Grechko v. Maimonides Medical Center

Supreme Court, Appellate Division, Second Department, New York. | September 11, 2019 | --- N.Y.S.3d ---- | 2019 WL 4281970

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Outline

2019 WL 4281970
Supreme Court, Appellate Division,
Second Department, New York.

Inna GRECHKO, etc., Appellant,
v.
MAIMONIDES MEDICAL CENTER,
et al., Respondents, et al., Defendants.

2016–03935
|
(Index No. 12681/10)
|
Argued - December 13, 2018
|
September 11, 2019

Synopsis

Background: Wife of patient who died of pneumonia brought medical malpractice action against physician who first diagnosed patient and medical center where physician was employed, alleging that defendants were negligent in failing to recognize seriousness of patient's pneumonia, and filed motion in limine to preclude admission of medical record entries by and testimony of physicians who later examined patient, which indicated that patient's primary care physician said that patient had signed form indicating that he left medical center against medical advice and that patient had been recommended hospitalization but had chosen to leave. The Supreme Court, Kings County, Ellen Spodek, J., denied motion except as to primary care physician's assertion, and entered judgment dismissing complaint. Wife appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] evidence was insufficient to establish that entries made in patient's hospital records were admissible under business records exception to hearsay rule;

[2] entry made in patient's records, indicating that, according to patient's primary care physician, patient had signed form discharging himself from medical center against medical advice, was not admissible;

[3] patient's wife, in soliciting testimony from her expert physician, did not "open the door" to admission of such entry;

[4] entry indicating that patient had been recommended hospitalization but had chosen to sign form discharging himself against medical advice was not admissible;

[5] statute prohibiting people interested in action, upon commencement of action, from being examined as witnesses against survivor of decedent concerning personal transactions or communications they had with decedent applied;

[6] physician's deposition testimony did not fall within declaration against interest exception to hearsay rule; and

[7] erroneous admission of entries and testimony was not harmless.

Reversed and remitted.

West Headnotes (11)

[1] Health

A hearsay entry in a hospital record is admissible under the business records exception to the hearsay rule if the entry is germane to the diagnosis or treatment of the patient.

Cases that cite this headnote

[2] Health

Evidence was insufficient to establish that entries made in patient's hospital records, in which treating physicians indicated that patient's primary care physician had stated that patient had left medical center against medical advice, that patient had refused treatment at medical center, and that patient had signed form discharging himself against medical advice, were admissible under business records exception to hearsay rule in medical malpractice action brought by patient's wife against physician who initially diagnosed patient and medical center where physician was employed; although entries were germane to patient's diagnosis and treatment, physician and medical center failed to offer

foundational testimony or certification. N.Y. CPLR §§ 4518(a), 4518(c).

Cases that cite this headnote

[3] Health

If an entry in medical records is inconsistent with a position taken by a party at trial, it is admissible as an admission by that party, even if it is not germane to the diagnosis or treatment, as long as there is evidence connecting the party to the entry.

Cases that cite this headnote

[4] Health

Entry made in patient's medical records by physician who examined patient after he was diagnosed with pneumonia, which indicated that, according to patient's primary care physician, patient had signed form discharging himself from medical center against medical advice, was not admissible in medical malpractice action brought by patient's wife against physician who initially diagnosed patient and medical center where physician was employed; although entry was inconsistent with position taken at trial by wife, entry clearly stated that primary care physician, not patient himself, was source of information contained therein.

Cases that cite this headnote

[5] Health

Patient's wife, in soliciting testimony from her expert physician, did not "open the door" to admission of entry made in patient's medical records by physician who examined patient after he was diagnosed with pneumonia, which indicated that, according to patient's primary care physician, patient had signed form discharging himself from medical center against medical advice, in medical malpractice action brought by patient's wife against physician who initially diagnosed patient and medical center where physician was employed; expert did not testify regarding any conversations between patient's primary care physician and physician who made entry in medical records, and instead testified only as to patient's own statements.

Cases that cite this headnote

[6] Health

Entry made in patient's medical records by physician who examined patient after he was diagnosed with pneumonia, which indicated that patient had been recommended hospitalization by medical center where he was initially diagnosed but had chosen to sign form discharging himself against medical advice, was not admissible in medical malpractice action brought by patient's wife against physician who initially diagnosed patient and medical center where physician was employed; although such entry was inconsistent with position taken by wife at trial, defendants failed to establish that patient was source of information contained in entry.

Cases that cite this headnote

[7] Health

Statute prohibiting parties or people interested in action, upon commencement of action, from being examined as witnesses against survivor of decedent concerning personal transactions or communications they had with decedent prior to death applied to preclude admission into evidence of deposition testimony of physicians who examined patient after he was diagnosed with pneumonia, in medical malpractice action brought by patient's wife; both physicians were defendants at time they gave deposition testimony, and they both testified as to transactions or communications they had with patient and sought to offer that testimony against patient's estate. N.Y. CPLR § 4519.

Cases that cite this headnote

[8] Witnesses

Executor of decedent does not waive rights under statute prohibiting parties or people interested in action, upon commencement of action, from being examined as witnesses against executor concerning personal transactions or communications they had with decedent prior to death by taking opponent's deposition. N.Y. CPLR § 4519.

Cases that cite this headnote

[9] Witnesses

Where the Dead Man's Statute, which prohibits parties or people interested in action, upon commencement of action, from being examined as witnesses against survivor of decedent concerning personal transactions or communications they had with decedent prior to death, renders a witness's testimony inadmissible, the fact that the testimony would fall within an exception to the hearsay rule is simply irrelevant.

Cases that cite this headnote

[10] Health

Deposition testimony of physician who examined patient after he had been diagnosed with pneumonia, which indicated that patient had told physician that he had refused treatment at medical center, did not fall within declaration against interest exception to hearsay rule, and thus was inadmissible in medical malpractice action brought by patient's wife against physician who initially diagnosed patient and medical center where patient was employed; although defendants argued that testimony was admissible for impeachment purposes, defendants failed to establish that subject statement was against patient's interest when made. N.Y. CPLR § 3117(a).

Cases that cite this headnote

[11] Health

Trial court's error in admitting into evidence entries made in patient's medical records by physicians who examined patient after he had been diagnosed with pneumonia, which indicated that patient's primary care physician had said that patient signed form discharging himself from medical center against medical advice, as well as testimony from physicians stating that patient said that he had refused treatment at medical center, was not harmless in medical malpractice action brought by patient's wife against physician who initially diagnosed patient and medical center where physician was employed; entries and testimony related to issue of whether medical center failed to recognize severity of patient's illness, which was very issue to be decided by jury.

Cases that cite this headnote

Attorneys and Law Firms

Jeffrey E. Michels, New York, NY, for appellant.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York, N.Y. (Elliott J. Zucker of counsel), for respondents.

REINALDO E. RIVERA, J.P., JEFFREY A. COHEN, SYLVIA O. HINDS–RADIX, JOSEPH J. MALTESE, JJ.

DECISION & ORDER

***1** In an action to recover damages for medical malpractice, the plaintiff appeals from a judgment of the Supreme Court, Kings County (Ellen Spodek, J.), entered February 25, 2015. The judgment, insofar as appealed from, upon a jury verdict, is in favor of the defendants Maimonides Medical Center and Reginald Orr and against the plaintiff, dismissing the complaint insofar as asserted against those defendants.

ORDERED that the judgment is reversed insofar as appealed from, on the law, with costs, the complaint is reinstated insofar as asserted against the defendants Maimonides Medical Center and Reginald Orr, and the matter is remitted to the

Supreme Court, Kings County, for a new trial as to those defendants.

On June 1, 2008, the plaintiff's decedent presented to the emergency room at the defendant Maimonides Medical Center (hereinafter the Medical Center), where he was evaluated by the defendant Reginald Orr, an emergency room physician employed by the Medical Center. Orr diagnosed the decedent with pneumonia. In the decedent's medical record, Orr wrote that he "offered" the decedent hospitalization for fluids and IV antibiotics. However, the decedent was discharged from the emergency room the same day with oral antibiotics and instructions to follow up with his primary care physician. Although Orr testified at trial that he informed the decedent that his pneumonia was serious and required hospitalization, and that the decedent left the Medical Center against medical advice (hereinafter AMA), it is uncontested that Orr never requested that the decedent sign an AMA form before he was discharged.

On June 4, 2008, the decedent presented to his primary care physician, Vitaly Volovoy. After evaluating the decedent, Volovoy sent the decedent to Coney Island Hospital for further treatment. Emmanuil Rakhmanchik, an attending physician at Coney Island Hospital, wrote in the decedent's medical record that according to the decedent's primary care physician, the decedent signed an AMA form at the Medical Center. At a deposition, Volovoy testified that the decedent told him that he refused treatment at the Medical Center, and further that he was discharged home from the Medical Center. Additionally, Mohammed Uddin, a resident physician at Coney Island Hospital, wrote in the decedent's medical record that the decedent was recommended hospitalization at the Medical Center, but signed an AMA form. The decedent died at Coney Island Hospital on the evening of June 4, 2008.

The plaintiff alleges that the Medical Center and Orr were negligent in failing to recognize the seriousness of the decedent's pneumonia when he presented to the Medical Center on June 1, 2008. Prior to trial, the plaintiff moved, in limine, to preclude and/or redact so much of the entries by Rakhmanchik and Uddin in the decedent's medical record at Coney Island Hospital, and to preclude so much of the deposition testimony of Uddin and Volovoy, as pertained to discussions they had with the decedent. The Supreme Court denied the motion except for that branch of the motion which was to preclude so much of Rakhmanchik's entry as stated that, according to the decedent's primary care physician, the decedent signed an AMA form at the Medical Center, which the court determined was inadmissible hearsay. However, the court later permitted defense counsel to cross-examine the plaintiff's expert emergency medicine physician on the substance of Rakhmanchik's entry.

***2** The jury returned a verdict in favor of the Medical Center and Orr (hereinafter together the defendants), and the Supreme Court entered a judgment, inter alia, dismissing the complaint insofar as asserted against them. On appeal, the plaintiff contends, inter alia, that the court should not have allowed the entries in the Coney Island Hospital record into evidence.

[1] **[2]** The defendants argue that the entries in the Coney Island Hospital records were admissible under the business records exception to the hearsay rule. "A hearsay entry in a hospital record is admissible under the business records exception to the hearsay rule if the entry is germane to the diagnosis or treatment of the patient" (*Berkovits v. Chaaya*, 138 A.D.3d 1050, 1051, 31 N.Y.S.3d 531; *see* CPLR 4518[a]). Here, although the entries were germane to the decedent's diagnosis and treatment, the defendants failed to offer foundational testimony under CPLR 4518(a) or certification under CPLR 4518(c) (*cf. Matter of Kai B.*, 38 A.D.3d 882, 884, 834 N.Y.S.2d 216). Accordingly, the entries were not admissible under the business records exception to the hearsay rule.

[3] **[4]** **[5]** If an entry in the medical records "is inconsistent with a position taken by a party at trial, it is admissible as an admission by that party, even if it is not germane to the diagnosis or treatment, as long as there is 'evidence connecting the party to the entry' " (*Robles v. Polytemp, Inc.*, 127 A.D.3d 1052, 1054, 7 N.Y.S.3d 441, quoting *Coker v. Bakkal Foods, Inc.*, 52 A.D.3d 765, 766, 861 N.Y.S.2d 384). Here, we agree with the Supreme Court's determination to preclude so much of Rakhmanchik's entry as stated that, according to the decedent's primary care physician, the decedent signed an AMA form at the Medical Center, as the entry clearly states that the decedent's primary care physician, not the decedent himself, was the source of the information contained therein (*see Robles v. Polytemp, Inc.*, 127 A.D.3d at 1054, 7 N.Y.S.3d 441; *cf. Amann v. Edmonds*, 306 A.D.2d 362, 363, 760 N.Y.S.2d 858). However, we disagree with the court's ruling that the plaintiff opened the door to the admission of Rakhmanchik's entry with the testimony of the plaintiff's expert physician. The expert did not testify to any conversations between the decedent's

primary care physician and Rakhmanchik, but only to the decedent's own statements.

[6] Moreover, we disagree with the Supreme Court that Uddin's entry was admissible, as the defendants failed to establish that the decedent was the source of the information that he left the Medical Center after signing an AMA form (*see Coker v. Bakkal Foods, Inc.*, 52 A.D.3d at 766, 861 N.Y.S.2d 384; *Cuevas v. Alexander's, Inc.*, 23 A.D.3d 428, 429, 805 N.Y.S.2d 605; *Thompson v. Green Bus Lines*, 280 A.D.2d 468, 468, 721 N.Y.S.2d 70; *Ginsberg v. North Shore Hosp.*, 213 A.D.2d 592, 592–593, 624 N.Y.S.2d 257; *Echeverria v. City of New York*, 166 A.D.2d 409, 410, 560 N.Y.S.2d 473).

[7] Additionally, we disagree with the Supreme Court's determination that the deposition testimony of Uddin and Volovoy was admissible. Pursuant to CPLR 4519, otherwise known as the Dead Man's Statute, "[u]pon the trial of an action ... a party or a person interested in the event ... shall not be examined as a witness in his [or her] own behalf or interest ... against the executor, administrator or survivor of a deceased person or the committee of a mentally ill person ... concerning a personal transaction or communication between the witness and the deceased person or mentally ill person, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his [or her] own behalf, of the testimony of the mentally ill person or deceased person is given in evidence, concerning the same transaction or communication." Here, both Volovoy and Uddin were defendants at the time they gave deposition testimony, making them interested parties under the statute (*see Durazinski v. Chandler*, 41 A.D.3d 918, 920, 837 N.Y.S.2d 775). Moreover, they both testified to transactions or communications with the decedent and sought to offer that testimony against the decedent's estate. Accordingly, the Dead Man's Statute applied to, and barred, the admission of their deposition testimony.

***3** **[8]** **[9]** **[10]** The defendants argue that the plaintiff waived the protections of the Dead Man's Statute by eliciting the communications at issue. However, "[t]he executor does not waive rights under the statute by taking the opponent's deposition" (*Phillips v. Kantor & Co.*, 31 N.Y.2d 307, 313, 338 N.Y.S.2d 882, 291 N.E.2d 129; *see Wall St. Assoc. v. Brodsky*, 295 A.D.2d 262, 263, 744 N.Y.S.2d 378). Additionally, although the defendants contend that Volovoy's deposition testimony was properly admitted for impeachment purposes, deposition testimony may only be used to impeach a witness "so far as admissible under the rules of evidence" (CPLR 3117[a]; *see Rivera v. New York City Tr. Auth.*, 54 A.D.3d 545, 547, 863 N.Y.S.2d 201). Contrary to the defendants' contention, the declaration of the decedent did not fall within the declaration against interest exception to the hearsay rule because the defendants failed to establish that the subject statement was against the decedent's interest when made (*see Field v. Schultz*, 308 A.D.2d 505, 506, 764 N.Y.S.2d 473). Moreover, where the Dead Man's Statute renders a witness's testimony inadmissible, "the fact that the testimony would fall within an exception to the hearsay rule is simply irrelevant" (*Wall St. Assoc. v. Brodsky*, 295 A.D.2d at 263, 744 N.Y.S.2d 378 [internal quotation marks omitted]).

[11] Under the circumstances here, the erroneous admission of the entries contained in the Coney Island Hospital record and the deposition testimony of Uddin and Volovoy cannot be deemed harmless, as the entries and testimony related to the very issue to be determined by the jury, i.e., whether Orr and the Medical Center failed to recognize the severity of the decedent's illness (*see Cuevas v. Alexander's, Inc.*, 23 A.D.3d at 429, 805 N.Y.S.2d 605). A new trial is therefore necessary.

In light of our determination, we need not reach the plaintiff's remaining contentions.

RIVERA, J.P., COHEN, HINDS–RADIX and MALTESE, JJ., concur.

All Citations

--- N.Y.S.3d ----, 2019 WL 4281970, 2019 N.Y. Slip Op. 06478