

A.C.L. v Shin

2019 NY Slip Op 31677(U)

June 11, 2019

Supreme Court, New York County

Docket Number: 805276/2016

Judge: George J. Silver

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

**A---C---L---, an infant, by her Mother and
Natural Guardian DARIHANA LOPEZ, and
DARIHANA LOPEZ, Individually,**

Index No. 805276/2016
Motion Seq. No. 001

Plaintiffs,

DECISION & ORDER

- v -

**THOMAS SHIN, M.D., KATARINA EISINGER, M.D.,
SARAH HORVATH, M.D. AND THE NEW YORK
PRESBYTERIAN HOSPITAL,**

Defendants.

Cross-Motion: Yes No

Plaintiffs A-C-L, an infant (“infant-plaintiff”), by her mother and natural guardian DARIHANA LOPEZ, and DARIHANA LOPEZ (“Ms. Lopez”), individually (collectively “plaintiffs”) move for an order: (1) restoring this action to its active pre-note of issue status in the court’s case management system; (2) vacating the dismissal of an order dated February 15, 2018 with notice of entry dated March 14, 2018; (3) vacating the judgment dated February 13, 2019; (4) scheduling a compliance conference to set dates for the remainder of discovery; (5) lifting the automatic stay imposed upon this action due to the death of plaintiffs’ prior attorney David L. Taback, Esq. (“Mr. Taback”) of the law firm David L. Taback, P.C., and (6) compelling defendants to exchange a complete copy of plaintiffs’ prenatal, OB/GYN, labor, and delivery records, NICU records, pediatric follow-up visit records, and imaging studies from NYPH.

Defendants THOMAS SHIN, M.D., KATARINA EISINGER, M.D., SARAH HORVATH, M.D., and THE NEW YORK AND PRESBYTERIAN HOSPITAL s/h/a THE NEW YORK PRESBYTERIAN HOSPITAL (“NYPH” collectively “defendants”) oppose the motion.

Specifically, defendants partially oppose vacating the February 15, 2018 order dismissing the case, and restoring this case to active pre-note of issue status as (1) Ms. Lopez's time to recommence this action is barred by the statute of limitations, (2) plaintiffs cannot seek to "restore" the action as they must commence a new action, and serve defendants with a summons and complaint; and (3) plaintiffs have repeatedly failed to prosecute this matter, causing prejudice to defendants.

For the reasons discussed below, the court grants plaintiffs' motion.

BACKGROUND

Plaintiffs commenced this medical malpractice and wrongful death action with the filing of the summons and complaint on July 7, 2016. Thereafter, defendants filed answers on July 28, 2016 and November 8, 2016. Plaintiffs allege that defendants failed to adequately and properly manage Ms. Lopez's pregnancy and labor, and the delivery of infant-plaintiff on December 1, 2014. As a result, plaintiffs claim that infant-plaintiff suffered fetal distress in utero as well as oxygen deprivation during her delivery, resulting in multiple strokes at the time of birth, permanent and severe seizure disorder, global developmental delays, and permanent brain damage.

On April 19, 2017, plaintiffs' prior attorney, Mr. Taback died. As a result, his law firm dissolved in its entirety. However, Mr. Taback did not have a succession plan in place at the time of his death, and no attorney or law firm was assigned or designated to take over his cases. At this time, the files belonging to Mr. Taback's law firm remained locked in Mr. Taback's office, and were inaccessible to Mr. Taback's clients. On June 21, 2017, the public administrator of New York County was appointed to administer and oversee the estate of Mr. Taback.

By correspondence dated July 20, 2017, Wendy Tobias ("Ms. Tobias") of Schram, Graber & Opell, P.C. informed me that plaintiffs' counsel had died, and that the public administrator of New York County was appointed as the administrator of Mr. Taback's estate. At a compliance

conference the following day, plaintiffs failed to appear. The court adjourned the conference to October 4, 2017, at which time plaintiffs again failed to appear. The conference was subsequently adjourned several additional times due to plaintiffs' failure to appear. The court thereafter requested that defendants inform Ms. Tobias of a final conference scheduled for February 15, 2018. On January 17, 2018, defendants sent a correspondence to Ms. Tobias advising her of the final compliance conference date.

On February 15, 2018, upon defendants' oral application to dismiss the action due to plaintiffs' failure to appear at numerous court conferences, the Hon. Judith McMahon issued an order dismissing this case without prejudice. The order was entered by the clerk of the court on February 16, 2018, and was thereafter filed and served upon plaintiffs with a notice of entry on March 14, 2018. A judgment was filed and entered by the court on February 13, 2019. On February 14, 2019, defendants filed the executed judgment with notice of entry. Defendants also served the judgment with notice of entry upon plaintiffs and Ms. Tobias.

Following the death of Mr. Taback, plaintiffs have retained The Neveloff Law Firm, P.C. to represent them in this action. Plaintiffs advise that The Neveloff Law Firm, P.C. was able to obtain Mr. Taback's file from counsel for the public administration.¹ However, plaintiffs aver that while they have some records from NYPH, they are missing all imaging studies of infant-plaintiff, Ms. Lopez's complete labor and delivery records, and infant-plaintiff's NICU admission records.

Plaintiffs argue that the court improperly dismissed this action since the automatic stay due to the death of plaintiffs' prior attorney was in effect at the time this action was dismissed. Plaintiffs explain that the order dismissing this action was based on plaintiffs' alleged failure to appear at

¹ To the extent that any files remain in possession of the counsel for the public administrator, such files shall be released to plaintiffs within 30 days of this order.

court conferences, however, plaintiffs did not have knowledge of Mr. Taback's death until weeks after his death, and were not informed of the impending court conferences. Plaintiffs also elaborate that they relied on attorneys'² representations that no action could be taken in this matter since Mr. Taback's death imposed an automatic stay of this case. Plaintiffs also highlight that they were not served with a 30-day notice to appoint new counsel following Mr. Taback's death.

Additionally, plaintiffs argue that this case should be restored to the court's active pre-note of issue calendar since the length of time between the February 15, 2018 order and the instant motion³ to reactivate this case is minimal. Plaintiffs also note that the statute of limitations has not expired for infant-plaintiff to commence a new action against defendants. Plaintiffs further aver that they did not intend to abandon this case, and that any delays in this matter are due solely to circumstances outside of plaintiffs' control, including the unexpected death of Mr. Taback, the lack of timely communication about Mr. Taback's death, the months it took to have a public administrator appointed to represent Mr. Taback's estate, and plaintiffs' inability to access their files while the estate proceedings were ongoing. Lastly, plaintiffs maintain that defendants are not prejudiced by reactivating this case. In that regard, plaintiffs highlight that the parties have already conducted substantial discovery⁴ in this matter, and that plaintiffs' present counsel is ready, willing, and able to proceed with the litigation.

In opposition, defendants assert that plaintiffs' argument that dismissal was improper under CPLR § 321(c) is meritless. Defendants contend that it was within the court's discretion to dismiss the action as the language of CPLR § 321(c) expressly indicates that any further proceeding in an action after the death of an attorney is within the discretion of the court. Defendants also posit that

² Plaintiffs do not specify the names of the attorneys or their relationship to plaintiffs.

³ Plaintiffs' motion is dated March 6, 2019.

⁴ Plaintiffs concede that depositions have not been held as of date.

prior to the dismissal, the court had indicated that it would inform plaintiffs of the adjourned conference dates, and that, as instructed by the court, defendants informed Ms. Tobias that the case would be dismissed if plaintiffs fail to appear at the February 15, 2018 conference. In that regard, defendants contend that plaintiffs had ample opportunity to appear before the court either *pro se* or with new counsel prior to the dismissal, but failed to do so.

Defendants further argue that because this action was properly dismissed, plaintiffs cannot seek to restore it, but must commence a new action within the applicable statute of limitations. However, defendants maintain that the statute of limitations for Ms. Lopez has expired on July 7, 2017, and therefore, she cannot proceed with her claims. Defendants also assert that plaintiffs' attempt to "restore" the case without serving defendants is improper and prejudicial.

Lastly, defendants argue that plaintiffs' motion should be denied due to plaintiffs' failure to prosecute this action. Defendants highlight that plaintiffs failed to appear for numerous court conferences, and that plaintiffs did not take any action although they were served with copies of the dismissal order with notice of entry since March of 2018. Accordingly, defendants submit that they would be prejudiced if this case were restored to active status.

In reply, plaintiffs reiterate that because this case was stayed at the time of the dismissal due to Mr. Taback's death, dismissal of this action was improper. Plaintiffs also argue that contrary to defendants' argument that CPLR § 321(c) permits dismissal of an action with leave of court, thus nullifying the 30-day notice requirement, the court in *Moray v. Koven & Krause* vacated an order dismissing the action as the suspension of plaintiff's attorney from the practice of law stayed the lawsuit pursuant to CPLR § 321(c) (15 NY3d 384 [2010]).

Additionally, plaintiffs assert that they were not properly advised of the court conferences. Plaintiffs explain that while defendants informed Ms. Tobias of the February 15, 2018 conference,

Ms. Tobias was the attorney for the administrator, and never represented plaintiffs in this action. Plaintiffs also argue that the instant motion is timely as it was brought within one year of March 14, 2018, the date of the service of the dismissal order with notice of entry. Plaintiffs further aver that while defendants allege that they have been prejudiced, requiring plaintiff to file a new action would be more burdensome on defendants. In contrast, plaintiffs contend that they would suffer more prejudice as Ms. Lopez's action is now time-barred.

DISCUSSION

CPLR § 321(c) provides that, "If an attorney dies . . . at any time before judgment, no further proceeding shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs." "As a result, '[d]uring the stay imposed by CPLR § 321(c), no proceedings against the party will have any adverse effect. It lies within the power of the other side to bring the stay to an end by serving a notice on the affected party to appoint new counsel within 30 days'" (*Moray v. Koven & Krause, Esqs.*, 15 N.Y.3d 384, 389 [2010] *citing* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR **4 C321:3, at 183). "The stay is meant to 'afford a litigant, who has, through no act or fault of his own, been deprived of the services of his counsel, a reasonable opportunity to obtain new counsel before further proceedings are taken against him in the action'" (*id.*).

Here, pursuant CPLR § 321(c), the case was automatically stayed as a result of the death of plaintiffs' attorney, Mr. Taback on April 19, 2017. Since plaintiffs were never served with a notice to appoint another attorney as required by the statute, the stay continued to remain in effect at the time the court dismissed the action on February 15, 2018 (*id.* [vacating order dismissing the action where defendant never acted to lift the stay by serving a notice upon plaintiff to appoint

new counsel within 30 days]; *Galletta v. Siu-Mei Yip*, 271 A.D.2d 486, 486 [2d Dept. 2000] [vacating default judgment where plaintiff failed to comply with notice requirements of CPLR § 321(c)]; *McGregor v. McGregor*, 212 A.D.2d 955, 956 [3d Dept. 1995] [“The record reveals no compliance with the leave or notice requirements of CPLR § 321(c). The appropriate remedy for a violation of CPLR § 321(c) is vacatur of the judgment.”]). Accordingly, in light of the automatic stay imposed by CPLR § 321(c), dismissal of this action was improper, and therefore, the February 15, 2018 order must be vacated. Further, as plaintiffs have retained new counsel, The Neveloff Law Firm, P.C. to represent them in this matter, the automatic stay of this action is hereby lifted.

Moreover, plaintiffs have demonstrated that they are entitled to have this matter restored to the court’s active calendar. Under CPLR § 3404, “a case that has been marked off or stricken from the calendar and has not been restored within one year is deemed abandoned” (*Nicholos v. Cashelard Rest., Inc.*, 249 A.D.2d 187, 188 [1st Dept. 1998]). “Notwithstanding the mandatory language of this rule, a court retains the discretion to restore a case to the trial calendar after expiration of this one-year period, provided the party seeking such relief establishes the merits of his claim, reasonable excuse for the delay, lack of intent to abandon and/or deliberately default in the action, and lack of prejudice to his adversary on the motion to restore (*Zabari v. City of New York*, 242 A.D.2d 15, 16 [1st Dept. 1998]).

Here, although plaintiffs moved to restore the case to the trial calendar beyond the one-year period prescribed by CPLR § 3404,⁵ they nonetheless have established that they are entitled to have the case restored to the trial calendar. Ms. Lopez’s affidavit, plaintiffs’ bill of particulars, and plaintiffs’ counsel’s affirmation have demonstrated sufficient merit to their medical

⁵ Plaintiffs claim that they timely moved to restore this matter within one year from March 14, 2018, the date of the service of the dismissal order with notice of entry. However, this case was “marked off or stricken from the calendar” by the clerk of the court on February 16, 2018.

malpractice and wrongful death claims. Further, the sudden and unexpected death of plaintiffs' prior counsel, coupled with the appointment of the public administration to oversee Mr. Taback's estate and the delay in obtaining plaintiffs' files from the counsel of the public administrator, constitute reasonable excuses for plaintiffs' delay in restoring the matter to the trial calendar (*Zabari*, 242 A.D.2d at 17, *supra* ["Unquestionably, the disability of a party's attorney may serve as a reasonable excuse for a party's delay in moving for restoration."]).

Moreover, plaintiffs' delay was not occasioned by an intent to abandon this case. Rather, plaintiffs' retention of new counsel to represent them in this matter following the death of their prior counsel evidences plaintiffs' intent to proceed with this litigation. Similarly, there is no showing that plaintiffs' failed to prosecute this action, as the delays were caused by circumstances beyond plaintiffs' control as outlined above.

Furthermore, defendants have not demonstrated that they would be prejudiced by restoring this action to the trial calendar. Indeed, defendants cannot show that the mere one-year delay, without more, has resulted in any prejudice (*id.* at 18 ["Lapse of time . . . does not necessarily establish prejudice."]; *Ronsco Const. Co. v. 30 E. 85th St. Co.*, 219 A.D.2d 281, 284 [1st Dept. 1996] ["The overall circumstances in this matter: the merit of the claim; the relative brevity of the delay in filing the motion to restore; the lack of intent to abandon the action evidenced in the record; the amount at issue; and the lack of prejudice to the substantial right of any party, all militate in favor of restoration."]; *see also*, *Enax v. New York Tel. Co.*, 280 A.D.2d 294, 296 [1st Dept. 2001]; *Campbell v. Yanoff*, 273 A.D.2d 166, 167 [1st Dept. 2000]; *Nicholos v. Cashelard Rest., Inc.*, 249 A.D.2d 187, 190 [1st Dept. 1998]).

Consequently, it is hereby

ORDERED that plaintiffs' application to vacate the order dated February 15, 2018 is GRANTED; and it is further

ORDERED that plaintiffs' application to vacate the judgment dated February 13, 2019 is GRANTED; and it is further

ORDERED that plaintiffs' application to lift the stay imposed upon this action by the death of plaintiff's prior attorney, David L. Taback, Esq. of the law firm David L. Taback, P.C. is GRANTED; and it is further


ORDERED that plaintiffs' application to restore this action to active pre-note of issue status in the court's case management system is GRANTED; and it is further

ORDERED that plaintiffs' application to compel defendants to exchange a complete copy of plaintiffs' prenatal, OB/GYN, and labor and delivery records, NICU and pediatric follow-up visit records, and imaging studies records from NYPH is GRANTED, and defendants are directed to provide the same within 30 days of this order; and it is further

ORDERED that the parties are directed to appear for a compliance conference on August 13, 2019 at 111 Centre Street, Room 1227 (Part 10) New York, New York 10013 to ensure compliance with this court's order and to further facilitate discovery.

This constitutes the decision and order of the court.

Dated: June 11, 2019


HON. GEORGE J. SILVER
GEORGE J. SILVER
J.S.C.

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