

<b>Kimmelman v Smith</b>
2022 NY Slip Op 32397(U)
July 18, 2022
Supreme Court, New York County
Docket Number: Index No. 805150/2019
Judge: Judith N. McMahon
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Plaintiff now moves for an Order pursuant to CPLR 1021 amending the caption in this matter because Plaintiff Joan Kimmelman has been appointed the Executrix of Gerald Kimmelman's Estate, and pursuant to CPLR 3025 amending the Complaint to add a cause of action for wrongful death.

"A motion for substitution may be made by the successors or representatives of a party or by any party." *NY CPLR 1021*. Plaintiff included Letters Testamentary issued by the Surrogate's Court of the County of Nassau, dated April 5, 2022, appointing Joan Kimmelman as the Fiduciary of the Estate of Gerald Kimmelman. Joan Kimmelman is the proper representative of the Plaintiff Decedent's Estate and the caption shall be amended accordingly.

Plaintiff is also moving to amend the Complaint to add a cause of action for wrongful death. "A motion seeking leave to amend a personal injury complaint to assert a cause of action for wrongful death must be supported by competent medical proof of the causal connection between the alleged malpractice and the death of the original plaintiff." *Imperati v. Lee*, 132 A.D.3d 591, 18 N.Y.S.3d 615 (N.Y.A.D. 1<sup>st</sup> Dept. 2015); see also *Gambles v. Davis*, 32 A.D.3d 224, 820 N.Y.S.2d 18 (N.Y.A.D. 1<sup>st</sup> Dept. 2006); *McGuire v. Small*, 129 A.D.2d 429, 513 N.Y.S.2d 691 (N.Y.A.D. 1<sup>st</sup> Dept. 1987).

Plaintiff failed to submit sufficient competent medical proof of the causal connection between the alleged malpractice and the death of Plaintiff Decedent. The only support submitted by Plaintiff is Decedent's Death Certificate. The Death Certificate states that Plaintiff Decedent died November 11, 2021, four years after the alleged malpractice, and that the immediate cause of death was "choking". Below the cause of death, the Certificate has spaces to enter factors for which the cause of death is "due to or as a consequence of" which were left blank. Below this, the Certificate lists "other significant conditions contributing to death but not related to cause [of

death]”. Under this category is listed, “atherosclerotic and hypertensive cardiovascular disease and cerebrovascular infarct (remote).” Plaintiff Attorney’s conclusory arguments attempting to establish a causal relationship based on the Death Certificate are insufficient, the Death Certificate does not link the stroke to the choking cause of death listed, nor is Plaintiff’s Attorney a medical expert such that they are even qualified to make such assertions. *See Cruz v. Brown*, 129 A.D.3d 455, 11 N.Y.S.3d 33 (N.Y.A.D. 1<sup>st</sup> Dept. 2015).

**ORDERED** that Plaintiff’s motion for an Order pursuant to CPLR 1021 amending the caption in this matter is granted; and it is further

**ORDERED** that the caption in this matter shall be amended as follows:

**JOAN KIMMELMAN, Individually and as the Executrix of the  
Estate of GERALD KIMMELMAN,**

**Plaintiff,**

**-against-**

**CRAIG SMITH, M.D., THE NEW YORK AND PRESBYTERIAN  
HOSPITAL, BARRY KAPLAN, M.D., NORTH SHORE  
UNIVERSITY HOSPITAL, CLAUDIU JULIAN DAICONU,  
M.D., ANTHONY SOCIEDADE, R.N., DANIEL O’CONNOR,  
M.D., LESLIE COOPERMAN, M.D., PROHEALTH CARE  
ASSOCIATES, LLP, and ANDRE ROBINSON, N.P.,**

**Defendants.**

;and it is further

**ORDERED** that all papers, pleadings, and proceedings in the above-entitled action be amended by substituting the name of Joan Kimmelman, as executor of the estate of Gerald Kimmelman, deceased, as plaintiff in the place and stead of said decedent, without prejudice to the proceedings heretofore had herein; and it is further

**ORDERED** that counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court, who are directed to amend their records to reflect such change in the caption herein; and it is further

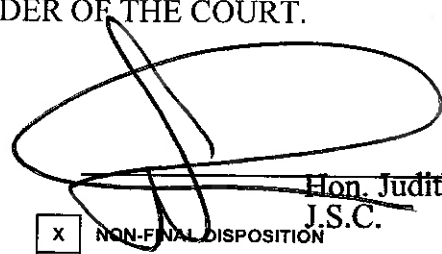
**ORDERED** that Plaintiff's motion pursuant to CPLR 3025 amending the Complaint to add a cause of action for wrongful death is denied; and it is further

**ORDERED** that any and all additional requests for relief are hereby denied; and it is further

**ORDERED** that all parties shall appear for a Court conference, to be conducted via Microsoft Teams, on **October 17, 2022, at 10:30 AM.**

THIS IS THE DECISION AND ORDER OF THE COURT.

7/18/2022  
DATE

  
Hon. Judith N. McMahon  
J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE