

**Bair v Windsor**

2023 NY Slip Op 32999(U)

August 29, 2023

Supreme Court, New York County

Docket Number: Index No. 805266/2019

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** **56M**

*Justice*

-----X

BARRY BAIR,

Plaintiff,

- v -

RUSSELL WINDSOR, M.D., and HOSPITAL FOR SPECIAL SURGERY,

Defendants.

-----X

**INDEX NO.** 805266/2019

**MOTION DATE** 05/05/2023

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for VACATE STAY.

In this action to recover damages for medical malpractice, the plaintiff moves to vacate the automatic stay of proceedings imposed by operation of law on July 3, 2022 due to the death of the defendant Russell Windsor, M.D., and thereupon to settle the action with the defendant Hospital For Special Surgery (HSS) and discontinue the action against Windsor. Neither HSS nor Theresa Windsor, Windsor’s widow, who has petitioned the Surrogate’s Court to be appointed as the administrator of Windsor’s estate, oppose the motion. The motion is granted, the stay is vacated, and this court appoints the individual named equity partners and the individual named partners of the law firm of Vigorito, Barker, Patterson, Nichols & Porter, LLP (VBPNP), as the temporary administrators of Windsor’s estate for the sole purpose of accepting and signing the stipulation of discontinuance of the action against Windsor, with prejudice, and resolving the action against Windsor.

After Windsor’s death on July 3, 2022, this court issued an order dated August 22, 2022, memorializing the automatic stay of proceedings imposed by operation of law upon Windsor’s death. The court explained that it lacked jurisdiction to proceed with the action, and that, unless

the stay were vacated, any further proceedings---even those stipulated to by the parties---were legally inoperative nullities. The plaintiff made the instant motion on March 29, 2023, asserting that he had settled the action against HSS and wished to discontinue the action against Windsor. Theresa Windsor thereafter informed the court that she had petitioned the Surrogate's Court, New York County, for appointment as the executor of Windsor's estate, but that the Surrogate's Court had yet to grant her petition or issue letters testamentary to her as of the return date of the motion. She further indicated that she would have no objection to the vacatur of the stay if the plaintiff intended to discontinue the action against Windsor with prejudice. VBPNP, as the attorneys representing the insurer for both HSS and Windsor, indicated that they, too, were awaiting Theresa Windsor's appointment "as fiduciary with the authority to retain Vigorito Barker to assume representation of the Windsor Estate."

"The Supreme Court is a court of general jurisdiction with the power to appoint a temporary administrator and may do so to avoid delay and prejudice in a pending action" (*Dieye v Royal Blue Servs., Inc.*, 104 AD3d 724, 726 [2d Dept 2013]). This court thus has discretion to determine whether to exercise its authority to appoint a temporary administrator for Windsor's estate (see *Lambert v Estren*, 126 AD3d 942, 944 [2d Dept 2015]; *Harding v Noble Taxi, Inc.*, 155 AD2d 265, 266 [1st Dept 1989]; *Batan v Schmerler*, 155 Misc 2d 46, 47 [Sup Ct, Queens County 1992]), particularly where the delays attendant in pursuing a remedy in the Surrogate's Court warrant this court's intervention (see *Harding v Noble Taxi, Inc.*, 155 AD2d 266; see also *Biancono v Pierre*, 9 Misc 3d 1126[A], 2005 NY Slip Op 51801[U], \*2, 2005 NY Misc LEXIS 2460, \*4 [Civ Ct, Kings County, Nov. 3, 2005] [Civil Court also has authority to appoint a temporary administrator by virtue of New York City Civ Ct Act § 212]; *Abecasis v Fontenazza*, 10 Misc 3d 195, 196-197 [Civ Ct, Kings County 2005] [same]).

In the instant matter, VBPNP represented both HSS and Windsor because it was assigned by an insurer that provided medical malpractice liability insurance to both of those defendants. As courts frequently have recognized, under many circumstances, such as where

a settlement or an agreement to discontinue an action has been reached, the insurer is the real party in interest to the underlying dispute (see *George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA*, 92 AD3d 104, 118 [1st Dept 2012]). As the court explained it in *Batan*, the appointment of a temporary administrator

“is a proper one for the exercise of the court's power, since it is otherwise trial-ready, and has in fact been reached for trial. It should not be unduly delayed or forced to remain in limbo while the plaintiff, at unnecessary expense, proceeds in the Surrogate's Court.

“Further, it appears that the only asset of the estate which the plaintiffs seek to pursue is the decedent's contract of insurance with the Aetna Casualty Company. If this is in fact the case, and the plaintiffs do not seek to pursue other assets of the estate in the event of recovering a judgment, then the appointment of a temporary administrator will not infringe upon the jurisdiction of the Surrogate's Court”

(*Batan v Schmerler*, 155 Misc 2d at 47; cf. *Matter of Sheahan v Rodriguez*, 194 Misc 2d 179, 184 [Surr Ct, Bronx County 2002] [under the circumstances presented, SCPA 206 confers subject matter jurisdiction upon the Surrogate's Court in New York to issue temporary letters of administration in connection with the estate of a nondomiciliary, limited to the extent of insurance coverage]). Consequently, courts have appointed the attorney designated by the insurer to represent a defendant to serve as temporary administrator where an individual defendant dies during the pendency of litigation (see *Fahey v Zissis*, 2023 NY Slip Op 23152, 2023 NY Misc LEXIS 2367 [Sup Ct, Bronx County, May 16, 2023]; *Batan v Schmerler*, 155 Misc 2d at 47; see also *Ramirez v Zalak*, 10 Misc 3d 1080[A], 2006 NY Slip Op 50160[U], \*1-2, 2006 NY Misc LEXIS 213, \*3 [Sup Ct, Kings County, Feb. 6, 2006] [recognizing the practice, but declining to apply it because the plaintiff had commenced the action against a defendant after that defendant had died]). The appointment of Windsor's attorneys here would be particularly apt, since they would only be appointed for the purpose of accepting and signing a stipulation of discontinuance in that capacity, with no liability to Windsor or the insurer that retained them.

Since SCPA 707 provides that only a natural person may be appointed as a temporary administrator, the court concludes that it is appropriate to appoint the named partners and

equity partners of VBPNP as temporary administrators, with their authority limited to the disposition of this action and only to the extent of the decedent's insurance coverage (see *Biancono v Pierre*, 9 Misc. 3d 1126[A], 2005 NY Slip Op 51801[U], \*2-3, 2005 NY Misc LEXIS 2460, \*5-7). The court notes, however, that the issue of insurance coverage has been rendered academic here in any event, since the plaintiff intends to discontinue the action against Windsor's estate.

The court further notes that, if, during the pendency of this motion, the pending probate proceeding initiated by Theresa Windsor in the Surrogate's Court, New York County, has resulted in the issuance of letters testamentary to Theresa Windsor, her authority to accept and execute the stipulation of discontinuance on behalf of the estate of Russell Windsor shall supersede that of the relevant VBPNP partners, and the partners' authority under this order shall be null and void.

Accordingly, it is

ORDERED that the plaintiff's motion is granted, the stay imposed by operation of law on July 3, 2022, as memorialized in this court's order dated August 22, 2022, is dissolved and vacated, and the plaintiff is permitted to settle the action against the defendant Hospital For Special Surgery and to discontinue the action against the defendant Russell Windsor, M.D, with prejudice; and it is further;

ORDERED that the Clerk of the court shall restore this action to active status; and it is further,

ORDERED that, on the court's own motion, John W. Barker, Esq., Gary W. Patterson, Jr., Esq., Jeffrey R. Nichols, Esq., and Kevin D. Porter, Esq., are appointed to serve as temporary administrators of the estate of Russell Windsor, M.D., deceased, for the limited and sole purpose of defending and disposing of this action on behalf of Russell Windsor, M.D., by accepting and executing a stipulation of discontinuance of the action insofar as asserted against Russell Windsor that has been executed by the plaintiff with prejudice, subject to the pending

probate proceeding initiated by Theresa Windsor in the Surrogate's Court, New York County, in connection with the estate of Russell Windsor.

This constitutes the Decision and Order of the court.

8/29/2023  
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: