

Wan Fund Leung v Yan Q. Sun

2021 NY Slip Op 32625(U)

December 8, 2021

Supreme Court, New York County

Docket Number: Index No. 450461/2016

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN KELLEY **PART** **56M**

Justice

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WAN FUND LEUNG and WEI LEUNG,

Plaintiffs,

- v -

YAN Q. SUN, M.D., SEUNGYOUL YI, M.D., EUN SU KIM,
R.P.T., SUN ORTHOPEDICS, INC., and SEUNGYOUL YI
PHYSICAL THERAPY, P.C., doing business as DAO WON
REHABILITATION,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 213, 214, 216, and 219

were read on this motion to/for

DISMISSAL

**DECISION + ORDER ON
MOTION**

This is an action to recover damages for medical malpractice and loss of spousal consortium, arising from treatment rendered to the plaintiff Wan Fund Leung (hereinafter the patient) by the defendants. Specifically, the plaintiffs alleged that the patient sustained a burn in the course of undergoing acupuncture treatment. The defendant Suengyoul Yi moves pursuant to CPLR 1021 to dismiss the complaint insofar as asserted against him for the failure timely to substitute a representative of the patient's estate upon the patient's death. The patient's adult son, Patrick Leung, and his adult daughter, Lily Leung, oppose the motion. The motion is denied.

On January 19, 2020, the patient died, and his attorney notified the court of his death on January 28, 2020. 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)" (*Griffin v Manning*, 36 AD3d 530, 532 [1st Dept 2007]; see *Perez v City of New York*,

95 AD3d 675, 677 [1st Dept 2012]; *Manto v Cerbone*, 71 AD3d 1099 [2d Dept 2010]; *Nieves v 331 E. 109th St. Corp.*, 112 AD2d 59, 60 [1st Dept 1985]). Any determination rendered or proceedings held without such a substitution generally is deemed a nullity (see *Griffin v Manning*, 36 AD3d at 532; *Stancu v Cheon Hyang Oh*, 74 AD3d 1322, 1322-1323 [2d Dept 2010]; *Morrison v Budget Rent A Car Syst., Inc.*, 230 AD2d 253 [2d Dept 1997]; *Nieves v 331 E. 109th St. Corp.*, 112 AD2d at 60). Rather, the action is automatically stayed upon the party's death (see *Perez v City of New York*, 95 AD3d at 677). Nor can the parties "by agreement confer subject matter jurisdiction upon [a] court where there is none" (*Cuomo v Long Island Lighting Co.*, 71 NY2d 349, 351 [1988]; see *Haverstraw Park, Inc. v Runcible Properties Corp.*, 33 NY2d 637 [1973]; *Stancu v Cheon Hyang Oh*, 74 AD3d at 1323) by stipulating to conducting further proceedings prior to the substitution of a personal representative for the deceased party. Indeed, any such stipulation is "legally inoperative" (*Morrison v Budget Rent A Car Syst., Inc.*, 230 AD2d at 261).

To pursue this action, a representative of the patient's estate was thus required to be appointed as executor or administrator of the patient's estate by the appropriate Surrogate's Court, and thereafter move for leave to substitute himself or herself as plaintiff in place of the patient. The courts, however, were closed between March 17, 2020 and June 10, 2020 due to the COVID-19 pandemic, with all filings suspended between March 22, 2020 and May 5, 2020. Moreover, all service and filing deadlines in pending actions were tolled between March 20, 2020 and November 3, 2020 (see L 2020, ch 23, § 2; Executive Law § 29-a; Executive Order 202.8, Executive Order 202.67; *Brash v Richards*, 195 AD3d 582 [2d Dept 2021]).

The patient's surviving spouse, Wei Leung, was the most likely person to have sought to be appointed as executor or administrator of the patient's estate. On November 9, 2020, however, Wei Leung also died. As of that date, she had yet to apply for letters of administration in connection with the patient's estate. In early 2021, the plaintiffs' daughter, Lily Leung, petitioned the Surrogate's Court, New York County, for letters of administration in connection

with the estates of both Wan Fund Leung and Wei Leung. On June 24, 2021, the Surrogate's Court issued letters of administration to her in connection with the estate of Wei Leung, under file number 2021-2269. On or about December 6, 2021, the same court issued letters of administration to her in connection with the estate of Wan Fund Leung, under file number 2021-4469.

Suengyoul Yi made the instant motion on August 21, 2021 (see CPLR 2211), less than two months after Lily Leung had obtained letters of administration in connection with her mother's estate, and while her application for letters of administration was pending in connection with her father's estate.

CPLR 1021 provides, in relevant part, that

“A motion for substitution may be made by the successors or representatives of a party or by any party. If a person who should be substituted does not appear voluntarily he may be made a party defendant. If the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made, however, such dismissal shall not be on the merits unless the court shall so indicate.”

The issue of what constitutes a reasonable time depends on the circumstances of the case (see *Randall v Two Bridges Assoc. Ltd. Partnership*, 139 AD3d 435 [1st Dept 2016]), including the diligence of the party who will ultimately seek substitution, the prejudice to the other parties, and whether the party who eventually will be substituted has shown that the action has potential merit (see *Green v Maimonides Med. Ctr.*, 172 AD3d 824, 826 [2d Dept 2019]).

Here, Suengyoul Yi waited only 18 months after the patient's death, 9 months after the death of the patient's wife, and less than 2 months after letters of administration were issued in connection with the estate of the patient's wife to move to dismiss the complaint against him. As noted above, during the 18 months immediately following the patient's death, all court filings were suspended for 2 months, the courts were closed for 3 months, and filing deadlines were tolled for almost 8 months. Given these circumstances, the apparent potential merit of the action, and the fact that the surviving heirs of both the patient and his wife have evinced their

intent to move for substitution immediately after letters of administration were issued in connection with both of those estates, Suengyoul Yi's motion must be denied as premature (see *Dugger v Conrad*, 189 AD3d 478, 479-480 [1st Dept 2020] [where defendant waited only 16 months before moving to dismiss, and counsel for deceased plaintiff was attempting to have the Public Administrator substituted as plaintiff, request for dismissal was premature]; *Tokar v Weissberg*, 163 AD3d 1031, 1032-1033 [2d Dept 2018] [lapse of 2½ years between decedent's death and defendant's submission of motion to dismiss under CPLR 1021 is insufficient to support defendant's contention that substitution had not been made within a reasonable time, particularly where the case revolved around medical records already in defendant's possession]).

The court notes that, in order to proceed with this action, Lily Leung must now move to be substituted for both of the decedents or must stipulate with the defendants to substitute her for the decedents.

Accordingly, it is

ORDERED that, on the court's own motion, the automatic stay of proceedings imposed by virtue of the deaths of the plaintiffs is vacated for the limited purpose of hearing and determining this motion; and it is further,

ORDERED that the motion of Suengyoul Yi to dismiss the complaint insofar as asserted against him is denied.

This constitutes the Decision and Order of the court.

12/8/2021
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/>
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE