

Murphy v New York & Presbyt. Hosp.

2021 NY Slip Op 31902(U)

May 25, 2021

Supreme Court, New York County

Docket Number: 805009/2021

Judge: John J. Kelley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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ASHLEY MURPHY, as Administratrix of the Estate of DENNIS A. MURPHY, Deceased,

Plaintiff,

- v -

THE NEW YORK AND PRESBYTERIAN HOSPITAL, Individually, and/or d/b/a NEW YORK PRESBYTERIAN/COLUMBIA UNIVERSITY MEDICAL CENTER, COLUMBIA UNIVERSITY MEDICAL CENTER d/b/a COLUMBIA DOCTORS CARDIOLOGY, JOSEPH M. LEE, M.D., DAVID A. BROGNO, M.D., AINAT BENIAMINOVITZ, M.D., CHRISTOPHER N. IROBUNDA, M.D., and JUAN TERRE, M.D.,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for DISMISS

In this action to recover damages for wrongful death (hereinafter Action No. 3), the defendant moves pursuant to CPLR 3211(a)(7) and EPTL 5-4.1 to dismiss the complaint in its entirety, with prejudice, for failure to state a cause of action.

In a separate order dated May 25, 2021, this court granted those branches of the plaintiff's motion in a pending companion action entitled Dennis A. Murphy v The New York and Presbyterian Hospital, et al., New York County Index No. 805334/2018 (hereinafter Action No. 1), that sought to (a) dissolve the stay imposed by operation of law upon the death of her decedent, Dennis A. Murphy, (b) substitute the plaintiff for her decedent, (c) consolidate that action with a related action entitled Dennis Murphy v Irobunda, M.D. and Terre, M.D., New York County Index No. 805337/2018 (hereinafter Action No. 2), and (d) amend the caption accordingly. The court made consolidation and amendment of the caption contingent upon the plaintiff's filing of a Request for Judicial Intervention in Action No. 2.

In the instant matter, the plaintiff partially opposes the defendant's motion to dismiss the complaint in Action No. 3, and informally requests leave to amend the complaint in the now consolidated Action Nos. 1 and 2 so as to add a cause of action for wrongful death. Inasmuch as the plaintiff inscribed her opposition papers with the Index Numbers for all three actions, the court will consider those papers to have been filed in connection with all three actions even though the papers were only uploaded to the New York State Electronic Court Filing system under Action No. 3. The defendant's motion is granted to the extent that the complaint in Action No. 3 is dismissed without prejudice. The plaintiff's cross application for leave to amend the complaint in the now consolidated Action Nos. 1 and 2, so as to add a cause of action to recover for wrongful death, is granted.

On January 6, 2021, the plaintiff commenced this action against the defendants New York and Presbyterian Hospital, Columbia University Medical Center, doing business as Columbia Doctors Cardiology, Joseph M. Lee, M.D., David A. Brogno, M.D., and Ainat Benjaminovitz, M.D., by filing a summons and complaint, in which she asserted that those defendants committed malpractice in treating her decedent between April 15, 2016 and June 14, 2016. She averred that the decedent died on February 2, 2020, and that she was thereafter appointed administratrix of her decedent's estate. On January 8, 2021, the plaintiff amended the summons and complaint as of right to add defendants Christopher Irobunda, M.D., and Juan Terre, M.D. On the same date, the plaintiff filed papers under Action No. 1 to dissolve the stay imposed upon both Action Nos. 1 and 2, substitute herself as the party plaintiff in those actions, and thereupon to consolidate those two actions with Action No. 3. Between January 11, 2021 and January 25, 2021, all of the named defendants were served with the plaintiff's motion papers. On February 4, 2021, the defendants filed opposition to the plaintiff's motion to consolidate the three pending actions, arguing that the complaint in this action (Action No. 3) failed to state a cause of action to recover for wrongful death. On February 5, 2021, the defendant filed the instant motion to dismiss, making the same contention.

CPLR 3211(a)(7) allows a party to move for a “judgment dismissing one or more causes of action against him on the ground that the pleading fails to state a cause of action.” Upon such a motion, the pleading is to be construed liberally, accepting the facts alleged as true, according to the plaintiff the benefit of every possible favorable inference, and the court must determine only whether the facts alleged fit within any cognizable legal theory (*see Bernberg v Health Mgt. Sys.*, 303 AD2d 348, 349 [2d Dept 2003]). Regardless of being given a liberal construction, the pleading still must be sufficiently particular to give the court and parties notice of the material elements of the cause of action (*see Woolridge v Rosen*, 35 AD2d 714, 715 [1st Dept 1970]).

The defendant alleges that the plaintiff has not established that the action could have been maintained by the decedent had he survived. The defendants argue that if the decedent had commenced a medical malpractice claim at the time of his death against the defendants for the alleged negligent medical treatment spanning from April 15, 2016 to June 14, 2016, the malpractice claim would have been invalid and untimely. According to the defendants, this is a key element in establishing a wrongful death claim pursuant to EPTL 5-4.1, which provides:

“[t]he personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within two years after the decedent's death.”

(*see Prink v Rockefeller Ctr., Inc.*, 48 NY2d 309, 315 [1979]; *Emery v Rochester Tel. Corp.*, 271 NY 306, 309 [1936]). The court agrees with the defendants in this regard, and the plaintiff essentially does not contest that argument. Therefore, the stand-alone wrongful death claim in this action must be dismissed for failure to state a cause of action.

Although, generally, a party opposing a motion who seeks leave to amend a complaint must request it via a properly noticed cross motion, the court has discretion to consider informally requested relief set forth in opposition papers if there is no prejudice to the initial

movant, and the request for relief is clearly stated therein (*see Fried v Jacob Holding, Inc.*, 110 AD3d 56 [2d Dept. 2013]). Thus, the court deems the plaintiff's opposition papers to include an informal cross application for leave to amend the complaint in consolidated Action Nos. 1 and 2 so as to add a cause of action to recover for wrongful death. Where a plaintiff moves for leave to amend a complaint so as to assert a wrongful death cause of action, and, as here, the two-year limitations period applicable to that wrongful death cause of action has yet to expire, the statute of limitations is tolled from that date that the motion papers are served until the entry of the order granting leave to amend (*see Vastola v Maer*, 48 AD2d 561 [2d Dept 1975], *aff'd* 39 NY2d 1019 [1976]). In its decision affirming the Appellate Division, the Court of Appeals went on to explain that, where a complaint is amended to add a wrongful death cause of action,

“even if the claim for wrongful death had been interposed more than two years after the death of the plaintiff's [decedent], the claim would still have been timely since it would relate back, for limitations purposes, to the date of commencement of the personal injury action”

(*id.* at 1021). Stated another way, where, as here, the complaints in the pending action or actions gave

“notice of the transactions, occurrences, or series of transactions or occurrences on which the wrongful death cause of action in the amended complaint was based, the wrongful death cause of action asserted in the amended complaint relates back to the original complaint and is deemed to have been timely interposed”

(*DeLuca v PSCH, Inc.*, 170 AD3d 800, 802 [2d Dept 2019] [internal quotation marks omitted]; *see* CPLR 203[f]; EPTL 11-3.3[b] [2]; *Caffaro v Trayna*, 35 NY2d 245, 250 [1974]; *Assevero v Hamilton & Church Props., LLC*, 154 AD3d 728 [2d Dept 2017]). Hence, even though the stand-alone wrongful death cause of action asserted in Action No. 3 must be dismissed, leave to amend the complaint in the now-consolidated action is granted, and the court shall include a provision in the order determining MOT SEQ 002 in Action No. 1 permitting the amendment sought by the plaintiff.

Accordingly, it is

ORDERED that the defendant's motion is granted, and the complaint filed under Index No. 805009/2021 is dismissed in its entirety, without prejudice; and it is further,

ORDERED that the plaintiff's cross application for leave to amend the complaint in the two actions now consolidated under Index No. 805334/2018, so as to add a cause of action to recover for wrongful death, is granted, and the plaintiff shall serve an amended complaint in that consolidated action within 20 days after the entry of this order.

This constitutes the Decision and Order of the court.

5/25/2021
DATE



MOTION:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

CROSS MOTION:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE