

<b>Arroyo v Castellanos</b>
2017 NY Slip Op 31195(U)
June 2, 2017
Supreme Court, New York County
Docket Number: 805064/14
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

LUIS ARROYO,  
Plaintiff,

INDEX NO. : 805064/14

MOTION DATE: 6/1/17

- v -

MOTION SEQ. NO.: 003

LUIS MENDEZ CASTELLANOS, M.D.,  
and LUIS MENDEZ CASTELLANOS,  
M.D., PC,  
Defendants.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: [ ] Yes [x] No

Plaintiff moves for order to show cause for an order (1) lifting the stay caused by plaintiff Luis Arroyo’s death, (2) substituting Clifford A. Meirowitz, as Executor of the Estate of Luis Arroyo, as plaintiff, (3) amending the caption to reflect the substitution; (4) amending the complaint to add a cause of action for wrongful death, (5) directing that the amended complaint in the form annexed to the papers be deemed served on defendants and filed with the court upon granting the relief requested. Defendants Luis Mendez Castellanos, M.D. and Luis Mendez Castellanos, M.D., P.C. (together “Castellanos defendants”) partially oppose the motion.

This is an action for medical malpractice arising from allegations that defendants, *inter alia*, failed to timely diagnose prostate cancer. In support of the motion, plaintiff submit a physician’s affirmation showing that when the cancer was diagnosed it was in the advanced, incurable stage. Mr. Arroyo died on July 6, 2016. The certificate death indicates that he died of

natural causes. By order dated February 22, 2017, Clifford A. Meirowitz was appointed as Executor of Mr. Arroyo's Estate.

Plaintiff now seeks to substitute Mr. Meirowitz, as Executor of the Estate of Luis Arroyo, as plaintiff and to amend the caption to reflect the substitution and to amend the complaint to add a cause of action for wrongful death, and direct that the amended complaint in the form annexed to the papers be deemed served on defendants. The Castellanos defendants oppose the motion to the extent it seeks to amend the complaint to add a cause of action for wrongful death, arguing that they are entitled to discovery as to whether plaintiff's death was caused by prostate cancer, particularly in light of Mr. Arroyo's deposition testimony that he suffered from other various life morbidities including chronic pulmonary hypertension that required the implantation of a pace maker. They also object to an amendment to the first cause of action for negligence seeking to recovery for conscious pain and suffering to include allegations that Mr. Arroyo's death was caused by "his injuries sustained," asserting that such allegation is "superfluous to the cause of action" and "unnecessarily inflammatory." They also note that the proposed pleading is improperly labeled as Verified Complaint instead of an Amended Verified Complaint.

In reply, plaintiff argues that the mislabeling is a mere typo and that the conscious pain and suffering caused from fear of death are unavailable if plaintiff did not claim that defendants' conduct caused decedent's death citing Walker v. New York City Transit Authority, 130 AD2d 442 (1<sup>st</sup> Dept 1987); Oates v. New York City Transit Authority, 138 AD3d 470 (1<sup>st</sup> Dept 2016).

Leave to amend a pleading should be 'freely given' (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise." Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352, 355-356 (1<sup>st</sup> Dept 2005)(internal citations and quotations omitted). In this context, the courts define prejudice as a "some special right lost in the interim, some change of position, or some significant trouble or expense which could have been avoided had the original pleading contained what the amended one wants to add." Barbour v. Hospital for Special Surgery, 169 A.D.2d 385, 386 (1<sup>st</sup> Dept. 1991)(citations omitted). As for the merit of a proposed amendment, leave to amend will be granted as long as the proponent submits sufficient support to show that

proposed amendment is not “palpably insufficient or clearly devoid of merit.” MBIA Ins Corp. v. Greystone & Co., Inc., 74 AD3d 499 (1<sup>st</sup> Dept 2010)(citation omitted).

Under this standard, the motion to amend is granted, as defendants do not claim prejudice or surprise resulting from the amendment, and it cannot be said that wrongful death claim lacks prima facie merit. With respect to defendants’ request for discovery, such discovery was ordered at the June 1, 2017 argument date of the motion. Finally, while the proposed complaint does not indicate that it is an amended complaint, such mistake can be corrected by efileing a corrected pleading as directed below.

In view of the above, it is

ORDERED that any stay of this action due to the death of Luis Arroyo is lifted; and it is further

ORDERED that Clifford A. Meirowitz, as Executor of the Estate of Luis Arroyo is substituted as plaintiff in the above-entitled action in the place and stead of plaintiff, Luis Arroyo; and it is further

ORDERED that all papers, pleadings and proceedings in the above-entitled action be amended by substituting the name of Clifford A. Meirowitz, as Executor of the Estate of Luis Arroyo deceased, as plaintiff in the place and stead of Luis Arroyo, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that the caption is amended to read as follows:

\_\_\_\_\_  
Clifford A. Meirowitz, as Executor of the Estate of Luis Arroyo deceased, Index No. 805064/14

Plaintiff

-v-

Luis Mendez Castellanos, M.D. and Luis Mendez Castellanos, M.D., P.C..

Defendants.  
\_\_\_\_\_

and it is further

ORDERED that within 20 days of e-filing of this order, plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon 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 the motion for leave to amend the complaint to add a cause of action for wrongful death is granted and plaintiff shall efile the proposed complaint annexed to the motion , except that it shall be corrected to indicate that it is an amended complaint.

DATED: June 2, 2017

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

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION