

**Berusch v Hudson Spine & Pain Medicine, P.C.**

2018 NY Slip Op 32214(U)

September 7, 2018

Supreme Court, New York County

Docket Number: 805153/2016

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

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

-----X  
Martin Berusch,

Index No:  
805153/2016

Plaintiff,

Decision/Order

- against -

Mot. Seq. 1

Hudson Spine & Pain Medicine, P.C., and  
Alexander R. Rances, D.O.,  
Defendants.

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

This is an action to recover damages on behalf of plaintiff Martin Berush ("Plaintiff") as a result of the alleged medical malpractice by defendants occurring on December 19, 2014.

This medical malpractice action was commenced by the filing of a Summons and Verified Complaint on April 11, 2016. Thereafter, Defendants served a Verified Answer on July 5, 2016.

Presently before the Court is Defendants' Order to Show Cause seeking an Order pursuant to CPLR §1021 dismissing the Complaint for failure to timely substitute a proper party as plaintiff after his death. No opposition is submitted.

In support of Defendants' motion, Defendants submit the Affirmation and Supplemental Affirmation of their attorney William R. Meiselas, Esq. Meiselas states that on August 8, 2017, Plaintiff's counsel notified both the Court and Defendants that Plaintiff had died on December 26, 2016. The case was stayed pending substitution of a proper representative on behalf of Plaintiff's estate. At the Court-mandated Pre-Note Blockbuster Conference on April 26, 2018, Plaintiff's counsel stated that they were unable to locate any contact information for any interested parties who may want to continue this action on Plaintiff's estate's behalf.

Meiselas states that on June 18, 2018, he traveled to Somerset County Surrogate's Court upon information and belief that Plaintiff had been a resident of Somerset County at the time of this death. Upon review of the file with the Somerset County Probate Clerk, he learned that Plaintiff had been a resident of Monmouth County at the time of his death. He then traveled to the Monmouth County Surrogates Court and inquired as whether it maintained, or had maintained, a file for Plaintiff. Meiselas was informed by the Monmouth County Probate Clerk that a probate filing had previously been opened by Plaintiff's, but that no will had ever been provided and the file had been closed in early 2018. Meiselas was only able to obtain the name and contact information of the Plaintiff's brother, Jeffrey Berusch ("Jeffrey")

Meiselas states that on June 18, 2018, he then contacted Jeffrey, via telephone to provide notice of the instant Order to Show Cause and determine the identities of any other interested parties as to Plaintiff's estate. Jeffrey informed Meiselas that he had no interest in participating in the instant action and that he did not know whether his brother had maintained a will. Jeffrey identified Annabel C. Berusch ("Annabel"), Plaintiff's daughter, as an interested party to Plaintiff's estate. Jeffrey further stated that he believed that the Plaintiff's wife had previously obtained a divorce from Plaintiff and maintained no contact with him. Jeffrey was unable to provide any contact information as to Annabel. Meiselas stated that he then conducted a Public Records search as to contact information for Annabel and located an address and phone number. The phone number, however, was no longer in service. Meiselas mailed a letter to Annabel at the address he located, explaining the nature of the instant action, Defendants' intent to dismiss the action with the instant Order to Show Cause, and his contact information. The letter was sent via certified mail, with return receipt requested, on June 18, 2018. According to United States Postal Service (USPS) - Return Receipt Tracking, the letter was delivered on July 2, 2018. According to the USPS tracking information, the letter was "left with an individual."

Meiselas states that, to date, Meiselas has not received any response Annabel in response to his June 18, 2018 letter informing her of the instant Order to Show Cause. He has no further information by which to know of or contact any further interested parties in relation to this matter.

### Legal Standard

“It is well settled that the death of a party divests a court of jurisdiction to conduct proceedings in an action until a proper substitution has been made pursuant to CPLR §1015(a), and any order rendered after the death of a party and before the substitution of a legal representative is void.” (*Griffin v Manning*, 36 A.D. 3d 530, 532 [1st Dept. 2007]). CPLR §1015(a) provides that “if a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties.”

CPLR § 1021 provides that:

“...if the event requiring substitution is the death of a 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.”

The court “may not order dismissal for such failure without first ordering the persons interested in the decedent’s estate to show cause why the action should not be dismissed.” (*Petty v Meadowbrook Distributing Corp.*, 266 A.D. 2d 88 [1st Dept 1999]).

### Discussion

Here, over three years have passed since the alleged malpractice by Defendants and almost two years since Plaintiff’s death. No individual has sought a substitution in Plaintiff’s stead. Based on Meiselas’ Supplemental Affirmation, Defendants performed the necessary research required to ascertain the name and location of Anderson’s heirs, which includes his daughter Annabel and brother Jeffrey. Defendants have further contacted them both, advised them of the malpractice action, and provided notice of this instant Order to Show Cause. No opposition was submitted.

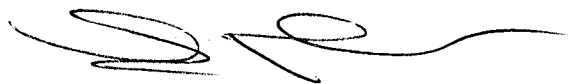
Wherefore it is hereby

ORDERED that the Order to Show Cause is granted without opposition; and it is further

ORDERED the Complaint is dismissed pursuant to CPLR § 1021 for the failure to appoint and substitute an estate representative for the deceased plaintiff pro-se within a reasonable time of his death, and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: September 7, 2018



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EILEEN A. RAKOWER, J.S.C.