

<b>Turner v Interfaith Med. Ctr.</b>
2021 NY Slip Op 30473(U)
February 18, 2021
Supreme Court, Kings County
Docket Number: 11948/2015
Judge: Michelle Weston
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At an IAS Trial Term, Part 3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 320 Jay Street, Brooklyn, New York, on the 18th day of February, 2021

PRESENT:

HON. MICHELLE WESTON,  
Justice.

----- X  
EVELYN TURNER AND RAYNOR SKYERS,

Plaintiff,

- against -

**DECISION & ORDER**  
Index No. 11948/2015

INTERFAITH MEDICAL CENTER, KINGSBROOK  
JEWISH MEDICAL CENTER, KINGSBROOK  
REHABILITATION INSTITUTE and RUTLAND  
NURSING HOME, INC.,

Defendants.

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The following papers e-filed numbered 1 to 37 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and Affirmations (Affidavits) Annexed _____	1,3,27
Opposing Affirmations (Affidavits) _____	10,37
Reply Affirmations (Affidavits) _____	26

Upon the foregoing papers and after oral arguments heard, the defendant INTERFAITH MEDICAL CENTER ("Interfaith") and defendants KINGSBROOK JEWISH MEDICAL CENTER, KINGSBROOK REHABILITATION INSTITUTE and RUTLAND NURSING HOME, INC. (defendant "Kingsbrook") have moved to dismiss this action pursuant to CPLR § 1015(a) and CPLR § 1021 for failure to timely substitute a party and timely appoint an administrator on behalf of deceased plaintiff Evelyn Turner. After initially submitting opposition asserting he was unaware of plaintiff's marital status, plaintiff now, by way of a cross

motion, seeks an Order permitting him to substitute Derrien Turner, as the personal representative of the deceased plaintiff, limited for the purpose of this litigation only, granting plaintiff leave to amend the caption to reflect said substitution; permitting plaintiff to amend the complaint; seeking an extension of time to serve the amended complaint; seeking to discontinue co-plaintiff Raynor Skyer's action (although co-plaintiff is included in the amended complaint) and for a further discovery schedule.

This medical malpractice action was commenced on or about September 30, 2015. It is alleged on or about and between April 30, 2013 and August 28, 2013, following a below the knee amputation, the defendants failed to properly treat pressure ulcers on deceased plaintiff's right heel and left buttocks requiring debridement. Notwithstanding discovery orders in 2016, directing plaintiff to provide authorizations, exchange certain materials and appear for depositions, to date there has been minimal discovery exchanged and all depositions remain outstanding.

In 2017, defendant Kingsbrook requested plaintiff provide the outstanding discovery and appear for a deposition. It was believed plaintiff was at that time a permanent resident of South Carolina and unable to travel. Defendant Kingsbrook indicated they did not wish to settle the case and inquired whether plaintiff desired to continue with the prosecution of this case. When plaintiff failed to respond, defendant Kingsbrook, on September 10, 2018, served plaintiff with a 90-day demand by certified mail, return receipt requested.

Defendant Interfaith, which has been in bankruptcy since 2012, attempted to settle the claims asserted on its' behalf. Defendant Interfaith and plaintiff reached a settlement in the amount of \$50,000, however plaintiff died prior to executing the settlement papers. Defendant

Interfaith was notified on September 12, 2018 plaintiff, Evelyn Turner had died. Defendant Kingsbrook was subsequently notified in October 2018 by plaintiff's counsel, that Ms. Turner had died, she had left a will and it was being probated.

In February 2019 and April 2019, defendant Kingsbrook sent correspondences to plaintiff inquiring whether an administrator had been appointed for the deceased plaintiff. There was no response to either letter by plaintiff's counsel.

Over two years have passed, and no substitution of the deceased party has occurred. Neither defendants have received any communication from plaintiff's counsel regarding substitution. Defendant Interfaith was given a deadline of September 30, 2020 to complete the settlement by the Bankruptcy Court Judge. It has been nearly eight years since treatment was rendered, it is still unknown who plaintiff considered material witnesses from defendant Kingsbrook. Based upon the above history, defendants have moved to dismiss for failure to timely substitute a deceased party.

Plaintiff has submitted no explanation for the delay in timely seeking to substitute the deceased plaintiff. Plaintiff's initial opposition did not address any efforts made to effect substitution beyond stating he was unaware of the legal marital status between the deceased plaintiff and plaintiff's spouse, co-plaintiff, Mr. Skyers, who continues to reside in New York. Plaintiff then cross-moved, three months after the initial motion had been made, to substitute plaintiff's adult son, who resides in Brooklyn, to be appointed the personal representative of the deceased plaintiff. The cross-motion failed to offer any explanation for the two year and five-month delay in seeking substitution and failed to include an affidavit of merit.

Under the circumstance presented here, the court finds an unreasonable time to obtain the

substitution of a party has been demonstrated. CPLR § 1021 provides, in pertinent part, “[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” (*Reed v. Grossi*, 59 AD3d 509, 511, quoting *McDonnell v. Draizin*, 24 AD3d 628, 628). Thus, CPLR § 1021 imposes upon a party the obligation to seek substitution within a reasonable time.

The failure to seek the required substitution within a reasonable time after the decedent’s death can evince a lack of diligence on the part of the plaintiff in prosecuting this action (*see, Alejandro v. N. Tarrytown Realty Associates*, 129 AD3d 749, 749). “The determination of reasonableness requires 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 or the defense has merit” (*Reed v. Grossi*, 59 AD3d at 511, quoting *McDonnell v. Draizin*, 24 AD3d at 628–629; *see Rubino v. Krasinski*, 54 AD3d 1016, 1017; *Johnson v. Trivedi*, 41 AD3d 1259, 1260; *Bauer v. Mars Assoc.*, 35 AD3d 333, 334; *Borruso v. New York Methodist Hosp.*, 84 AD3d 1293, 1294).

Here, the over two-year delay in this case was unexplained, unreasonable and prejudicial to the defendants. Plaintiffs’ counsel failed to exercise diligence in seeking the substitution of the deceased party (*see, Suciu v. City of New York*, 239 AD2d 338). On or about, August 1, 2018, plaintiff, Evelyn Turner passed away. Defendants were notified in September and October 2018. When plaintiffs’ counsel notified defendants of plaintiff’s death, he also informed them his client had a will, and it was being probated. Plaintiff’s son, Derrien Turner, a resident of Brooklyn, was appointed in South Carolina, a few days after his mother’s death.

Counsel continued to represent co-plaintiff, the deceased plaintiff's spouse, a resident of New York. Notwithstanding the above, plaintiff took no action to substitute the deceased party. Plaintiff fails to address what efforts he undertook during the two-year time frame. Further, counsel ignored letters sent requesting substitution in order for the prosecution of this case to resume.

Plaintiff adopted a less than proactive approach to this action since its' inception. At the time of her death, minimal discovery had been exchanged. The case had been pending for three years, and yet plaintiff still had not been deposed. Defendant Kingsbrook has never been informed specifically which of its' employees plaintiff wished to deposed. It is unknown if such individuals would still be under Kingsbrook control, and they would be required to testify about events which occurred over eight years ago. Defendant Interfaith had to continuously delay finalizing its' bankruptcy awaiting the approval of the proposed settlement in this case. Moreover, an affidavit of merit in support of the claims made in the complaint has not been provided.

Based upon the above, the Court finds substitution was not made in a reasonable time and the complaint is dismissed.

Accordingly, defendant Interfaith's motion and defendant Kingsbrook's cross-motion to dismiss the complaint for failure to timely substitute the plaintiff is granted, and the complaint is dismissed with prejudice; and it is further

Ordered, that the plaintiff's cross-motion to substitute a party is denied in its' entirety; and it is further

Ordered, that defendant INTERFAITH shall serve a copy of this decision and order on all parties.

Anything not specifically granted shall be deemed denied.

ENTER:

/s/ Hon. Michelle Weston

FEB 19 2021 J.S.C.