

Cantor v Goldstone

2012 NY Slip Op 30321(U)

February 8, 2012

Supreme Court, New York County

Docket Number: 103019/07

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

CANTOR, JAMES

INDEX NO.

103019/07

MOTION DATE

1-27-12

MOTION SEQ. NO.

01

MOTION CAL. NO.

- v -
STEPHEN E. GOLDSTONE, M.D.,
ET AL.

The following papers, numbered 1 to 9 were read on this motion to for lift stay & amend caption.

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

PAPERS NUMBERED

1-9

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

FEB 09 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/8/12

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

JOAN B. LOBIS

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
JAMES CANTOR,

Plaintiff,

Index No. 103019/07

-against-

Decision and Order

STEPHEN E. GOLDSTONE, M.D., JEFFREY W.
HUYETT, N.P., STEPHEN E. GOLDSTONE, M.D. d/b/a
LASER SURGERY CARE, LASER SURGERY CARE,
CHRISTIAN J. HIRSCH, M.D., JASON R. PENZER, M.D.,
BRUCE S. GINGOLD, M.D., and MANHATTAN
COLORECTAL ASSOCIATES, P.C.,

FILED

Defendants.

FEB 09 2012

-----X
JOAN B. LOBIS, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

Motion Sequence Numbers 001 and 002 are hereby consolidated for disposition. In Motion Sequence Number 001, Fredric Andrew Cantor, as executor of the estate of named plaintiff James Cantor, deceased, moves, by order to show cause, for an order lifting the automatic stay imposed due to the death of James Cantor and amending the caption to reflect the substitution and a prior discontinuance of the case against one of the defendants, Bruce S. Gingold, M.D. In Motion Sequence Number 002, defendant Stephen E. Goldstone, M.D., moves, by order to show cause, for an order denying Fredric Andrew Cantor's motion and dismissing the complaint for failing to timely effect substitution.

This medical malpractice case involves events that occurred between 2002 and 2006. The action was commenced by the filing of a summons with notice on March 5, 2007. An amended summons with notice and a verified complaint were filed on or about March 26, 2007. Issue was joined and the case proceeded to a preliminary conference before the Hon. Eileen Bransten, to whom

this case was originally assigned. Due to inventory changes, this case was assigned to me in or about March 2008, and the parties appeared for a number of conferences before me between May 2008 and April 2009. On or about May 23, 2008, the parties entered into a stipulation of discontinuance as to defendant Bruce S. Gingold, M.D. James Cantor was deposed over three days in 2008. Prior to commencing defendants' depositions, James Cantor died on April 16, 2009, and as a result, the case was stayed pending the appointment of a representative of the estate and substitution. C.P.L.R. § 1015.

Letters Testamentary were issued to Fredric Andrew Cantor on July 20, 2009. Apparently, on or about July 28, 2009, counsel for plaintiff circulated a stipulation proposing to substitute Fredric Andrew Cantor as the plaintiff and amend the caption. While counsel for a number of the other co-defendants did sign the stipulation, counsel for Stephen E. Goldstone, M.D., never signed the stipulation. It is unclear why, at this point, counsel for plaintiff never moved to effect the substitution. By March 29, 2011, the next time the parties appeared for a court conference to assess the status of this case, no substitution had been effected. Nine months later, counsel for plaintiff filed the motion for substitution, and shortly thereafter, counsel for Dr. Goldstone filed the motion to dismiss for failure to substitute.

Pursuant to C.P.L.R. § 1021, substitution of an estate must be made within a reasonable time after the death of the party. The determination of whether a delay in substitution is reasonable is left to the discretion of the court, and some factors that the court may consider are the length of time between the death of the party and the motion to substitute; whether any party would

be subjected to undue prejudice by the delay; the movant's excuse for the delay; whether there has been a demonstration of merit; and the strong public policy favoring disposal on the merits. See Peters v. City of N.Y. Health & Hosps. Corp., 48 A.D.3d 329 (2008); Largo-Chicaiza v. Westchester Scaffold Equip. Corp., 90 A.D.3d 716 (2d Dep't 2011).

In his initial motion papers, plaintiff's counsel fails to show that the case has merit or provide any excuse for the thirty-three (33) month delay between the James Cantor's death and the instant substitution motion. In his motion to dismiss, Dr. Goldstone points out these deficiencies and argues that the delay in resuming prosecution of the case has prejudiced his ability to defend the case because it may be difficult to locate and secure interviews with witnesses. In opposition, plaintiff again fails to offer any excuse for the delay, but asserts that there is no prejudice to defendants in the delay. In the opposition papers, plaintiff also provides an affirmation from a physician (name redacted) in which the physician opines, to a reasonable degree of medical certainty, that Dr. Goldstone and co-defendant Christian J. Hirsch, M.D. deviated from accepted standard of care in treating James Cantor, and that such deviations were substantial factors in causing injury to James Cantor. The physician briefly opines that Dr. Hirsch failed to properly treat James Cantor's anal fistulae, necessitating further surgery, and that Dr. Goldstone improperly performed a surgery to repair James Cantor's rectum, causing a loss of sphincter and a large V-shaped defect and necessitating further surgery. In reply, Dr. Goldstone maintains that the physician's affirmation is conclusory and fails to show merit.

Though the delay in substitution was lengthy and unexplained, the affirmation of merit is sufficient under these circumstances and there is little prejudice to defendants other than the

mere passage of time, which alone is not a basis for finding prejudice. See Kaufman v. Bauer, 36 A.D.3d 481, 484 (1st Dep't 2007); Wynter v. Our Lady of Mercy Med. Ctr., 3 A.D.3d 376, 378 (1st Dep't 2004). Considering, further, New York's strong preference for a resolution of matters on their merits, plaintiff's application to substitute the estate is granted, and Dr. Goldstone's motion to dismiss is denied. Accordingly, it is hereby

ORDERED that plaintiff's motion (Motion Sequence Number 001) is granted, and that Fredric Andrew Cantor, as Executor of the Estate of James Cantor, Deceased, be substituted as plaintiff in the above-entitled action in the place and stead of the plaintiff, James Cantor, without prejudice to any proceedings heretofore had herein; and it is further

ORDERED that all papers, pleadings, and proceedings in the above-entitled action be amended by substituting the name of Fredric Andrew Cantor, as Executor of the Estate of James Cantor, Deceased, as plaintiff in the place and stead of said decedent, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that defendant Stephen E. Goldstone, M.D.'s motion to dismiss (Motion Sequence Number 002) is denied; and it is further

ORDERED that the parties shall appear for a status conference on March 20, 2012,
at 9:30 a.m.

Dated: February 8, 2012

ENTER:



JOAN B. LOBIS, J.S.C.

FILED

FEB 09 2012

NEW YORK
COUNTY CLERK'S OFFICE