Broadley v Matros
2018 NY Slip Op 33032(U)
November 26, 2018
Supreme Court, New York County
Docket Number: 805220/14
Judge: Joan A. Madden

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

PRESENT:HON. JOAN A. MADDEN PART 11

Justice

EDMUND BROADLEY,

Plaintiff,

INDEX NO. 805220/14
MOTION DATE: 11/15/18

- v -

MOTION SEQ. NO. 007

EVAN MATROS, M.D.,

Defendant.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Plaintiff, appearing *pro se*, moves for reargument of the court's decision and order dated June 27, 2018 denying his motion to vacate the note of issue and certificate of readiness filed by his former attorney ("the original decision"). Defendant opposes the motion, which is denied for the reasons below.

This is an action for medical malpractice and lack of informed consent. Plaintiff's Bill of Particulars alleges that "the anterolateral thigh ("ALT") flap reconstruction surgery performed by [defendant] at Memorial Sloan-Kettering Cancer Center (hereinafter"Memorial") on January 31, 2012 immediately following a radical resection of plaintiff's left groin synovial sarcoma was "contraindicated, unnecessary, and improperly performed." Plaintiff also asserts a claim for lack of informed consent "in that he would not have agreed to any surgical procedure on his leg that in any way posed a threat to his mobility." Plaintiff also alleges that defendant failed to ensure that a "specifically requested type of urinary catheter" be used during the ALT flap surgical reconstruction.

Note of issue was filed on August 30, 2016. By stipulation dated September 19, 2016,

which was so-ordered by Justice Alice Schlesinger (who presided over this action before her retirement), the parties agreed that the time for defendant to move for summary judgment would be extended until 60 days after the taking of the deposition of non-party witness, Cynthia Dubuc, who is a friend of the plaintiff.[1] The stipulation further provided that if defendant did not receive a fully executed transcript of Ms. Dubuc's deposition by the time the summary judgment motion was filed, the court would consider given defendant a further extension. Ms. Dubuc's deposition was taken on February 15, 2017. By stipulation so-ordered by this court dated March 16, 2017, the parties agreed that the time to move for summary judgment would be extended to May 17, 2017. Defendant filed a motion for summary judgment on May 16, 2017. The motion was submitted unopposed. Counsel for plaintiff then made a motion to withdraw as counsel. Before permitting counsel to withdraw, in its interim order dated October 12, 2017, the court required plaintiff's counsel, on or before October 30, 2017, to submit to the court:

1. An affirmation for in-camera inspection delineating his attempts to retain an expert and providing identifying information as to the experts he contacted, including their names, specialities, locations and affiliations; and

2. Subpoenas (at plaintiff's request) for (I) the operation manual for Memorial, (ii) any letters exchanged between plaintiff and the Memorial patient representative, together with any internal Memorial documents that were generated with respect to plaintiff's letters and/or communications with the patient representative, and (iii) defendant Dr. Matros' work schedule

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[1]Plaintiff argues that at the time that this stipulation was so ordered Judge Schlesinger was unaware that the note of issue had been filed. However, as pointed out by defendant in its opposition, Judge Schlesinger would have been aware of the filing of the note of issue, which triggers the time for the summary judgment motion to be made, and gave rise to the need to extend such time until after the completion of the non-party deposition.

for the day before, the day of, and the day after plaintiff's surgery.[2]

After plaintiff's counsel complied with the interim order, and submitted the documents and the subpoenas to be so-ordered by the court, the court permitted him to withdraw.

Plaintiff moved to vacate the note of issue and certificate of readiness pursuant to 22 NYRCC § 202.21(d), arguing that "unusual and unanticipated circumstances" have developed since the filing of the note of issue and certificate of readiness the warrant further pre-trial proceedings to prevent substantial prejudice to plaintiff, and pursuant to 22 NYCRR § 202.21(e) on the grounds that "numerous material facts in the certificate of readiness are incorrect."

In support of his argument as to existence of "unusual and unanticipated circumstances" plaintiff argued, *inter alia*, that defendant failed to provide specific documents as directed in preliminary conference and compliance conference orders or to adequately respond to plaintiff's second amended combined demands for discovery and inspection ("second demand"). Plaintiff also argued that his attorney did not pursue discovery as requested by plaintiff.

Defendant opposed the motion, on various grounds including that plaintiff failed to demonstrate "unusual or anticipated circumstances" since all discovery ordered was provided, including certified records from Memorial, and that plaintiff's working relationship with his former attorney and his former attorney's purported lack of diligence in pursuing discovery did not constitute an unusual or unanticipated circumstance.

In the original decision, the court denied the motion to vacate the note of issue and certificate of readiness, finding that defendant provided proof that it produced various discovery the plaintiff alleged was outstanding and that the withdrawal of plaintiff's counsel did not constitute "unusual or unanticipated circumstances" under section 202.31(d) of the Uniform

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[2]Memorial subsequently moved to quash the subpoenas served on it by plaintiff, and by decision and order dated June 27, 2018, the court denied the motion except to the extent of finding that Memorial was not required to produce Dr. Matos' schedule for the day before and the date after plaintiff's surgery.

Rules of Trial Courts, which would allow discovery after the note of issue was filed. The court also found that plaintiff's motion to vacate the note of issue pursuant to section 202.21(e) on the ground that the material facts in the certificate of readiness were incorrect was untimely and without merit.

Plaintiff now moves for reargument, asserting that the court overlooked matters of fact and law including his argument that his former attorney filed the note of issue prematurely since discovery was inadequate. In this connection, plaintiff argues that the 700 pages of medical records provided by defendant, together with a certification of authenticity, does not indicate that "all of plaintiff's medical records have been provided." He also argues that the non-party deposition which occurred more than two years after the filing of the note of issue and certificate of readiness renders these two documents "procedurally ineffective," and that the court should have vacated the note of issue before allowing the non-party deposition. Notably, this argument ignores that the parties agreed to extend the time to file the summary judgment motion after the note of issue was filed in light of the non-party deposition. He argues that under these circumstances, at the very least, the court should exercise its discretion to permit discovery following the filing of note of issue.

Defendant opposes the motion, arguing, *inter alia*, that plaintiff failed to demonstrate that the court overlooked any law or facts. Defendant also argues that he has been unfairly prejudiced as his summary judgment motion has not been decided as plaintiff continues to make frivolous motions.

In reply, plaintiff asserts that even assuming Memorial's billing records were produced by defendant, he never received them from his counsel and requests such records.

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp.

v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 (1992). Here, plaintiff's motion for reargument is denied as the court previously considered, and properly rejected, his arguments.

In the original decision, the court noted that under Section 202.21(d), a court may grant permission to conduct further pre-trial discovery"[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings." The court correctly found that plaintiff had not made the necessary factual showing of "special, unusual or extraordinary circumstances" such that would warrant further pre-trial discovery nor did he show that the note of issue should be vacated on this ground. With respect to plaintiff's argument that discovery had not been provided, the court wrote that:

> While plaintiff points to various discovery which defendant allegedly failed to produce, defendant provides proof that the discovery was provided, including a certified copy of plaintiff's records from Memorial, and copies of billing records. With respect to plaintiff's request for "correspondence" such request was addressed in the court's interim order which required plaintiff's counsel to provide subpoenas for "any letters exchanged between plaintiff and the Memorial patient representative, together with any internal Memorial documents that were generated with respect to plaintiff's letters and/or communications with the patient representative.
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> As for plaintiff's assertions that defendant's response to plaintiff's second demand was improper, the record shows that the sufficiency of such response was raised by plaintiff's former counsel and addressed by Justice Alice Schlesinger...at a compliance conference held on December 2,2015, by requiring defendant to provide a certification that medical records produced from Memorial were made and maintained in the ordinary course of business by Memorial.

The court also previously considered plaintiff's argument that the note of issue should be vacated as his former attorney did not properly prosecute the action, including by obtaining all material discovery before filing the note of issue. In finding that this argument was without merit

the court correctly found that his disagreement with his former attorney's handling of discovery did not constitute "usual or special circumstances" warranting vacating the note of issue or permitting unlimited discovery, citing Scheoeder v. IESI NY Corp, 24 AD3d 180, 181 (1st Dept 2005)(defendants' substitution of attorneys, which occurred after the filing of the note of issue in this case [do not], constitute the necessary "unusual or unanticipated circumstances" under [22 NYCRR 202.21(d), citing Ward v. City of Rensselaer, 106 AD2d 719, 721 (3d Dept 1984) ("fact that defendants have new counsel, who wish to prepare the case in a different manner than prior counsel, does not present unusual or unanticipated conditions").

As for plaintiff's motion to vacate the note of issue on the ground that the material facts in the certificate of readiness are incorrect, as found in the original decision, such motion was untimely as it was not made within 20 days of service of the note of issue and certificate of readiness as required under § 202.21(e). In any event, as noted in the original decision, since the record shows that discovery is complete, except for the non-party deposition permitted by the court, plaintiff has not demonstrated that any material fact in the note of issue or certificate of readiness were incorrect.

Next, contrary to plaintiff's position, and as found in the original decision, the conducting of non-party deposition with court permission after the note of issue was filed does not provide a ground for vacating the note of issue. In this connection, as noted above, the parties agreed to conduct the non-party deposition after the note of issue was filed conditioned on providing defendant additional time to move for summary judgment after such deposition was taken. Such an agreement did not prejudice plaintiff and, to the contrary, allowed the completion of discovery while allowing plaintiff's action to remain on the trial calendar.

That said, however, as plaintiff claims not to have the billing records from Memorial, defendant shall provide him with copies of such records as directed below.

As for defendant's summary judgment motion, since with the exception of certain records to be obtained in connection with a subpoena served on Memorial,[4] discovery is complete, plaintiff shall file any opposition to the summary judgment motion as set forth below.

Finally, to prevent further delay of this action and in light of the numerous motions filed by plaintiff, all further requests for relief in this action shall be made by order to show cause.

In view of the above, it is

ORDERED that plaintiff's motion for reargument is denied; and it is further

ORDERED within 15 days of the efiling of this order defendant shall provide plaintiff with copies of the Memorial's billing records; and it is further

ORDERED that all further requests for relief in this action shall be made by order to show cause and any motion submitted through the motion submissions part will be denied without prejudice to such relief being sought by order to show cause; and it is further

ORDERED that plaintiff shall file any opposition to defendant's summary judgment motion with working copies to be sent to the Clerk of Part 11, on or before January 31, 2019, and any reply shall be filed, with working copies sent to the Clerk of Part 11, by February 14, 2019, and oral argument shall be held on February 28, 2019 at 4:00 pm in Part 11, room 351, 60 Centre Street, New York, NY

Dated: November 26 2018

HON. JOAN A. MADDEN J.S.C.

J.S.C.

Check One: [ ] FINAL DISPOSITION [x] NON-FINAL DISPOSITION

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[4]Plaintiff has moved to compel Memorial to provide further records in response to judicial subpoena served by plaintiff on Memorial (motion sequence no. 009), and the motion is scheduled for argument on December 6, 2018 at 4:00 pm. The schedule for submission of opposition to the summary judgment motion takes into account that possibility that the court may order Memorial to provide further records, and plaintiff's argument that such records are relevant to his opposition.