 68 AD2d 558 (App. Div. 1979)). "A motion to reargue may not include 'any matters of fact not offered on the prior motion.'" *Alta Apartments, LLC v. Wainwright*, 2004 NY Slip Op 50797(U), ¶ 3, 791 N.Y.S.2d 867, 867 (NY 2004) (quoting CPLR 2221 (d)(2)).

CPLR §2221(e) provides that leave to renew must be identified as such, and may be granted by a court where there are "new facts not offered on the prior motion that would change the prior determination," provided that the movant provide "reasonable justification for the failure to present such facts on the prior motion."

Here, upon their application for reargument/renewal, Plaintiff advises the court that the documents produced in the Federal Action were subject to a Discovery Confidentiality Order and therefore not placed in the public arena. This fact had not been disclosed to the court previously.

The court grants Plaintiff's motion for renewal. Upon renewal, the court finds that the Shaw's request for *all* of the potentially sensitive and personal documents produced in the Federal Action is overly broad. Shaw's motion to compel the production of these documents is therefore denied.

Shaw, however, may proceed to more narrowly tailor his discovery requests or propound discovery demands to obtain the documents that may be necessary for his defense. "[O]nce the patient has voluntarily presented a picture of his or her medical condition to the court in a particular court proceeding, it is only fair and in keeping with the liberal discovery provisions of the CPLR to permit the opposing party to obtain whatever information is necessary to present a full and fair picture of that condition." (*Matter of Farrow v. Allen,* 194 A.D.2d 40, 45-46 [1st Dept 1993]).

The parties have entered into a stipulation regarding discovery. Plaintiff's counsel, who has reviewed all 17,000 pages will continue to respond to discreet inquiry, and where pages are responsive, will turn them over. Where there is an issue, the court will review the pages in camera.

Wherefore, it is hereby

ORDERED that Plaintiff's motion for renewal is granted; and it is further

ORDERED that upon renewal, Defendant's motion to compel the production of all the documents produced in the Federal Action is denied as overly broad; and it is further

ORDERED the parties are to comply with the stipulation that they entered into on June 5, 2018.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: JUNE 5, 2018

Eileen A. Rakower, J.S.C.