

Brown v Kamlet

2008 NY Slip Op 32181(U)

July 24, 2008

Supreme Court, New York County

Docket Number: 0101487/2006

Judge: Joan B. Carey

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

PRESENT: Honorable Joan B. Carey
Justice

PART 40 D

REBECCA SARGENT BROWN and
GRANT BROWN,

Plaintiffs,

Index No.: 101487/06

MOTION DATE _____

-v-

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

DAVID KAMLET M.D., JEAN PASCAL
SIMON, M.D., BARRY SLOAN, D.O.,
STEVEN GOLDSTEIN, M.D., DEBORAH
R. HUNTER, M.D., JEREMIE R.
RACHUNOW, M.D., and MIDTOWN
MEDICAL CENTER,

Defendants.

FILED
AUG 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

The following papers, 1- 13, were read on this motion by plaintiffs to amend the caption to reflect the death of plaintiff Rebecca Brown and the appointment of plaintiff Grant Brown as the Administrator of the Estate of Rebecca Brown; and to amend the complaint, pursuant to CPLR 3025(b), to add a cause of action for wrongful death.

Notice Of Motion - Affidavits - Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits _____

Papers Numbered

1-5

6-10

11-13

Cross-Motion: Yes No

Injured plaintiff Rebecca Brown, and her husband, Grant Brown, commenced the instant action on or about February 1, 2006, to recover damages for medical malpractice against defendants herein. The crux of plaintiffs' complaint is that the defendants were negligent in failing to timely diagnose and treat Stage III non-small cell lung cancer, thereby causing injury to Mrs. Brown. On March 5, 2007, following the commencement of the instant action, Mrs. Brown expired. On June 4, 2007, the Surrogate of the County of New York, appointed Grant Brown the

Administrator of the Estate of Rebecca Brown. Plaintiffs presently move to (i) amend the caption to reflect the death of plaintiff Rebecca Brown and the appointment of plaintiff Grant Brown as the Administrator of the Estate of Rebecca Brown; and (ii) to amend the complaint, pursuant to CPLR 3025(b), to add a cause of action for wrongful death.

Defendants do not oppose that portion of plaintiffs' motion that seeks to amend the caption to reflect the death of plaintiff Rebecca Brown and the appointment of plaintiff Grant Brown as the Administrator of the Estate of Rebecca Brown. However, defendants oppose that portion of plaintiffs' motion that seeks to amend the complaint, pursuant to CPLR 3025(b), to add a cause of action for wrongful death, arguing that the physician's affidavit submitted by plaintiffs in support of the instant motion is conclusory and does not sufficiently set forth the causal connection between the alleged medical malpractice and Mrs. Brown's death. The aforementioned affidavit simply sets forth that based upon a review of "the medical records of the defendants to the within action and Death Certificate of REBECCA SARGENT BROWN . . . it is [the expert's] opinion within a reasonable degree of medical certainty that defendant physicians failed to timely diagnose Stage III, non-small cell lung cancer (right lower lobe, pleural), and that this failure was a deviation from accepted medical practice amounting to medical malpractice." It is noted that plaintiffs' expert neither specified what medical records were reviewed prior to forming his opinion, nor did he address any specific departures on the part of each of the defendants. Plaintiffs' expert further opined "that REBECCA SARGENT BROWN died as a result of the lung cancer from which she suffered" and "that the lung cancer was the proximate cause of death of REBECCA SARGENT BROWN as a result of the progression of the initial disease which the defendants failed to diagnose."

CPLR 3025(b) governs permissive leave to amend a pleading, and sets forth in pertinent part that leave to amend a complaint "shall be freely given upon such terms as may be just" Notwithstanding, the law of the Appellate Division, First Department, whose authority binds this Court, requires that a plaintiff seeking leave to amend a medical malpractice complaint to assert a cause of action for wrongful death must submit "competent medical proof of the causal connection between the alleged malpractice and the death of the original plaintiff." *McGuire v. Small*, 129 AD2d 429 [1st Dept. 1987]; see also *Gambles v. Davis*, 32 AD2d 224 [1st Dept. 2006]; *Leibowitz v. Mt. Sinai Hospital*, 296 AD2d 340 [1st Dept. 2002]; *Smith v. Tyras*, 265 AD2d 217 [1st Dept. 1999]; *Rubick v. Atkins*, 2 Misc3d 796 [Sup. Ct., NY County, Jan. 7, 2004][Carey J.]. Although the affidavit submitted by plaintiffs sets forth that the defendants herein departed from good and accepted medical practice in failing to timely diagnose Stage III, non-small cell lung cancer (right lower lobe, pleural) in Mrs. Brown, and that she ultimately died of this disease, it does not specifically address any causal connection between such departure and the death of the injured plaintiff. In other words, plaintiffs' expert fails to address whether defendants' alleged departure negatively effected Mrs. Brown's survival rate, thereby constituting a proximate cause of her death. Without such opinion, this Court is left to speculate as to whether Mrs. Brown's outcome would have been any different if her condition was diagnosed sooner. As a result, that portion of plaintiffs' motion to amend the complaint, pursuant to CPLR 3025(b), to

¹In addition to the affidavit of their medical expert plaintiffs annexed a copy of Mrs. Brown's Death Certificate to the motion papers, which sets forth that her immediate cause of death was lung cancer.

add a cause of action for wrongful death is denied.

Although apparently acknowledging "the requirement of submitting competent medical proof of causal connection" in their initial moving papers, plaintiffs argue in their reply papers that such requirement has been abandoned by the Appellate Division, Second Department in the case of *Lucido v. Mancuso*, 49 AD3d 220 [2d Dept. 2008]. The Second Department, in *Lucido v. Mancuso, supra*, reviewed the history of CPLR 3025(b), finding that the provision has been eroded over the years and that courts, without a rationale for the rule, began to require medical proof when a plaintiff sought to add a cause of action for wrongful death. As a result, the Second Department relaxed this rule and held that where a plaintiff sought leave to amend a complaint to add a cause of action for wrongful death no evidentiary showing is required. According to the *Lucido* decision, under CPLR 3025(b), a "court need only determine whether a proposed amendment is 'palpably insufficient' to state a cause of action . . . or is patently devoid of merit. Where the proposed amended pleading is palpably insufficient or patently devoid of merit, or where the delay in seeking the amendment would cause prejudice or surprise, the motion should be denied." *Id.* Notwithstanding the Second Department's decision in *Lucido v. Mancuso, supra*, as set forth above, the First Department, whose authority binds this Court, has not abandoned its longstanding requirement that a plaintiff seeking leave to amend a medical malpractice complaint to assert a cause of action for wrongful death must submit "competent medical proof of the causal connection between the alleged malpractice and the death of the original plaintiff." *McGuire v. Small, supra*.

Lastly, despite plaintiffs' argument to the contrary, the mere submission of a Death Certificate does not fulfill the requirement of submitting competent medical proof of causal connection. *See Rubick v. Atkins, supra*. In the absence of a physician's affidavit adequately setting forth the causal connection between the alleged malpractice and the death of the plaintiff, a motion seeking leave to amend a medical malpractice complaint to assert a cause of action for wrongful death must be denied. *Id.*

Based on the foregoing, it is hereby

ORDERED that that portion of plaintiffs' unopposed motion to amend the caption herein is granted, and the action shall bear the following caption:

**GRANT BROWN as Administrator of the
Estate of REBECCA BROWN, and
GRANT BROWN, Individually**

Plaintiffs,

Index No.: 101487/06

-v-

**DAVID KAMLET M.D., JEAN PASCAL
SIMON, M.D., BARRY SLOAN, D.O.,
STEVEN GOLDSTEIN, M.D., DEBORAH
R. HUNTER, M.D., JEREMIE R.
RACHUNOW, M.D., and MIDTOWN
MEDICAL CENTER,**

Defendants.

and it is further

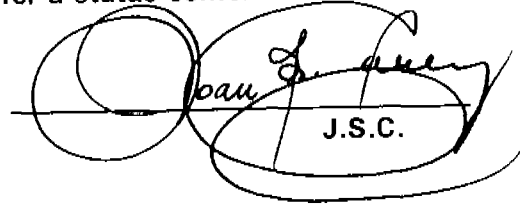
ORDERED that upon service on the Clerk of the Court of a copy of this order with notice of entry, the Clerk shall amend their records to reflect such change in the caption herein, and it is further

ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the amendment; and it is further

ORDERED that that portion of plaintiffs' motion for leave to amend the complaint herein is denied, it is further

ORDERED that counsel for all parties are to appear before the court on August 8, 2008, at 9:30am, at 100 Centre Street, room 1306, Part 40D, for a status conference.

Dated: 7/24/2008



J.S.C.

Check one: FINAL DISPOSITION

NON- FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

FILED
AUG 05 2008
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NEW YORK