

Sorcigli v Lombardo

2024 NY Slip Op 31941(U)

May 13, 2024

Supreme Court, Kings County

Docket Number: Index No. 9338/2015

Judge: Genine D. Edwards

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At an I.A.S. Trial Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York on the 13th of May 2024.

P R E S E N T :

Hon. Genine D. Edwards, Justice

FRANCESCA SORCIGLI and VINCENZO SORCIGLI

Plaintiffs,

Index No: 9338/2015

-against-

Decision & Order

JOVIN C. LOMBARDO, M.D., LOMBARDO OPTHAMOLOGY, ALEXANDER NASH, M.D., BROOK PLAZA AMBULATORY SURGICAL CENTER and 5000 AVENUE K MEDICAL ASSOCIATES, P.C.

Defendants.

<u>The following e-filed paper(s) read herein:</u>	<u>NYSCEF Doc. No.</u>
Notice of Motion, Affirmation and Exhibits.....	193-197
Affirmation in Opposition and Exhibits.....	199-203

In an action to recover damages for medical malpractice, lack of informed consent and loss of consortium, Francesca Sorcigli and Vincenzo Sorcigli (“plaintiffs”) moved for an order: (1) lifting within stay; (2) appointing a Kings County Public Administrator (“KCPA”) in place of

the deceased defendant Alexander Nash, M.D. (“Dr. Nash”); and (3) for such other and further relief as this Court deems proper and just. Brook Plaza Ambulatory Surgical Center (“Brook Plaza”) and 5000 Avenue K Medical Associates, P.C. opposed the motion.

Facts

Mrs. Sorcigli was scheduled to undergo a cataract extraction of her right eye with an intraocular lens implant and possible vitrectomy at Brook Plaza, on March 16, 2015. Defendant Jovin Lombardo, M.D. (“Dr. Lombardo”) was scheduled to perform the surgery. Dr. Lombardo testified that he cancelled the surgery because upon focusing a microscope on Mrs. Sorcigli's right eye, he found an air bubble in the center of her eye and the retrobulbar was hemorrhaging. Dr. Lombardo further stated that when Dr. Nash injected the retrobulbar block, he failed to purge air from the syringe. This caused Dr. Nash to introduce a vitreous air bubble into her globe, and in effect, increased the probability of a perforation of Mrs. Sorcigli's globe during the operation. The injection led to a large ecchymosis over Mrs. Sorcigli's right eye.

On March 18, 2015, Mrs. Sorcigli returned to Brook Plaza and Dr. Lombardo performed the surgery. He wrote a post-operative note that indicated “phacoemulsification cataract extraction right eye, foldable Sinsky interocular lens, uneventful, good red reflex at end of case. To Felder in A.M by arrangement.” Dr. Lombardo testified that a red reflex is a good sign, as it means that the media of the eye is clear. However, it could also indicate that the eye was filled with blood.

On March 19, 2015, Dr. Lombardo spoke with retinal surgeon Kenneth Felder, M.D. (“Dr. Felder”). Dr. Felder relayed Mrs. Sorcigli's poor prognosis and high probability of

blindness in her right eye. Mrs. Sorcigli has since experienced choroidal hemorrhage and permanent retinal detachment to her right eye.

Procedural History

During this action's pendency, on March 24, 2021, Dr. Nash died. Thus, this case was automatically stayed. Thereafter, this Court denied plaintiffs' motion to sever the action, inter alia. Plaintiffs' counsel made an abortive attempt to appoint an administrator of Dr. Nash's Florida estate.

Analysis

This Court held, in its Decision & Order dated December 22, 2022, that it was divested of jurisdiction upon the death of Dr. Nash. *See CitiMortgage, Inc. v. Clement*, 209 A.D.3d 971, 177 N.Y.S.3d 303 (2d Dept. 2022).

Pursuant to CPLR §1015(a), the death of a party does not dissolve any claims for or against them; and absent a Court's dismissal, the sitting Court shall order substitution of the proper parties. *Tollinchi v. Jamaica Hospital Medical Center*, 216 A.D.3d 842, 189 N.Y.S.3d 240 (2d Dept. 2023). The Supreme Court and the Surrogate's Court have concurrent jurisdiction over the administration of a decedent's estate. *Papadam v. Rothman*, 159 A.D.3d 557, 70 N.Y.S.3d 380 (2d Dept. 2018); *Joffe v. WidELITZ*, 134 A.D.3d 766, 19 N.Y.S.3d 904 (2d Dept. 2015). Furthermore, this Court acknowledges that "[t]he Supreme Court is a court of general jurisdiction with the [broad] power to appoint a temporary administrator, and [under the appropriate circumstances] may do so to avoid delay and prejudice in a pending action." *Lambert v. Estren*, 126 A.D.3d 942, 943, 7 N.Y.S.3d 169 (2d Dept. 2015); *Franco v. Estate of Ketterer*, 213 A.D.3d 912, 184 N.Y.S.3d 383 (2d Dept. 2023).

In the instant matter, plaintiffs failed to establish, prima facie, that the KCPA should be appointed as a representative of Dr. Nash's estate. Plaintiffs averred that since Dr. Nash passed away in Florida, Kings County Surrogate's Court lacks jurisdiction, but given this Court's general jurisdiction over Dr. Nash as a party to this action, it has the power to appoint a temporary administrator to avoid delay and prejudice.

Under the Surrogate's Court Procedure Act (SCPA) §1001, letters of administration "must be granted to the persons who are distributees of an intestate and who are eligible and qualify, in the following order: (a) *the surviving spouse*, (b) the children, (c) the grandchildren, (d) either parent, (e) the brothers or sisters..." (Emphasis added). Moreover, SCPA §1112 states that a county's public administrator can enforce their authorized rights only when a person dies intestate, with no eligible surviving individuals to receive letters within the State; *and* the decedent's personal or real property is left in the same county as the public administrator.

Mrs. Nash probated Dr. Nash's last will and testament in Collier County, Florida; not Kings County, New York. While plaintiffs indicated that Mrs. Nash expressed an unwillingness to cooperate in this matter, plaintiffs have not shown that they explained their intentions to Mrs. Nash, to wit, plaintiffs intend to dismiss the claim against Dr. Nash as soon as the stay is lifted.

In addition, plaintiffs have not moved to appoint an alternative personal representative such as a next of kin, an interested party, or a beneficiary. *See Kastrataj v. Blades*, 136 A.D.3d 756, 28 N.Y.S.3d 689 (2d Dept. 2016). Indeed, plaintiffs failed to proffer that Dr. Nash had no eligible surviving persons in Kings County or that he possessed any personalty or realty within the county. Hence, plaintiffs "did not demonstrate the steps taken to secure the appointment of a personal representative or show that it was necessary for the Supreme Court to appoint a temporary administrator to avoid delay and prejudice in the pending action..." *Laroche v.*

Laroche, 162 A.D.3d 1000, 1002, 80 N.Y.S.3d 361 (2d Dept. 2018); *Kastrataj v. Blades*, 136 A.D.3d 756, 758, 28 N.Y.S.3d 689 (2d Dept. 2016).

Conclusion

Accordingly, plaintiffs' motion is denied.

This constitutes the Decision and Order of this Court.

For Clerks use only

MG__

MD__

Motion Seq.#: 12

E N T E R

J.S.C.

HON. GENINE D. EDWARDS