

M.L. v Mt. Sinai St. Luke's
2020 NY Slip Op 33254(U)
October 1, 2020
Supreme Court, New York County
Docket Number: 805142/2018
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 6
Justice

**M.L., an infant, by FREDRICK LEWIS, his
Father and Natural Guardian, and
FREDRICK LEWIS, Individually,**

Plaintiff(s),

**Index No: 805142/2018
MOTION DATE
MOTION SEQ. NO. 2
MOTION CAL. NO.**

-against-

**MT. SINAI ST. LUKE’S, LAUREN SHAWN,
M.D., and RYAN CASARELLA. M.D.,**

Defendant(s).

The following papers, numbered 1 to _____ were read on this motion for/to

<u>NUMBERED</u>	<u>PAPERS</u>
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	█
Answer – Affidavits – Exhibits _____	█
Replying Affidavits	█

This is a medical malpractice brought on behalf of infant plaintiff, M.L., who underwent multiple surgical procedures as a result of Defendants’ alleged failure to properly diagnose and treat aseptic arthritis.

Presently before the Court is a motion seeking to: (1) substitute Kathleen Carr, as party plaintiff, in her capacity as Mother and Natural Guardian of M.L., and Kathleen Carr, Individually, pursuant to CPLR § 1021; (2) leave to amend the caption to reflect the substitution of Kathleen Carr as Mother and Natural Guardian of M.L. and Kathleen Carr, Individually, in the place and stead of Fredrick Lewis; (3) permit Gersowitz, Libo & Korek, P.C. (“GLK”), to withdraw as counsel for Plaintiff Fredrick Lewis; and (4) deem service of GLK’s instant motion to withdraw effected at the last known address of Fredrick Lewis. Defendants submit partial opposition. Michael A. Fruhling, Esq. (“Mr. Fruhling”), of GLK, submits an affirmation in support of the motion.

Mr. Fruhling states, “During the pendency of this litigation, we attempted to produce the infant for his deposition through his father, Plaintiff, Fredrick Lewis. However, we were unable to do so.” Mr. Fruhling states, “We were finally able to locate the infant in North Carolina, who was now residing with his mother, Kathleen Karr (sic).” Mr. Fruhling states, “On March 17, 2020, Ms. Karr (sic) retained our office to prosecute the above-entitled action.”

Mr. Fruhling states, “After a careful evaluation of the facts and circumstances surrounding the Plaintiff’s lawsuit and after a careful consideration of the Plaintiff’s file, your Affirmant’s office determined that it could no longer zealously represent the Plaintiff, Fredrick Lewis.” Mr. Fruhling states that GLK “has lost contact with the Plaintiff,” and that the “file reflects multiple letters, calls and emails to the Plaintiff that have gone unanswered.” Mr. Fruhling states that if required by the Court, he “shall produce these communication (sic) in an in camera conference with the Court in order to ensure that unnecessary prejudice does not fall to the lot of the Plaintiff, Fredrick Lewis, should he decide to retain new counsel to protect his loss of services claim.” Mr. Fruhling states, “Plaintiff’s refusal to cooperate in this litigation has made it impossible for your Affirmant’s office to continue representing Plaintiff, Frederick Lewis, in this litigation.”

Defendants “do not oppose substituting Kathleen Carr into the caption as Mother and Natural Guardian of infant-plaintiff M.L. and defendants do not oppose the branch of plaintiffs’ motion seeking to withdraw as counsel to Fredrick Lewis.” Defendants “oppose the portion of plaintiffs’ motion seeking to substitute Kathleen Carr, Individually, as a plaintiff” as barred by the statute of limitations.

No reply is submitted.

The portion of the motion that seeks to substitute Kathleen Carr, as party plaintiff, in her capacity as Mother and Guardian of M.L., in the place and stead of Fredrick Lewis, in his capacity as Father and Natural Guardian, and to amend the caption to reflect said substitution is granted.

The portion of the motion that seeks to substitute Kathleen Carr, Individually, as a plaintiff, in the place and stead of Fredrick Lewis, Individually, is denied. The allegations of negligence in this action concern the treatment that the defendants rendered to M.L. on January 18, 2017 through January 27, 2017. The two and a half year statute of limitations expired on July 27, 2019. This application to substitute Kathleen Carr, Individually, was made nine months after the expiration of the statute of limitations. Further, Kathleen Carr’s individual claims cannot relate back to the time the original cause of action was commenced. Kathleen Carr’s individual claim of loss of services would be distinct from Fredrick Lewis’ claim of loss of services by Fredrick Lewis. Further, and importantly, no proposed pleading to add a separate cause of action on behalf of Kathleen Carr is provided.

GLK’s application to withdraw as counsel for Plaintiff Fredrick Lewis is granted. Further, the service of the application at the last known address of Fredrick Lewis is deemed to be proper service. CPLR § 321 (2) provides, “An attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct.” The First Department has stated, “[A]n attorney may withdraw as counsel of record upon a showing of good and sufficient cause, and reasonable notice to the client.” (*Mason v MTA New York City Transit*, 832 NYS2d 153, 154 [1st Dept 2017]). The Court finds that good and sufficient cause exists in this case for GLK to withdraw as counsel for Plaintiff Fredrick Lewis.

Wherefore, it is hereby

ORDERED that the portion of the motion which seeks an Order substituting Kathleen Carr, as party plaintiff, in her capacity as Mother and Natural Guardian of M.L., is granted; and it is further

ORDERED that leave to amend the caption to reflect the substitution of Kathleen Carr as Mother and Natural Guardian of M.L., in the place and stead of Fredrick Lewis, as Father and Natural Guardian of M.L., is granted; and it is further

ORDERED the caption shall be amended to read:

-----X
M.L., an infant, by KATHLEEN CARR, his
Mother and Natural Guardian, and
FREDRICK LEWIS, Individually,

Plaintiffs,

-against-

MT. SINAI ST. LUKE’S, LAUREN SHAWN,
M.D., and RYAN CASARELLA. M.D.,

Defendants.

-----X

and it is further

ORDERED that Gersowitz, Libo & Korek, P.C. shall serve a notice of this Order on the Clerk's Office who is directed to amend the caption accordingly; and it is further

ORDERED that the portion of the motion that seeks an Order substituting Kathleen Carr, Individually, in the place and stead of Fredrick Lewis, Individually, is denied; and it is further

ORDERED that Gersowitz, Libo & Korek, P.C.'s application to withdraw as counsel for Plaintiff Fredrick Lewis is granted and the service of the application at the last known address of Fredrick Lewis is deemed to be proper service; and it is further

ORDERED that no further proceedings may be taken in this matter without leave of this court for a period of 30 days from the date of this order within which time Fredrick Lewis must appoint a substitute attorney or shall be deemed to be proceeding *pro se*; and it is further

ORDERED that, WITHIN 3 DAYS OF THE DATE OF THIS DECISION, the law firm of Gersowitz, Libo & Korek, P.C., shall serve a copy of this order with notice of entry upon Fredrick Lewis and upon the attorneys for all other parties appearing herein by overnight mail; and it is further

ORDERED that, WITHIN 6 DAYS OF THE DATE OF THIS DECISION, the law firm of Gersowitz, Libo & Korek, P.C., shall serve the client file as it pertains to him upon Fredrick Lewis; and it is further

ORDERED that any new attorney retained by Fredrick Lewis shall file a notice of appearance with the Clerk of the Trial Support Office (Room 158) and the Clerk of the Part; and it is further

ORDERED that the parties shall appear for a remote compliance conference on November 10, 2020 at 9:30 AM.

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

Dated: OCTOBER 1, 2020

ENTER: 
_____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION