

Jenkins v Mazlin

2023 NY Slip Op 33558(U)

October 11, 2023

Supreme Court, New York County

Docket Number: Index No. 805413/2021

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

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TAHISHA JENKINS and DANIEL HILTON-ALLEN,

Plaintiffs,

INDEX NO. 805413/2021

MOTION DATE 06/16/2023

MOTION SEQ. NO. 004

- 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.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 115

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In this medical malpractice action, the plaintiffs move pursuant to CPLR 1015 and 1021 to substitute Lesly Kernisant, as the executor of the estate of Gail A. Stephen-Johnson, as a party defendant in place and instead of Stephen-Johnson (the decedent), to vacate the automatic stay of proceedings imposed by operation of law upon the decedent’s death, and pursuant to CPLR 305(c) for leave to amend the caption accordingly. The plaintiffs also move pursuant to CPLR 3215 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. (collectively the Terrani defendants). The plaintiffs withdraw that branch of their motion seeking leave to enter a default judgment against the Terrani defendants. The motion is otherwise granted, without opposition.

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 Terrani defendants (MOT SEQ 002). By order dated July 12, 2022, this court granted the plaintiffs' motion 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, however, died on July 13, 2022, only one after that order was signed, but the court was not then informed of her death. Nonetheless, all proceedings in this action thus were automatically stayed by operation of law on that date, pending substitution of a representative of Stephen-Johnson's estate (*see Perez v City of New York*, 95 AD3d 675, 677 [1st Dept 2012]).

Inasmuch as the plaintiffs had not yet learned of Stephen-Johnson's death, they purported to serve her pursuant to CPLR 308(4) by affixing a copy of the summons and complaint to the door of her residence on July 23, 2022, and mailing a second copy to that residence on July 29, 2022. In an order dated October 3, 2022, the court, having not yet been informed of Stephen-Johnson's death, granted the plaintiffs' motion for leave to enter a default judgment against the Terrani defendants. On November 3, 2022, the court was informed of Stephen-Johnson's death. In an order issued that same day, the court stayed all proceedings in the action, retroactive to July 13, 2022, vacated, as a nullity, the October 3, 2022 order holding the Terrani defendants in default, and denied the plaintiffs' motion for leave to enter a default judgment against Stephen-Johnson (MOT SEQ 003).

On April 28, 2023, the Surrogate's Court, Nassau County, issued letters testamentary to Lesly Kernisant, thus appointing him as the executor of Stephen-Johnson's estate. The plaintiffs now move to substitute Kernisant in this action for the decedent as a party defendant, to vacate the automatic stay, and for leave to amend the caption accordingly. Inasmuch as the order granting the plaintiffs leave to enter a default judgment against the Terrani defendants had

been vacated as a nullity, the plaintiffs again seek leave to enter a default judgment against the Terrani defendants.

It is well settled that, where an administrator or executor is appointed as representative of the estate of a decedent who was the party to a pending action, substitution and amendment of the caption is appropriate (*see Tag 380, LLC v Estate of Howard P. Ronson*, 69 AD3d 471, 473-474 [1st Dept 2010]). The plaintiffs have submitted sufficient proof of Kernisant's due appointment as executor of Stephen-Johnson's estate. Hence, the court must grant those branches of the plaintiffs' motion seeking to vacate the automatic stay, to thereupon substitute Kernisant, as executor, for Stephen-Johnson, and to amend the caption accordingly. Upon substitution and amendment, the plaintiffs must serve a copy of the summons and complaint upon Kernisant, as executor, in the manner prescribed by CPLR 308 and within the time prescribed by CPLR 306-b (*see generally Wells Fargo Bank, N.A. v Barrella*, 166 AD3d 711 [2d Dept 2018]).

During the pendency of the motion, the plaintiffs withdrew that branch of their motion again seeking leave to enter a default judgment against the Terrani defendants. The plaintiffs stipulated to permit the Terrani defendants to serve a late answer, which the Terrani defendants did on June 12, 2023. Although the action was stayed at that juncture, the court vacates the stay nunc pro tunc and deems the Terrani defendants' service and filing of their answer to be valid.

In light of the foregoing, it is

ORDERED that the plaintiffs' motion is granted to the extent that the automatic stay of proceedings imposed by operation of law upon the death of the defendant Gail A. Stephen-Johnson, M.D., on July 13, 2022, as memorialized in this court's order dated November 3, 2022, is vacated and dissolved, Lesly Kernisant, as executor of the estate of Gail A. Stephen-Johnson, is substituted as a party defendant in place and instead of Gail A. Stephen-Johnson,

the caption shall be amended as set forth below, and the motion is otherwise denied as withdrawn; and it is further,

ORDERED that, on or before October 31, 2023, the plaintiffs shall file an amended summons and amended complaint substituting Lesly Kernisant, as Executor of the Estate of Gail A. Stephen-Johnson, as a defendant in place and instead of Gail A. Stephen-Johnson, M.D.; and it is further,

ORDERED that, on the court's own motion, the answer served and filed on June 12, 2023 by the defendants Garden City Plaza Office Based Surgery, P.C., Michael Terrani, M.D., FACOG, and Michael Terrani, M.D., P.C., is deemed to have been validly served and filed nunc pro tunc; and it is further,

ORDERED that the caption of the action shall read as follows:

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TAHISHA JENKINS and DANIEL HILTON-ALLEN,

Plaintiffs,

v

JEFFREY A. MAZLIN, M.D., LESLY KERNISANT, as
Executor of the Estate of GAIL A. STEPHEN-JOHNSON,
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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and it is further,

ORDERED that, within 15 days of the entry of this decision and order, the plaintiff shall serve a copy of this decision and order upon both the County Clerk and the Clerk of the General Clerk's Office, which shall be effectuated in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases, accessible at the "E-Filing" page on the court's website at <https://www.nycourts.gov/LegacyPDFS/courts/>

[1jd/supctmanh/Efil-protocol.pdf \(nycourts.gov\)](#), and, to comply with those procedures, the plaintiff shall (1) upload the decision and order to the NYSCEF system under document title “SERVICE ON SUPREME COURT CLERK (GENL CLERK) W/COPY OF ORDER” **AND** (2) separately file and upload the notice required by CPLR 8019(c) in a completed Form EF-22, along with a copy of the decision and order, under document title “NOTICE TO COUNTY CLERK CPLR 8019(C),” and the County Clerk and all appropriate court support offices shall thereupon amend the court records accordingly.

This constitutes the Decision and Order of the court.

10/11/2023
DATE

JOHN J. KELLEY, J.S.C.

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