

Karas v Manhattan Diagnostic Radiology

2024 NY Slip Op 32720(U)

July 25, 2024

Supreme Court, New York County

Docket Number: Index No. 800001/2013

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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MURIEL KARAS,

Plaintiff,

- v -

MANHATTAN DIAGNOSTIC RADIOLOGY, L. DANIEL
NEISTADT, FLORISA CAPARROS, NADINE FLETCHER,
and DEBORAH DUROCHER,

Defendants.

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INDEX NO. 800001/2013

MOTION DATE 07/12/2024

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for DISMISSAL/X-MOTION DISMISSAL.

In this action to recover damages for medical malpractice, the attorneys for the deceased defendant, Deborah Durocher, move pursuant to CPLR 1021 to dismiss the complaint insofar as asserted against her for the plaintiff's failure to substitute a representative of Durocher's estate as a party defendant. In papers incorrectly denominated as notices of cross motion, the defendant L. Daniel Neistadt, and the defendant Florisa Caparros, each separately move to dismiss the complaint insofar as asserted against them on the same ground. The plaintiff opposes the motions. The motions are denied.

The plaintiff commenced this action on January 28, 2013. On April 30, 2022, Durocher died, and, in an order dated October 11, 2022, this court memorialized the automatic stay of proceedings imposed by operation of law retroactive to the date of Durocher's death. No party has yet moved to substitute a representative of Durocher's estate in her place. Rather, the attorneys assigned by her insurer to represent her made the instant motion to dismiss the complaint insofar as asserted against her.

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).

CPLR 1021 requires that a motion to dismiss for failure to substitute a representative of a deceased party’s estate may only be made where substitution was not made “within a reasonable time” after the decedent’s death.

“Although the determination of a motion pursuant to CPLR 1021 made by the successors or representatives of a party or by any party is an exception to a court’s lack of jurisdiction, here, one of the motions pursuant to CPLR 1021 was made by the former attorney for the decedent purportedly on behalf of the decedent. Since the former attorney lacked the authority to act, the Supreme Court lack[s] jurisdiction to consider that motion to dismiss”

(*Vicari v Kleinwaks*, 157 AD3d 975, 977 [2d Dept 2018]; see *Vapnersh v Tabak*, 131 AD3d 472, 474 [2d Dept 2015]; *Lewis v Kessler*, 12 AD3d 421, 422 [2d Dept 2004]). Hence, the motion made on behalf of Durocher must be denied on that ground. In any event, Durocher’s former attorneys made the instant motion only 20 months after Durocher’s death, and the court

concludes that this interval did not constitute a reasonable time after her death to warrant dismissal (*see Dugger v Conrad*, 189 AD3d 478, 479-480 [1st Dept 2020]; *Tokar v Weissberg*, 163 AD3d 1031, 1032-1033 [2d Dept 2018]).

Neither Neistadt's nor Kaparros's application constituted a proper cross motion because the applications did not seek relief against a moving party; instead, their requests for relief were, in effect, separate motions seeking relief against a nonmoving party (*see* CPLR 2215; *Asiedu v Lieberman*, 142 AD3d 858, 858 [1st Dept 2016]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]; *Guzetti v City of New York*, 32 AD3d 234 [1st Dept 2006]; *Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986 [2d Dept 2005]; *Sheehan v Marshall*, 9 AD3d 403, 404 [2d Dept 2004]; *Lucheux v William Macklowe Co., LLC*, 2017 NY Slip Op 31044[U], 2017 NY Misc LEXIS 187 [Sup Ct, N.Y. County, May 11, 2017]). CPLR 2214(b) requires such a separate motion to be made on at least eight days' notice. The mislabeling of a motion as a cross motion, however, may be treated as a "technical" defect to be disregarded, particularly where the nonmoving party does not object and the consideration of the application results in no prejudice to the nonmoving party (*see Sheehan v Marshall*, 9 AD3d at 404), and where, as here, the moving parties made their applications more than eight days prior to the return date, thus giving the plaintiff ample opportunity to be heard on the merits (*see Daramboukas v Samlidis*, 84 AD3d 719, 721 [2d Dept 2011]; *Matter of Jordan v City of New York*, 38 AD3d 336, 338 [1st Dept 2007]; *Della-Mura v White Plains Hosp. Med. Ctr.*, 2022 NY Slip Op 31085[U], *3, 2022 NY Misc LEXIS 1697, *3-4 [Sup Ct, N.Y. County, Mar. 31, 2022] [Kelley, J.]).

Nonetheless, although Neistadt's and Kaparros's "cross motions" may be considered as properly noticed separate motions (*see Matter of Jordan v City of New York*, 38 AD3d at 338), they must be denied on the merits in any event. Although this court has jurisdiction to consider Neistadt's and Kaparros's separate motions to dismiss the complaint pursuant to CPLR 1021, that statute "d[oes] not authorize dismissal of the complaint as against any of the other defendants" apart from Durocher, the deceased defendant (*Vicari v Kleinwaks*, 157 AD3d at

977-978). In this regard, CPLR 1021 provides, in pertinent part, that “[i]f the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed *as to the party for whom substitution should have been made*, however, such dismissal shall not be on the merits unless the court shall so indicate” (emphasis added; see *Vicari v Kleinwaks*, 157 AD3d at 977; *Terpis v Regal Hgts. Rehabilitation & Health Care Ctr., Inc.*, 108 AD3d 618, 619 [2d Dept 2013]; *Borruso v New York Methodist Hosp.*, 84 AD3d 1293, 1294 [2d Dept 2011]). CPLR 1021 also provides, in pertinent part, that “if the event requiring substitution is the death of a party, and timely substitution has not been made, the court, before proceeding further, shall, on such notice as it may in its discretion direct, order the persons interested in the decedent’s estate to show cause why the action or appeal should not be dismissed.” “The latter provision is intended to provide special protection for the estate of a deceased plaintiff where the opponent seeks dismissal of the action based on the estate’s failure to make timely substitution” (*Vicari v Kleinwaks*, 157 AD3d at 977; see Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR C1021:2). It is not intended to provide non-deceased defendants with the opportunity to dismiss the complaint insofar as asserted them against where there has been no substitution of a deceased co-defendant (see *Vicari v Kleinwaks*, 157 AD3d at 977-978). Hence, Neistadt’s and Kaparros’s motions must be denied.

The court thus directs the parties to take all necessary steps forthwith to substitute a representative of Durocher’s estate. In this regard, however, the court notes that “[t]he 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 Durocher’s estate (see *Lambert v Estren*, 126 AD3d 942, 944 [2d Dept 2015]; *Harding v Noble Taxi, Inc.*, 155 AD2d at 266; *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 at 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]). Moreover, where, as here, Durocher's insurer is the real party in interest to the underlying dispute, it may be appropriate to appoint, as the temporary administrator, an attorney assigned by her insurer to defend her (*see Batan v Schmerler*, 155 Misc 2d at 47; *see also Bair v Windsor*, 2023 NY Slip Op 32999[U], *3, 2023 NY Misc LEXIS 4824, *5 [Sup Ct, N.Y. County, Aug. 29, 2023] [Kelley, J.]; *Fahey v Zissis*, 2023 NY Slip Op 23152, 2023 NY Misc LEXIS 2367 [Sup Ct, Bronx County, May 16, 2023]; *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]; *see generally George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA*, 92 AD3d 104, 118 [1st Dept 2012] [explaining circumstances in which insurer becomes real party in interest]).

If the parties cannot secure the appointment of a representative of Durocher's estate within a reasonable time, the court would be amenable to entertaining a motion to appoint Durocher's former attorney as temporary administrator of her estate, with any recovery limited to the limits of her insurance policy.

In light of the foregoing, it is,

ORDERED that the motion purportedly made on behalf of the deceased defendant Deborah Durocher is denied; and it is further,

ORDERED that the separate motion of the defendant L. Daniel Neistadt, incorrectly denominated as a cross motion, is denied; and it is further,

ORDERED that the separate motion of the defendant Florisa Caparros, incorrectly denominated as a cross motion, is denied; and it is further,

ORDERED that the remaining parties shall forthwith take all reasonable steps to secure the appointment of a representative of the estate of Deborah Durocher and thereupon move to substitute that representative as a party defendant in this action.

This constitutes the Decision and Order of the court.

JOHN J. KELLEY, J.S.C.

7/25/2024
DATE

MOTION 1:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
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CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
MOTION 2:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
APPLICATION:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
MOTION 3:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
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