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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. MARTIN SHULMAN, J S C

Index Number : 800173/2011

VELEZ, JULIA

vs

NEW YORK PRESBYTERIAN HOSPITAL

Sequence Number : 001

AMEND PLEADINGS

PART 1

INDEX NO. 800173/11

MOTION DATE _____

MOTION SEQ. NO. 001

papers, numbered 1 to ____, were read on this motion to/for amend/substitute

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits D-C | No(s). 1

Answering Affidavits — Exhibits Notice of Cross-motion (2) | No(s). 2, 3

Replying Affidavits Reply on Cross-motions | No(s). 4, 5 Nos. 6, 7

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

FILED

AUG 04 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: AUG - 1 2014

_____, J.S.C.

HON. MARTIN SHULMAN, J S C

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☑ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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JULIA VELEZ and ANTONIO CORTORREAL,

Plaintiffs,

-against-

NEW YORK PRESBYTERIAN HOSPITAL, RALPH LAUREN CENTER FOR CANCER CARE AND PREVENTION, MEMORIAL SLOAN KETTERING CANCER CENTER, AND JOHN DOES 1-10 INTENDING TO DESIGNATE PHYSICIANS, NURSES AND STAFF AFFILIATED WITH OR EMPLOYED BY THE NAMED DEFENDANTS,

Defendants.

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Index No. 800173/2011

Decision & Order

MARTIN SHULMAN, J.:

In this medical malpractice action alleging a failure to diagnose and treat decedent and former plaintiff Julia Velez's (Velez) breast cancer, Antonio Cortorreal (Cortorreal), co-plaintiff and alleged widower, who was issued limited letters of administration, moves for an order, effectively pursuant to CPLR §§ 1015 and 1021, substituting himself for Velez, as plaintiff. Defendant, The New York and Presbyterian Hospital (NYPH), s/h/a New York Presbyterian Hospital, opposes the motion and cross-moves, pursuant to CPLR 1021, for an order dismissing the complaint based on Cortorreal's failure to timely substitute himself as plaintiff or, pursuant to CPLR 3124, compelling Cortorreal to provide outstanding discovery and a responsive or supplemental bill of particulars within 30 days. Codefendant, Ralph Lauren Center for Cancer Care and Prevention (RLC), opposes the motion and cross-moves, pursuant to CPLR 1021, CPLR 3124, and CPLR 3126, for an order dismissing the complaint based

on Cortorreal's alleged failures to timely substitute himself as plaintiff and to respond to demands for discovery and for a supplemental bill of particulars, or in the alternative compelling Cortorreal to provide outstanding discovery and a supplemental bill of particulars, or precluding Cortorreal from offering any evidence or testimony at trial as to any information which he has wilfully failed or refused to provide.

Background

In May 2011, Velez and Cortorreal, represented by Jeffrey M. Judd (Judd), then of Shapiro, Beilly & Aronowitz, LLP, commenced this action against defendants[1] by filing a summons with notice, which notified the defendants that this was a medical malpractice action based on the failure to diagnose cancer. The verified complaint dated October 17, 2011 was served with a certificate of merit and purports to assert three causes of action. The first alleges that, between about 2006 and 2010, the defendants saw Velez for a number of medical "complaints," including routine mammography and breast exams and negligently rendered treatment to her, thereby causing her to suffer cancer, its increased invasion, the loss of an opportunity to cure it, and related pain, suffering, hospitalization, and medical expenses. Complaint, ¶¶ 15-18. The second cause of action purports to assert a claim predicated on the res ipsa loquitur doctrine and appears to be based on defendants' negligent rendition of care and readings of mammograms. The final cause of action is for Cortorreal's alleged loss of services.

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[1] It is undisputed that named defendant, Memorial Sloan Kettering Cancer Center, was never served.

On October 25, 2011, RLC served its answer and combined demands for discovery and a bill of particulars. NYPH served an answer, a demand for a bill of particulars, and its discovery demands, all dated November 2, 2011. Months later, specifically on March 16, 2012, plaintiffs merely served defendants with separate bills of particulars, but failed to respond to defendants' discovery demands. Two days later, Velez died. By letter dated April 4, 2012, RLC advised Judd that the bill of particulars was defective in certain respects and requested a further bill, in addition to authorizations for collateral sources/insurance and for medical and hospital records. O'Dwyer affirmation, exhibit I. On May 18, 2012 Judd spoke with a Ms. Langan, a member of the law firm representing NYPH, apparently advising her of Velez's death and that a copy of the death certificate would be forwarded once Judd obtained it. *See* Nikiciuk affirmation, exhibit C. By letter dated June 22, 2012, Judd sent both defense firms copies of Velez's death certificate. O'Dwyer affirmation, exhibit J.

On May 6, 2013, Olga Nikiciuk (Nikiciuk), another attorney from the firm representing NYPH, contacted Judd, looking for the death certificate and inquiring whether an executor had been appointed. Nikiciuk, by letter dated June 24, 2013, again asked Judd for a copy of the death certificate and for "outstanding" authorizations, "further to [Judd's] conversation with Ms. Langan," on May 18, 2012, i.e., after Velez's death. Nikiciuk further asked whether an estate representative had been appointed and if so, requested a copy of the letters of administration. To avoid motion practice, Nikiciuk requested authorizations previously demanded and all subsequent treatment and films. Nikiciuk affirmation, exhibit C. By letters dated October 7, November 12, and December 10, 2013, Langan and Nikiciuk repeated their

discovery/bill of particulars requests, added some new discovery requests and sought a copy of the letters of administration. By letters dated January 6 and February 21, 2014, Nikiciuk sent Judd NYPH's respective "fourth and final good faith correspondence" and "fifth good faith correspondence" to obtain discovery, before motion practice ensued, and also asked for a copy of the letters of administration. *Id.*

Meanwhile, by application dated January 14, 2014, Judd, then working at another law firm, sought letters of administration for Cortorreal, which letters were issued within a week.

Substitution Motion and Cross Motions

Attaching a copy of the letters of administration issued two months earlier, Cortorreal now moves for an order substituting himself for Velez as plaintiff and amending the caption to reflect that change. Both defendants oppose the motion, pointing to a lack of response to their requests for discovery and demands for further bills of particulars, and to the absence of any explanation as to why it took Cortorreal approximately 22 months to apply for letters of administration and several more months after their issuance to move for substitution.

NYPH asserts that it "has been prejudiced by the passage of time since in the absence of discovery and a meaningful Bill of Particulars setting out a coherent theory of liability against it, NYPH has been unable to investigate the basis for the plaintiff's claims." Nikiciuk affirmation, ¶ 18. RLC contends that it has been prejudiced because "the delay has allowed the statute of limitations to lapse as to [nonparty] private attending physicians ... who provided care and treatment to Ms. Velez at Ralph Lauren." O'Dwyer affirmation, ¶ 23. RLC claims further prejudice because the plaintiff has failed

to demonstrate this action's merit and because the plaintiff has, in its bill of particulars, alleged malpractice over a 12-year period, which "arguably" may cause parties' and witnesses' memories to fade in a failure to diagnose cancer case. *Id.*, ¶¶ 24, 27. Defendants maintain that in view of such prejudice, the action must be dismissed because Cortorreal failed to prosecute this action, seek his substitution within a reasonable time and demonstrate that this case has merit.

In response, Judd asserts that discovery had been proceeding "apace" until Velez's death, and now that Cortorreal has been granted letters of administration, discovery can resume. Judd affirmation in opp to RLC motion at 1. Judd maintains that defendants' requests for discovery after Velez's death and before an estate administrator had been appointed and substituted were improper. In any event, Judd advises that all requested authorizations have been provided, as allegedly demonstrated by copies of authorizations for certain medical providers attached to his opposing papers. Judd does not, however, mention most of the discovery demands served before Velez's death, including for authorizations for collateral sources, photographic evidence, defendants' statements and for information regarding Medicaid/Medicare liens and witnesses' names. Judd also states that supplemental bills of particulars will be provided. Judd, who makes no attempt to demonstrate the action's merit, further contends that the delay in obtaining letters of administration was not so long as to prejudice defendants, that the delay was not egregious and that it occurred for reasons beyond his control, which he does not wish to divulge publicly because they involve the attorney-client privilege. *Id.* at 2.

In reply, defendants urge that Judd's excuse for the delay in substituting Cortorreal is patently inadequate, that on this application he was required but failed to submit a physician's affidavit/affirmation of merit and that discovery requested many months before Velez's death remains outstanding.

Discussion

"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)," and any order made before that substitution is void. *Faraone v National Academy of Tel. Arts & Sciences*, 296 AD2d 349, 349 (1st Dept 2002) (internal quotation marks and citation omitted); *see also Gaines v City of New York*, 104 AD3d 610 (1st Dept 2013). Generally, a party's death stays the action until a personal representative is substituted for the decedent. *Neuman v Neumann*, 85 AD3d 1138, 1139 (2d Dept 2011); *see also Reed v Grossi*, 59 AD3d 509, 511 (2d Dept 2009) (party's death stays action as to that party). Further, an attorney's authority to act for a party ends when that party dies. *Giroux v Dunlop Tire Corp.*, 16 AD3d 1068 (4th Dept 2005).

CPLR 1015 (a) provides that "[i]f a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties." CPLR 1021 provides that a substitution motion can be made by the deceased party's successors or representatives "or by any party." That statute also recites that "[i]f 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." Additionally, irrespective of whether the event

requiring substitution occurs before or after final judgment, if such event is the party's death, "and timely substitution has not been made, the court, before proceeding further, shall ... order the persons interested in the decedent's estate to show cause why the action ... should not be dismissed." CPLR 1021.

Determinations under CPLR 1015 and CPLR 1021 are discretionary, including as to what constitutes "reasonable" under the latter provision. *Rosenfeld v Hotel Corp. of Am.*, 20 NY2d 25, 28-29 (1967). Where the delay is egregious or inordinate, the courts will decline to permit substitution and will dismiss the case where the plaintiff fails to demonstrate merit, a reasonable excuse for the delay, and/or lack of prejudice to the other side. *See e.g. Borruso v New York Methodist Hosp.*, 84 AD3d 1293 (2d Dept 2011) (action dismissed where there was a failure to move to substitute estate eight years after plaintiff's death and no reasonable excuse offered); *Suciu v City of New York*, 239 AD2d 338 (2d Dept 1997) (in view of five-year delay in getting letters of administration, prejudice, and absence of reasonable excuse and an affidavit of merit, motion to dismiss should have been granted); *Schwartz v Montefiore Hosp. & Med. Ctr.*, 305 AD2d 174, 176 (1st Dept 2003) (dismissal of case improper, notwithstanding seven-year delay in seeking substitution, where plaintiff made showing of merit, reasonable excuse for delay, and lack of prejudice to defendants); *Ruderman v Feffer*, 10 AD2d 704 (1st Dept 1960) (failure to grant motion to dismiss for lack of prosecution reversed and action dismissed where there was about a six-year delay in substituting estate and plaintiff made no showing of merit).

There is some case law which suggests that, absent an egregious delay, the principal factor that the court should consider on the issue of reasonableness is

whether the other side has been prejudiced, given the strong policy that cases be decided on their merits. *See Karoon v Karoon*, 74 AD3d 612, 613 (1st Dept 2010); *Rubino v Krasinski*, 54 AD3d 1016, 1017 (2d Dept 2008); *see also Egrini v Brookhaven Mem. Hosp.*, 133 AD2d 610 (2d Dept 1987) (although reason for the two and a half-year delay in obtaining letters testamentary inadequately explained, absent prejudice and in accordance with policy of deciding cases on the merits, motion to dismiss denied, and executor substituted). However, whether a showing of merit had been made in those cases is not revealed in the foregoing decisions.

As to whether a two-year delay is considered inordinate, and requires the decedent's estate to demonstrate merit, a reasonable excuse, and a lack of prejudice, the Court of Appeals in *Rosenfeld v Hotel Corp. of Am.* (20 NY2d at 29) opined that granting substitution was not an abuse of discretion where only 10 months of a two-year period following a party's death constituted the delay, which 10-month period was not an unreasonable amount of time. The Court then indicated that, even if the delay had been for the whole two-year period, it "would be hesitant to describe the substitution as an abuse of discretion." *Id.* Nevertheless, there is case law from the Appellate Division, First and Second Departments, which effectively indicates that such a delay can be unreasonable, thus requiring the party seeking substitution to come forward and demonstrate the lack of prejudice, merit, and a reasonable excuse for the delay. *See Wynter v Our Lady of Mercy Med. Ctr.*, 3 AD3d 376 (1st Dept 2004) (in a medical malpractice action, lower court abused its discretion in granting defendants' motion to dismiss the complaint and in denying plaintiffs' cross motion to substitute estate, where, although there was a two-year delay in appointing estate representative and in moving

for substitution, there was no showing of prejudice, and plaintiffs demonstrated a reasonable excuse for the delay and a sufficient showing of merit through a physician's affirmation and verified pleadings); *Sopcheck v Long Is. Jewish-Hillside Med. Ctr.*, 161 AD2d 577, 578 (2d Dept 1990) (court did not abuse its discretion in dismissing deceased husband's derivative claim where his representative was appointed two years after his death and no reasonable excuse was given for such "inordinate delay"); *see also Terpis v Regal Hgts. Rehabilitation & Health Care Ctr., Inc.*, 108 AD3d 618, 619 (2d Dept 2013) (in light of 21-month delay in obtaining letters testamentary, another delay of one year in moving for substitution, the failure to establish a reasonable excuse for each of the delays, the lack of an affidavit of merit and prejudice to the defendant, court did not abuse its discretion in dismissing the action pursuant to CPLR 1021).

Turning to the instant applications, defendants' bald and conclusory claims of prejudice are unavailing, because in this action premised on defendants' alleged failure to diagnose breast cancer, the claims are likely to turn on the medical records. *Wynter v Our Lady of Mercy Med. Ctr.*, 3 AD3d at 378. Further, RLC mentions no particular private physician who treated Velez at its facility, and any such treatment is presumably reflected in Velez's RLC treatment chart, which would have enabled RLC to bring any such physician in as a third-party defendant if it so chose. In any event, even if a claim that Velez had against such a private physician was time-barred, a claim for contribution or indemnification would not be, since such claims accrue when the underlying claim is paid. *See McDermott v City of New York,* 50 NY2d 211, 217 (1980); *Bay Ridge Air Rights, Inc. v State of New York,* 44 NY2d 49, 54-56 (1978); *Scaccia v Wallin*, 121 AD2d 709, 711 (2d Dept 1986). Also, as to any private physician who

treated Velez at RLC, assuming that such person was not a de facto RLC agent for whom it was liable (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 79-82 [1986]), RLC has the benefit of a CPLR Article 16 defense, which it has already asserted.

Nevertheless, assuming for argument's sake that plaintiff's excuse for not promptly moving for substitution involved a privileged conversation between Cortorreal and Judd, plaintiff has failed to set forth any reasonable explanation why it took two years to substitute the estate. There is, for example, no claim that there was an ongoing dispute between Cortorreal and anyone else who sought to be appointed as the estate's representative. Even before Velez's death, this case was not moved along with alacrity by plaintiffs, whose responses to the defendants' initial discovery demands were inexplicably months late and incomplete.

Furthermore, despite defendants' setting forth the showing needed to overcome an unreasonably tardy motion to substitute, plaintiff failed in his reply papers to attempt to establish any merit to this case. This is so because plaintiff vaguely alleges a continuous failure to diagnose cancer over a period of about 12 years (*see* bill of particulars as to RLC, ¶¶ 1-2). Further, because this is a medical malpractice action, a qualified physician, with the requisite expertise, is required to provide an affirmation/affidavit opining as to the defendants' departures from standards of good and accepted medical practice (*see Iazzetta v Vicenzi*, 243 AD2d 540 [2d Dept 1997]) and as to proximate cause to establish a meritorious claim. It is true that in this action plaintiffs were required to, and did, serve a certificate of merit (*see* CPLR 3012-a) in which Judd represented that he had consulted with a qualified, licensed physician, who led Judd to believe that there was a reasonable basis for commencing this action. In

light of that consultation, Judd presumably could have obtained and submitted a physician's affidavit/affirmation of merit in response to defendants' cross motions to dismiss, but decided not to do so, simply contending that the two-year lack of prosecution was not egregious.

Because Cortorreal failed to establish merit and a reasonable excuse for his inordinate delay in moving to substitute himself as the estate's representative, his motion is denied in the exercise of this court's discretion and the cross motions are granted to the extent that this action is dismissed for failure to move to substitute the decedent's estate within a reasonable time. The dismissal is without prejudice to any prompt application plaintiff is advised to make to seek reinstatement of the complaint on a proper showing. *Wynter v Our Lady of Mercy Med. Ctr.*, 3 AD3d at 378 (if action dismissed for failure to timely substitute, plaintiff, to obtain reinstatement, is required to show merit, reasonable excuse, and a lack of undue prejudice); *Ruderman v Feffer*, 10 AD2d at 704 (where plaintiff failed to demonstrate merit, motion to dismiss for failure to timely substitute granted, and plaintiffs granted leave to move to vacate dismissal on proper affidavit of merits); *see also* CPLR 5015 (a) (1); *cf. Yousian v New York Med. Ctr. Hosp. of Queens,* 277 AD2d 449 (2d Dept 2000) (application to be relieved of dismissal for neglect to prosecute under CPLR 3404 requires showing of a reasonable excuse for delay in prosecuting action, a meritorious action, a lack of prejudice to the other side, and a lack of intent to abandon the action); *Petersen v Lysaght, Lysaght & Kramer, P.C.*, 47 AD3d 783 (2d Dept 2008); *Berner v MCV Prods., Inc.*, 171 AD2d 1041 (4th Dept 1991) (relating to applications, under CPLR 5015 [a] [1] to vacate dismissals for failure to prosecute under CPLR 3216, and the requisite showing of a reasonable

excuse and merit); CPLR 3216 (e) (to avoid dismissal for failure to prosecute plaintiff required to establish action's merit and a reasonable excuse for failing to file note of issue within 90 days).

Because this action is dismissed, the court need not address defendants' alternative requests for relief relating to their discovery demands and bills of particulars, but notes in passing that such applications are without merit because defendants failed to comply with 22 NYCRR § 202.7 (a) (2), which provides that a party may not file a motion pertaining to discovery or a bill of particulars unless that party has filed and served with its motion papers, "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." The good faith affirmation must indicate the time, place and nature of the consultation and the issues discussed, and any resolutions, or shall indicate why no such conferral with counsel for the opposing party was held. 22 NYCRR § 202.7 (c). A party's failure to provide a good faith affirmation in compliance with the foregoing provisions requires the denial of that party's application. *Grasso v McCoy*, 113 AD3d 1096 (4th Dept 2014); *148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 (1st Dept 2009); and *Amherst Synagogue v Schuele Paint Co., Inc.*, 30 AD3d 1055, 1056-1057 (4th Dept 2006).

In conclusion it is

ORDERED that the plaintiff's motion is denied; and it is further

ORDERED that the cross motions of defendants New York Presbyterian Hospital and Ralph Lauren Center for Cancer Care and Prevention are granted to the extent that the complaint is dismissed pursuant to CPLR 1021, with costs and disbursements to

defendants, New York Presbyterian Hospital and Ralph Lauren Center for Cancer Care and Prevention, as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it further

ORDERED that the dismissal of this action is without prejudice to any prompt application plaintiff is advised to make, upon a proper showing, to seek reinstatement of the complaint.

Dated: August 1, 2014

Martin Shulman, J.S.C.