

Khan v Brooklyn Hosp. Ctr.

2020 NY Slip Op 31506(U)

April 28, 2020

Supreme Court, Kings County

Docket Number: Index No. 515826/2015

Judge: Genine D. Edwards

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At Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 28th day of April 2020.

PRESENT:

Hon. Genine D. Edwards
Justice, Supreme Court

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SAKHAWATUN KHAN, as proposed Administrator
of the estate of MOHAMMED KHAN, deceased,
and SAKHAWATUN KHAN, individually,

Plaintiffs,

Index No. 515826/2015

-against-

DECISION/ORDER

THE BROOKLYN HOSPITAL CENTER,

Defendant.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motions and Affirmations.....	1-2
Notice of Cross-Motion.....	3
Affirmations in Opposition.....	4-5
Affirmations in Reply.....	6-7

In this medical malpractice action, plaintiffs seek, in motion sequence #1, leave to file and serve a notice of medical malpractice and deem it filed, *nunc pro tunc*; in motion sequence #2, an order: (1) substituting Sakhawatun Khan, as Administrator of the Estate of Mohammed Khan, deceased, and amending the caption accordingly as set forth in the annexed affirmation in support, pursuant to CPLR §1015 and §1021; (2) granting plaintiffs leave to amend the Summons and Complaint; and (3) deeming the affidavit of service as to defendant timely filed, *nunc pro tunc*, pursuant to CPLR §306-b. In opposition, defendant cross-moves, in motion sequence #3, for an order: (1) dismissing plaintiffs’ complaint, pursuant to CPLR §3012-a, for failing to serve a valid certificate of merit in the instant action; (2) denying plaintiffs’ motion to substitute and amend the caption

and summons and complaint to reflect same and, pursuant to CPLR §1021, dismissing plaintiffs' complaint for failing to substitute an administrator of the estate within a reasonable time period; and (3) denying plaintiffs' motion to deem a purported affidavit of service as to defendant timely filed, *nunc pro tunc*, and dismissing plaintiffs' complaint for failing to provide any proof of service of the complaint on the defendant in violation of CPLR §306-b; and (4) dismissing plaintiffs' complaint, pursuant to CPLR §3042, for failure to serve a bill of particulars, or in the alternative, precluding plaintiffs from offering evidence at the time of trial, pursuant to CPLR §3042, for failure to serve the bills of particulars.

Plaintiffs are granted leave to file and serve a late notice of medical malpractice upon defendant.

Plaintiffs submitted an expert affirmation from a physician who opined that the defendant provided “[s]ubstandard and delayed treatment resulting in a worsening of his condition”. *See NYSCEF Doc. No. 37*. Since the alleged malpractice was apparent from an independent review of the medical records, defendant is deemed to have actual knowledge and lack of substantial prejudice. *See J.H. v. New York City Health & Hosps. Corp. (Elmhust Hosp. Ctr.)*, 169 A.D.3d 880, 94 N.Y.S.3d 345 (2d Dept. 2019); *Breslin v. Nassau Health Care Corp.*, 153 A.D.3d 1256, 62 N.Y.S.3d 118 (2d Dept. 2017); *Rojas v. New York City Health & Hosps. Corp.*, 127 A.D.3d 870, 6 N.Y.S.3d 294 (2d Dept. 2015); *Randolph v. Westchester Med. Ctr.*, 122 A.D.3d 822, 996 N.Y.S.2d 703 (2d Dept. 2014); *Cifuentes v. New York City Health & Hosps. Corp.*, 43 A.D.3d 385, 840 N.Y.S.2d 433 (2d Dept. 2007). Moreover, plaintiffs' lack of a reasonable excuse is not dispositive when the defendant has actual knowledge and a dearth of substantial prejudice. *See Breslin*, 153 A.D.3d 1256; *Matter of Khan v. New York City Health and Hosps. Co.*, 135 A.D.3d 940, 24 N.Y.S.3d 163 (2d Dept. 2016); *Matter of Hendershot v. Westchester Med. Ctr.*, 8 A.D.3d 381, 777 N.Y.S.2d 743 (2d Dept. 2004). Plaintiffs shall serve the notice of medical malpractice within thirty days of the receipt of this Order via email.

Plaintiffs' motion to substitute and amend the caption is buttressed by the aforementioned expert's affirmation and defendant's lack of substantial prejudice. *See Petion v. New York City Health & Hosps. Co.*,

175 A.D.3d 519, 109 N.Y.S.3d 426 (2d Dept. 2019); *Tokar v. Weissberg*, 163 A.D.3d 1031, 83 N.Y.S.3d 76 (2d Dept. 2018); *Borruso v. New York Methodist Hosp.*, 84 A.D.3d 1293, 924 N.Y.S.2d 152 (2d Dept. 2011).

Additionally, plaintiffs' motion to amend the summons and complaint is fully substantiated. The defendant made no showing of prejudice and the proposed amended pleadings are not palpably insufficient or patently devoid of merit. *See Jeter v. New York Presbyt. Hosp.*, 172 A.D.3d 1338, 101 N.Y.S.3d 411 (2d Dept. 2019); *Grant v. Brooklyn Ctr. for Rehabilitation & Residential Health Care, LLC*, 153 A.D.3d 798, 60 N.Y.S.3d 352 (2d Dept. 2017); CPLR §3025(b). Plaintiffs' requests to substitute, amend the caption and amend the summons and complaint are granted.

Plaintiffs' request to have the affidavit of service timely served, *nunc pro tunc*, is denied.

Plaintiffs have thirty days from receipt of this Order via email to serve a certificate of merit upon defendant. *See Rabinovich v. Maimonides Med. Ctr.*, 179 A.D.3d 88, 113 N.Y.S.3d 198 (2d Dept. 2019); *Russo v. Pennings*, 46 A.D.3d 795, 848 N.Y.S.2d 678 (2d Dept. 2007).

Defendant waived its objection to defective service by filing an answer without raising it. *See Darko v. Guerrino*, 169 A.D.3d 768, 94 N.Y.S.3d 147 (2d Dept. 2019); *Estate of Fernandez v. Wyckoff Hgts. Med. Ctr.*, 162 A.D.3d 742, 80 N.Y.S.3d 271 (2d Dept. 2018); *Castillo v. JFK Medport, Inc.*, 116 A.D.3d 899, 983 N.Y.S.2d 866 (2d Dept. 2014); *Dong v. Kao*, 115 A.D.3d 839, 982 N.Y.S.2d 152 (2d Dept. 2014).

Defendant's motion to dismiss the complaint is granted unless plaintiffs provide defendant with a verified bill of particulars within thirty days of receipt of this Order via email. *See* CPLR §3042(d); CPLR §3126.

Defendant's request to dismiss the complaint for failing to serve the certificate of merit or affidavit of service is denied.

ORDERED that plaintiffs shall provide a verified bill of particulars to defendant within thirty days of receipt of this Order via email. Failure to do so will result in dismissal of the complaint.

ORDERED that plaintiffs shall serve the certificate of merit within thirty days of receipt of this Order via email. Failure to do so will result in dismissal of the complaint.

ORDERED that plaintiff shall serve and file an affidavit of service forthwith.

ORDERED the caption is amended as follows:

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 SAKHAWATUN KHAN, as Administrator
 of the Estate of MOHAMMED KHAN, Deceased,
 and SAKHAWATUN KHAN, individually,

 Plaintiffs,
 -against-

 THE BROOKLYN HOSPITAL CENTER,

 Defendant.
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This constitutes the Decision and Order of this Court.

E N T E R,

_____/s/Genine Edwards

Hon. Genine D. Edwards
J. S. C.