

Peralta v Mandigo

2024 NY Slip Op 33837(U)

October 11, 2024

Supreme Court, New York County

Docket Number: Index No. 805452/2017

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

ANNA PERALTA, as Temporary Guardian of JULIO PERALTA, an alleged incapacitated person,

Plaintiff,

INDEX NO. 805452/2017

MOTION DATE 06/11/2024

MOTION SEQ. NO. 001

- v -

CHRISTOPHER MANDIGO, M.D., ANIS DIZDAREVIC, M.D., WILLIAM TURNER, M.D., and THE NEW YORK AND PRESBYTERIAN HOSPITAL,

Defendants.

DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for DISMISS.

This is an action to recover damages for medical malpractice, arising from treatment rendered by the defendants to the plaintiff's former ward, Julio Peralta (hereinafter the patient). The defendants Anis Dizdarevic, M.D., William Turner, M.D., and The New York and Presbyterian Hospital (collectively the NYPH defendants) move pursuant to CPLR 1021 to dismiss the complaint insofar as asserted against them for the failure timely to substitute a representative of the patient's estate upon the patient's death. The plaintiff Anna Peralta, who had been appointed as the patient's temporary guardian when she commenced this action on his behalf, opposes the motion. The motion is denied.

The patient died on June 12, 2021, the plaintiff's attorney notified the court of his death on July 1, 2021, and the court issued an order memorializing the stay on July 6, 2021. 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 generally is 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 upon the party's death (see *Perez v City of New York*, 95 AD3d at 677). Nor can the parties "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).

To pursue this action, a representative of the patient's estate thus was required to be appointed as executor or administrator of the patient's estate by the appropriate Surrogate's Court, and thereafter move for leave to substitute himself or herself as the plaintiff in place of the patient. The plaintiff, as the patient's daughter, is one of the most likely persons to have sought to be appointed administrator of the patient's estate. Nonetheless, due to mistrust and enmity between the plaintiff, her siblings, her mother---who was the patient's estranged wife--- and the patient's girlfriend, with whom he resided at the time of his death, those persons were unable to agree as to who should act as the administrator of the patient's estate. This caused delay, as informal agreements amongst these persons as to how to proceed first were reached, and then rescinded. The plaintiff's attorneys now report, however, that the interested parties finally agreed to permit the plaintiff to petition the Surrogate's Court for letters of administration and, as of several months ago, counsel was already "awaiting the return of the executed citations" from the plaintiff's siblings so that they "may proceed with the Surrogate's proceeding."

The NYPH defendants made the instant motion on April 2, 2024 (see CPLR 2211), several months shy of three years after the patient's death.

CPLR 1021 provides, in relevant part, that

“A motion for substitution may be made by the successors or representatives of a party or by any party. If a person who should be substituted does not appear voluntarily he may be made a party defendant. If 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.”

The issue of what constitutes a reasonable time depends on the circumstances of the case (see *Randall v Two Bridges Assoc. Ltd. Partnership*, 139 AD3d 435 [1st Dept 2016]), including the diligence of the party who will ultimately seek substitution, the prejudice to the other parties, and whether the party who eventually will be substituted has shown that the action has potential merit (see *Green v Maimonides Med. Ctr.*, 172 AD3d 824, 826 [2d Dept 2019]).

Since a proceeding has been commenced in the Surrogate’s Court, pursuant to which the plaintiff is seeking to be appointed as the administrator of the patient’s estate, and because the plaintiff has submitted affidavit of merit submitted in opposition to the motion by emergency medicine specialist W. Clark Connell, M.D., the NYPH defendants’ motion must be denied as premature (see *Dugger v Conrad*, 189 AD3d 478, 479-480 [1st Dept 2020] [where defendant waited only 16 months before moving to dismiss, and counsel for deceased plaintiff was attempting to have the Public Administrator substituted as plaintiff, request for dismissal was premature]; *Tokar v Weissberg*, 163 AD3d 1031, 1032-1033 [2d Dept 2018] [lapse of 2½ years between decedent’s death and defendant’s submission of motion to dismiss under CPLR 1021 is insufficient to support defendant’s contention that substitution had not been made within a reasonable time, particularly where the case revolved around medical records already in defendant’s possession]).

Accordingly, it is,

ORDERED that, on the court’s own motion, the automatic stay of proceedings imposed by virtue of the death of Julio Peralta is vacated for the limited purpose of hearing and determining this motion, and otherwise remains in full force and effect; and it is further,

ORDERED that the motion is denied.

This constitutes the Decision and Order of the court.

10/11/2024
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE