Russell v Colantonio
2018 NY Slip Op 33564(U)
January 26, 2018
Supreme Court, Nassau County
Docket Number: 4167/13
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 23 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Justice

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SCOTT RUSSELL and DANA RUSSELL,

Plaintiff(s),

Index No.: 4167/13

-against-

Motion Seq. No.: 006
Motion Submitted: 11/9/17

ANTHONY COLANTONIO, MD, GENERAL and VASCULAR SURGERY OF LONG ISLAND P.C., FRANKLIN HOSPITAL, NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, INC.,

Defendant(s).

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The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition/Memorandum of Law.....X
Reply Affirmation.....X[1]

Defendants, Anthony Colantonio, MD (Dr. Colantonio) and General and Vascular

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[1]At Dr. Colantonio's request, the court held oral arguments on this motion on November 9, 2017. During the oral argument, counsel for Dr. Colantonio sought to have Dr. Colantonio sworn in as a witness for purposes of testifying. The court, finding both that sworn testimony was not appropriate during an oral argument, and that Dr. Colantonio's testimony was unnecessary for the court to reach its determination, denied the application.

Surgery of Long Island (VSLI), move this court, pursuant to CPLR §2221, for leave to renew and reargue this court's December 16, 2016 order which, *inter alia*, granted Plaintiffs an adverse inference at trial due to the moving Defendants failure to supply discovery. Plaintiffs, Scott Russell (Scott) and Dana Russell (Dana) oppose the motion.

The procedural and factual history of this matter have been recounted in prior orders and need not be restated in full herein. The current dispute involves medical records in Dr. Colantonio's possession that he was directed to turnover but which he claimed he could not find. The court was frustrated by Dr. Colantonio's somewhat slippery excuses for why he could not find the records, with him claiming he was not sure where he kept them, but that he was certain they had been destroyed in one of a number of possible flooding events or leaks to the various locations where the records may have been stored. The possible locations were his basement, his attic and an neighbor's basement[2].

After the court issued the order allowing the adverse inference, Dr. Colantonio had the timely good fortune of suddenly finding the medical records inside his own garage. They were then served upon counsel for Plaintiffs, and this motion ensued.

A motion for leave to renew or reargue is addressed to the sound discretion of the Supreme Court (see *Matter of Swingearn*, 59 AD3d 556 [2d Dept. 2009]). A motion for renewal "shall be based upon new facts not offered on the prior motion that would change

[2]The list of possible locations expanded during the oral argument.

the prior determination" (CPLR § 2221[e] [2]). A motion for reargument must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR § 2221[d][2]). It is not designed, however, to provide an unsuccessful party with successive opportunities to re-litigate the issues previously decided (*see Foley v. Roche*, 68 AD2d 558, 567 [1st Dept. 1979]), or to present arguments different from those originally tendered (*see Giovanniello v. Carolina Wholesale Off. Mach. Co., Inc.*, 29 AD3d 737, 738 [2d Dept. 2006]).

Pursuant to CPLR § 2221(d)(3) a motion for reargument "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry". There is no statutory limit to the time within which a litigant can file a motion to renew based upon facts not offered on the prior motion that would change the prior determination pursuant to CPLR § 2221[e]. Defendants' motion was not timely filed, but the Supreme Court has jurisdiction to reconsider its prior order "regardless of statutory time limits concerning motions to reargue" (*Liss v Trans Auto Sys.*, 68 NY2d 15, 20 [1986]; *see Aridas v Caserta*, 41 NY2d 1059 [1977]; *cf. Matter of Huie [Furman]*, 20 NY2d 568 [1967]; *Johnson v Incorporated Vil. of Freeport*, 303 AD2d 640 [2d Dept. 2003]).

To prevail upon a motion to renew, a party must proffer both "new facts not offered on the prior motion that would change the prior determination . . . and . . .

reasonable justification for the failure to present such facts on the prior motion" (CPLR § 2221 [e] [2], [3]; *see New York Cent. Mut. Fire Ins. Co. v Caddigan*, 15 AD3d 581 [2d Dept. 2005], *JP Morgan Chase Bank, N.A. v Malarkey*, 65 AD3d 718, 719-720 [3d Dept. 2009]; *Johnson v Title N., Inc.*, 31 AD3d 1071, 1071-1072 [3d Dept. 2006]).

Dr. Colantonio states that after the court issued its December 16, 2016 order, he had a conversation with his wife who told him there was a box of medical records in their garage. He looked in that box and, as luck would have it, Scott's medical records were there.

In opposition, Plaintiffs raise a number of valid points about delay, about the holes in Dr. Colantonio's various stories, and about how the evidence annexed to the moving papers do not necessarily support either reargument or renewal. Plaintiffs also allude to forgery of the records and other significant, unethical conduct. Those allegations, however, are purely speculative.

There are no grounds for reargument. The court did not overlook or misapprehend any facts or law. To the contrary, the court perfectly understood the facts and law and properly sanctioned Dr. Colantonio for his conduct. Had he chatted with his wife earlier, perhaps he would have not caused such a significant amount of wasted effort and delay in this matter.

However, the point of these proceedings was for Plaintiffs to get the records they demanded. That has now occurred. It would not be proper for the adverse inference to be

given now that the records have been disclosed. The court therefore finds the records to be new information that would have changed the prior determination. The court finds Dr. Colantonio's excuse for not presenting the information earlier reasonable in the sense that not knowing there was a box of medical records in his garage seems consistent with the haphazard and thoughtless manner in which he claims to store his clients' sensitive, personal medical information.

Whether it was through laziness, failure to take this matter seriously, disrespect for the court and its orders or unprofessional conduct, Dr. Colantonio caused significant delay and unnecessary work to the parties in this case, the lawyers and this court. The court therefore sanctions Dr. Colantonio (but not his counsel) and directs him to pay $750.00 to the Lawyer's Fund for Client Protection, 119 Washngton Avenue, Albany, New York, 12210, within five days of his counsel being served with notice of entry of this order.

Accordingly, it is hereby;

ORDERED that Defendants' motion for leave to reargue this court's December 16, 2016 order is DENIED; and it is further

ORDERED, Defendants' motion for leave to renew this court's December 16, 2016 order is GRANTED; and it is further

ORDERED, that upon renewal, the court hereby modifies the December 16, 2016 order by vacating so much of that order that directed an adverse inference be given at trial

against Dr. Colantonio; and it is further

ORDERED, that Dr. Colantonio is directed to pay $750.00 to the Lawyer's Fund for Client Protection within five days of his counsel being served with notice of entry of this order.

This constitutes the decision and order of the court.

Dated: January 26, 2018
Mineola, N.Y.

Hon. James P. McCormack, J. S. C.

ENTERED

JAN 29 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE