

Lawrence v Tannous
2021 NY Slip Op 30127(U)
January 12, 2021
Supreme Court, New York County
Docket Number: 452582/2016
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY **PART** **IAS MOTION 56EFM**

Justice

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DORA LAWRENCE,

Plaintiff,

- v -

HENRY TANNOUS, M.D., THE MOUNT SINAI HOSPITAL, NIRAV
PATEL, D.O., GARY TANNENBAUM, M.D., ST. JOHN'S
RIVERSIDE HOSPITAL, WESTCHESTER SURGICAL
SPECIALIST, PLLC, and TERENCE CARDINAL
COOKE HEALTH CARE CENTER,

Defendants.

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The following e-filed documents, listed by NYSCEF document number 131, 132, 133, 134, 135, 136, 137, 138, 139, 156, 176, 181, 184, 185, 186, and 193 (Motion 003)

were read on this motion to/for DISMISS COMPLAINT/CPLR 1021.

In this action to recover damages for medical malpractice, the defendant St. John's Riverside Hospital (SJRH) moves pursuant to CPLR 1021 to dismiss the complaint insofar as asserted against it on the ground that, after the plaintiff's death on March 26, 2018, no one timely moved to substitute a representative of her estate as the party plaintiff in this action. This motion, which had been returnable on September 24, 2020, was adjourned until December 11, 2020, upon the condition that SJRH serve the person identified as the representative of the decedent's estate at her most recent addresses in New Jersey. SJRH has served the representative of the decedent's estate in accordance with this court's amended interim order dated November 2, 2020. She has neither appeared in the action nor opposed SJRH's motion. The attorneys who had been representing the decedent at the time of her death oppose the motion only to the extent that they request the court, by way of motion filed under SEQ 006, to

relieve them as counsel. SJRH's motion is granted, the complaint is dismissed as against it, and the court has granted counsel's motion in the order disposing of SEQ 006.

The plaintiff commenced this action in the Supreme Court, Bronx County, on June 2, 2015. By order dated June 28, 2016, the action was transferred to the Supreme Court, New York County. The plaintiff died on March 26, 2018, thus staying all proceedings in this action by operation of law. By order dated January 18, 2019, the Supreme Court, New York County (Shulman, J.), memorialized the automatic stay of proceedings that went into effect immediately upon the plaintiff's death.

By decree entered March 11, 2019, the Surrogate's Court, Bronx County, admitted the plaintiff's will to probate, and appointed her daughter, Lizbeth A. Lawrence (hereinafter Lawrence), as the executor of the plaintiff's estate (*see Matter of Lawrence*, Docket No. 2019-427 [Surr Ct, Bronx County, Mar. 11, 2019]).

By order dated January 28, 2020, the Supreme Court, New York County (Shulman, J.), lifted the stay in this action to the extent of (a) permitting the defendants to move pursuant to CPLR 1021 to dismiss the complaint for failure timely to substitute a representative of the decedent's estate, and (b) directing counsel for the deceased plaintiff to provide all other parties with the name and last known address of the decedent's next of kin.

Sometime between January 28, 2020 and March 2, 2020, the decedent's attorney informed all other parties that the decedent's next-of-kin was her daughter, Lizbeth A. Lawrence, and that her last known address was 4000 Pratt Avenue, Bronx, New York 10466. By order to show cause dated March 2, 2020, SJRH moved pursuant to CPLR 1021 to dismiss the complaint insofar as asserted against it. In the order to show cause, the court directed SJRH to serve all motion papers upon Lawrence at that Bronx address. As it turns out, Lawrence, on behalf of the decedent's estate, had sold that residence on June 14, 2019, so that the service of any motion papers at that location in March 2020 or thereafter was not likely to provide her with notice of the relief sought therein.

A computer search revealed to the court that Lawrence has resided at two separate addresses in New Jersey since June 2019, and has maintained a private mailbox at a UPS facility in New Jersey. To properly provide Lawrence with notice that SJRH was seeking to dismiss her deceased mother's medical malpractice action based on her own failure to substitute herself as the party plaintiff in this action, the court, by amended interim order dated November 2, 2020, adjourned the motion until December 11, 2020, and directed SJRH to re-serve Lawrence at those three addresses by FedEx Overnight Delivery and file proof of service thereof. SJRH has complied with the terms of this court's directive. Lawrence, however, has neither appeared in the action, nor opposed the motion.

CPLR 1021 provides, in relevant part, that

“A motion for substitution may be made by the successors or representatives of a party or by any party. If a person who should be substituted does not appear voluntarily he may be made a party defendant. If 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 issue of what constitutes a reasonable time depends on the circumstances of the case (see generally *Randall v Two Bridges Assoc. Ltd. Partnership*, 139 AD3d 435 [1st Dept 2016]).

Here, SJRH waited more than 23 months after the plaintiff's death to move to dismiss the complaint against it, and neither the deceased plaintiff's counsel nor anyone on behalf of Lawrence sought to move to substitute her as the party plaintiff after Lawrence was appointed executor on March 11, 2019. Even after Lawrence was recently notified of the pending motion, she elected neither to appear in opposition to the motion, nor to request that she be substituted as plaintiff in place of her deceased mother. In fact, she did not even attempt to contact the court. Inasmuch as no attempt at substitution was made within a reasonable time, dismissal is warranted under the circumstances presented here (see *Leroy v Morningside House Nursing Home Co., Inc.*, 126 AD3d 652, 653 [1st Dept 2015]; *Washington v Min Chung Hwan*, 20 AD3d 303, 304 [1st Dept 2005]; *Palmer v Selpan Elec. Co.*, 5 AD3d 248, 248 [1st Dept 2004]; cf.

Dugger v Conrad, _____AD3d_____, 2020 NY Slip Op 07313 [1st Dept, Dec. 8, 2020] [where defendant waited only 16 months before moving to dismiss, and counsel for deceased plaintiff was attempting to have the Public Administrator substituted as plaintiff, dismissal was premature]).

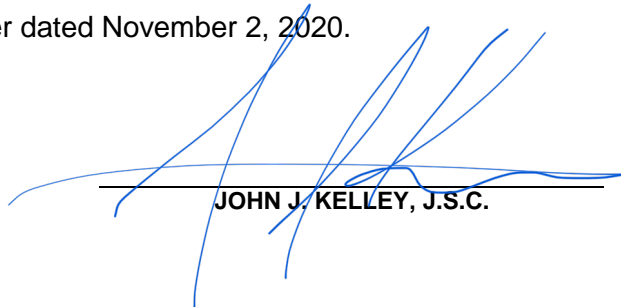
The court declines to characterize the dismissal as a dismissal on the merits.

Accordingly, it is

ORDERED that the motion of the defendant St. John's Riverside Hospital to dismiss the complaint insofar as asserted against it is granted, without opposition, the complaint is dismissed insofar as asserted against the defendant St. John's Riverside Hospital, without prejudice, and the Clerk of the court shall enter judgment accordingly; and it is further,

ORDERED that the defendant St. John's Riverside Hospital is directed to serve a copy of this order with notice of entry upon Lizbeth A. Lawrence by regular mail at the three addresses identified in the amended interim order dated November 2, 2020.

1/12/2021
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

XXXXXXXXXX
X ~~OTHER~~ X
XXXXXXXXXX

REFERENCE