

Hershmann v St. Vincent's Catholic Med. Ctr.

2017 NY Slip Op 31314(U)

June 16, 2017

Supreme Court, New York County

Docket Number: 150002/05

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

RUBENS HERSHMANN,
Plaintiff,

INDEX NO. : 150002/05

MOTION DATE: 6/1/17

- v -

MOTION SEQ. NO.: 002

ST. VINCENT'S CATHOLIC MEDICAL CENTER and MARC KLAPHOLZ,
Defendants.

The following papers, numbered 1 to _____, were read on this motion to dismiss.

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Defendants move for an order (i) pursuant to CPLR 1021 dismissing this action with prejudice based on plaintiff's failure to timely substitute the plaintiff, who is deceased, with the plaintiff's representative or, in the alternative, (ii) pursuant to CPLR 3126 dismissing the complaint for lack of prosecution . Plaintiff opposes the motion.

This action for medical malpractice arises out of the medical treatment received by decedent at defendant St. Vincent's Catholic Medical Center (St Vincent's) from September 19, 2002, until October 14, 2002. Plaintiff, a Brazilian resident and Brazilian citizen, was visiting New York when he suffered a heart attack and defendants performed an emergency operation on September 19, 2002. It is alleged that defendants committed malpractice in failing to diagnose an infection prior to discharging plaintiff from a follow-up visit after heart surgery.

This action was commenced on March 10, 2005. On July 5, 2005, St Vincent's filed a voluntary petition seeking bankruptcy protection in the Bankruptcy Court for the Southern

District of New York, and plaintiff's counsel timely filed a proof of claim in that proceeding. A Bankruptcy Court order confirming St. Vincent's reorganization and liquidation dated July 27, 2007 became effective on August 30, 2007. Plaintiff died on January 29, 2008 due to causes unrelated to the alleged malpractice.

After defendants made this motion, plaintiff's counsel submitted a proposed order to show cause to withdraw as counsel for plaintiff. By order dated March 28, 2017, the court declined to sign the order to show cause writing that "any orders or court proceedings after death of a party but prior to substitution are null and void," citing Hicks v. Jeffrey, 304 AD2d 618 (2d Dept 2003); Geroux v. Dunlop Tire Corp., 16 AD3d 1068 (4th Dept 2005).¹

Defendants argue that this action should be dismissed with prejudice pursuant to CPLR 1021 as plaintiff died in Brazil in January 2008, and his estate/next of kin have not made any effort to be substituted for plaintiff in this matter and that under such circumstances the complaint must be dismissed with prejudice, citing, e.g. Terpis v. Regal Heights Rehabilitation Center, 108 AD3d 618(2d Dept 2013)(affirming lower court order dismissing action with prejudice based on failure to timely substitute plaintiff "in light of the 21-month delay in obtaining preliminary letters testamentary, the further one-year delay in seeking substitution, the failure to demonstrate a reasonable excuse for the delays, the absence of any affidavit of merit, and the prejudice to the DE); Aljandro v. N. Tarry Town Realty Assoc., 129 AD3d 749 (2d Dept 2015)(affirming dismissal with prejudice where administrator sought substitution more than 61/2 years after decedent's death and failed to demonstrate a reasonable excuse for delay).

Plaintiff opposes the motion, asserting that plaintiff's family members have advised plaintiff's counsel that a Brazilian court appointed plaintiff's daughter as administratrix of plaintiff's estate. Plaintiff further argues that dismissal is not warranted under the circumstances here as plaintiff's counsel has diligently sought to substitute plaintiff's estate for the deceased

¹The court also noted that death certification submitted by plaintiff's counsel did not include a translation into English.

plaintiff but has been frustrated due to lack of information and communication with the deceased plaintiff's family. As for the motion pursuant to CPLR 3126, plaintiff argues that as there has been no wilful conduct in connection with failure to provide discovery, there is no basis for striking the complaint based on this statute.

CPLR 1021 provides, in relevant part, that "[i]f the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made, however, such dismissal shall not be on the merits unless the court shall so indicate...[and that] if the event requiring substitution is the death the party, and timely substitution has not been made, the court, before proceeding further, shall on such notice as it may in its discretion direct, order the persons interested in the decedent's estate to show cause why the action or appeal should not be dismissed."

Here, it has been almost 15 years since the events underlying this action occurred, more than 12 years since the commencement of this action, and more than nine years since plaintiff's death. Under similar circumstances, it has been found that it is appropriate to dismiss an action under CPLR 1021. See Palmer v. Selpan Elec. Co., Inc., 5 AD3d 248 (1st Dept 2004)(reversing trial court order denying motion to dismiss pursuant to CPLR 1021 where it had been "six years since the accident, five years since the commencement of the action, and four years since the death of the plaintiff" and counsel's numerous attempts to appoint plaintiff's father as a representative had failed); Suciu v. City of New York, 239 AD2d 338 (2d Dept 1997)(trial court should have granted motion dismissing complaint "[i]n light of the five-year delay in obtaining letters of administration, the delay in seeking substitution, the failure to offer any excuse for the delay, the absence of any affidavit of merit, and the prejudice to the appellants").

That said, however, based on the representation of plaintiff's counsel that the deceased plaintiff's daughter has been appointed as administratrix of plaintiff's estate in Brazil, the dismissal shall be without prejudice, in order to provide notice of this order to plaintiff's

daughter and those with an interest in the deceased plaintiff's estate and to give such persons an opportunity to reinstate the action and substitute a representative for the deceased plaintiff. That said, however, as set forth below, in the event that a motion to reinstate the action and to substitute a representative of the estate for plaintiff is not made by December 15, 2017, the action shall be dismissed with prejudice.

Accordingly, it is

ORDERED that counsel for plaintiff shall transmit a copy of this order to all persons known to counsel for plaintiff to have an interest in the estate of the deceased plaintiff, including the deceased plaintiff's daughter, together with a letter explaining that if a motion to reinstate the action and substitute a representative for the deceased plaintiff is not made by December 15, 2017, then the complaint will be dismissed with prejudice, which means that the action cannot be brought again; and it is further

ORDERED that counsel for plaintiff shall efile proof of transmittal of this order together with the above described letter on or before June 30, 2017; and it is further

ORDERED that the defendants' motion to dismiss pursuant to CPLR 1021 is granted without prejudice; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint without prejudice; and it is further

ORDERED that in the event a motion to reinstate the action and substitute a representative for the deceased plaintiff is not made by December 15, 2017, this action shall be dismissed with prejudice; and it is further

ORDERED that defendants' motion pursuant to CPLR 3126 is denied.

DATED: June 16, 2017



HON. JOAN A. MADDEN
J.S.C.
J.S.C.

.Check One: FINAL DISPOSITION NON-FINAL DISPOSITION