

<b>DeShong v Laserclinic, LLC</b>
2020 NY Slip Op 32139(U)
June 29, 2020
Supreme Court, Kings County
Docket Number: 510057/2015
Judge: Bernard J. Graham
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

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KARIMAH DESHONG, LASHEANA GAMBLE and  
ANGELITA MCDONALD,

Index No.: 510057/2015

Plaintiff,

**DECISION/ORDER**

-against-

LASERKLINIC, LLC, and DAN ACARU, M.D.,  
MORGAN OSTAD (previously named "JOHN DOE"),  
JOHN DOE 2, JOHN DOE 3 and JOHN DOE 4,

Hon. Bernard J. Graham  
Supreme Court Justice

Defendants.  
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**Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to:** sever the action against defendant, Dan Acaru, M.D., and to amend the caption in accordance therewith

<b>Papers</b>	<b>Numbered</b>
Notice of Motion and Affidavits Annexed.....	_____ 1-2 _____
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits & cross-motion.....	_____ 3 _____
Replying Affidavits.....	_____ 4 _____
Exhibits.....	_____
Other: ..... (memo).....	_____

**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

The plaintiffs, Karimah DeShong ("Ms. DeShong"), LaSheana Gamble ("Ms. Gamble") and Angelita McDonald ("Ms. McDonald") have moved collectively for an Order to sever the action as against defendant, Dan Acaru, M.D. ("Dr. Acaru"), to amend the caption in accordance therewith and restore this matter to active status. Defendants, Laserclinic, LLC ("Laserclinic") and Morgan Ostad ("Ostad") oppose the plaintiffs' motion as they maintain that the motion is procedurally defective as it fails to comply with the CPLR and that the caption cannot be amended nor can this matter be restored to the calendar until a personal representative for the Estate of Dr. Acaru is appointed and then substituted in place of Dr. Acaru.

Background:

The underlying action was commenced on behalf of the plaintiffs by the filing of a summons and verified complaint dated August 14, 2015, and thereafter by the filing of an amended complaint dated August 18, 2015 with the County Clerk of Kings County.

In said complaint, which contains eight causes of action, it is alleged that each of the plaintiffs became patients of the defendants<sup>1</sup> wherein the defendants undertook to perform surgical procedures, including, but not limited to Smartlipo treatment or treatment to various parts of their body. It is alleged that the defendants were negligent and departed from accepted medical practice in the care and treatment rendered to the plaintiffs in the performance of the surgical Smartlipo procedures; in failing to utilize approved methods; in burning, scarring and deforming their bodies; and in failing to use proper tests and examinations in order to diagnose the condition from which they suffered.

On or about January 16, 2016, the plaintiffs by its counsel, moved for a default judgment as against the defendants who had failed to answer the complaint or appear in this action. On April 1, 2016, the Hon. Justice Gloria Dabiri, issued an order in which the court acknowledged that the plaintiffs accepted service of the answer of defendant Dr. Acaru and said defendant waived any objections to the court's jurisdiction of this matter.

On or about March 23, 2016, defendant Ostad served and filed a pro-se answer and defendant Laserclinic also served its answer.

On May 16, 2016, plaintiffs' counsel and counsel for defendants, Laserclinic and Ostad executed a stipulation, wherein it was agreed that the motion by plaintiffs' for a default judgment was withdrawn, and these defendants consented to the jurisdiction of the Court and waived any defenses based upon service of process. It was further agreed that the time for the defendants to answer the amended complaint was extended through

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<sup>1</sup> LaSheana Gamble allegedly became a patient on or about December 24, 2012. Angelia McDonald allegedly became a patient on or about January 17, 2013. Karimah DeShong allegedly became a patient on or about January 29, 2013.

June 10, 2016. Thereafter, defendants Laserclinic and Ostad jointly filed an amended answer dated July 10, 2016.

On October 16, 2017, counsel for the parties entered into a Preliminary Conference (PC) Order, which included the scheduling of depositions, physical examinations of the plaintiffs, as well as addressed issues pertaining to medical and hospital authorizations and the production of photographs. In addition, on October 16, 2017, counsel for Dr. Acaru in a letter to the Clerk of the Court, requested a stay of this action based upon the death of Dr. Acaru, having maintained that pursuant to CPLR § 1015(a), the death of a party divests the court of jurisdiction and automatically stays the proceedings.<sup>2</sup> The matter was then automatically stayed as a result of the death of Dr. Acaru and there has been no further activity on this matter until this motion by the plaintiffs.

Plaintiffs' contention:

The plaintiffs, in moving for a severance of the action as against Dr. Acaru, argue that they have been prejudiced as a result of this case having been stayed since October 16, 2017, when the parties were informed of the death of Dr. Acaru. The plaintiffs maintain there is no reason for the stay to remain in effect since the death of Dr. Acaru does not affect the merits of the action as against the other defendants. Defendants Laserclinic and its principal, Morgan Ostad had employed Dr. Acaru as a plastic surgeon, and the plaintiffs assert the cause of action against these parties will survive the death of Dr. Acaru.

Plaintiffs further alleges that there was no estate filing for Dr. Acaru in Surrogates Court, Nassau County, where he was a resident at the time of his death nor did he maintain professional liability insurance. The plaintiffs contend that they should not be burdened with the obligation to commence proceedings for the appointment of a personal

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<sup>2</sup> Counsel for Dr. Acaru submitted a copy of a death certificate which indicates that Dr. Acaru passed away on October 2, 2017.

representative for the Estate of Dr. Acaru and they are prepared to proceed against defendants Laserclinic and Ostad who remain liable for the damages that were sustained.

Defendants (Laserclinic and Morgan Ostad's contention):

Defendants Laserclinic and Ostad oppose the application to sever the action as against co-defendant Dr. Acaru arguing that the plaintiffs' motion is procedurally defective as the Court has been divested of jurisdiction due to the death of one of the parties (Dr. Acaru) and the case should continue to be stayed until the appointment of a personal representative for the Estate of Dr. Acaru.

Defendants argue that it is incumbent upon the plaintiffs to seek the appointment of a personal representative for the Estate of Dr. Acaru. Pursuant to EPTL§ 11-3.2, plaintiffs' claims against Dr. Acaru are not extinguished by his death and a claim for injuries may be brought or continued against the personal representative of the decedent.

Defendants contend that the proper method by which the court acquires jurisdiction over the deceased party's representative is by proof of the appointment of that representative and a motion for substitution of that representative pursuant to CPLR § 1021.

It is further argued that the severance of the action as against Dr. Acaru would be improvident as Dr. Acaru's demise affects the rights of both Laserclinic and Ostad, as well as the merits of this matter. Here, Laserclinic and Ostad do not have any identity of interest with Dr. Acaru, but rather their interests are inapposite and adverse as evidenced by their claims for contribution and indemnity as against Dr. Acaru. Defendants assert that Laserclinic, as the employer of a licensed physician, is only derivatively liable for the alleged fault of Dr. Acaru.

Severance of this action would not serve the interests of justice and judicial economy as it would result in duplicate trials as many of the same witnesses and medical evidence would be involved in both matters. In addition, the duly appointed representative of the Estate would be in possession and control of relevant documentation and information pertaining to the medical procedures that were performed by Dr. Acaru.

That individual would be in the best position to produce the documents and evidence needed to rebut or defend any allegations of fault, and thus the personal representative would be a necessary party to an action against defendants Laserclinic and Ostad.

Discussion:

It is well settled that “the death of a party stays the action as to him or her pending the substitution of a legal representative, and any determination rendered without such a substitution is generally deemed a nullity.” Reed v. Grossi, 59 AD3d 509, 510 [2d Dept 2009]. “Generally, the death of a party divests a court of jurisdiction to act, and automatically stays proceedings in the action pending the substitution of a personal representative for the decedent.” Lambert v Estren, 126 AD3d 942, 943 [2d Dept 2015]. In order for the court to gain jurisdiction over the deceased party’s personal representative, a motion for substitution pursuant to CPLR § 1021 must be filed. Singer v Riskin, 32 AD3d 839 [2d Dept 2006] (holding that such a motion “is not a mere technicality”). Here, no motion has been made to substitute a personal representative for Dr. Acaru.

This Court recognizes that “[t]he Supreme Court is a court of general jurisdiction with the power to appoint a temporary administrator and may do so to avoid delay and prejudice in a pending action.” Dieye v Royal Blue Servs., Inc., 104 AD3d 724 [2d Dept 2013]. “The determination of whether to exercise its authority to appoint a temporary administrator is committed to the sound discretion of the Supreme Court and will not be disturbed by this Court<sup>3</sup> so long as the determination does not constitute an improvident exercise of discretion.” Lambert v Estren, 126 Ad3d 942, 944 [2d Dept 2015]<sup>4</sup>.

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<sup>3</sup> The Appellate Division, Second Department.

<sup>4</sup> However, in Lambert, the Court denied the plaintiff’s motion to appoint a temporary administrator because she failed to demonstrate the steps she had taken to secure the appointment of a personal representative in the appropriate Surrogate’s Court, and also failed to contend that the action, based on events which occurred nearly 20 years prior, was trial-ready. Based on these facts, the Court determined that the plaintiff had not adequately demonstrated the necessity of the appointment of a temporary administrator to avoid undue delay and prejudice.

This action cannot proceed until an administrator is appointed to Dr. Acaru's estate. The proper procedure is set forth in EPTL §11-3.2(a)(1), which provides, in pertinent part, that no cause of action for injury to person or property is lost because of the death of the person liable for the injury and for any injury an action may be brought or continued against the personal representative of the decedent. Pursuant to CPLR 1015 (a), "[i]f a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties." The case at bar is analogous to Meehan v Washington, where the Court directed the plaintiff to apply for the appointment of an administrator and upon said appointment, to apply for substitution of the administrator as a party defendant. Meehan v Washington, 242 AD2d 286, 287 [2d Dept 1997].

Here, the plaintiffs do not present any evidence as to the measures taken to secure the appointment of a personal representative in Surrogate's Court or that resort to Surrogate's Court was otherwise unfeasible. This Court sees no reason presented why the plaintiffs should not be responsible for commencing the proceedings to appoint a personal representative for Dr. Acaru.

Severance of this action is not advisable, as there are multiple tortfeasors and interrelated claims, and severance would lead to duplicate trials and potentially inconsistent verdicts. (*See* Harding v. Noble Taxi Corp., 155 AD2d 265 [1st Dept 1989] (in which the court reasoned the convenience of the parties would not be served by duplicate trials involving many of the same witnesses and medical evidence); Johnson v. Gonzalez, 67 AD2d 842 [1st Dept 1979] (severance is inappropriate where the potential exists for inconsistent verdicts); *see also* New York Cent. Mut. Ins. Co. v McGee, 87 Ad3d 622, 928 NYS2d 360 [2d Dept. 2011] (where the court held that severance is inappropriate where the claims against the defendants involve common factual and legal issues, and the interests of judicial economy and consistency of verdicts will be served by having a single trial), *see also* Bentoria Holdings, Inc. v Travelers Indem. Co., 84 AD3d 1135, 925 NYS2d 516 [2d Dept. 2011].

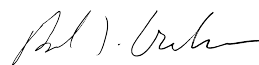
Conclusion:

The plaintiffs' motion to sever the action against Dr. Acaru, amend the caption, and restore the matter to active status is denied. On the Court's own motion, the plaintiffs are directed to apply for the appointment of an administrator for the deceased Dr. Acaru within sixty (60) days after entry of this order, and upon said appointment, to apply for substitution of the administrator as a party defendant in place and instead of the deceased defendant Dr. Acaru.

This shall constitute the decision and order of this Court. The movant's counsel is directed to electronically serve a copy of this decision and order with notice of entry on all parties within thirty (30) days and thereafter to electronically file an affidavit of service thereof with the Kings County Clerk.

Dated: June 29, 2020  
Brooklyn, NY

E N T E R



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Hon. Bernard J. Graham, Justice  
Supreme Court, Kings County