

Mattison v OrthopedicsNY LLP
2020 NY Slip Op 31133(U)
January 13, 2020
Supreme Court, Albany County
Docket Number: Index No. 903275-17
Judge: Christina L. Ryba
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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JUDITH A. MATTISON and JOHN H. MATTISON,

Plaintiffs,

DECISION/ORDER

-against-

Index No. 903275-17
RJI No. 01-17-125462

ORTHOPEDICSNY LLP, FREDERICK J. FLETCHER, M.D., JOSEPH W. KRAUT, P.A., JEMSHAI D SHAMS P.A., and ST. PETER'S HEALTH PARTNERS MEDICAL ASSOCIATES P.C.,
Defendants.

APPEARANCES:

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For Plaintiffs
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Albany, NY 12203

Carter, Conboy, Case, Blackmore, Maloney & Laird PC
For Defendants Frederick J. Fletcher MD, OrthopedicsNY LLP,
Joseph W. Kraut PA.
20 Corporate Woods Boulevard
Albany, NY 12211-2396

Thorn Gershon Tymann & Bonanni LLP
For Defendants Jemshaid Shams PA,
St. Peter's Hospital of the City of Albany,
5 Wembley Court, P.O. Box 15054
Albany, New York 12212

RYBA, J.,

Plaintiffs commenced this action alleging causes of action sounding in medical malpractice and lack of informed consent arising from an alleged sciatic nerve injury sustained by plaintiff Judith Mattison (hereinafter plaintiff) during a total right knee revision surgery performed by defendant Frederick J. Fletcher MD at defendant St. Peter's Hospital of the City of Albany (hereinafter St. Peter's Hospital) with the assistance of defendant Joseph W. Kraut PA, a physician's assistant employed by defendant OrthopedicsNY (OrthoNY), and defendant Jemshaid Shams PA, a physician's assistant

employed by St. Peter's Hospital. Defendants OrthoNY, Fletcher, Kraut, and R. Martin Knowlton PA jointly moved for summary judgment dismissing the complaint against them, while defendants St. Peter's Hospital, Shams, Jenna Patterson NP, Michael Frank Jr. PA, Jon Ford PA, St. Peter's Health Partners and St. Peter's Health Partners Medical Associates PC, also jointly moved for summary judgment dismissing the complaint against them.

In deciding the respective summary judgment motions, this Court issued a decision and order dated October 23, 2019 granting the motion as to defendants Jenna Patterson NP, Michael Frank Jr. PA, Jon Ford PA, and R. Martin Knowlton PA, based upon plaintiff's failure to oppose the request for summary judgment as to those defendants. Again due to plaintiff's failure to oppose the requested relief, the Court granted summary judgment dismissing the medical malpractice claims against St. Peter's Hospital. Finally, inasmuch as the claims asserted against St. Peter's Health Partners and St. Peter's Health Partners Medical Associates PC were predicated upon their alleged vicarious liability for the acts of employees who have been dismissed from this action, the Court granted summary judgment dismissing all claims against those defendants. The requests for summary judgment dismissing the informed consent and medical malpractice claims against OrthoNY, Fletcher and Kraut (the Ortho NY defendants), and St. Peter's Hospital and Shams (the St. Peter's defendants) were denied.¹ The St. Peter's defendants now move for reargument of the decision, arguing that the Court overlooked its request for dismissal of the informed consent claim against St. Peter's Hospital and misapplied the facts and law with respect to the request for dismissal of the medical malpractice claim against Shams. Plaintiffs oppose the motion.

¹ The decretal paragraph of the original decision and order contained a typographical error stating that the complaint was also dismissed as against defendant Joseph W. Kraut PA. This error was corrected by the issuance of a corrected decision and order dated December 12, 2019.

A motion for reargument is addressed to the sound discretion of the Court and is designed to permit a party an opportunity to establish that the Court misapprehended the relevant facts or misapplied a controlling principle of law in deciding a prior motion (see, Campos v State of New York, 139 AD3d 479, 481 [2016]; Foley v Roche, 68 AD2d 558, 567 [1976]). Its purpose is not to permit the unsuccessful party the opportunity to argue once again the same questions that were previously decided (see, Foley v Roche, 68 AD2d at 567-568 [1976]). Nor is a motion for reargument a proper vehicle for raising new arguments that could have been advanced in the context of the original motion (see, Wasson v Bond, 134 AD3d 1224, 1225 [2015]; Foley v Roche, 68 AD2d at 568 [1976]).

In support of reargument, the St. Peter's defendants first contend that the Court overlooked its request for dismissal of the informed consent cause of action against St. Peter's Hospital as well as the derivative claim of plaintiff's husband based upon that cause of action. In denying the respective motions for summary judgment dismissing the informed consent cause of action, this Court concluded that the issue could not be decided as a matter of law due to "conflicting expert proof on the issue of whether a sciatic nerve injury was a known and foreseeable risk of the total knee revision surgery". However, the St. Peter's defendants contend that this Court overlooked its argument that St. Peter's Hospital did not have a duty to obtain plaintiff's informed consent in the first instance, because that duty rested solely upon Fletcher as plaintiff's private attending physician. Upon review of the underlying motion papers, the Court concludes that it indeed overlooked this issue and that, therefore, reargument is warranted. Upon reargument and a further review of the underlying motion papers, the Court observes that plaintiffs failed to interpose any opposition to the St. Peter's defendants' request for dismissal of the informed consent cause of action against St. Peter's Hospital and the associated derivative claim. Accordingly, upon reargument, the Court grants the summary judgment motion to dismiss the informed consent cause of action against St. Peter's Hospital and the derivative claim of plaintiff's husband based

upon that cause of action. Plaintiffs' belated arguments in opposition to summary judgment are not properly raised in the context of a motion for reargument and therefore may not be considered.

Turning to the request for reargument of the Court's denial of summary judgment dismissing the medical malpractice claim against Shams, the St. Peter's defendants contend that this Court misunderstood its argument regarding the doctrine of res ipsa loquitur and erroneously concluded that they failed to meet their burden on the motion. Upon review of the underlying motion papers and the Court's prior decision, the Court concludes that reargument is not warranted. The Court did not misapprehend the arguments raised in the underlying motion, and the St. Peter's defendants should not be permitted to argue once again the same questions that were previously decided.

For the foregoing reasons, it is

ORDERED that the motion for reargument is granted in part, only to the extent that reargument is granted as to the motion for summary judgment dismissing the informed consent cause of action against St. Peter's Hospital and the derivative claim based thereon, and it is further

ORDERED that upon reargument, the informed consent cause of action and derivative cause of action based thereon are dismissed as against St. Peter's Hospital, and it is further

ORDERED that the motion for reargument is otherwise denied.

This constitutes the Decision & Order of the Court, the original of which is being transmitted to the Albany County Clerk for electronic filing and entry. Upon such entry, plaintiffs' counsel shall promptly serve notice of entry on all other parties (see, Uniform Rules for Trial Courts [22 NYCRR] § 202.5-b [h] [1], [2]).

Dated: *January 13, 2020*



HON. CHRISTINA L. RYBA
SUPREME COURT JUSTICE