

Hobbins v Linden Ctr. for Nursing & Rehabilitation

2024 NY Slip Op 31237(U)

April 8, 2024

Supreme Court, Kings County

Docket Number: Index No. 521114/2018

Judge: Genine D. Edwards

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8th day of April 2024.

P R E S E N T:

HON. GENINE EDWARDS

Justice.

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D'ANDRE HOBBS, as Temporary Administrator of the Estate of MARTEL HOBBS, Deceased,

Decision and Order

Plaintiff,

-against-

Index No.: 521114/2018

LINDEN CENTER FOR NURSING AND REHABILITATION; LINDEN GARDENS NURSING AND REHABILITATION CENTER; RUBY WESTON MANOR; ALLURE REHABILITATION SERVICES, BROOKLYN GARDENS NURSING & REHABILITATION CENTER; BISHOP HENRY B. HUCLES EPISCOPAL NURSING HOME; THE BROOKLYN HOSPITAL CENTER; OLATUNDE OSOFISAN, MD; FRANZILS SAINT-LOUIS, M.D., a/k/a DR. SAINT-LOUIS FRANZ; ROSELLE REYES, RN; MAGDOLIN SHENDOUDA, PT; ALLAN SANTIAGO, M.D.; HAO ZHANG, M.D.; DIEDRICH HOLTkamp, MD; NELISSA GRACES, RN; AHMED GHANNEM, PT; SIMONE GORDON-HARDY, RN, and John Doe and Jane Doe 1-10 being unknown unnamed Defendants,

Motion Sequences #19-27

Defendants.

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The following e-filed papers read herein:

NYSEF Nos.:

Notice of Motions/Orders to Show Cause/
Cross-Motions and
Affidavits/Affirmations.....377-392, 401-402;404- 423-436; 437-442; 443; 444;
450-455; 456; 457-469; 476-481; 484; 520; 521- 539; 549; 546- 551; 553; 554
Opposing Affidavits/Affirmations.....490-503; 504-520; 557- 571; 572-587; 588-604
Affidavits/Affirmations in Reply.....519; 540; 542-545; 552; 606-607; 608-610
Other Papers.....394-400; 611

BACKGROUND

This action for negligence and medical malpractice was initiated by the filing of a summons with notice on October 19, 2018. The complaint, filed February 27, 2019, alleges that prior to and on or about March 28, 2016, and continuing through December 22, 2016, all the defendants failed to properly treat Martel Hobbins.

Martel Hobbins, died on April 16, 2020, a year and a half after the commencement of this action. During that year and a half, many of the defendants filed answers and combined demands as well as several motions contesting jurisdiction and service. Upon initiating the action, plaintiff's attorney filed a statement that he conferred with a physician who confirmed that the case had merit. However since the statute of limitations was expiring there was insufficient time to obtain an affirmation of merit from the physician. During the year that issue was joined and Martel Hobbins was alive, no responses to the combined demands or affidavit of merit were filed, which would have indicated why the defendants were being sued. The death of Mr. Hobbins then stayed the action.

On September 28, 2022, almost two years after Mr. Hobbins died, his son, D'Andre Hobbins was granted temporary letters of administration, however such letters restricted the power of the temporary administrator, allowing him to act only for the sole purpose of appearing in Supreme Court actions bearing the index Nos: 52114/2018 and 515723/2018, to forestall the dismissal of the actions. A permanent administrator has to date not been appointed as Martel Hobbins' wife, sister and other children were litigating this issue. An extension of D'Andre Hobbins' temporary letters was granted on

November 15, 2023, however the limitation to his authority set forth in the original temporary letters remained.

At the time that Martel Hobbins died, the time to have responded to demands to provide bills of particulars and authorizations had passed. Prior to his death, various defendants moved pursuant to CPLR §3126 for preclusion and/or dismissal of the action for the failure to respond, however, by the time all the motions seeking that relief were to be heard, the stay was in effect. The attorney for Martel Hobbins had no authority to act until he was retained by D'Andre Hobbins upon his appointment as temporary administrator. Upon D'Andre Hobbins' appointment as temporary administrator, the defendants moved to dismiss the action for the plaintiff's failure to proceed with the action pursuant to CPLR §1021. Technical defects in the motions, including the failure to move by Order to Show Cause and to serve the decedent's distributees, required that the motions be denied, and this Court entered an order to that effect on December 4, 2022.

On May 12, 2023, defendants ALLIANCE HEALTH OPERATIONS, LLC d/b/a LINDEN CENTER FOR NURSING AND REHABILITATION, LINDEN GARDENS NURSING AND REHABILITATION CENTER, ALLURE REHABILITATION SERVICES, LLC, NELISSA GARCES i/s/h/a NELISSA GRACES, RN and SIMONE GORDON-HARDY, RN, filed an Order to Show Cause to dismiss pursuant to CPLR §§1021 and CPLR 3126, and to lift the stay to the extent of allowing the application.

On May 24, 2023, counsel for the temporary administrator filed four bills of particulars, however, the bills of particulars did not differentiate the claims as to the individual defendants. No instances of malpractice or negligence on the part of any of the

individual defendants were set forth that would indicate what departures were alleged to have been made by any of the individual doctors, the hospital or nursing home. There is no mention in any of the filings of the conditions that brought the decedent to any of the individual physicians and facilities sued nor the treatments provided that allegedly constituted acts of malpractice. The boiler plate nature of the bills of particulars exemplified by the citing of the same alleged departures and injuries to each of the defendants and, although affirmed three years after Martel Hobbins' death, they each allege that:

“The injuries described herein and their sequelae are of a permanent nature and will leave plaintiff with permanent pain, disability, deformity and severe limitation of motion for the rest of his years..... and are continuing to adversely affect and impair plaintiff's feeling of well-being, his physical condition and all his daily activities...”.

Alliance Health's Order to Show Cause was signed on June 1, 2023. Additional Orders to Show Cause seeking the same relief were filed by the other defendants.

In opposition, the attorney for the temporary administrator claimed that he had the authority to act for the estate, by virtue of the renewed temporary letters of administration. He averred that since the appointment of the temporary administrator, there is no need to lift the stay that was in effect to make the motions herein. He denied that the action was abandoned, or that there was a lack of diligence in pursuing this matter given the prolonged litigation in Surrogate's Court and the stay following plaintiff's death. He further alleged that the failure of defendants to have served Lalika Gerald Hobbins, one of the decedent's daughters, alone, requires denial of the motions.

Counsel for the temporary administrator asserted that he is empowered to act on behalf of the estate since he was retained by D'Andre Hobbins and is responsible to take whatever actions are necessary to forestall dismissal of the action. He did not serve any of the distributees with any of his motions, opposition papers, or the Bills of Particulars, and did not include any of the parties to the Surrogate's Court proceeding with his notice to this Court that the temporary letters awarded to D'Andre Hobbins had been extended, thereby authorizing counsel to act to prevent dismissal of the action. He did not serve his own opposition on Lalika Gerald Hobbins, who is not a petitioner or participant in the Surrogate's Court action nor any of the distributees who are actively participating in the Surrogate's Court action, who were served by defendants, and who do have an interest in the prosecution of the present action. None of the heirs or distributees responded to the Orders to Show Cause served upon them, neither did the counsel representing some of the distributees in Surrogate's Court. In any event, the Court established in the Orders to Show Cause seeking dismissal of the action, filed as motion sequences 24, 26 and 27, that service upon the attorney for the distributees was sufficient notice.

LAW

CPLR §1021 provides that “[a] motion for substitution may be made by the successors or representatives of a party or by any party.” The motion must “**be made within a reasonable time**” *Silberstein v Silberstein Awad & Miklos, P.C.*, 173 A.D.3d 798, 798, 103 N.Y.S.3d 443 (2d Dept. 2019), with the determination of reasonableness requiring consideration of three factors: (1) the diligence of the party seeking substitution; (2) prejudice to the other parties; and (3) whether the party to be substituted

has shown that the action has merit. *Hemmings v. Rolling Frito-Lay Sales, LP*, 220 A.D.3d 754, 197 N.Y.S.3d 561 (2d Dept. 2023); *Mesniankina v. 302 BBA, LLC*, 219 A.D.3d 1516, 196 N.Y.S.3d 769 (2d Dept. 2023).

Here, not only did the plaintiff fail to timely respond to the defendants' combined demands while Martel Hobbins was alive, but there was also considerable delay in seeking substitution, it taking two years to obtain the temporary letters, and a further delay of seven months in obtaining an extension of the March 28, 2023 expiration date of the original letters. The defendants moved to dismiss the action for failure to prosecute in 2022, before the letters expired, and plaintiff succeeded in defeating those motions on technical grounds. A proposed Order to Show Cause to dismiss was filed on May 12, 2023. Although on notice that defendants were again pursuing a CPLR §1021 dismissal, with the technical defects in the earlier applications addressed, plaintiff failed to obtain any affidavit of merit in anticipation of the motions, however, knowing that a showing of merit was required under CPLR §1021, plaintiff instead filed bills of particulars. The bills of particulars do not establish the basis of the claims against the defendants. They do not set forth generally the dates the decedent received care from the individual defendants nor the alleged departures of the individual defendants.

In *Byner v. Murray-Taylor*, 208 A.D.3d 1214, 1216, 174 N.Y.S.3d 751, 753 (2d Dept. 2022), the Court held:

“Here, Lonnidell's approximately three-year delay in seeking letters testamentary shows a lack of diligence (*see Terpis v. Regal Hgts. Rehabilitation & Health Care Ctr., Inc.*, 108 A.D.3d at 619, 968 N.Y.S.2d 380; *Borruso v. New York Methodist Hosp.*, 84 A.D.3d 1293, 924 N.Y.S.2d 152; *Giroux v. Dunlop Tire Corp.*, 16 A.D.3d 1068, 791 N.Y.S.2d 769). Furthermore, the plaintiffs failed to demonstrate that they had a potentially

meritorious cause of action. Neither the attorney affirmation, complaint or amended complaint, nor the certificates of merit submitted by the plaintiffs constituted an affidavit of merit, as the plaintiffs' counsel had no personal knowledge of the facts of this case (see *Juseinoski v. Board of Educ. of City of N.Y.*, 15 A.D.3d 353, 356, 790 N.Y.S.2d 162; *Lucido v. Vitolo*, 251 A.D.2d 383, 672 N.Y.S.2d 818). Where the plaintiffs failed to submit an affidavit of merit and provided no reasonable justification for the delay in petitioning for letters testamentary, the Supreme Court providently exercised its discretion in granting the defendants' cross motion to dismiss the amended complaint insofar as asserted against them, even where the defendants were not prejudiced by the delay in moving for substitution (see *Rose v. Frankel*, 83 A.D.3d 607, 920 N.Y.S.2d 912)."

See also, *Mesniankina*, 219 A.D.3d 1518; *Terpis v. Regal Heights Rehab. & Health Care Ctr., Inc.*, 108 A.D.3d 618, 619, 968 N.Y.S.2d 380, 381 (2d Dept. 2013) (the Court dismissed the complaint pursuant to CPLR §1021 considering the 21-month delay in obtaining preliminary letters testamentary, the failure to demonstrate a reasonable excuse for the delays, the absence of any affidavit of merit, and the prejudice to the defendant).

In this instant matter, the prejudice to defendants, who, nine years after the alleged malpractice occurred, still have not been apprised of what acts of malpractice are being alleged against them, cannot be ignored. *Martone v. Huang*, 216 A.D.3d 1152, 190 N.Y.S.3d 421, 423 (2d Dept. 2023).

Motion sequences 24, 26 and 27, which seek dismissal of the entire complaint must be granted pursuant to CPLR §1021, since plaintiff failed to demonstrate that the action was prosecuted diligently, that the defendants have not been prejudiced or that the action has merit.

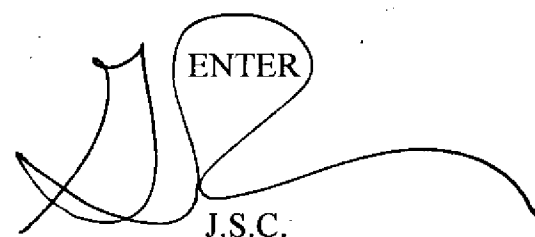
The parties remaining motions and contentions have been considered and are denied as unavailing or moot in consideration of the dismissal of this action.

Accordingly, it is

ORDERED that the complaint is dismissed in its entirety, and it is further

ORDERED that plaintiff's counsel is directed to electronically serve a copy of this decision/order with notice of entry on the other parties' respective counsel and to electronically file an affidavit of service with the Kings County Clerk.

The foregoing constitutes the opinion and order of this court.



ENTER

J.S.C.

HON. GENINE D. EDWARDS