SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHY J. KING** **PART** **06**

Justice

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BARBARA SILVERSTEIN,

Plaintiff,

- v -

FARR NEZHAT, M.D., OB/GYN FACULTY PRACTICE ASSOCIATION, THE MOUNT SINAI HOSPITAL

Defendant.

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INDEX NO. 109486/2006

MOTION DATE 3/22/22

MOTION SEQ. NO. 04

DECISION + ORDER ON MOTION

The following papers, numbered 1 to 4, were read on this application to/for vacate judgment:

Notice of Motion/ Petition/ OSC - Affidavits – Exhibits----------No(s) 1,2

Answering Affidavits – Exhibits---------- No(s) 3

Replying Affidavits---------- No(s) 4

Upon the foregoing documents, plaintiff seeks an order, pursuant to CPLR § 5015(a)(3), and Judiciary Law § 487, for the following relief:

1) vacating the judgment entered on June 1, 2016;

2) granting summary judgment to plaintiff on liability, and finding damages in the sum of $3,989,007 for lost earnings, plus interest; and

3) for a hearing on the value of plaintiff's additional damages, including pain and suffering.

Defendants oppose the motion.

The instant medical malpractice action was commenced in 2006 against Mount Sinai Hospital and Dr. Farr Nezhat. Plaintiff, who is an attorney and proceeding *pro se* in this application, was represented by counsel at trial, in early 2016. The case was tried to verdict over

the course of 15 days before the Honorable Eileen A. Rakower, and ultimately the jury ruled in favor of the defendants on plaintiff's medical malpractice and lack of informed consent claims. Judgment was entered on June 1, 2016. The record reveals that a notice of appeal was filed on behalf of plaintiff; however, plaintiff never perfected her appeal, and according to defendants, the appeal was dismissed on defendants' motion.

In support of her motion, plaintiff argues that the judgment must be vacated because defense counsel engaged in fraudulent conduct at trial through "deceit and collusion" with the defendants, defense witnesses, and defense experts, resulting in a "fraudulent verdict." In essence, plaintiff asserts, *inter alia*, that witnesses perjured themselves at the behest of defense counsel. Plaintiff also asserts that during the trial defense counsel used defamatory language when speaking about the plaintiff to the jury.

CPLR § 5015(a)(3) permits a court to relieve a party from a judgment or order based upon "fraud, misrepresentation, or other misconduct of an adverse party." Under 5015(a)(3), fraud "may be defined as a fraud practiced in obtaining a judgment such that a party may have been prevented from fully and fairly litigating the matter" (*Shaw v Shaw*, 97 AD2d 403, 403 [2d Dept 1983]). Further, a party asserting fraud as a basis for vacatur is required to submit evidence in admissible form in support of such a claim (*see 101 Maiden Lane Realty Co., LLC v Tran Han Ho*, 88 AD3d 596, 596-97 [1st Dept 2011]).

Here, the arguments presented by plaintiff demonstrate that she is seeking to relitigate the same claims raised at trial by her attorney, and that she simply disagrees with the jury's verdict. Plaintiff has failed to submit a scintilla of evidence to support the speculative and specious claims of deceit and collusion and has "offered nothing more than broad, unsubstantiated allegations of fraud on the part of [the defendants]" (*Aames Capital Corp. v Davidsohn*, 24

AD3d 474, 475 [2d Dept 2005], quoting *Miller v Lanzisera*, 273 AD2d 866, 868 [4th Dept 2000]. As such, plaintiff's argument must fail.

The Court also finds plaintiff's claims about allegedly defamatory language used against her at trial by defense counsel as a basis for vacatur to be without merit. Said statements are protected by the immunity of litigation proceedings, as set forth in *Front, Inc. v Khalil*, 24 NY3d 713, 718 [2015], wherein the New York Court of Appeals held that "absolute immunity from liability for defamation exists for oral or written statements made by attorneys in connection with a proceeding before a court when such words and writings are material and pertinent to the questions involved" [internal quotation marks and citation omitted].

In any event, the plaintiff's application is late, having been made nearly six years after the judgment was entered and, under the circumstances presented here, such a delay is not a "reasonable time" within which to seek the instant relief (*see Mark v Lenfest*, 80 AD3d 426, 426 [1st Dept 2011]).

The Court further finds that plaintiff's reliance on Judiciary Law § 487 is barred by collateral estoppel which gives conclusive effect to prior determinations when two conditions are met. There must be "an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling" (*Lennon v 56th and Park (NY) Owner, LLC*, 199AD3d 64, 69 [2d Dept 2021], quoting *Buechel v Bain*, 97 NY2d 295, 303-04 [2001] [internal quotation marks omitted]). Here, the issue as to whether defendants' attorneys violated Judiciary Law § 487 prior to and during the trial of the instant medical malpractice action was determined in a plenary matter commenced by plaintiff. By Decision and Order dated May 30, 2023,

bearing Index No. 151024/2022, the Court (J. Ramseur) denied plaintiff's motion under Judiciary Law § 487. Thus, vacatur of the judgment and damages is barred by collateral estoppel.

Based on the foregoing, it is hereby,

ORDERED, that the plaintiff's motion is denied in its entirety.

6/24/2024
DATE

KATHY J. KING, J.S.C.

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