

Spina-Sterling v Birnbaum
2016 NY Slip Op 32931(U)
June 30, 2016
Supreme Court, New York County
Docket Number: 805166-2013
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: GEORGE J. SILVER
Justice

PART 10

Index Number : 805166/2013
SPINA-SPERLING, ANN
vs.
BIRNBAUM, MD, STANLEY
SEQUENCE NUMBER : 001
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

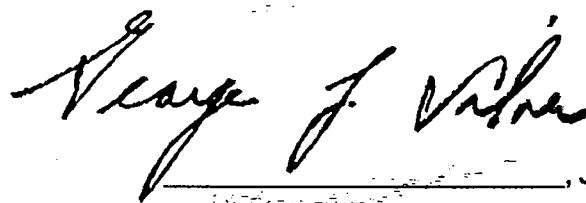
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

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

Dated: 6/30/16


_____, J.S.C.

GEORGE J. SILVER

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 10

-----X
ANN SPINA-STERLING and MARVIN STERLING,

Plaintiff,

Index No. 805166-2013

-against-

DECISION/ORDER

Motion Sequence 001

STANLEY BIRNBAUM, M.D., KEVIN M. HOLCOMB, M.D.,
ROISIN O'CEARBHAILL, M.D., MEMORIAL SLOAN-
KETTERING CANCER CENTER, NEW YORK HOSPITAL-
CORNELL MEDICAL CENTER, NEW YORK
PRESBYTERIAN HOSPITAL/WEILL CORNELL MEDICAL
CENTER,

Defendants.

-----X
HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Collective Exhibits Annexed.....	<u>1, 2, 3</u>
Answering Affirmation & Exhibit.....	<u>4, 5</u>
Answering Affirmation.....	<u>6</u>
Reply Affirmation & Exhibit.....	<u>7</u>

In this medical malpractice action plaintiff moves by notice of motion dated October 15, 2015 for an order granting him leave to serve an amended summons and complaint adding a cause of action for wrongful death and amending the caption to reflect to appointment of Marvin Sperling as administrator of the estate of Ann Spina-Sterling. Defendants oppose the motion.

Generally, leave to amend a pleading is freely granted in the absence of prejudice or surprise to the opposing party. Mere lateness is not a barrier to amendment. To establish prejudice, which must be significant (*see Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 459 NE2d 164, 471 NYS2d 55 [1983]), there must be some indication that the opposing party will have been hindered in the preparation of its case or prevented from taking some measure to support its position (*see Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 429 NE2d 90, 444 NYS2d 571 [1981]). Moreover, on a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations but simply show that the proffered amendment

is not palpably insufficient or clearly devoid of merit (*MBIA Ins. Corp v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). A motion seeking leave to amend a personal injury complaint to assert a cause of action for wrongful death must be supported by competent medical proof of the causal connection between the alleged negligence and the death of the original plaintiff (*Cruz v Brown*, 12 AD3d 455 [1st Dept 2015]). While plaintiff did not annex any medical evidence to his moving papers, plaintiff did submit a redacted physician's affirmation in reply. The physician's affirmation sufficiently establishes a causal connection between defendants' alleged negligent treatment of plaintiff's metastatic ovarian cancer and her death from the same condition (*see generally Layz v City of New York*, 205 AD2d 460 [1st Dept 1994]; *Casalone v Presbyterian Hosp.*, 276 AD2d 452 [1st Dept 2000]). To the extent the physician's affirmation can be described as conclusory, it should be noted that this action, and all discovery, has been stayed due to plaintiff's death. To require a more detailed showing at this point in the litigation would impose upon plaintiff a burden of proof associated with summary judgment without affording plaintiff full discovery on the issue (*Gambles v Davis*, 32 AD3d 224 [1st Dept 2006]). Accordingly, it is hereby

ORDERED that plaintiff motion for leave to amend the complaint is granted and the amended verified complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendants shall serve an answer to the amended verified complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that the action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

MARVIN STERLING, as Administrator of the Estate of
ANN SPINA-STERLING, deceased and MARVIN
STERLING, Individually,

Plaintiffs,

Index No. 805166-2013

-against-

STANLEY BIRNBAUM, M.D., KEVIN M. HOLCOMB, M.D.,
ROISIN O'CEARBHAILL, M.D., MEMORIAL SLOAN-
KETTERING CANCER CENTER, NEW YORK HOSPITAL-
CORNELL MEDICAL CENTER, NEW YORK
PRESBYTERIAN HOSPITAL/WEILL CORNELL MEDICAL
CENTER,

Defendants.

-----X

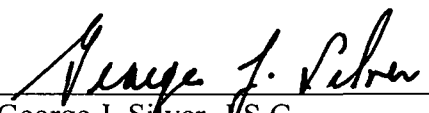
And it is further

ORDERED that movant is to serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office who are directed to mark the court's records to reflect the amended caption; and it is further

ORDERED that the parties are to appear for a preliminary conference on October 19, 2016 at 2:30 p.m. in Part 10, room 422 of the courthouse located at 60 Centre Street, New York, New York 10007; and it is further

ORDERED that movant is to serve a copy of this order with notice of entry upon defendants within 20 days of entry.

Dated: 6/30/16
New York County


George J. Silver, J.S.C.

GEORGE J. SILVER