

Jenkins v Mazlin

2022 NY Slip Op 33790(U)

November 3, 2022

Supreme Court, New York County

Docket Number: Index No. 805413/2021

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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TAHISHA JENKINS and DANIEL HILTON-ALLEN,

Plaintiff,

- v -

JEFFREY A. MAZLIN, M.D., GAIL A. STEPHEN-JOHNSON,
M.D., PAULINA GUTA, M.D., GARDEN OB/GYN,
BETHPAGE MEDICAL PLLC, GARDEN CITY PLAZA
OFFICE BASED SURGERY, P.C., MICHAEL TERRANI,
M.D., FACOG, and MICHAEL TERRANI, M.D., P.C.,

Defendants.

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INDEX NO. 805413/2021

MOTION DATE 10/26/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION AND STAY**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 80, 81, 82, 83, 84, 85, 86, 87, and 88

were read on this motion to/for JUDGMENT - DEFAULT.

In this action to recover damages for medical malpractice, the plaintiffs move pursuant to CPLR 3215(a) for leave to enter a default judgment on the issue of liability against the defendant Gail A. Stephen-Johnson, M.D. Inasmuch as Stephen-Johnson died on July 13, 2022 and, thus, prior to the date when the plaintiffs made the instant motion on September 27, 2022 (see CPLR 2211), the motion must be denied as a nullity. The action is automatically stayed, retroactive to July 13, 2022, pending the substitution of a representative of Stephen-Johnson's estate as a party defendant in this action.

The plaintiffs commenced this action on December 22, 2021 (see CPLR 304), and unsuccessfully attempted to serve Stephen-Johnson with process on several occasions between January 2022 and March 2022. On April 14, 2022, the plaintiffs moved pursuant to CPLR 306-b to extend their time to serve process upon Stephen-Johnson (MOT SEQ 001). On June 30, 2022, the plaintiffs moved pursuant to CPLR 3215(a) for leave to enter a default judgment against the defendants Garden City Plaza Office Based Surgery, P.C., Michael

Terrani, M.D., FACOG, and Michael Terrani, M.D., P.C. (the Terrani defendants) (MOT SEQ 002). By order dated July 12, 2022, this court granted the plaintiffs' motion under Sequence 001 to extend their time to serve process upon Stephen-Johnson, and permitted them to serve process upon her up until October 13, 2022, a period of 92 days. Stephen-Johnson died on July 13, 2022, the day after that order was signed, but the court was not then informed of her death. The plaintiffs thereafter attempted to serve Stephen-Johnson on July 23, 2023. On September 27, 2022, the plaintiffs made the instant motion for leave to enter a default judgment against her (MOT SEQ 003). By order dated October 3, 2022, and entered October 13, 2022, this court granted the plaintiffs' motion under Sequence 002 for leave to enter a default judgment against the Terrani defendants. The court was informed of Stephen-Johnson's death on November 3, 2022.

It is well settled that "the death of a party divests a court of jurisdiction to conduct proceedings in an action until a proper substitution has been made pursuant to CPLR 1015(a)" (*Griffin v Manning*, 36 AD3d 530, 532 [1st Dept 2007]; see *Perez v City of New York*, 95 AD3d 675, 677 [1st Dept 2012]; *Manto v Cerbone*, 71 AD3d 1099 [2d Dept 2010]; *Nieves v 331 E. 109th St. Corp.*, 112 AD2d 59, 60 [1st Dept 1985]). Any determination rendered or proceedings held without such a substitution is generally deemed a nullity (see *Griffin v Manning*, 36 AD3d at 532; *Stancu v Cheon Hyang Oh*, 74 AD3d 1322, 1322-1323 [2d Dept 2010]; *Morrison v Budget Rent A Car Syst., Inc.*, 230 AD2d 253 [2d Dept 1997]; *Nieves v 331 E. 109th St. Corp.*, 112 AD2d at 60). Rather, the action is automatically stayed as of the date of the decedent's death (see *Perez v City of New York*, 95 AD3d at 677). Moreover, parties may not "by agreement confer subject matter jurisdiction upon [a] court where there is none" (*Cuomo v Long Island Lighting Co.*, 71 NY2d 349, 351 [1988]; see *Haverstraw Park, Inc. v Runcible Properties Corp.*, 33 NY2d 637 [1973]; *Stancu v Cheon Hyang Oh*, 74 AD3d at 1323) by stipulating to conducting further proceedings prior to the substitution of a personal representative for the deceased party.

Indeed, any such stipulation is “legally inoperative” (*Morrison v Budget Rent A Car Syst., Inc.*, 230 AD2d at 261).

Inasmuch as Stephen-Johnson died prior to both the attempted re-service of the summons and complaint upon her, and the date that the instant motion was made, both the attempted re-service and this motion must be deemed nullities. Similarly, since Stephen-Johnson died during the pendency of the plaintiffs’ motion under Sequence 002 for leave to enter a default judgment against the Terrani defendants, this court’s October 3, 2022 order disposing of that motion must be vacated as a nullity as well, without prejudice to re-noticing the motion after the substitution of a representative of Stephen-Johnson’s estate and the concomitant lifting of the automatic stay.

Accordingly, it is

ORDERED that the plaintiffs’ motion for leave to enter a default judgment against the defendant Gail A. Stephen-Johnson, M.D., is denied as a nullity; and it is further,

ORDERED that all proceedings in this action are stayed, pending the substitution of a representative of the estate of Gail A. Stephen-Johnson, M.D., as a party defendant in this action; and it is further,

ORDERED that the purported service of process upon the defendant Gail A. Stephen-Johnson, M.D., on July 23, 2022 is deemed to be a nullity; and it is further,

ORDERED that, on the court’s own motion, the 92-day period extending the time for service of process upon the defendant Gail A. Stephen-Johnson, M.D., as set forth in this court’s July 12, 2022 order disposing of Motion Sequence 001, shall be deemed to commence running on the first date after the substitution of a representative of the estate of Gail A. Stephen-Johnson, M.D., and the concomitant lifting of the automatic stay, and shall be deemed to apply to service of process upon the person substituted as the representative of the estate of the defendant Gail A. Stephen-Johnson, M.D.; and it is further,

ORDERED that, on the court’s own motion, this court’s order dated October 3, 2022, and entered October 13, 2022, granting the plaintiffs’ motion under Motion Sequence 002 for leave to enter a default judgment against the defendants Garden City Plaza Office Based Surgery, P.C., Michael Terrani, M.D., FACOG, and Michael Terrani, M.D., P.C., is vacated as a nullity, without prejudice to re-noticing that motion after the substitution of a representative of the estate of Gail A. Stephen-Johnson, M.D., and the concomitant lifting of the automatic stay.

This constitutes the Decision and Order on Motion and Stay of the court.

11/3/2022

DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE