Sheiffer v Fox
2023 NY Slip Op 33142(U)
September 11, 2023
Supreme Court, New York County
Docket Number: Index No. 162180/2015
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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JAIME SHEIFFER,

Plaintiff,

- v -

NATHAN FOX, M.D., ADRIENNE BARASCH, M.D., SUSAN PESCI, M.D., SAMUEL BENDER, M.D., MICHAEL SILVERSTEIN, M.D., STEPHANIE MELKA, M.D., NEIL GRAFSTEIN, M.D., CIARA MARLEY, M.D., PAUL CHOI M.D., JERRY BLAIVAS, M.D., MATERNAL FETAL MEDICINE ASSOCIATES, PLLC, THE MOUNT SINAI HOSPITAL, NEW YORK UROLOGICAL ASSOCIATES, P.C., EAST RIVER MEDICAL IMAGING, P.C., and UROCENTER OF NEW YORK,

Defendants.

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INDEX NO. 162180/2015

MOTION DATE 06/20/2023

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 259, 260, 261

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

This is an action to recover damages for medical malpractice based, inter alia, on alleged departures from good and accepted practice and lack of informed consent. The defendants Ciara Marley, M.D., and New York Urological Associates, P.C. (the Marley defendants) together move pursuant to CPLR 2221(d) and (e) for leave to reargue and renew their prior motion for summary judgment dismissing the complaint insofar as asserted against them, which had been denied in part in an order dated November 19, 2021 (MOT SEQ 002). The plaintiff opposes the motion. The motion is granted to the extent that (a) the Marley defendants are granted leave to reargue, (b) upon reargument, the provision in that order dated November 19, 2021 denying that branch of their motion seeking summary judgment dismissing the medical malpractice cause of action against them is vacated, (c) that branch of their motion is thereupon granted, and (d) the medical malpractice cause of action is dismissed insofar as

asserted against them. The motion is otherwise denied. Since the medical malpractice cause of action was the only cause of action remaining against the Marley defendants, this dismissal effectuates the dismissal of the entire complaint against them.

The facts of this dispute are set forth in great detail in this court's November 19, 2021 order deciding Motion Sequence 002, its November 19, 2021 order deciding Motion Sequence 003, its March 27, 2023 order deciding Motion Sequence 004, its March 27, 2023 order deciding Motion Sequence 005, and its March 28, 2023 order deciding Motion Sequence 006.

In short, the plaintiff alleged that, on March 20, 2014, the defendant obstetrician/ gynecologist Nathan Fox, M.D., negligently transected her urinary bladder during a cesarean section procedure, necessitating intraoperative repair surgery. She further alleged that, as a consequence of the bladder repair surgery, she later developed a vesicovaginal fistula that also required surgical repair, and that, as relevant here, a series of four urologists, including Marley, failed to appreciate the presence of the fistula in a timely fashion, causing her to suffer from pain and discomfort until the fistula was repaired. The crux of the plaintiff's claim against Marley, who was the second urologist to examine her, is that Marley, who saw the plaintiff between May 9, 2014 and May 14, 2014, performed a battery of tests on her and did not observe a fistula, but merely suspected one. The plaintiff asserted that Marley's failure to diagnose the fistula constituted a departure from good and accepted medical practice, and caused or contributed to her continuing fistula-related discomfort and pain.

Marley, however, recommended that the plaintiff follow up with her if symptoms persisted. Rather than following up with Marley, the plaintiff, on May 21, 2014---only one week later---instead consulted with the defendant Jerry Blaivas, M.D., the third urologist with whom she consulted. Blaivas performed even more testing, although he didn't repeat prior testing. He, too, did not observe a fistula, but prescribed drugs to treat an overactive bladder. Blaivas also recommended the plaintiff return to see him in one month if she were doing well, or one week if she were not. She did not return to see him, although she did have a phone

conversation with him on May 27, 2014. Rather than following up with Blaivas, the plaintiff, on May 29, 2014---only 8 days after seeing him and 2 days after speaking with him---instead consulted with Jaspreet Sandhu, M.D., the fourth urologist with whom she conducted. Dr. Sandhu prescribed the placement of a Foley catheter for two weeks, performed a CT cystography on June 19, 2014, and diagnosed a fistula, which he repaired on June 28, 2014. Hence, the amount of time that lapsed between the date on which the plaintiff first consulted with Marley, and the date on which she first consulted with Dr. Sandhu, was only 20 days, and the amount of time that lapsed between first appointment with Dr. Sandhu and the fistula repair was an additional 30 days.

In its November 19, 2021 order deciding Motion Sequence 002, although the court awarded summary judgment to the Marley defendants dismissing the lack of informed consent cause of action insofar as asserted against them, it denied that branch of their motion seeking summary judgment dismissing the medical malpractice cause of action against them. It that order, the court explained that the plaintiff raised a triable issue of fact as to whether Marley departed from good and accepted practice by delaying a CT cystogram study until after conducting a methylene blue test and a CT urogram, by failing to take scans from certain views during the May 14, 2014 cystogram, and by misreading or misinterpreting the images that were taken during that cystogram. As relevant here, the court concluded that the plaintiff also raised a triable issue of fact with respect to whether those delays and failures "led to several additional, unnecessary weeks of pain, discomfort, and urinary dysfunction before the fistula was repaired and these adverse conditions were resolved." In its March 28, 2023 order deciding Motion Sequence 006, this court similarly concluded that the plaintiff raised a triable issue of fact as to whether Blaivas departed from good and accepted practice, in that the plaintiff's expert concluded that Blavais should have "recognized the May 14, 2014 cystogram imaging as positive for vesicovaginal fistula, and treated the plaintiff accordingly."

Nonetheless, in connection with Blavais, the court ruled that the plaintiff failed to raise a triable issue of fact as to whether Blavais's departures contributed to her injuries. In this regard, the court held that Blavais demonstrated that the plaintiff's outcome and course of treatment would have been the same regardless of whether he had diagnosed the fistula on May 21, 2014. As the court explained it,

> "[w]here a plaintiff alleges that a defendant negligently failed or delayed in diagnosing and treating a condition, a finding that the negligence was a proximate cause of an injury may be predicated on the theory that the defendant thereby diminished the plaintiff's chance of a better outcome (*Majid v Cheon-Lee*, 147 AD3d 66, 71 [3d Dept 2016]; *Clune v Moore*, 142 AD3d 1330, 1331 [4th Dept 2016]; *Wolf v Persaud*, 130 AD3d 1523, 1525 [4th Dept 2015]; *Goldberg v Horowitz*, 73 AD3d 691, 694 [2d Dept 2010]; *Borawski v Huang*, 34 AD3d 409, 410 [2d Dept 2006]). Here, the lapse of time between Blaivas's one appointment with the plaintiff and the plaintiff's first appointment with Dr. Sandhu was only eight days."

The court further noted that the plaintiff's expert urologist, upon whom she relied for her opposition to both Marley's and Blavais's motions, "did not render an opinion that the de minimis delay diminished the plaintiff's chance of a better outcome," as he "'failed to articulate how the treatment would have been different had the defendant made a timely diagnosis. . . . [and] failed to articulate, in a nonconclusory fashion, that the injured plaintiff's condition would not have deteriorated had there been a timely diagnosis'" (*Sheiffer v Fox*, 2023 NY Slip Op 30959[U], *10-11, 2023 NY Misc LEXIS 1383, *19 [Sup Ct, N.Y. County, Mar. 28, 2023] [Kelley, J.], quoting *Goldsmith v Taverni*, 90 AD3d 704, 705 [2d Dept 2011]).

On this motion for leave to reargue and renew, the Marley defendants argue that her motion should have been analyzed and determined identically to that of Blavais and his practice, and that the court thus should have awarded summary judgment dismissing the complaint as to them in the same fashion. The court agrees.

Initially, the motion is timely. CPLR 2221(d)(3) provides that a motion for leave to reargue must be made within 30 days after service of a copy of the order determining the prior motion and written notice of its entry. Here, inasmuch as no party served a copy of the relevant

order with notice of entry, the 30-day clock never started to run. With respect to the merits of the motion, as the Appellate Division, First Department, has explained,

> "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and 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 AD2d 22, 27 [1st Dept 1992], quoting *Schneider v Solowey*, 141 AD2d 813, 813 [2d Dept 1988]; *see Matter of Setters v AI Props. & Devs. (USA) Corp.*, 139 AD3d 492, 4492 [1st Dept 2016]). Here, the court overlooked the fact that Marley's examination and testing of the plaintiff was so close in time to the plaintiff's subsequent examination and treatment by Dr. Sandhu that any departures committed by Marley could not have been a proximate cause of the plaintiff's continued injuries. As was the case with Blavais's involvement in the plaintiff's care, Marley instructed the plaintiff to return as soon as possible if there was continued discomfort and pain, but the plaintiff never returned, choosing instead to consult with Blavais only 7 days later, and with Dr. Sandhu only a few days after that. The greater portion of any discomfort suffered by the plaintiff subsequent to consulting with Marley was caused by Dr. Sandhu's determination to wait 30 days after he first examined the plaintiff to repair the fistula. Since the Marley defendants established, prima facie, that any failure on Marley's part to diagnose and treat the fistula was not a proximate cause of the plaintiff's injuries, and her expert failed to address that issue, leave to reargue must be granted and, upon reargument, summary judgment must be awarded to the Marley defendants dismissing the medical malpractice cause of action insofar as asserted against them.

CPLR 2221(e) provides that

> "A motion for leave to renew:
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> "1. shall be identified specifically as such;
>
> "2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and

> "3. shall contain reasonable justification for the failure to present such facts on the prior motion"

(*see Melcher v Apollo Med. Fund Mgt., LLC,* 105 AD3d 15, 23 [1st Dept 2013]; *American Audio Serv. Bur. Inc. v. AT & T Corp*., 33 AD3d 473, 476 [1st Dept 2006]).

The term "change in the law," as employed in CPLR 2221(e)(2), refers to a change in appellate precedent or the amendment of a statute that would affect the outcome of a motion (*see D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]). Although the Marley defendants characterize the renewal branch of their motion as one based on a "change in the law," there has been no change in appellate precedent or the amendment of a statute. Rather, the only event that transpired subsequent to November 19, 2021 was that this court applied established law differently to subsequent movants who engaged in virtually the same conduct as the Marley defendants at approximately the same time.

Nor did the Marley defendants establish that "new facts not offered on the prior motion" would have changed the outcome "'Renewal is granted sparingly. . . ; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation'" (*Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010], quoting *Matter of Weinberg*, 132 AD2d 190, 210 [1st Dept 1987]). Nonetheless, although "'renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion . . . courts have discretion to relax this requirement and to grant such a motion in the interest of justice'" (*Tuccillo v Bovis Lend Lease, Inc*., 101 AD3d 625, 628 [1st Dept 2012], quoting *Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept. 2003]), despite the absence of any excuse (*Matter of Pasanella v Quinn*, 126 AD3d 504, 505 [1st Dept 2015]). That said, on a motion for leave to renew, it is improper for the moving party to rely on facts that were not in existence at the time of the original motion (*see Farahmand v Dalhousie Univ*., 96 AD3d 618, 619 [1st Dept 2012]; *Johnson v Marquez*, 2 AD3d 786, 789 [2d Dept 2003]). The court's order disposing of

the summary judgment motion submitted by Blavais and his practice was not in existence on November 19, 2021, when the court rendered its decision on Motion Sequence 002.

Hence, that branch of the Marley defendants' motion seeking leave to renew must be denied.

In light of the foregoing, it is

ORDERED that the motion of the defendants Ciara Marley, M.D., and New York Urological Associates, P.C., is granted to the extent that (a) they are granted leave to reargue, (b) upon reargument, the provision in the order dated November 19, 2021, under Motion Sequence 002, denying that branch of their motion seeking summary judgment dismissing the medical malpractice cause of action against them is vacated, (c) that branch of their motion is thereupon granted, and (d) the medical malpractice cause of action is dismissed insofar as asserted against the defendants Ciara Marley, M.D., and New York Urological Associates, P.C., and the motion is otherwise denied; and it is further,

ORDERED that, on the court's own motion, the action is severed against the defendants Ciara Marley, M.D., and New York Urological Associates, P.C.; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendants Ciara Marley, M.D., and New York Urological Associates, P.C.

This constitutes the Decision and Order of the court.

9/11/2023
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		**CASE DISPOSED**			[X]	**NON-FINAL DISPOSITION**	
		GRANTED	[ ]	**DENIED**	[X]	**GRANTED IN PART**	[ ] **OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**