

McKinney v Saul

2016 NY Slip Op 31555(U)

August 12, 2016

Supreme Court, New York County

Docket Number: 805127/2014

Judge: Martin Shulman

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This opinion is uncorrected and not selected for official publication.

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

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LILLIAN MCKINNEY,

Plaintiff,

Index No. 805127/2014

-against-

Decision & Order

TURANDOT SAUL, M.D., SEBASTAIN
SIADECKI, M.D., MOUNT SINAI ST. LUKE'S
HOSPITAL CENTER and ST. LUKE'S HOSPITAL
CENTER,

Defendants.
-----X

MARTIN SHULMAN, J.:

In this medical malpractice action alleging failure to adequately treat decedent and former plaintiff Lillian McKinney's ("plaintiff" or "McKinney") left ankle fracture, the defendants, Turandot Saul M.D., Sebastain Siadecki, M.D., Mount Sinai St. Lukes's Hospital Center and St. Luke's Hospital Center (collectively "defendants"), move for an order dismissing this action pursuant to CPLR § 1021 based upon the failure to substitute an administrator of the decedent plaintiff's estate within a reasonable time. McKinney's former counsel purports to oppose the motion.¹

Background

McKinney commenced this action against defendants on April 15, 2014 by filing the summons and verified complaint, which alleges two causes of action for medical malpractice and lack of informed consent based upon defendants' 2012 treatment of plaintiff for a fractured ankle. The verified complaint alleges that such treatment

¹ "Just as the death of a principal ordinarily revokes the authority of the agent, so the death of a party to an action revokes the power of the attorney (citations omitted)." *Wisdom v Wisdom*, 111 AD2d 13, 14-15 (1st Dept 1985).

resulted in "severe and permanent neurological and physical injuries", including "infection, necrosis, pain, a below ankle amputation, inability to ambulate, inability to live independently, diminished earning capacity, and loss of enjoyment of life." Verified Complaint, ¶12, at Exh. A to Motion.

McKinney expired on May 15, 2015.² At a September 21, 2105 status conference plaintiff's counsel reported that neither McKinney's daughter nor her mother wished to continue the action. At a subsequent status conference on December 9, 2015, plaintiff's counsel reiterated the foregoing and reported that decedent's estranged husband, Jose McKinney, had expressed interest in being appointed the administrator of his late wife's estate and resuming prosecution of this action. As of April 26, 2016, the date of the most recent status conference, no action had been taken with respect to having Jose McKinney appointed as an estate representative. Defendants' motion ensued.

In support of their motion, defendants argue that it has been a year since McKinney's death and at least six months since McKinney's estranged husband allegedly indicated an interest in pursuing this action. As the matter cannot be prosecuted without substituting a duly appointed estate representative, defendants contend that they cannot properly defend and continue to be prejudiced. Defendants claim further prejudice because of the passage of time. Specifically, since this case involves care and treatment rendered four years ago, defendants argue that "memories

² Plaintiff's former counsel disputes defendants' counsel's claim that McKinney's death was unrelated to the treatment at issue herein. See *Morelli Aff. in Opp.* at ¶4.

have faded, witnesses have moved” and they are “behind in fully investigating the decedent’s claims.” See Maione Aff. at ¶22.

In response, plaintiff’s former counsel advises that Jose McKinney had indicated that he preferred to retain new counsel to pursue this action. Plaintiff’s counsel states that his firm has had no further communication with Jose McKinney and attempts to contact him further have been unsuccessful. Morelli Aff. in Opp. at ¶66. Plaintiff’s former counsel opposes the motion on the ground that it is defective and must be denied *inter alia* because defendants failed to comply with CPLR §1021’s requirement (more fully discussed *infra*) that the motion be brought by order to show cause upon notice to those persons interested in the decedent’s estate (here, McKinney’s husband, daughter and mother). Defendants have not submitted a reply to plaintiff’s opposition.

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). 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).

However, “while the death of a party results in a stay of the action, the courts are vested with jurisdiction in certain situations to dismiss such an action.” *Washington v Min Chung Hwan*, 20 AD3d 303, 305 (1st Dept 2005). For example, CPLR §1021,

which provides that a substitution motion can be made by the deceased party's successors or representatives "or by any party", also provides 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, regardless of whether the event requiring substitution occurs before or after final judgment:

if the event requiring substitution is the death of a party, and timely substitution has not been made, **the court, before proceeding further, shall, on such notice as it may in its discretion direct, order the persons interested in the decedent's estate to show cause why the action ... should not be dismissed.**" (Emphasis added).

See also *Gonzalez v Ford Motor Co.*, 295 AD2d 474, 475 (2d Dept 2002) (CPLR §1021 provides an exception to the principle that the court is divested of jurisdiction to act upon the death of a party and ensuing stay of proceedings); *Rumola v Maimonides Med. Ctr.*, 37 AD3d 696, 697 (2d Dept 2007).

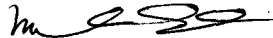
Defendants' motion to dismiss for failure to timely substitute an estate administrator as plaintiff must be denied, albeit without prejudice. It is clear from CPLR §1021's mandatory language that "[w]hen a timely substitution is not made, a court may not order dismissal without first ordering the persons interested in the decedent's estate to show cause why the action should not be dismissed." *Noriega v Presbyterian Hosp. in City of New York*, 305 AD2d 220, 221 (1st Dept 2003); *Petty v Meadowbrook Distrib. Corp.*, 266 AD2d 88 (1st Dept 1999).

Here, plaintiff's former counsel has indicated that there are at least three people who may potentially be interested in McKinney's estate and further indicated his willingness to provide their names and last known addresses. These individuals must be given an opportunity to establish that the claimed delay in effectuating substitution has not been unreasonable. Accordingly, defendants' motion is denied without prejudice to their prompt renewal of their application, which shall be brought by order to show cause, upon notice to the persons interested in the estate of decedent plaintiff Lillian McKinney. "If proper notice is given to the persons interested in the decedent's estate, the court may then effectively proceed to decide the motion to dismiss (citations omitted)." Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C1021:2.

Accordingly, it is

ORDERED that the defendants' motion is denied without prejudice.

Dated: August 12, 2016



Martin Shulman, J.S.C.