

Johnson v Goertz

2022 NY Slip Op 33516(U)

October 11, 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 IAS MOTION 56EFM

Justice

-----X

GLORIA JOHNSON, as administrator of the Estate of
KAREEM JOHNSON,

Plaintiff,

- 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, M.D., ROBERT J. ZIETS,
M.D., JANI LEE, M.D. YULIA ZAK, M.D. RAJESH I.
PATEL, M.D., and MOUNT SINAI BETH ISRAEL,

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number 91, 92, 93, 94, 100, 101, 102, 103,
104, 105, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, and 125 (Motion 002)

were read on this motion to/for LEAVE TO AMEND COMPLAINT/X-MOTION
DISCOVERY DISMISSAL CPLR 3124 3126

In this action to recover damages for medical malpractice, the plaintiff moves pursuant to
CPLR 3025(b) for leave to amend the complaint to add a wrongful death cause of action. The
defendants oppose the motion and cross-move, pursuant to CPLR 3126 and 3042(b) to dismiss
the complaint for the plaintiff's failure to respond to discovery demands and a demand for a bill
of particulars or, alternatively, pursuant to CPLR 3124 to compel the plaintiff to respond to those
demands. The plaintiff opposes the cross motion. The plaintiff's motion is denied without
prejudice to renewal upon proper papers. The defendants' cross motion is denied.

On June 22, 2020, 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 between January 8, 2018 and March 9, 2018. On June 29, 2020, he
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, Kareem Johnson 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 Kareem Johnson, thus permitting her to prosecute this action. By order dated May 10, 2022, the court granted her motion to substitute her as the party plaintiff, vacate the automatic stay, and amend the caption accordingly. She now seeks leave to add a wrongful death cause of action.

Leave to amend a pleading is to be freely given absent prejudice or surprise resulting from the amendment (*see CPLR 3025[b]; McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp.*, 59 NY2d 755 [1983]; *360 West 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552 [1st Dept 2011]; *Smith-Hoy v AMC Prop. Evaluations, Inc.*, 52 AD3d 809 [1st Dept 2008]; *Daniels v Kromo Lenox Assoc.*, 275 AD2d 608 [1st Dept 2000]; *Bellini v Gesalle Realty Corp.*, 120 AD2d 345 [1st Dept 1986]). Thus, leave to amend should granted unless the proposed amended pleading is "palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; *see Hill v 2016 Realty Assoc.*, 42 AD3d 432 [2d Dept 2007]) or the amendment would prejudice the opposing party (*Blue Diamond Fuel Oil Corp. v Lev Mgt. Corp.*, 103 AD3d 675, 676 [2d Dept 2013]).

Where a plaintiff moves for leave to amend a complaint so as to assert a wrongful death cause of action, and, as here, the two-year limitations period applicable to that wrongful death cause of action had yet to expire when the motion was made, the statute of limitations is tolled from that date that the motion papers are served until the entry of the order granting leave to amend (*see Vastola v Maer*, 48 AD2d 561 [2d Dept 1975], *affd* 39 NY2d 1019 [1976]). In its decision affirming the Appellate Division, the Court of Appeals in *Vastola* explained that, where a complaint is amended to add a wrongful death cause of action,

“even if the claim for wrongful death had been interposed more than two years after the death of the plaintiff’s [decedent], the claim would still have been timely since it would relate back, for limitations purposes, to the date of commencement of the personal injury action”

(id. at 1021). Stated another way, where the complaint in the pending action gives the defendants

“notice of the transactions, occurrences, or series of transactions or occurrences on which the wrongful death cause of action in the amended complaint was based, the wrongful death cause of action asserted in the amended complaint relates back to the original complaint and is deemed to have been timely interposed”

(*DeLuca v PSCH, Inc.*, 170 AD3d 800, 802 [2d Dept 2019] [internal quotation marks omitted]; see CPLR 203[f]; EPTL 11-3.3[b] [2]; *Caffaro v Trayna*, 35 NY2d 245, 250 [1974]; *Assevero v Hamilton & Church Props., LLC*, 154 AD3d 728 [2d Dept 2017]).

Nonetheless, where a plaintiff in a medical malpractice action dies, his or her representative is substituted as the plaintiff, and the representative seeks leave to amend the complaint to add a cause of action to recover for wrongful death, the motion “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 AD3d 591, 592 [1st Dept 2015], quoting *McGuire v Small*, 129 AD2d 429, 429 [1st Dept 1987]; see *Cruz v Brown*, 129 AD3d 455, 456 [1st Dept 2015]; *Katechis v Our Lady of Mercy Med. Ctr.*, 36 AD3d 514, 517 [1st Dept 2007]; *Leibowitz v Mt. Sinai Hosp.*, 296 AD2d 340, 341-342 [1st Dept 2002]; cf. *Smith v Tyras*, 265 AD2d 217 [1st Dept 1999] [concluding that affidavit of physician in support of plaintiff’s motion for leave to amend was sufficient to establish a causal connection between defendant’s malpractice and decedent’s death]). Although the court recognizes that, in *Lucido v Mancuso* (49 AD3d 220 [2d Dept 2008]), the Appellate Division, Second Department, overruled years of precedent, and determined that no such medical proof is required on a motion for leave to add a wrongful death cause of action, this court is bound to adhere to the precedent established in the

First Department (see *D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]), which continues to require such proof.

Inasmuch as the plaintiff did not submit any expert medical affirmation or affidavit demonstrating the causal connection between the alleged malpractice and the death of Kareem Johnson, this court is constrained to deny the plaintiff's motion for leave to amend the complaint, albeit without prejudice to renewal upon proper papers.

Since "a preliminary conference has not been held" (22 NYCRR 202.8[f]), the appropriate remedy for the plaintiff's alleged failure to provide bills of particulars and disclosure at this juncture is for the court to schedule a preliminary conference (see *id.*; *Westchester Med. Ctr. v Amoroso*, 110 AD3d 580, 580 [1st Dept 2013]) or direct the parties to submit a proposed preliminary conference order. Hence, the defendants' cross motion must be denied. The court notes that, during the pendency of this motion, the plaintiff served bills of particulars responsive to the demands of several of the defendants. The fact that a party serves discovery materials during the pendency of a 3126 motion to strike his or her pleading does not render its prior failure to make discovery willful or contumacious (see *Chamberlain, D'Amada, Oppenheimer & Greenfield v Beauchamp*, 247 AD2d 858, 859 [4th Dept 1998]; see also *Butler v Knights Collision Experts, Inc.*, 165 AD3d 406, 407 [1st Dept 2018]; *Bard-Rock Corp. v Corutky*, 110 AD2d 611, 612 [2d Dept 1985]). "[A]ny mere lack of diligence in furnishing certain requested materials is not a ground for dismissal" or other sanctions (*Moon 170 Mercer, Inc. v Vella*, 146 AD3d 537, 539 [1st Dept 2017]; see *Bueno v 562 W. 174th St. Equities, LLC*, 2020 NY Slip Op 30223[U], 2020 NY Misc LEXIS 374 [Sup Ct, N.Y. County, Jan. 28, 2020 [Kelley, J.]).

Accordingly, it is

ORDERED that the plaintiff's motion is denied, without prejudice to renewal upon proper papers; and it is further,

ORDERED that the defendants' cross motion is denied; and it is further,

ORDERED that, on November 18, 2022, the parties shall submit a proposed preliminary conference order to the court at SFC-Part56-Clerk@nycourts.gov.

This constitutes the Decision and Order of the court.

10/11/2022
DATE


JOHN J. KELLEY, J.S.C.

MOTION:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN
CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT
NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
 REFERENCE
 OTHER
 REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

CROSS MOTION:

APPLICATION:

CHECK IF APPROPRIATE: