[* 1]

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

PRESENT: JOAN B. LOBIS Justice

PART 6

Georgia Roe

-v-

Martin J. Frankel, M.D.

INDEX NO. 116375/04

MOTION DATE 7/14/09

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to 26 were read on this motion to/for substitute estate

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-10
Answering Affidavits — Exhibits XMOTS 11, 12-15; 16	17-23; OPP: 24
Replying Affidavits	25; 26

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 7/31/09

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

----------X

GEORGIA ROSE, as Administratrix of the Estate of WILLIAM HAMILTON, and GEORGIA ROSE, Individually,

Plaintiffs,

Index No. 116375/04

-against-

Decision, Order, and Judgment

MARTIN J. FRANKEL, M.D., CHARLES POWELL, M.D., COLUMBIA UNIVERSITY COLLEGE OF PHYSICIAN & SURGEONS and NEW YORK PRESBYTERIAN HOSPITAL,

Defendants.

----------X

JOAN B. LOBIS, J.S.C.:

Plaintiffs move for an order, pursuant to C.P.L.R. §§ 1021 and 1015(a), substituting Georgia Rose as the Administrator of the Estate of William A. Hamilton, decedent; amending the caption to reflect the substitution; and, deeming the supplemental summons and amended verified complaint properly served on all defendants. Defendant Martin J. Frankel, M.D., cross-moves to dismiss the complaint, pursuant to C.P.L.R. Rules 3211(a)(5) and (a)(8), and §§ 1021 and 214-a. Defendants Charles Powell, M.D., and New York and Presbyterian Hospital ("NYPH"), cross-move to dismiss the action, pursuant to C.P.L.R. §§ 1015(a), 1021, and 214-a, based on plaintiffs' failure to effect a substitution of the estate of the decedent-plaintiff within a reasonable time.

On November 19, 2004, a summons and complaint was filed, commencing this action that was brought originally by William A. Hamilton and his wife, Georgia Rose. The action alleged medical malpractice against the individual and institutional defendants from November 1982 through November 2002, in that they failed to timely diagnose and properly treat Mr. Hamilton's alpha-1 antitrypsin deficiency. On December 1, 2004, Mr. Hamilton passed away.

On December 2, 2004, NYPH was served with summons and complaint. Plaintiffs filed affidavits of service showing that Dr. Frankel was served on December 8, 2004. Dr. Frankel claims that he was never served at this time. These efforts at service are a nullity, since by operation of law, the action was stayed once Mr. Hamilton died. See C.P.L.R. § 1015.

On March 16, 2006, letters of administration were issued to Georgia Rose. On April 8, 2008, the administratrix filed a supplemental summons and amended complaint, substituting the estate as a plaintiff. On April 17, 2008, NYPH was served. NYPH served an answer on April 28, 2008. Dr. Powell was served on June 5, 2008; he served an answer on July 8, 2008. Dr. Frankel was served on June 12, 2008, and served an answer on or about July 9, 2008.[1]

In or about October 2008, plaintiffs moved for an order, pursuant to C.P.L.R. Rule 3406(a) and § 2004, to extend plaintiffs' time to file a Notice of Medical Malpractice, and pursuant to C.P.L.R. § 306-b, to extend plaintiffs' time to serve the summons, verified complaint, and certificate of merit. The court denied plaintiffs' motion in a decision and order dated February 9, 2009 (the "February 2009 Order"), on the ground that there had never been an order substituting Georgia Rose as administratrix for the decedent, William A. Hamilton. The February 2009 Order directed plaintiffs to move by order to show cause for substitution of the estate and for leave to amend the complaint, given the requirement that in order to add a cause of action for wrongful death, a plaintiff must submit competent medical proof of the causal connection between the alleged malpractice and the deceased party's death.

---

[1] It appears that Columbia University College of Physicians & Surgeons was never served.

"'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).'" Lugo v. GE Capital Auto Lease, 36 A.D.3d 409, 410 (1st Dep't 2007), quoting Silvagnoli v. Consolidated Edison Empls. Mut. Aid Socy., 112 A.D.2d 819, 820 (1st Dep't 1985). Therefore, this action was stayed from Mr. Hamilton's death on December 1, 2004. After his widow, Georgia Rose, was appointed as the administratrix of his estate on March 16, 2006, it was incumbent on counsel to promptly move for an order of substitution, which was not done.

Service of process of the original summons and complaint on Dr. Frankel on December 8, 2004 was void *ab initio*, and service of the supplemental summons and amended complaint was also a nullity. Although theoretically, the complaint could have been amended once as of right, since no valid responsive pleading had been served (C.P.L.R. Rule 3025), counsel had no authority to serve an amended complaint. "[T]he death of a party to an action revokes the power of the attorney [to act]." Wisdom v. Wisdom, 111 A.D.2d 13, 15 (1st Dep't 1985). Prior to any action being taken, there must be a motion for substitution, pursuant to C.P.L.R. § 1021. Bossert v. Ford Motor Co., 140 A.D.2d 480 (2d Dep't 1988) ("A motion for substitution pursuant to CPLR 1021 is the method by which the court acquires jurisdiction over the personal representative and is not a mere technicality."). While the court also has the power to order a substitution, that could not be done in this case. No Request for Judicial Intervention was filed before Mr. Hamilton's death. Therefore, this case was not assigned to a judge, and there was no judge to order substitution of the proper party. See C.P.L.R. § 1015(a). Moreover, because any service of process that was made in December 2004 was a nullity, there were no defendants who had appeared in the case who could

bring a motion for substitution after Mr. Hamilton's death. See C.P.L.R. § 1021. The filing and service of the supplemental summons and amended complaint was a nullity, since counsel did not have authority to act. See C.P.L.R. §§ 1015 and 1021.

Plaintiffs' reliance on Noriega v. Presbyterian Hosp. in the City of New York, 305 A.D.2d 220, 221 (1st Dep't 2003), and other cases that allowed a late substitution is somewhat misplaced. In all of those cases, the defendants had been validly served, and the court obtained jurisdiction over them before the death of the plaintiff. Here, however, none of the defendants were validly served. See also, Schwartz v. Montefiore Hosp. & Med. Ctr., 305 A.D.2d 174 (1st Dep't 2003) (allowing case to proceed where motion to substitute was made more than six years after administratrix was appointed). This case is distinguishable, since jurisdiction was never obtained over defendants. Although defendants served and filed answers, the individual defendants, Drs. Frankel and Powell, asserted lack of jurisdiction and improper service as affirmative defenses. Both NYPH and Dr. Powell asserted as affirmative defenses that the complaining party is not a proper party and lacks status to maintain this action. In addition, defendant NYPH asserted the failure to timely substitute decedent's estate as an affirmative defense.

Moreover, in the most analogous factual scenarios, where there has been a delay in appointment of a representative of the estate, the plaintiff also demonstrated a prima facie showing of merit, by submitting the affirmation of a physician; a reasonable excuse for the delay in appointing a legal representative for the decedent; and, no undue prejudice to defendants. Peters v. City of New York Health & Hosps. Corp., 48 A.D.3d 329 (1st Dep't 2008); Wynter v. Our Lady of Mercy Med.

Ctr., 3 A.D.3d 376 (1st Dep't 2004). The only excuse plaintiffs' counsel offers is counsel's belief that, since defendants had not been served and issue was not joined, plaintiffs believed they were not required to bring a motion for substitution. Counsel claims that he believed all that needed to be done was to amend the original complaint. Plaintiffs' counsel claims mistake, confusion and oversight.

This is not a valid excuse for the delay, in that plaintiffs' counsel has not explained why it took over three and one-half years from Mr. Hamilton's death, and over two years from Ms. Rose's appointment as Administratrix, to serve and file the supplemental summons and amended complaint. At no time have plaintiffs sought an extension of time within which to serve the supplemental summons and amended complaint. C.P.L.R. § 306-b. Even if they had, plaintiffs have failed to demonstrate good cause, pursuant to C.P.L.R. § 2004, for an extension of time. Further, plaintiffs never served and filed a Notice of Medical Malpractice. C.P.L.R. Rule 3406(a). There has been a lack of diligence, and no showing that this action has merit. Moreover, defendants have demonstrated prejudice as a result of the delay. The prejudice to Dr. Frankel is that he claims not to have been aware of this action until June 14, 2008, five and one-half years after the last date of alleged treatment. Similarly, Dr. Powell was "served" on June 5, 2008. For all of these reasons, the request for substitution is denied. See McDonnell v. Draizin, 24 A.D.3d 628, 629 (2d Dep't 2005); Suciu v. City of New York, 239 A.D.2d 338 (2d Dep't 1997).

The application to substitute Georgia Rose as the Administratrix of the Estate of William A. Hamilton and to amend the caption is denied. The cross motions to dismiss this action

in its entirety, based on plaintiffs' failure to effect a substitution, and for failure to obtain personal jurisdiction over defendants (C.P.L.R. § 3211[a][8]), is granted, because defendants were never served with a valid summons and complaint. The Clerk is directed to enter judgment dismissing the complaint in its entirety.

This constitutes the decision, order, and judgment of the court.

Dated: July 31, 2009

JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).