

<b>Rosenthal v Zaremski</b>
2018 NY Slip Op 31364(U)
June 26, 2018
Supreme Court, New York County
Docket Number: 158865/2012
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

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THERESA ROSENTHAL,

Plaintiff,

- v -

BENJAMIN ZAREMSKI,

Defendant.

INDEX NO. 158865/2012

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 1, 2

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number 15 - 47  
were read on these applications for dismissal/restoration and substitution

HON. BARBARA JAFFE:

By order to show cause, defendant moves pursuant to CPLR 1021 for an order dismissing the complaint on the ground that an administrator for the estate of the deceased plaintiff was not appointed in a timely fashion. By notice of motion, the administrator of plaintiff's estate moves for an order restoring the matter to the calendar, and amending the caption to substitute himself as plaintiff. These motions are consolidated solely for disposition herein.

I. PERTINENT FACTS

On December 22, 2011, plaintiff underwent a physical examination by defendant, her long-time cardiologist. On December 4, 2012, she commenced this action against him for assault and intentional infliction of emotional distress, alleging that during the examination, he performed a rectal examination on her without her consent. Thereafter, defendant joined issue, and the parties appeared for approximately five discovery conferences. (NYSCEF 25-27).

On September 10, 2016, plaintiff passed away and, on September 29, 2016, her widower was issued letters of administration for her estate. (NYSCEF 34, 42). At a conference held on October 26, 2016, plaintiff's counsel advised defendant of plaintiff's death, and that plaintiff's widower had been issued letters of administration, but expressed uncertainty was unsure whether the action would continue to be prosecuted. An order was issued staying the matter pending the appointment of an administrator and substitution. (NYSCEF 16, 28).

Defendant reached out to plaintiff to learn the status of the case in December 2016, and in February, May and August 2017. In September 2017, defendant wrote to plaintiff's counsel and indicated that, as it had been more than one year since the action was stayed, he intended to seek judicial intervention should counsel not respond within ten days. (NYSCEF 29). Having received no response, defendant brought this motion. (NYSCEF 15). Plaintiff's counsel then moved to restore the action to the calendar, and amend the caption to reflect the substitution of the administrator. (NYSCEF 33). The parties stipulated to adjourn both motions, extending the time for service of opposition and reply papers. (NYSCEF 47).

## II. CONTENTIONS

In support of his motion to dismiss, defendant argues that approximately 14 months of delay in seeking substitution is unreasonable, especially here, as plaintiff's widower could have pursued the action as early as October 2016, when he possessed letters of administration, and chose not to. Moreover, he contends, the decedent delayed discovery over the almost four years elapsing from the alleged assault to the day of her death, having failed to comply with court orders that she provide medical records authorizations and appear for an examination before trial, thereby causing the needless incursion of years of legal expenses. (NYSCEF 16, 19-30).

In support of reinstatement and substitution, deemed opposition to defendant's motion to dismiss, the administrator argues that the action has merit, as evidenced by defendant's nurse/physician's assistant, who noted in the treatment notes that a rectal examination was conducted. He offers copies of the pleadings, as well as an affidavit of merit in which he describes the incident as it was relayed to him by plaintiff as soon as she exited the examination room, without stopping for their customary post-examination consultation with defendant. He also recounts a telephone conversation he had with defendant regarding the incident, along with his own memories of plaintiff's physical and mental state after the incident, and the harm she allegedly suffered due to defendant's conduct. He denies that defendant will be prejudiced. (NYSCEF 34).

In opposition, defendant argues that absent an explanation of the delay in appointing an administrator, nor admissible evidence that the action has merit, plaintiff fails to establish grounds for relief. Rather, he contends, the administrator's affidavit consists of irrelevant facts, hearsay, and inadmissible statements, and that without testimony from plaintiff, there is no evidence supporting the action, nor reason to expect it at trial. He also asserts that he would suffer great prejudice should the action be restored, as he will be forced to continue protracted litigation of a now futile claim, with the faded memories of any eyewitnesses. In any event, he claims that the motion must be denied absent an affidavit of merit from a physician, as the action concerns defendant's alleged departure from accepted standards of practice. (NYSCEF 43).

In reply, the administrator maintains that while a delay in moving may be considered unreasonable after two years, little more than one year's delay is not unreasonable under the circumstance of his grieving his wife's passing. He also contends that defendant fails to demonstrate that any prejudice would result from substitution, and that as the action will rely

primarily on medical and psychiatric records, allegations that the testimony of defendant and his nurse/physician's assistant, the sole eyewitnesses, will fade by the time of trial do not establish prejudice. He observes that public policy favors deciding cases on their merits. (NYSCEF 46).

### III. ANALYSIS

CPLR 1021 provides, in relevant part, 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.” The determination of whether substitution is made within a reasonable time requires the consideration of several factors, including the diligence of the party seeking substitution, prejudice to the other parties, and whether the party to be substituted has shown that the action has potential merit. (*Alejandro v N. Tarrytown Realty Assocs.*, 129 AD3d 749, 749 [2d Dept 2015]; *Borruso v New York Methodist Hosp.*, 84 AD3d 1293, 1294 [2d Dept 2011]).

Bare, conclusory allegations of prejudice are insufficient to defeat a motion for substitution. (*Noriega v Presbyterian Hosp. in City of New York*, 305 AD2d 220, 221 [1<sup>st</sup> Dept 2003]). Moreover, in light of the strong public policy in favor of disposing of matters on their merits, a motion for substitution should be granted absent a showing that prejudice resulted from the movant's delay, even where the movant fails to provide a reasonable excuse for the delay. (*Egrini v Brookhaven Mem. Hosp.*, 133 AD2d 610, 610 [2d Dept 1987]).

Fourteen months of delay in appointing an estate administrator is not unreasonable. (*See Egrini*, 133 AD2d at 610 [dismissal denied notwithstanding unexplained delay of two and one-half years, absent showing of prejudice and given policy of disposing of matters on merits]; *Orellana v Malek*, 116 AD2d 557 [2d Dept] [dismissal not warranted where motion to dismiss

made within one year of plaintiff's death]; *cf. Palmer v Selpan Elec. Co.*, 5 AD3d 248, 248 [1<sup>st</sup> Dept 2004] [four years' delay unreasonable]), and no authority is offered to the contrary. Moreover, defendant's claim that the passage of time will cause witnesses' memories to fade and unnecessarily increase his legal expenses does not establish prejudice (*see Wynter v Our Lady of Mercy Med. Ctr.*, 3 AD3d 376, 378 [1<sup>st</sup> Dept 2004] [passage of time alone insufficient for finding prejudice on motion for substitution]), as is his inability to depose the decedent given the existence of medical records and other documentary evidence (*see id.* at 378 [no significant likelihood of undue prejudice, given medical records and other documentary proof]). Absent a demonstration of prejudice, the failure to explain the fourteen-month delay in seeking substitution is not dispositive. (*See Largo-Chicaiza v Westchester Scaffold Equip. Corp.*, 90 AD3d 716, 717 [2d Dept 2011] [although executor failed to explain lengthy delay in moving to substitute, decision granting motion to substitute affirmed absent prejudice]).

As plaintiff's causes of action are for assault and intentional infliction of emotional distress and not for medical malpractice, a physician's affidavit is not required. In any event, regardless of whether the administrator's affidavit of merit is sufficient, his submission of a copy of the complaint, verified by decedent, establishes the potential merit of the action, as it sets forth the factual details of the incident and the claims on which the action is based. (*See Pub. Adm'r v Levine*, 142 AD3d 467, 470 [1<sup>st</sup> Dept 2016] [administrator made *prima facie* showing of merit on basis of pleadings, deposition testimony and other supporting documents]).

In light of the aforementioned determinations, and the strong public policy in favor of deciding actions on their merits, and as the administrator now shows an interest in pursuing the litigation, dismissal pursuant to CPLR 1201 is not warranted. (*Cf. Bauer v Mars Assocs. & Normel Const. Corp.*, 35 AD3d 333, 334 [2d Dept 2006] [dismissal pursuant to CPLR 1021

affirmed, as lack of cooperation on part of decedent's family in effectuating substitution after previous executor's death evinced lack of interest in 16-year-old action]; *Washington v Min Chung Hwan*, 20 AD3d 303, 305 [1<sup>st</sup> Dept 2005] [action dismissed pursuant to CPLR 1201, as disinterest of plaintiff's family in pursuing litigation apparent from failure to seek substitution within seven years of plaintiff's death]).

#### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss plaintiff's complaint pursuant to CPLR 1021 (seq. 1) is denied; it is further

ORDERED, that the administrator's motion to restore the action to the general calendar and amend the caption to substitute himself, Louis R. Rosenthal, as Administrator of the Estate of Theresa Rosenthal, in the place and stead of the plaintiff (seq. 2) is granted; it is further

ORDERED, that Louis R. Rosenthal, as administrator of the estate of Theresa Rosenthal, deceased, be substituted as plaintiff in the above-entitled action in the place and stead of the plaintiff, Theresa Rosenthal, without prejudice to any proceedings heretofore had herein; it is further

ORDERED, that all papers, pleadings, and proceedings in the above-entitled action be amended by substituting the name of Louis R. Rosenthal, as administrator of the estate of Theresa Rosenthal, deceased, as plaintiff in the place and stead of said decedent, without prejudice to the proceedings heretofore had herein; it is further

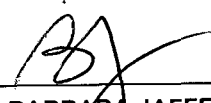
ORDERED, that counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's

Office (60 Centre Street, Room 119), who are directed to amend their records to reflect such change in the caption herein; it is further

ORDERED, that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); it is further

ORDERED, that the Clerk is directed to restore this matter to the active calendar; and it is further

ORDERED, that the parties appear for a compliance conference on September 5, 2018 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

<u>6/26/2018</u>				
DATE			BARBARA JAFFE, J.S.C. <b>HON. BARBARA JAFFE</b>	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE