

Linyard v Long Is. Coll. Hosp.

2023 NY Slip Op 30740(U)

March 9, 2023

Supreme Court, Kings County

Docket Number: Index No. 16286/2014

Judge: Consuelo Mallafre Melendez

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At an IAS Term, Part 15 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9th day of March 2023.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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DIANE LINYARD as Administratrix of the Estate of
MARTHA A. LINYARD, and DIANE LINYARD individually,

-Plaintiff-

-against-

DECISION & ORDER

Index#: 16286/2014
Mo. Seq. 013, 014, 015, 016

LONG ISLAND COLLEGE HOSPITAL,
RUTLAND NURSING HOME COMPANY, INC.,
RIVER MANOR CORPORATION, ATRIUM CENTER
FOR REHABILITATION and NURSING and
KINGSBROOK MEDICAL CENTER,

Defendants.

-----X

Hon. Consuelo Mallafre Melendez

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

- NYSCEF #s: Seq. 013: 66 – 67, 68 – 78, 102, 126
- Seq. 014: 79 – 80, 81 – 82, 114 – 115
- Seq. 015: 83 – 84, 85 – 101, 118
- Seq. 016: 103 – 104, 105 – 113, 116, 117, 119, 120, 121 – 125

Defendants, RIVER MANOR CORPORATION and ATRIUM CENTER FOR REHABILITATION and NURSING (hereinafter “River Manor”), move to dismiss the complaint, Seq. 013, for Plaintiff’s failure to timely substitute an estate representative pursuant to CPLR § 1021. Defendant, LONG ISLAND COLLEGE HOSPITAL (hereinafter “LICH”), moves to lift the death stay and dismiss the action, Seq. 014, pursuant to CPLR § 1021 for failure to substitute a legal representative in place of the deceased plaintiff within a reasonable period of time. Defendants, RUTLAND NURSING HOME COMPANY, INC., RUTLAND NURSING HOME CO., INC. (hereinafter “Rutland”) and KINGSBROOK MEDICAL CENTER (hereinafter “Kingsbrook”), move to dismiss the action, Seq. 015, pursuant to CPLR § 1021 for

Plaintiff's failure to seek, obtain appointment and substitution of an estate representative in place and stead of the deceased Administrator, DIANE LINYARD.

Plaintiff opposes Defendants, River Manor, LICH, Rutland and Kingsbrook's motions to dismiss and cross-moves, Seq. 016, to lift the stay of this action that arose upon the death of the Estate Administrator DIANE LINYARD and seeks to amend the caption to substitute MICHAEL LINYARD as Administrator of the Estate of MARTHA A. LINYARD.

The claims on behalf of Martha Linyard arose from care and treatment that took place at LICH on or about February 28, 2009 to on or about April 10, 2009; at Rutland on or about June 2009 to on or about November 2012; at River Manor on or about February 28, 2009 to on or about June 9, 2009; at Kingsbrook on multiple occasions from 2011 to 2013. Martha Linyard died on or about February 15, 2013. Diane Linyard, as the Administrator of the Estate of decedent Martha Linyard, commenced this suit by service of the Summons on or about October 30, 2014 and the Verified Complaint on or about January 9, 2015. Issue was joined by Defendants by service of a Verified Answer on or about March 20, 2015. Pursuant to a Preliminary Conference Order dated December 4, 2015, plaintiff was to provide supplementation to all Bills of Particulars by asserting specific allegations of negligence as to each party, provide other enumerated discovery and hold depositions of the parties by dates specified on the order. Plaintiff did not comply with the Preliminary Conference Order and extensive discovery was still outstanding more than one year later. On May 1, 2017, a second Court order directed Plaintiff to provide all outstanding discovery. Further, nearly a year later, on April 17, 2018, a Final Pre-Note Order directed Plaintiff to provide discovery still outstanding from the Preliminary Conference Orders of December 4, 2015 and the May 1, 2017 order. On September 27, 2018 yet another order enumerated discovery that plaintiff still had outstanding. The Note of Issue was to have been filed on or before October 4, 2018. The case was marked disposed in October 2018

after plaintiff failed to file a note of issue. The matter was restored and again marked disposed after the plaintiff once again failed to file a Note of Issue by the new date, August 9, 2019.

In its February 26, 2021 order, the Court again restored the case to the calendar, extended the Note of Issue date, set forth a new discovery schedule and indicated that “Plaintiff is cautioned that failure to strictly comply with the instant order shall result in dismissal of the action.” On April 14, 2021, the Court again directed Plaintiff to provide outstanding discovery. On April 30, 2021, Plaintiff’s counsel notified the Court that administrator, Diane Linyard, had passed away on or about June 2, 2020, 10 months earlier. It is noted that the death certificate which plaintiff attaches to this motion as exhibit F is a completely illegible miniature of a document that purportedly is the death certificate. On August 3, 2022, Michael Linyard submitted an application to replace Diane as the Administrator of Martha’s estate. Michael Linyard’s application for Letters of Administration was granted on February 9, 2023.

In determining whether to grant a motion to dismiss pursuant to CPLR §1021 the court must consider whether Plaintiff moved within a reasonable time to substitute a representative for the deceased Plaintiff, whether Defendants are prejudiced by the delay, and whether Plaintiff has shown that the action or defense has potential merit. *Howlader v. Lucky Star Grocery, Inc.*, 153 A.D.3d 610 [2017]; *Terpis v. Regal Hgts. Rehabilitation & Healthcare Ctr., Inc.*, 108 A.D.3d 618 [2013]; *Borruso v. New York Methodist Hosp.*, 84 A.D.3d 1293 [2011]. “CPLR § 1021 requires a motion for substitution to be made within a reasonable time”. *See Reed v. Grossi*, 59 A.D.3d 50, 511 [2009]; *McDonnell v. Draizin*, 24 A.D.3d 628, 628 [2005].

“The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has potential merit (internal citations omitted).” *See Howlader*, 153 A.D.3d at 610-611. In *Terpis v. Regal Hgts.*

Rehabilitation and Health Care Ctr., Inc., the Second Department found that “the Supreme Court providently exercised its discretion in denying the appellant's motion pursuant to CPLR§ 1015 for leave to substitute himself as a party plaintiff and granting the defendant's cross motion pursuant to CPLR§ 1021 to dismiss the complaint, in light of the 21-month delay in obtaining preliminary letters testamentary, the further one-year delay in seeking substitution, the failure to demonstrate a reasonable excuse for the delays, the absence of any affidavit of merit, and the prejudice to the defendant (*See Borruso v. New York Methodist Hosp.*, 84 A.D.3d 1293 [2011]; *Thompson v. Clearway Auto., Inc.*, 50 A.D.3d 1014, 1015 [2008]; *Bauer v. Mars Assoc.*, 35 A.D.3d 333, 333-334 [2006]; *Suciu v. City of New York*, 239 A.D.2d 338 [1997]; *Mansfield Contr. Corp. v. Prassas*, 183 A.D.2d 878, 879 [1992])”. *Terpis*, 108 A.D.3d at 619. Vague and unsubstantiated claims are insufficient to constitute a reasonable excuse. *Borruso*, 84 A.D.3d 1293; *Knowles v. Schaeffer*, 70 A.D.3d 897, 898 [2010].

In this matter, Plaintiff’s counsel informed the Court on April 30, 2021 that the administrator had passed away on or about June 2, 2020. There is no evidence that counsel contacted the proposed Administrator until on or about April 30, 2021 despite having appeared in court for two compliance conferences and having filed a notice of readiness. A petition to substitute the estate as plaintiff in this matter was filed on August 3, 2022, more than two years after the death of the original Administrator in 2020.

Plaintiff’s counsel alleges the COVID-19 shutdown as the main reason for any delay in this matter. While in the papers plaintiff’s counsel states that there were issues with obtaining a death certificate and with the filings to appoint an administrator (some due to covid), no explanation is offered as to delays in obtaining the status of the client at any point after the last activity in the case which was in February 2019. Plaintiff’s reference to a COVID-19 shutdown does not specify how long the Office of Vital Statistics was closed or whether attempts were

made to access the governmental office. Similarly, Plaintiff's counsel does not describe how Michael Linyard's health impacted the delay, rather Plaintiff states he was ill at some point but does not describe how long and how that contributed to the delay. Furthermore, there is no explanation as to why there was no contact with the family until June 2021. The court therefore finds that the proffered excuses are vague.

However, even if the court finds that Plaintiff's excuses are not reasonable the motion may still be granted. In *Navas v. New York Hosp. Med. Ctr. of Queens*, 180 A.D.3d 796 [2d Dept 2020], the Second Department held that even if the plaintiff's explanation for the delay is not satisfactory, the court may still grant the motion for substitution if there is no showing of prejudice and there is potential merit to the action, in light of the strong public policy in favor of disposing of matters on the merits. See *Tokar v. Weissberg*, 163 A.D.3d 1031 [2018]; *Rubino v. Krasinski*, 54 A.D.3d 1016 [2018]. In determining reasonableness pursuant to CPLR § 1021 the court must also determine whether Defendants have been prejudiced by Plaintiff's delay to appoint an Administrator. *Borruso*, 84 A.D.3d 1293; CPLR §1021.

Defendants have established that plaintiff's delays and inactivity have resulted in prejudice to them. The claim in this matter arose in 2009. Little to no discovery has taken place in the nine years that this matter has been in suit. As previously mentioned, there has not been compliance with numerous court orders. The matter has been disposed and restored at least twice and the last activity on the case prior to 2021 took place a year before the Covid shutdown. Authorizations for the patient's records are still outstanding and witnesses and the original administrator is no longer available. Additionally, the defendants are prejudiced by Plaintiff's delay to appoint an Administrator as witnesses are no longer employed at their respective facilities and, those still employed, may not remember the events that happened 14 years ago. In sum, Plaintiff's failure to comply with court orders, plaintiff's inordinate delay in litigating the

matter and the delay in substituting the estate representative has severely prejudiced the Defendants.

An affidavit of merit can substantiate reasonableness pursuant to CPLR § 1021. *Howlader*, 153 A.D.3d 610 [2017]; *Terpis*, 108 AD.3d 618 [2013]; *Navas*, 180 A.D.3d 796 [2d Dept 2020]. However, the plaintiff has not shown that the action has potential merit as no affidavit of merit has been submitted. Plaintiff claims to have a meritorious cause of action based on photograph submissions of Decedent's injuries. However, these submissions are not a substitute for an affidavit of merit from an expert who can attest to alleged medical malpractice claims in the care and treatment of the patient and opine as to the cause of the alleged injuries. *Terpis*, 108 AD.3d 618. Further, without a showing of causation, the plaintiff has failed to show that the action has potential merit, since proximate cause is an essential element of a claim for medical malpractice. *See Navas*, 180 A.D.3d at 799; *Gilmore v. Mihail*, 174 A.D.3d 686 [2019].

Based on the foregoing, Defendants motions to dismiss, Seq. 013, 014, and 015, are GRANTED. Plaintiff's cross-motion, Seq. 016, is DENIED. The case is dismissed pursuant to CPLR §1021.

This constitutes the decision and order of the court.

ENTER.



**Hon. Consuelo Mallafre Melendez,
J.S.C.**