

Gatas v New York City Health & Hosps. Corp.

2018 NY Slip Op 30798(U)

May 1, 2018

Supreme Court, New York County

Docket Number: 805066/2015

Judge: George J. Silver

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: GEORGE J. SILVER PART 10
Justice

FERIAL GATAS,

MOTION INDEX NO. 805066/2015

Plaintiff,

MOTION DATE

- v -

MOTION SEQ. NO. 001

**NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,**

Defendant.

Cross-Motion: Yes No

SALWA YOUSSEF ("plaintiff") seeks an order, pursuant to CPLR §§ 1015(a) and 1021, substituting herself as the administratrix for the estate of Ferial Gatas. Plaintiff also seeks leave to amend the caption, restore this matter to "active status" on the court's calendar, and extend her time to file the note of issue.

Defendant NEW YORK CITY HEALTH AND HOSPITAL CORPORATION ("defendant") opposes plaintiff's motion, and cross-moves to dismiss the complaint for failure to timely substitute a legal representative.

BACKGROUND

On February 19, 2014, decedent Ferial Gatas ("decedent") slipped and fell and injured herself while she was a resident at Gouverneur Skilled Nursing Facility ("Gouverneur"). On or about May 15, 2014, plaintiff served a notice of claim upon defendant. A General Municipal Law §50-h ("GML § 50-h") hearing was held on August 6, 2014 and decedent was deposed. On February 17, 2015, a Summons and Complaint was filed, and defendant answered on April 16, 2015. On July 15, 2015, decedent served a verified bill of particulars together with authorizations for the release of her medical records and responses to defendant's discovery demands.

On May 11, 2015, decedent passed away unexpectedly while in Egypt. At a preliminary conference on September 22, 2015, the court dismissed the case. At that time, decedent's estate had not been probated. On March 23, 2016, plaintiff, decedent's daughter, was appointed as the administratrix of her estate. On November 6, 2017, plaintiff moved to restore the case to the court's "active calendar" and to substitute herself as the administratrix of decedent's estate.

Plaintiff argues that the action should be restored to the court's calendar because there was an excusable default. Plaintiff further asserts that case law has recognized the importance of resolving actions on their merits, and that there is no prejudice to defendant because decedent testified at a GML § 50-h hearing on August 6, 2014. Additionally, plaintiff alleges that defendant had agreed and stipulated to restoring the matter to the court's calendar and to extending plaintiff's time to file the note of issue.

In opposition, defendant cross-moves for an order dismissing the complaint, arguing that plaintiff waited 19 months before seeking substitution without providing any explanation for the delay and without showing the absence of prejudice to defendant. Defendant also argues that the three-and-a-half-year passage of time since this action was commenced will impair the ability of Gouverneur's medical staff to recall the events of the underlying action, which will undermine defendant's ability to mount a vigorous defense. Defendant also claims that contrary to plaintiff's assertion, it did not agree to restore the matter to the court's calendar. Defendant further asserts that plaintiff's failure to proffer an expert affidavit of merit warrants dismissal of the complaint.

In reply, plaintiff argues that the delay in seeking substitution has not created undue prejudice since medical malpractice actions often rely on medical records and other documentary evidence, not eyewitness testimony alone. Plaintiff also avers that an expert affidavit is not necessary because she has shown merit to the action through the certificate of merit.

DISCUSSION

CPLR § 1015(a) allows a court to substitute a proper party where a party dies and his or her claims have not been extinguished. Pursuant to CPLR § 1021, the failure to make a substitution “within a reasonable time” is a basis for dismissal of the action. In the court's exercise of discretion, “The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, [a reasonable excuse for the delay], prejudice to the other parties, and [the merits of plaintiff's claim]” (*Pub. Adm'r v. Levine*, 142 A.D.3d 467, 470 [1st Dept. 2016]; *Largo-Chicaiza v. Westchester Scaffold Equip. Corp.*, 90 A.D.3d 716, 717 [2d Dept. 2011]). Here, plaintiff waited more than two years after decedent's death and 19 months after obtaining letters of administration before seeking substitution. In her moving papers and at oral argument before the court on March 20, 2018, plaintiff failed to provide any excuse or explanation for her substantial delay. Plaintiff's public policy argument that *Peters v. City of New York Health & Hosps. Corp.* recognizes the importance of resolving actions on their merits absent a showing of prejudice neglects to mention that the plaintiff there provided “a reasonable explanation for the delay” (48 A.D.3d 329, 329 [1st Dept. 2008]). Here, however, plaintiff has made no such showing.

Despite plaintiff's lengthy delay, defendant has not been prejudiced (*Pub. Adm'r*, 142 A.D.3d at 470, *supra* [“defendant's bare allegations of prejudice are insufficient to defeat a motion for substitution especially where . . . the case is likely to turn mainly on medical records rather than witnesses' memories”]; *Largo-Chicaiza*, 90 A.D.3d at 717, *supra*; *Peters*, 48 A.D.3d at 329, *supra* [no prejudice where the action will likely rely on medical records and other documentary evidence and not the testimony of eyewitnesses]; *Peterson v. City of New York*, 286 A.D.2d 287, 288–89 [1st Dept. 2001] [defendant did not identify any particular prejudice aside from the mere passage of time, which is legally insufficient]). Here, defendant was served with a timely notice of claim and received plaintiff's bill of particulars and authorizations for records. Defendant also took decedent's

testimony at a GML § 50-h hearing on August 6, 2014. As such, defendant had sufficient notice and time to conduct investigations and gather appropriate records and documents. Because the underlying medical malpractice action relates to plaintiff's allegation that decedent's slip and fall accident was due to Gouverneur's inattentive staff, defendant will likely rely on medical records and other documentary evidence at trial (*id.*). Therefore, defendant's assertion that the passage of time is prejudicial is insufficient to dismiss plaintiff's complaint.

Defendant's claim that plaintiff failed to demonstrate the merits of his case by proffering an expert affidavit is also insufficient to dismiss plaintiff's complaint. In *Pub. Adm'r v. Levine*, the underlying pleadings, including the amended complaint, the verified bill of particulars, and the decedent's deposition "adequately established the merit of the underlying [medical malpractice] action without the need for a physician's affirmation" (142 A.D.3d at 469; *see also, Leonardelli v. Presbyterian Hosp. in City of New York*, 288 A.D.2d 105, 106 [1st Dept. 2001] [plaintiff's bill of particulars and verified complaint allege sufficient detailed facts to establish that the case has merit]). Similarly, here, plaintiff's verified complaint, verified bill of particulars, certificate of merit, and decedent's GML § 50-h testimony adequately establish that plaintiff has a meritorious lawsuit.

Under these circumstances, and in light of the strong public policy favoring disposition of cases on their merits, plaintiff's motion to substitute is granted (*Peters*, 48 A.D.3d at 329, *supra*). Consequently, it is hereby

ORDERED that the application to substitute Salwa Youssef as the administratrix for the estate of Ferial Gatas is granted; is and it is further

ORDERED that plaintiff Salwa Youssef's request to amend the caption to reflect such substitution is granted; and it is further

ORDERED that the caption is amended to read as follows:

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

Index No. 805066/2015

**SALWA YOUSSEF, as administratrix for the
estate of FERAL GATAS, deceased,**

Plaintiff

-against-

**NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION**

Defendant

; and it is further

**ORDERED that plaintiff Salwa Youssef's request to restore this matter to
"active status" on the court's calendar is granted; and it is further**

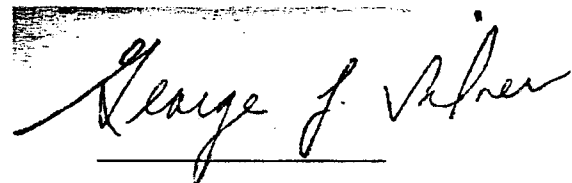
**ORDERED that plaintiff Salwa Youssef's request to extend the time to file
the note of issue is granted; and it is further**

**ORDERED that defendant's cross-motion to dismiss plaintiff's complaint is
denied; and it is further**

**ORDERED that the parties are directed to appear for a conference on May
22, 2018 at 9:30 A.M. at 111 Centre Street, Room 1227 (Part 10) New York, New
York 10013 to ensure compliance with this court's order and to set a date to file
the note of issue.**

This constitutes the decision and order of the court.

Dated: May 1, 2018



HON. GEORGE J. SILVER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE