

Mathews v Lenox Hill Hosp.

2022 NY Slip Op 33641(U)

October 20, 2022

Supreme Court, New York County

Docket Number: Index No. 805275/2017

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 56M

Justice

-----X

ERICA MATHEWS,

Plaintiff,

- v -

LENOX HILL HOSPITAL, RUCHITA BHARAT GANDHI, and
KAVITA MUKUND PATEL

Defendants.

-----X

INDEX NO. 805275/2017

MOTION DATE 09/13/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44

were read on this motion to/for DISMISSAL.

In this action to recover damages for medical malpractice, the defendants Lenox Hill Hospital (Lenox Hill) and Ruchita Bharat Gandhi move pursuant to CPLR 1021 to dissolve the stay imposed by operation of law upon the plaintiff's death, and thereupon to dismiss the complaint insofar as asserted against them on the ground that no timely motion was made to substitute a representative of the deceased plaintiff's estate for the plaintiff in this action. The plaintiff's former attorney submits opposition to the motion. The motion is granted.

The plaintiff commenced this action on July 17, 2017. The parties thereafter conducted some discovery, and the court (Madden, J.) issued seven case-management orders between February 2, 2018 and September 30, 2019. On April 13, 2018, the plaintiff discontinued the action against the defendant Kavita Mukund Patel. The plaintiff died on November 4, 2019. Shortly after the unmarried plaintiff's death, her two minor children were placed in separate foster care situations and, despite diligent attempts by her former counsel and the movants' attorneys to locate them, they have remained unlocatable. The deceased plaintiff's attorneys notified the court of her death on September 9, 2021, and this court, by order dated September

10, 2021, memorialized the automatic stay of proceedings that went into effect on the date of the plaintiff's death. On March 28, 2022, Lenox Hill and Gandhi made the instant motion.

CPLR 1021 provides, in relevant part, that

“A motion for substitution may be made by the successors or representatives of a party or by any party. If a person who should be substituted does not appear voluntarily he may be made a party defendant. If 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.”

The issue of what constitutes a reasonable time depends on the circumstances of the case (see generally *Randall v Two Bridges Assoc. Ltd. Partnership*, 139 AD3d 435 [1st Dept 2016]).

Here, the defendants waited 2½ years after the plaintiff's death to move to dismiss the complaint insofar as asserted against them, and neither the plaintiff's former counsel nor anyone on behalf of the plaintiff sought to move to substitute a representative of the plaintiff's estate since that time. Inasmuch as no attempt at substitution was made within a reasonable time, dismissal is warranted under the circumstances presented here (see *Leroy v Morningside House Nursing Home Co., Inc.*, 126 AD3d 652, 653 [1st Dept 2015]; *Washington v Min Chung Hwan*, 20 AD3d 303, 304 [1st Dept 2005]; *Palmer v Selpan Elec. Co.*, 5 AD3d 248, 248 [1st Dept 2004]; cf. *Dugger v Conrad*, 189 AD3d 478 [1st Dept 2020] [where defendant waited only 16 months before moving to dismiss, and counsel for deceased plaintiff was attempting to have the Public Administrator substituted as plaintiff, dismissal was premature]).

Contrary to the contention of the plaintiff's former attorney, the court has jurisdiction to entertain a motion pursuant to CPLR 1021 notwithstanding the fact that a representative of the plaintiff's estate has yet to be substituted as a party plaintiff.

“Although a determination [of a motion] rendered without such substitution will generally be deemed a nullity, determinations regarding substitution pursuant to CPLR 1021 are a necessary exception to the general rule, and the court does not lack jurisdiction to consider such a motion”

(*Medlock v Dr. William O. Benenson Rehabilitation Pavilion*, 167 AD3d 994, 996 [2d Dept 2018]).

The court “may not order dismissal for such failure without first ordering the persons interested in the decedent's estate to show cause why the action should not be dismissed.” (*Petty v Meadowbrook Distributing Corp.*, 266 AD2d 88, 88 [1st Dept 1999]; see *Velez v New York Presbyterian Hosp.*, 145 AD3d 632, 633 [1st Dept 2016]). Contrary to the movants’ contention, upon the plaintiff’s death, her former counsel no longer had an obligation to represent any person who was or will be appointed as the representative of her estate (see *Homemakers, Inc. of Long Is. v Williams*, 131 AD2d 636, 638 [2d Dept 1987]; *Wisdom v Wisdom*, 111 AD2d 13, 14-15 [1st Dept 1985]; *Hemphill v Rock*, 87 AD2d 836, 836 [2d Dept 1982]). Hence, service of the motion papers upon the plaintiff’s former counsel, in and of itself, does not satisfy CPLR 1021. Nonetheless, where, as here, the only identifiable persons with an interest in the plaintiff’s estate are unlocatable despite the exercise of due diligence, and the one friend of the plaintiff who may know of their location is likewise unlocatable, dismissal is warranted (see *Berusch v Hudson Spine & Pain Medicine, P.C.*, 2018 NY Slip Op 32214[U], *3, 2018 NY Misc LEXIS 3852, *4-5 [Sup Ct, N.Y. County, Sep. 7, 2018]

The court declines to characterize the dismissal as a dismissal on the merits.

Since the action already has been discontinued against Patel, the only other defendant in the action, the dismissal of the complaint against the movants fully disposes of the action.

Accordingly, it is

ORDERED that the motion of the defendants Lenox Hill Hospital and Ruchita Bharat Gandhi to dissolve the automatic stay of proceedings in this action and thereupon to dismiss the complaint insofar as asserted against them is granted, without opposition, the stay is dissolved, and the complaint is dismissed insofar as asserted against the defendants Lenox Hill Hospital and Ruchita Bharat Gandhi, without prejudice; and it is further,

ORDERED that the action is severed against the defendants Lenox Hill Hospital and Ruchita Bharat Gandhi; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendants Lenox Hill Hospital and Ruchita Bharat Gandhi.

This constitutes the Decision and Order of the court.

10/20/2022
DATE



CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE