

Johnson v Goertz

2022 NY Slip Op 31555(U)

May 10, 2022

Supreme Court, New York County

Docket Number: Index No. 805175/2020

Judge: John J. Kelley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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** **56M**

Justice

-----X

KAREEM JOHNSON,	INDEX NO.	<u>805175/2020</u>
Plaintiff,	MOTION DATE	<u>03/28/2022</u>
	MOTION SEQ. NO.	<u>001</u>

- v -

JACOB GOERTZ, M.D., KELLI OUTLAW, M.D., JANICE SHIN, M.D., ALFRED P. BURGER, M.D., SVETLANA CHERNYAVSKY, D.O., JENNIFER KAR YEE HUI, M.D., ANJALI ASHOK NIGALAYE, ROBERT J. ZIETS, M.D., JANI LEE, M.D., YULIA ZAK, M.D., RAJESH I. PATEL, JOHN DOE, M.D., and MOUNT SINAI BETH ISRAEL,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for LIFT STAY/SUBSTITUTE/AMEND/LATE MED MAL

In this medical malpractice action, the representative of the deceased plaintiff's estate moves pursuant to CPLR 1015 and 1021 to be substituted as the party plaintiff, to vacate the automatic stay of proceedings imposed by operation of law upon the decedent's death, and pursuant to CPLR 305(c) for leave to amend the caption accordingly. She also moves pursuant to CPLR 2004 and 3406(a) for leave to extend the time for filing a notice of medical malpractice action, and deem it timely to have been filed, nunc pro tunc, as of January 4, 2021. The motion is granted, without opposition.

On June 22, 2020, the plaintiff, Kareem Johnson, commenced this action to recover damages for medical malpractice arising from emergency care rendered to him at the defendant Mount Sinai Beth Israel hospital. On June 29, 2020, the plaintiff amended his complaint to add two physicians as defendants. All of the defendants answered the amended complaint and served demands for a bill of particulars and demands for discovery and inspection. On October 8, 2020, the plaintiff died, and all proceedings in this action thus were automatically stayed by

operation of law on that date (see *Perez v City of New York*, 95 AD3d 675, 677 [1st Dept 2012]).

On December 4, 2020, the decedent's attorneys informed the court of his death.

On February 4, 2022, the Surrogate's Court, New York County, issued limited letters of administration to Gloria Johnson, and appointed her as the administrator of the estate of the deceased plaintiff, Kareem Johnson, permitting her to prosecute this action. She now moves to be substituted in this action as party plaintiff, to vacate the automatic stay, and for leave to amend the caption accordingly.

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]). Gloria Johnson has submitted sufficient proof that she has been duly appointed as administrator of the estate of Kareem Johnson. Hence, those branches of her motion seeking to be substituted as party plaintiff, vacate the stay, and amend the caption accordingly must be granted.

The court also grants that branch of Gloria Johnson's motion seeking leave to extend the time for filing a notice of medical malpractice action and deem it timely to have been filed.

The defendants Jacob Goertz, M.D., Alfred P. Burger, M.D., Svetlana Chernyavsky, D.O., Jennifer Kar Yee Hui, M.D., Anjali Anshok Nigalye, M.D., Robert J. Ziets, M.D., Rajesh I. Patel, M.D., and Mount Sinai Beth Israel together served their answer on July 29, 2020, thus triggering the 60-day period for the plaintiff's service and filing of a notice of medical malpractice action (see CPLR 3406[a]). The statutory 60-period would, under usual circumstances, have lapsed on September 28, 2020 (see General Construction Law §§ 20, 25-a). Nonetheless, due to the COVID-19 pandemic, all service and filing deadlines in pending actions were tolled between March 20, 2020 and November 3, 2020 (see L 2020, ch 23, § 2; Executive Law § 29-a; Executive Order 202.8, Executive Order 202.67; see *Brash v Richards*, 195 AD3d 582 [2d Dept 2021]). Applying that toll to the instant matter, the plaintiff was obligated to serve and file the

notice on or before January 4, 2021, the first business day 60 days after the toll ended (see General Construction Law § 25-a). The plaintiff, however, had yet to serve and file the notice by that date. On March 7, 2022, the plaintiff made the instant motion.

The failure timely to serve and file a notice of medical malpractice action is not fatal to a medical malpractice action, and may be rectified by a motion pursuant to CPLR 2004 to extend the time for service and filing (see *Tawari v Tsoutsouras*, 75 NY2d 1, 9-10; *Grad v Hafliger*, 68 AD3d 543, 544 [1st Dept 2009]). CPLR 2004 permits the court to

“extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.”

Here, the “[p]laintiff made the requisite showing of good cause based on law office failure” (*Grad v Hafliger*, 68 AD3d at 544).

“The purpose of a CPLR 3406(a) notice is not to provide defendants with a document suitable for framing, but to trigger expedited discovery and other pretrial devices for resolution of the action. All that has already taken place in this case. The CPLR 3406(a) notice requirement in the current posture of the instant case is more cosmetic than substance”

(*Goldberg v Nathan Littauer Hosp. Assn.*, 160 Misc 2d 571, 577 [Sup Ct, Albany County 1994]).

Accordingly, it is,

ORDERED that the branch of the motion of Gloria Johnson, as administrator of the estate of Kareem Johnson, deceased, seeking to be substituted as party plaintiff in this action and to amend the caption accordingly is granted, without opposition; and it is further,

ORDERED that the automatic stay of proceedings imposed by operation of law upon the decedent's death is dissolved; and it is further,

ORDERED that the caption is amended to read as follows:

GLORIA JOHNSON, as administrator of the estate KAREEM
JOHNSON, deceased,

Plaintiff,

Index No. 805175/2020

v

JACOB GOERTZ, M.D., KELLI OUTLAW, M.D., JANICE SHIN, M.D., ALFRED P. BURGER, M.D., SVETLANA CHERNYAVSKY, D.O., JENNIFER KAR YEE HUI, M.D., ANJALI ASHOK NIGALAYE, ROBERT J. ZIETS, M.D., JANI LEE, M.D., YULIA ZAK, M.D., RAJESH I. PATEL, JOHN DOE, M.D., and MOUNT SINAI BETH ISRAEL,

Defendants.

and it is further,

ORDERED that the plaintiff shall serve a copy of this order upon 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, and the Trial Support Office shall thereupon amend the court records accordingly; and it is further,

ORDERED that the branch of Gloria Johnson's motion seeking to extend the time for the service and filing of a notice of medical malpractice action is granted, without opposition; and it is further,

ORDERED that the proposed notice of medical malpractice action filed by the plaintiffs on March 7, 2022 is deemed timely to have been served and filed as of January 4, 2021; and it is further,

ORDERED that, on or before June 24, 2022, the parties shall submit a proposed preliminary conference order to the Part 56 Part Clerk at RSPEAKS@NYCOURTS.GOV.

This constitutes the Decision and Order of the court.

JOHN J. KELLEY, J.S.C.

5/10/2022

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE