

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

Krembs v NYU Langone Hosps.

Krembs v. NYU Langone Hosps., 2023 NY Slip Op 01236 (N.Y. Ct. App. 2023) · No. Appeal Nos. 17469-17470-17471-17472; Case Nos. 2021-01497, 2021-01498, 2021-02388, 2021-02389; Index Nos. 805375/12, 805372/19 · Decided March 9, 2023

SUMMARY

The New York Appellate Division, First Department modified and otherwise affirmed orders in a medical malpractice action. The court upheld denial of an extension to serve NYU School of Medicine, dismissal of the informed-consent and ostensible-agency claims, and denial of consolidation, but reinstated the claim alleging Complex Regional Pain Syndrome because defendants failed to make a prima facie showing for summary judgment. The decision was issued per curiam.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, First Department
WRITING FOR THE COURT	Webber, J.P.; Kern, J.; Oing, J.; Friedman, J.; González, J.
JURISDICTION	New York
DECIDED	March 9, 2023
DOCKET	Appeal Nos. 17469-17470-17471-17472; Case Nos. 2021-01497, 2021-01498, 2021-02388, 2021-02389; Index Nos. 805375/12, 805372/19
DISPOSITION	other
PROCEDURAL POSTURE	Plaintiff appealed Supreme Court, New York County orders denying an extension of time to serve NYU School of Medicine, granting defendants summary judgment on certain claims, and denying consolidation. The Appellate Division modified the orders by denying summary judgment on the claim premised on Complex Regional Pain Syndrome and otherwise affirmed.
STANDARD OF REVIEW	Summary judgment requires the movant to make a prima facie showing of entitlement to judgment as a matter of law; if that burden is not met, the sufficiency of the opposing papers need not be considered. The grant or denial of an extension of time under CPLR 306-b in the interest of justice and consolidation under CPLR 602(a)

	are reviewed for abuse of discretion or providently exercised discretion.
PRECEDENTIAL VALUE	Published intermediate appellate opinion
PARTIES	Susan Krembs v. NYU Langone Hospitals, Andreas N. Neophytides, Andreas N. Neophytides, M.D., P.C., Neurological Consultants of New York P.C., Michael L. Smith, Michael L. Smith, M.D., P.C., Robert E. Elliott, Robert E. Elliott, M.D., P.C., Stephen P. Kalhorn, Emile Hiesiger, M.D., Emile Hiesiger, M.D., P.C.

TOPICS

summary judgment

medical malpractice

informed consent

service of process

civil procedure

PRACTICE AREAS

civil procedure

appellate procedure

medical malpractice

health law

torts

QUESTIONS PRESENTED

1. Whether plaintiff was entitled to an extension of time under CPLR 306-b to serve NYU School of Medicine.
2. Whether NYU Langone Hospitals could be held vicariously liable under an ostensible-agency theory.
3. Whether defendants were entitled to summary judgment dismissing plaintiff's informed-consent claim.
4. Whether defendants established prima facie entitlement to summary judgment dismissing plaintiff's claim premised on Complex Regional Pain Syndrome.
5. Whether the two actions should be consolidated under CPLR 602(a).

HOLDINGS

1. The denial of plaintiff's motion under CPLR 306-b for an extension of time to file and serve the supplemental summons, amended verified complaint, and certificate of merit was proper because an extension in the interest of justice was not warranted under the circumstances.
2. NYU Langone Hospitals was not vicariously liable under an ostensible-agency theory because the record established that plaintiff knew before arriving at the hospital that Dr. Michael L. Smith would perform the surgery.
3. Defendants were entitled to summary judgment dismissing plaintiff's informed-consent claim because the evidence established that plaintiff was advised of the reasonably foreseeable risks and offered specific nonsurgical alternatives.
4. Defendants were not entitled to summary judgment dismissing plaintiff's claim premised on Complex Regional Pain Syndrome because they failed to make a prima facie showing that plaintiff did not suffer from that condition.

5. The denial of plaintiff's motion to consolidate was proper because the actions involved disparate medical procedures, time periods, records, and witnesses and were at substantially different stages of litigation.

FACTUAL BACKGROUND

Plaintiff underwent surgery at NYU Langone after being referred to the treating neurologist and neurosurgeon by her primary care physician. She claimed, among other things, that NYU Langone was vicariously liable under an ostensible-agency theory, that she lacked informed consent, and that she developed Complex Regional Pain Syndrome after surgery. Plaintiff also sought to serve NYU School of Medicine after it had been added as a defendant and sought consolidation with a separate action involving different medical procedures and litigation timelines.

PROCEDURAL HISTORY

Supreme Court granted plaintiff's motion to add NYU School of Medicine as a defendant in 2017, but plaintiff did not serve it. Supreme Court later denied plaintiff's motion under CPLR 306-b for an extension of time to serve NYU School of Medicine, granted defendants summary judgment dismissing the informed-consent, ostensible-agency vicarious-liability, and CRPS claims, and denied plaintiff's motion to consolidate this action with another action. The Appellate Division affirmed the rulings concerning service, informed consent, ostensible agency, and consolidation, but reversed the grant of summary judgment on the CRPS claim.

DISPOSITION

other

CASES CITED

- Sutter v Reyes, 60 AD3d 448, 449 (1st Dept 2009)
- Khedouri v Equinox, 73 AD3d 532, 533 (1st Dept 2010)
- Shelkowitz v Rainess, 57 AD3d 337, 337 (1st Dept 2008)
- Pratt v Haber, 105 AD3d 429, 429 (1st Dept 2013)
- King v Mitchell, 31 AD3d 958, 960-961 (3d Dept 2006)
- Zeoli v Jacobowitz, 195 AD3d 547, 547-548 (1st Dept 2021)
- Walker v Saint Vincent Catholic Med. Ctrs., 114 AD3d 669, 670-671 (2d Dept 2014)
- Roques v Noble, 73 AD3d 204, 206 (1st Dept 2010)
- Ocasio-Gary v Lawrence Hosp., 69 AD3d 403, 404 (1st Dept 2010)
- Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985)
- L.B. v Stahl York Ave. Co., 188 AD3d 421 (1st Dept 2020)
- Ramos v City of New York, 30 AD3d 201 (1st Dept 2006)

OPINION

PER CURIAM.

Krembs v NYU Langone Hosps. (2023 NY Slip Op 01236) Krembs v NYU Langone Hosps. 2023 NY Slip Op 01236 Decided on March 09, 2023 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered: March 09, 2023 Before: Webber, J.P., Kern, Oing, Friedman, González, JJ. Index No. 805375/12, 805372/19 Appeal No. 17469-17470-17471-17472 Case No. 2021-01497, 2021-01498, 2021-02388, 2021-02389 [*1]Susan Krembs, Plaintiff-Appellant, vNYU Langone Hospitals et al., Defendants-Respondents, Baxter International, Inc., et al., Defendants.

Susan Krembs, Plaintiff-Appellant, The Flomenhaft Law Firm, PLLC, New York (David C. Zegarelli of counsel), for appellant. Martin Clearwater & Bell, LLP, New York (Barbara D. Goldberg of counsel), for NYU Langone Hospitals, Andreas N. Neophytides, Andreas N. Neophytides, M.D., P.C., Neurological Consultants of New York P.C., Michael L. Smith, Michael L. Smith, M.D., P.C., Robert E. Elliott, Robert E. Elliott, M.D., P.C. and Stephen P. Kalhorn, respondents.

Mauro Lilling Naparty, LLP, Woodbury (Seth M. Weinberg of counsel), for Emile Hiesiger, M.D. and Emile Hiesiger, M.D., P.C., respondents. Orders, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about March 24, 2021, March 29, 2021, and June 9, 2021, which, respectively, denied plaintiff's motion pursuant to CPLR 306-b to extend her time to file and serve a supplemental summons, amended verified complaint and certificate of merit on NYU School of Medicine (SOM), granted defendants' motion for summary judgment to the extent of dismissing the claims for lack of informed consent, vicarious liability as against NYU Langone Hospitals Center (Langone), and premised on Complex Regional Pain Syndrome (CRPS), and denied plaintiff's motion to consolidate this action with an action pending before the same court and Justice, unanimously modified, on the law, to deny defendants summary judgment dismissing the claim premised on CRPS, and otherwise affirmed, without costs.

Supreme Court providently exercised its discretion in denying plaintiff's motion for an extension of time to serve SOM in the interest of justice (see CPLR 306-b). In 2017, the court granted plaintiff's motion to add SOM as a defendant. Plaintiff subsequently made no attempt to serve SOM and did not move for relief until seven months after defendants moved for summary judgment, arguing that any claims against SOM should be dismissed as abandoned since it was never served, and the statute of limitations had since expired.

While diligence and delay are not threshold issues when seeking an extension of time in the interest of justice, they remain factors to be considered by the court, and, under these circumstances, we agree that an extension of time was not warranted (see *Sutter v Reyes*, 60 AD3d 448, 449 [1st Dept 2009]; see also *Khedouri v Equinox*, 73 AD3d 532, 533 [1st Dept 2010]; *Shelkowitz v Rainess*, 57 AD3d 337, 337 [1st Dept 2008]).

Plaintiff's vicarious liability claim against Langone on a theory of ostensible agency was properly dismissed. The record established that plaintiff was referred to defendant neurologist, Andreas N. Neophytides, M.D., by her primary care physician, and Dr. Neophytides referred her to defendant neurosurgeon, Michael L. Smith, M.D., prior to her admission to Langone.

Plaintiff testified that she was aware before she went to Langone that Dr. Smith would be performing the surgery (see *Pratt v Haber*, 105 AD3d 429, 429 [1st Dept 2013]). Accordingly, the fact that plaintiff was admitted through the emergency room, had no prior relationship with Dr. Smith, signed consent forms on Langone letterhead, and underwent presurgical testing at Langone, does not create ostensible agency (see *King v Mitchell*, 31 AD3d 958, 960-961 [3d Dept 2006]).

Plaintiff's lack of informed consent claim was also properly dismissed. Contemporaneous medical records and deposition testimony establish that plaintiff was advised of the reasonably foreseeable risks of surgery and offered specific nonsurgical options like medication and steroid injections (see *Zeoli v Jacobowitz*, 195 AD3d 547, 547-548 [1st Dept [*2]2021]).

Plaintiff's contention that defendants did not obtain her informed consent because she was misinformed that the surgery was necessary does not counter the evidence that she was advised of the specific risks and benefits of surgery and offered alternatives (see Public Health Law § 2805-d; *Walker v Saint Vincent Catholic Med. Ctrs.*, 114 AD3d 669, 670-671 [2d Dept 2014]).

With respect to plaintiff's claim premised on CRPS, we find that defendants failed to make a prima facie showing that plaintiff did not suffer from such condition. Defendants' expert's recital of plaintiff's post-operative symptoms was not supported by record evidence and his opinion that her later development of symptoms associated with CRPS could not be attributed to the surgery was conclusory, and thus insufficient to establish defendants entitlement to summary judgment on this claim (see *Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Ocasio-Gary v Lawrence Hosp.*, 69 AD3d 403, 404 [1st Dept 2010]).

Since defendants failed to meet their prima facie burden, we need not consider the sufficiency of plaintiff's opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). We find no reason to disturb Supreme Court's decision denying plaintiff's motion to consolidate pursuant to CPLR 602(a).

The two actions involve disparate medical procedures, time periods, medical records, and witnesses. Moreover, since the two actions are at vastly different stages of litigation — eight years of discovery have been completed in the first action, while discovery is just beginning in the second action — consolidation would not serve judicial economy or the interest of justice (see *L.B. v Stahl York Ave. Co.*, 188 AD3d 421 [1st Dept 2020]; *Ramos v City of New York*, 30 AD3d 201 [1st Dept 2006]).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT,
APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: March 9, 2023

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