

DiMaggio v Kodali
2018 NY Slip Op 31620(U)
July 10, 2018
Supreme Court, New York County
Docket Number: 805647/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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ANGELA DIMAGGIO, as Executor of the Estate of Mario
DIMAGGIO, deceased, and ANGELA DIMAGGIO,
Individually,

Plaintiff,

Index No.
805647/2015

**DECISION and
ORDER**

- against -

Mot. Seq. #003

SUSHEEL KUMAR KODALI, M.D., ISAAC GEORGE,
M.D., TORSTEN VAHL, M.D., and NEW YORK
PRESBYTERIAN HOSPITAL-COLUMBIA UNIVERSITY
MEDICAL CENTER,

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

On September 18, 2015, Plaintiff Angela DiMaggio ("Angela") commenced this medical malpractice action individually and in her capacity as Executor of her husband Mario DiMaggio's ("Mario") estate. Angela alleges that Defendants Susheel Kumar Kodali, M.D., Isaac George, M.D., Torsten Vahl, M.D., and New York Presbyterian Hospital-Columbia University Medical Center (collectively "Defendants") departed from accepted standards of medical practice in connection with the placement of Mario's transfemoral transcatheter aortic valve. (DiMaggio complaint at 6) Angela also alleges, on the estate's behalf, causes of action for wrongful death and lack of informed consent. Individually she claims loss of Mario's services and society. (DiMaggio complaint at 10) To bring this action, Angela retained the law firm of William Schwitzer & Associates, P.C., ("Schwitzer"). The Defendants filed their Answers on October 21, 2015.

Presently before the Court is Schwitzer's Order to Show Cause to withdraw as counsel for Angela individually and in her capacity as Mario's Executor. Schwitzer avers that "irreconcilable differences exist . . . which necessitate this application." (affirmation of Molesso at 2) Specifically, Schwitzer avers that it

must withdraw “due to irreconcilable differences regarding [the] firm’s theories and strategies surrounding the further prosecution of this matter . . .” (affirmation of Molesso at 2). Angela does not oppose. Defendants take “no position with respect to [Schwitzer’s] application to withdraw as counsel . . .” (affirmation of Blalock at 2) However Defendants assert that Angela has failed to comply with the “last seven (7)” court orders. (affirmation of Blalock at 4) Therefore, they request that the Court issue a self-executing order of dismissal such that the action will be dismissed if Angela fails to retain counsel or appear in 30 days.

On August 10, 2018, this Court conferenced the instant application with the parties. Among other things, it was brought to the Court’s attention, by Defendants, that the outstanding discovery includes supplemental Bills of Particulars and depositions.

Attorney Withdrawal

CPLR 321 (2) provides, “An attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct.” The First Department has stated, “[A]n attorney may withdraw as counsel of record upon a showing of good and sufficient cause, and reasonable notice to the client.” (*Mason v MTA New York City Transit*, 832 NYS2d 153, 154 [1st Dept 2017]).

Discussion

Because Angela and Schwitzer disagree over the firm’s theories and strategies surrounding further prosecution of this case, irreconcilable differences exist. Accordingly, Schwitzer has made a showing of good and sufficient cause, and given reasonable notice to Angela. (*Mason v MTA New York City Transit*, 832 NYS2d 153, 154 [1st Dept 2017].)

Wherefore it is hereby

ORDERED that the motion of the law firm of William Schwitzer & Associates, P.C., to be relieved as attorneys for plaintiff Angela DiMaggio individually and in her capacity as Executor of Mario DiMaggio’s estate is granted without opposition; and it is further

ORDERED that no further proceedings may be taken in this matter without leave of this court for a period of 30 days from the date of this order within which time plaintiff Angela DiMaggio must appoint a substitute attorney by August 10, 2018 or shall be deemed to be proceeding *pro se*; and it is further

ORDERED that, WITHIN 3 DAYS OF THE DATE OF THIS DECISION, the law firm of William Schwitzer & Associates, P.C. serve a copy of this order with notice of entry upon Angela DiMaggio and upon the attorneys for all other parties appearing herein by overnight mail; and it is further

ORDERED that, WITHIN 3 DAYS OF THE DATE OF THIS DECISION, the law firm of William Schwitzer & Associates, P.C. serve a copy of the disbursements, costs and expenses upon Angela DiMaggio; and it is further

ORDERED that, WITHIN 5 DAYS OF THE DATE OF THIS DECISION, Angela DiMaggio pay the disbursements, costs and expenses or provide security therefor; and it is further

ORDERED that, WITHIN 6 DAYS OF THE DATE OF THIS DECISION, the law firm of William Schwitzer & Associates, P.C. serve Angela DiMaggio's client file upon Angela DiMaggio; and it is further

ORDERED that any new attorney retained by plaintiff Angela DiMaggio shall file a notice of appearance with the Clerk of the Trial Support Office (Room 158) and the Clerk of the Part; and it is further

ORDERED that all parties are directed to appear for a compliance conference on August 14, 2018, at 9:30 AM in Part 6, 71 Thomas Street, Room 205 D to set a schedule for depositions and outstanding discovery; and it is further

ORDERED that the action may be dismissed unless Angela DiMaggio appears *pro se* or by her counsel on August 14, 2018 at 9:30 AM in Part 6, 71 Thomas Street, Room 205 D.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: JULY 10, 2018



Eileen A. Rakower, J.S.C.