

Chase v Zulqarnain
2018 NY Slip Op 30146(U)
January 23, 2018
Supreme Court, Kings County
Docket Number: 503897/2016
Judge: Gloria M. Dabiri
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At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of January, 2018.

P R E S E N T:

HON. GLORIA M. DABIRI,
Justice.

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NADIRA CHASE, as Proposed Administratrix of the Estate of ALTON CHASE, deceased, and NADIRA CHASE, individually,

Plaintiffs,

- against -

DECISION AND ORDER

Index No. 503897/2016

Motion Seq. 2, 3, 4, 5, 6, 7, 8, & 9

SIKANDER ZULQARNAIN, EMMANUEL VALERY, MOHAMMED RAHMAN, VINODKUMAR VELAYUDHAN, IAN PRESCOTT, AMANDA CYRULNIK, EDWARD HEILMAN, ALYSON PENSTEIN, DAVID LANDMAN, NYLA MANNING, ANTHONY JOSEPH, JAMES WALSH, DAVID JACOBS, HERMAN MORENO, CHEN ZHAO, KAREN CALDEMAYER, JENNA CHECCI, AEISHITA DWIVEDI, BEDFORD MEDICAL GROUP, LLP, GLOBAL MEDICAL CARE ASSOCIATES, PLLC, BAB NUCLEAR RADIOLOGY, P.C., AMERICAN COMPREHENSIVE HEALTHCARE MEDICAL GROUP, P.C., ALYSON C. PENSTEIN, MD, P.C., VIRTUAL RADIOLOGICAL PROFESSIONALS OF NEW YORK, P.A., KINGS COUNTY HOSPITAL CENTER, BELLEVUE HOSPITAL CENTER, and NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendants.

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The following papers read on this motion	NYSCEF Documents
Notice of Motion – Order to Show Cause and Affidavits (Affirmations) Annexed	72-77 82-92 111-115 116-119 120-123 127-130 134-139 140-145
Answering Affidavit (Affirmation)	82-92 94-100 134-139 134-139 134-139 134-139
Reply Affidavit (Affirmation)	101
Affidavit (Affirmation)	
Pleadings – Exhibits	
Stipulations – Minutes	

Upon the foregoing papers and pursuant to CPLR 3215, plaintiff seeks default judgments against defendants Amanda Cyrulnik, Nyla Manning and David Jacobs (MS #2).¹ Defendants

¹ Plaintiff’s motion also sought default judgment against defendants Bedford Medical Group, LLP, Global Medical Care Associates, PLLC, BAB Nuclear Radiology, P.C. and American Comprehensive

Amanda Cyrulnik, David Jacobs and Nyla Manning cross-move for an order dismissing the complaint as against them based upon improper service of process (CPLR 3211[a][8]) (MS # 3).²

Defendants Karen Caldemeyer and Virtual Radiological Professionals of New York, P.A. (MS #4), Bedford Medical Group, LLP, Mohammed Rahman and Global Medical Care Associates, PLLC (MS #5), Alyson C. Penstein, M.D., P.C. (MS #6) and Sikander Zulqarnain, Emmanuel Valery, Mohammed Rahman, Vinodkumar Velayudhan, Ian Prescott, Edward Heilman, Alyson Penstein, David Landman, Nyla Manning, Anthony Joseph, James Walsh, Herman Moreno, Chen Zhao, Jenna Checci, Aeishita Dwivedi and New York City Health and Hospitals Corporation s/h/a "Kings County Hospital Center, Bellevue Hospital Center, and New York City Health and Hospitals Corporation" (MS #7) seek an order, pursuant to CPLR 3211(a)(3), dismissing the complaint based upon the plaintiff's lack of capacity to sue.

Plaintiff Nadira Chase cross-moves for an order, pursuant to CPLR 3025(b), amending the Summons and Complaint to substitute her as administratrix of the estate of Alton Chase, or, in the alternative, pursuant to CPLR 205(a), permitting her to commence a new action in her capacity as administratrix (MS #8).

Healthcare Medical Group, P.C. Plaintiff withdrew the motion as to defendants Bedford Medical Group, LLP, Global Medical Care Associates, PLLC at oral argument on March 10, 2017. In an Order dated March 28, 2017 this Court denied the motion without prejudice, based on plaintiff's failure to submit sufficient proof of the facts constituting her claim, as to defendants BAB Nuclear Radiology, P.C. and American Comprehensive Healthcare Medical Group, P.C. In the same Order the Court held the motion in abeyance as to defendants Cyrulnik, Manning and Jacobs pending a traverse hearing to determine whether these defendants were properly served.

² The March 28, 2017 Order also held this motion in abeyance pending a traverse hearing.

Defendant Alyson C. Penstein, M.D., P.C. (“Penstein P.C.”) cross-moves, pursuant to CPLR 3217(b), for a So-Ordered partially executed stipulation of discontinuance as to defendant Penstein P.C. (MS #9).

BACKGROUND

In an Order dated March 28, 2017 the Court held the plaintiff’s motion for a default judgment as to defendants Cyrulnik, Manning and Jacobs and the cross-motion to dismiss the complaint as to defendants Cyrulnik, Manning and Jacobs in abeyance pending a traverse hearing as to whether these defendants were properly served with process. A traverse hearing was held on June 1, 2017 before Special Referee Richard Allman. In a decision filed on August 4, 2017, and as reflected in the hearing transcript excerpts filed with the Notice of Entry on August 18, 2017, Referee Allman held that Manning had been properly served. Referee Allman found as to Cyrulnik and Jacobs, that they had not been properly served in that they did not work at Kings County Hospital at the time that service was made there on April 8, 2016.

Thereafter, in separate motions, each of the defendants – except for Cyrulnik and Jacobs (the defendants who were not properly served) BAB Nuclear Radiology, P.C. and American Comprehensive Healthcare Medical Group, P.C. (the defendants which have not appeared) – moved to dismiss the complaint due to the plaintiff Nadira Chase’s lack of capacity to sue. The plaintiff Nadira Chase obtained Letters of Administration on July 5, 2017, after several of the motions to dismiss had been filed. Plaintiff then cross-moved to amend the pleadings to reflect her appointment as administratrix.

On July 12, 2017 counsel for plaintiffs and for Penstein P.C. stipulated to discontinue the complaint as to Penstein P.C. with prejudice. None of the remaining defendants have asserted cross-claims against Penstein P.C.

DISCUSSION

Service – Traverse Hearing

The referee's report and recommendations are confirmed and service upon the defendants Cyrulnik and Jacobs is deemed to have been improperly made (CPLR 308; *Rosario v NES Med. Servs. of N.Y., P.C.*, 105 AD3d 831, 833 [2d Dept 2013]).

Stipulation of Discontinuance as to Penstein P.C.

“While the authority of a court to grant or to deny an application made to it pursuant to CPLR 3217 (subd [b]) by a party seeking voluntarily to discontinue litigation is within its sound discretion, ordinarily a party cannot be compelled to litigate and, absent special circumstances, discontinuance should be granted” (*Tucker v Tucker*, 55 NY2d 378, 383 [1982]; see *Expedite Video Conferencing Servs., Inc. v Botello*, 67 AD3d 961, 961 [2nd Dept 2009]). Here, while the stipulation of discontinuance as to Penstein P.C. is only partially signed, none of the other defendants has asserted cross-claims against Penstein P.C. or opposed the request for discontinuance. It is also noted that plaintiff, Nadira Chase, obtained Letters of Administration on July 5, 2017 and, thus, had the legal capacity to waive claims against Penstein P.C. as of July 12, 2017, the date of the stipulation.

Capacity to Sue

A duly appointed administrator “is the only party who is authorized to commence a survival action to recover damages for personal injuries sustained by the decedent or a wrongful death action to recover damages sustained by the decedent’s distributees on account of his or her death” (*Shelley*, 123 AD3d 797; *Jordan v Jordan*, 120 AD3d 632 [2d Dept 2014]; *Mingone v State of New York*, 100 AD2d 897 [2d Dept 1984]; *Sam Kyung Cho v Yongshin Cho*, 45 AD3d 388 [1st Dept 2007]).

Dismissal of an action is appropriate when, as here, the plaintiff commenced the action prior to obtaining Letters of Administration (*Shelley v South Shore Healthcare*, 123 AD3d 797 [2d Dept 2014]; *Egan v Neghavi*, 84 Ad3d 1014 [2d Dept 2011]) and was unable to cure this defect prior to the defendants’ filing motions to dismiss (*Burwell v Yonkers Gen. Hosp.*, 6AD3d 478 [2d Dept 2004]; *Plotkin v New York City Tr. Auth.*, 220 AD2d 653 [2d Dept 1995]). Here, plaintiff Nadira Chase filed a summons and complaint on March 16, 2016 which identified her as the “Proposed Administratrix of the Estate of Alton Chase.” She did not obtain Letters of Administration until July 5, 2017, which was after several of the defendants had filed motions to dismiss, and did not make her motion to amend the complaint until after all of the CPLR 3211(a)(3) motions to dismiss had been filed. Accordingly, it is

ORDERED, that the motion of defendants Amanda Cyrulnik, Nyla Manning and David Jacobs is granted to the extent that this action is dismissed, pursuant to CPLR 3211(a)(8), as to defendants Amanda Cyrulnik and David Jacobs; and it is further

ORDERED, that the motion of plaintiff for a default judgment against defendants Amanda Cyrulnik, Nyla Manning and David Jacobs is denied as to defendants Amanda Cyrulnik and David Jacobs; and it is further

ORDERED, that the motion of defendant Alyson C. Penstein, M.D., P.C. is granted, pursuant to CPLR 3217(b), to the extent that this action is discontinued with prejudice as to defendant Alyson C. Penstein, M.D., P.C. only, without costs or disbursements to any party as against the others; and it is further

ORDERED, that the motion of defendant Alyson C. Penstein, M.D., P.C. to dismiss for lack of capacity, pursuant to CPLR 3211(a)(3), is denied as moot; and it is further

ORDERED, that the motions of defendants Karen Caldemeyer, Virtual Radiological Professionals of New York, P.A., Bedford Medical Group, LLP, Mohammed Rahman, Global Medical Care Associates, PLLC, Sikander Zulqarnain, Emmanuel Valery, Vinodkumar Velayudhan, Ian Prescott, Edward Heilman, Alyson Penstein, David Landman, Nyla Manning, Anthony Joseph, James Walsh, Herman Moreno, Chen Zhao, Jenna Checci, Aeishita Dwivedi and New York City Health and Hospitals Corporation s/h/a "Kings County Hospital Center, Bellevue Hospital Center, and New York City Health and Hospitals Corporation" to dismiss for lack of capacity, are granted to the extent that this action is dismissed pursuant to CPLR 3211(a)(3), without prejudice to commencement of a new action pursuant to CPLR 205(a); and it is further

ORDERED, that the motion of plaintiff to amend the pleadings is granted to the extent that plaintiff may commence a new action pursuant to CPLR 205(a), and the motion is otherwise denied; and it is further

ORDERED, that the motion of defendants Amanda Cyrulnik, Nyla Manning and David Jacobs is denied as moot as to defendant Nyla Manning; and it is further

ORDERED, that the motion of plaintiff for a default judgment against defendants Amanda Cyrulnik, Nyla Manning and David Jacobs is denied as moot as to defendant Nyla Manning.

ENTER,


J.S.C.
HON. GLORIA M. DABIRI
J.S.C.

**KINGS COUNTY CLERK
FILED
2018 JAN 26 AM 8:09**