

Murphy v New York & Presbyt. Hosp.

2021 NY Slip Op 31904(U)

May 25, 2021

Supreme Court, New York County

Docket Number: 805334/2018

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

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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DENNIS A. MURPHY,

Plaintiff,

- v -

THE NEW YORK AND PRESBYTERIAN HOSPITAL, THE NEW YORK AND PRESBYTERIAN HOSPITAL, doing business as NEW YORK-PRESBYTERIAN/ COLUMBIA UNIVERSITY MEDICAL CENTER, THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK CARDIOLOGY ASSOCIATES, THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK CARDIOLOGY ASSOCIATES, doing business as COLUMBIADOCTORS, THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK CARDIOLOGY ASSOCIATES, doing business as COLUMBIADOCTORS OF THE HUDSON VALLEY, COLUMBIADOCTORS, COLUMBIADOCTORS OF THE HUDSON VALLEY, CCW MANAGEMENT CORP, JOSEPH M. LEE, M.D., DAVID A. BROGNO, M.D., AINAT BENIAMINOVITZ, M.D., GOOD SAMARITAN HOSPITAL OF SUFFERN, N.Y., JOHN and JANE DOE Nos.1 through 10, said names being fictitious and being meant to represent the person or persons identified as providing medical care to Dennis A. Murphy referenced in the heretofore unreleased medical chart or charts, and XYZ Corporation nos.1 through 5, said organization names being fictitious and meant to represent organizations identified as providing medical care to Dennis A. Murphy referenced in the heretofore unreleased medical chart or chart

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for DISSOLVE STAY/AMEND CAPTION

In this action to recover damages for medical malpractice, the representative of the estate of the deceased plaintiff, Dennis A. Murphy, moves to dissolve the stay that was automatically imposed by law upon the plaintiff's death in the actions entitled Dennis Murphy v The New York and Presbyterian Hospital, et al., Index No. 805334/2018 (hereinafter Action No.

1), and *Dennis Murphy v Irobunda, M.D., et ano.*, Index No. 805337/2018 (hereinafter Action No. 2), both pending in the Supreme Court, New York County. She thereupon seeks to substitute herself as the party plaintiff and amend the captions accordingly. The plaintiff also moves pursuant to CPLR 602 to consolidate a third action, entitled *Ashley Murphy v The New York and Presbyterian Hospital, et al.*, pending in the Supreme Court, New York County, under Index No. 805009/2021 (hereinafter Action No. 3), with both Action No. 1 and Action No. 2. The defendants do not oppose the representative's requests to dissolve the stay, substitute herself for the plaintiff, amend the caption in Action No.1 and Action No. 2, or consolidate Action No. 1 and Action No. 2; the defendants do, however, oppose the representative's request to consolidate Action No. 3 with the two other actions.

Those branches of the motion seeking to dissolve the stay, substitute the representative of the decedent as party plaintiff, and amend the caption in Action No. 1 are granted. Those branches of the motion seeking the same relief in connection with Action No. 2 are granted upon the condition that the plaintiff file a Request for Judicial Intervention (RJI) with the New York County Clerk and pay the appropriate RJI filing fee in connection with the action commenced under 805337/2018. That branch of the motion seeking to consolidate Action No. 1, Action No. 2, and Action No. 3 is granted only to the extent that, upon the filing of an RJI in connection with Action No. 2, commenced under 805337/2018, Action No. 2 is fully consolidated into Action No. 1, and the motion is otherwise denied.

In addition, upon the consolidation of Action No. 1 and Action No. 2, the court grants the plaintiff's cross application for leave to amend the complaint in the consolidated action so as to add a cause of action to recover for wrongful death, as set forth in opposition papers bearing the Index Numbers of Action No. 1, Action No. 2, and Action No. 3, but uploaded only to the New York State Court Electronic Filing (NYSCEF) system under the Index Number assigned to Action No. 3.

On October 15, 2018, the plaintiff commenced Action No. 1 against The New York and Presbyterian Hospital (NYPH), several NYPH affiliates, Good Samaritan Hospital of Suffern , N.Y., and individual physicians Joseph M. Lee, M.D., David A. Brogno, M.D, and Ainat Beniaminovitz, M.D., seeking to recover damages for medical malpractice arising from an alleged improper placement of cardiac stents, which purportedly led to cardiac complications and other medical injuries. On October 16, 2018, the plaintiff commenced Action No. 2 against Christopher N. Irobunda, M.D., and Juan Terre, M.D., asserting the same allegations as in Action No. 1. On February 2, 2020, the plaintiff died, and a stay was imposed by operation of law on all proceedings in Action No. 1 and Action No. 2 (see *Perez v City of New York*, 95 AD3d 675, 677 [1st Dept 2012]), pending substitution of a representative of the deceased plaintiff's estate. On July 10, 2020, the Surrogate's Court, Rockland County, issued letters of administration to Ashley Murphy, and appointed her administrator of the estate of the deceased plaintiff, Dennis A. Murphy. On January 6, 2021, Ashley Murphy commenced Action No. 3, in which she asserted a stand-alone cause of action to recover for wrongful death. On January 8, 2021, the plaintiff made the instant motion.

It is well settled that, where an administrator or executor is appointed as representative of the estate of a decedent who was the party to a pending action, substitution and amendment of the caption is appropriate (see *Tag 380, LLC v Estate of Howard P. Ronson*, 69 AD3d 471, 473-474 [1st Dept 2010]). Ashley Murphy has submitted sufficient proof that she has been duly appointed as administrator of the estate of Dennis A. Murphy. Hence, those branches of the motion seeking to substitute Ashley Murphy as a party plaintiff in Action No. 1, to amend the caption in that action accordingly, and to dissolve the stay imposed therein are granted.

Nonetheless, 22 NYCRR 202.6(a) provides, in relevant part, that, with certain exceptions not relevant here, "in an action not yet assigned to a judge, the court shall not accept for filing a notice of motion . . . unless such notice or application is accompanied by a request for judicial intervention." CPLR 8020 requires that, before a civil action is assigned to a judge or justice,

the party seeking the assignment must pay the clerk of the court a fee of \$95 along with the filing of the RJI. Even though the instant motion was uploaded to the NYSCEF system under Action No. 1, in which an RJI fee has been paid and an RJI has been filed, relief is also requested that affects Action No. 2, which was commenced under Index No. 805337/2018, for which no RJI has yet been filed and no RJI fee has yet been paid. Thus, the filing of a separate RJI and the payment of the appropriate fee is required before this court may grant the identical relief sought with respect to Action No. 2, as well as the consolidation of Action No. 2 with any other action.

With respect to the representative's request to consolidate the three pending actions, "[c]onsolidation is generally favored in the interest of judicial economy and ease of decision-making where cases present common questions of law and fact, 'unless the party opposing the motion demonstrates that a consolidation will prejudice a substantial right'" (*Raboy v McCrory Corp.*, 210 AD2d 145 [1st Dept 1994], quoting *Amtorg Trading Corp. v Broadway & 56th St. Assoc.*, 191 AD2d 212, 213 [1st Dept 1993]). The defendants correctly argue that the consolidation of Action No. 3 with Action No. 1 and Action No. 2 should be denied since Action No. 3 fails to state a cause of action and should thus be dismissed. The defendants specifically assert that the plaintiff has not established that the newly commenced action could have been maintained by the decedent had he survived, that is, that the representative could not assert a stand-alone cause of action to recover for wrongful death. In an order dated May 25, 2021, this court granted the defendants' motion to dismiss the complaint in Action No. 3 under Index No. 805009/2021 on that very ground. Therefore, the plaintiff cannot consolidate Action No. 3 with the two prior actions.

However, the plaintiff may consolidate Action No. 1 and Action No. 2. These two actions arise from the same events, the claims are made by the same plaintiff, and they clearly present common questions of law and fact (see CPLR 602; *DeSilva v Plot Realty, LLC*, 85 AD3d 422 [1st Dept 2011]; *Kern v Shandell, Blitz, Blitz & Bookson*, 58 AD3d 487 [1st Dept 2009]).

Moreover, there is no indication that consolidation will prejudice any substantial right or delay the completion of discovery and the schedule for filing the note of issue (*see Amcan Holdings, Inc. v Torgys LLP*, 32 AD3d 337 [1st Dept 2006]).

The court notes that, in the order granting the defendants' motion to dismiss the complaint in Action No. 3, it granted the representative's cross application for leave to amend the complaint in this now-consolidated action so as to add the cause of action to recover for wrongful death that she could not assert in a stand-alone action.

Accordingly, it is

ORDERED that the motion of Ashley Murphy, as administrator of the estate of Dennis A. Murphy, deceased, is granted to the extent that the stay imposed by operation of law in Action No. 1 be, and hereby is, dissolved, Ashley Murphy, as administrator of the estate of Dennis A. Murphy, deceased, be, and hereby is, substituted as party plaintiff in Action No. 1, the caption of Action No. 1 is amended accordingly, and the plaintiff is directed, within 20 days of the entry of this order, to file a request for judicial intervention (RJI) with the Clerk of the Supreme Court, New York County, and pay the appropriate fee, in connection with the action entitled *Dennis Murphy v Irobunda, et ano.*, pending in the Supreme Court, New York County, under Index No. 805337/2018, upon which the stay imposed by operation of law in Action No. 2 shall be dissolved, Ashley Murphy, as administrator of the estate of Dennis A. Murphy, deceased, shall be substituted as party plaintiff in Action No. 2, the caption of Action No. 2 shall be amended accordingly, and Action No. 2 shall be fully consolidated into Action No. 1; and it is further,

ORDERED that the plaintiff, upon filing said request for judicial intervention and paying the appropriate fee, shall thereafter serve a copy of this order with notice of entry upon all other parties, the Clerk of the Supreme Court, New York County, and the Trial Support Office (60 Centre Street, Room 148, New York, NY 10007), and shall file the notice required by CPLR 8019(c) and a completed Form EF-22 with the New York County Clerk's office; and it is further,

ORDERED that, upon the plaintiff's compliance with the directives set forth above, the action entitled *Dennis Murphy v Irobunda, et ano*, pending in the Supreme Court, New York County, under Index No. 805337/2018 shall be fully consolidated into the action entitled *Dennis Murphy v The New York and Presbyterian Hospital, et al.*, pending in the Supreme Court, New York County, under Index No. 805334/2018, the consolidated action shall proceed under New York County Index No. 805334/2018, and, upon completion of discovery, the plaintiff shall only be required to file one note of issue in connection with the consolidated action; and it is further,

ORDERED that the caption of the consolidated action shall read as follows:

ASHLEY MURPHY, as administratrix of the estate of DENNIS MURPHY, deceased,

Plaintiff,

Index No. 805334/2018

v

THE NEW YORK AND PRESBYTERIAN HOSPITAL, THE NEW YORK AND PRESBYTERIAN HOSPITAL doing business as NEW YORK-PRESBYTERIAN/COLUMBIA UNIVERSITY MEDICAL CENTER, THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK CARDIOLOGY ASSOCIATES, THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK CARDIOLOGY ASSOCIATES, doing business as COLUMBIADOCTORS, THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK CARDIOLOGY ASSOCIATES, doing Business as COLUMBIA DOCTORS OF THE HUDSON VALLEY, COLUMBIADOCTORS, COLUMBIA DOCTORS OF THE HUDSON VALLEY, CCW MANAGEMENT CORP., JOSEPH M. LEE, M.D., DAVID A. BROGNO, M.D., AINAT BENIAMINOVITZ, M.D., GOOD SAMARITAN HOSPITAL OF SUFFERN, N.Y., JOHN and JANE DOE nos. 1 through 10, said names being fictitious and being meant to represent the person or persons identified as providing medical care to Dennis A. Murphy referenced in the heretofore unreleased medical chart or charts, XYZ Corporation nos. 1 through 5, said organization names being fictitious and meant to represent organizations identified as providing medical care to Dennis A. Murphy referenced in the heretofore unreleased medical chart or charts, CHRISTOPHER N. IROBUNDA, M.D., and JUAN TERRE, M.D.,

Defendants

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and, upon the plaintiff's compliance with the directives set forth above, the Trial Support Office and the New York County Clerk's Office shall amend their records accordingly; and it is further,

ORDERED that, as set forth in the order of this court also dated May 25, 2021, the plaintiff's cross application for leave to amend the complaint in the actions consolidated under Index No. 805334/2018 to add a cause of action to recover for wrongful death is granted, and the plaintiff shall serve an amended complaint in this consolidated action within 20 days after the entry of this order; and it is further,

ORDERED that the parties shall appear remotely for a status conference on July 1, 2021, at 11:30 a.m., and the court shall send an e-mail invitation to counsel for all parties to participate in said conference via the Microsoft Teams application, at which conference a new note of issue filing deadline will be established.

This constitutes the Decision and Order of the court.

5/25/2021
DATE



JOHN J. KILLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: