

Attinello v Gaudino

2025 NY Slip Op 32622(U)

July 2, 2025

Supreme Court, New York County

Docket Number: Index No. 805102/2020

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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JAMES ATTINELLO,

Plaintiff,

- v -

MARIO F.L. GAUDINO, M.D., THE NEW YORK AND
PRESBYTERIAN HOSPITAL, and WEILL CORNELL
MEDICAL CENTER,

Defendants.

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INDEX NO. 805102/2020

MOTION DATE 04/17/2025

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for DISMISSAL/X-MOTION LIFT STAY-SUBSTITUTE ADMINISTRATOR-AMEND CAPTION.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, lack of informed consent, and negligent hiring, training, supervision, and retention of health-care personnel, the defendants move pursuant to CPLR 1021 to dissolve the stay imposed by operation of law upon the September 2, 2022 death of the plaintiff, James Attinello (the decedent), and thereupon to dismiss the complaint on the ground that no timely motion has been made to substitute a representative of the decedent's estate in place and instead of the decedent in this action. They also seek dismissal pursuant to CPLR 3211(a)(3), alleging that the decedent lacks capacity to prosecute the action. Christopher James Attinello, as ancillary administrator of the decedent's estate, opposes the motion, and cross-moves pursuant to CPLR 1015 and 1021 to substitute himself as a party plaintiff in place and instead of 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 defendants oppose the cross motion. The defendants' motion is denied, the cross motion is granted, the stay is vacated and dissolved, Christopher James Attinello, as

ancillary administrator of the decedent's estate, is substituted as the plaintiff in place and instead of the decedent, and the caption is amended accordingly.

On May 25, 2020, the decedent commenced this action. On September 2, 2022, the decedent died. In an order dated September 29, 2022, the court memorialized the consequent automatic stay of proceedings. On May 31, 2023, the Court of Common Pleas of the Commonwealth of Pennsylvania, Northampton County, issued letters of administration to Christopher James Attinello, and thereupon appointed him as the administrator of the decedent's estate. On September 29, 2023, Christopher James Attinello petitioned the Surrogate's Court, New York County, for ancillary letters of administration, which were not issued until January 7, 2025. On March 25, 2025, the defendants made the instant motion, while Christopher James Attinello made his cross motion on May 9, 2025 (see CPLR 2211).

All proceedings in this action were automatically stayed by operation of law on the date of the decedent's death, pending substitution of a representative of his estate (see *Perez v City of New York*, 95 AD3d 675, 677 [1st Dept 2012]), and any determination rendered or proceedings held without such a substitution generally will be deemed a nullity (see *Griffin v Manning*, 36 AD3d 530, 532 [1st Dept 2007]; *Stancu v Cheon Hyang Oh*, 74 AD3d 1322, 1322-1323 [2d Dept 2010]). Nonetheless, "determinations . . . pursuant to CPLR 1021 are a necessary exception to the general rule, and the court does not lack jurisdiction to consider such a motion" (*Medlock v Dr. William O. Benenson Rehabilitation Pavilion*, 167 AD3d 994, 995 [2d Dept 2018]; see *Lee v Leeds, Morelli & Brown, P.C.*, 233 AD3d 1072, 1076 [2d Dept 2024]; *Barnabas v Boodoo*, 134 AD3d 970, 972 [2d Dept 2015]; *Vapnersh v Tabak*, 131 AD3d 472, 474 [2d Dept 2015]). As relevant here, CPLR 1021 provides 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 court “may not order dismissal for such failure without first ordering the persons interested in the decedent’s estate to show cause why the action should not be dismissed” (*Petty v Meadowbrook Distributing Corp.*, 266 AD2d 88, 88 [1st Dept 1999]; see *Velez v New York Presbyterian Hosp.*, 145 AD3d 632, 633 [1st Dept 2016]). Here, the court directed those persons to show cause why the action should not be dismissed, and the defendants properly served those persons with the order to show cause and supporting papers.

The issue of what constitutes a “reasonable time” within the meaning of CPLR 1021 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]). The defendants here waited approximately 2½ years after the decedent’s death to make the instant motion, while Christopher James Attinello waited just shy of 2 years after his appointment as administrator in Pennsylvania, but only months after his appointment in New York as ancillary administrator, to seek substitution.

The court concludes that the defendants have not established, under the circumstances of this case, that they waited a “reasonable” time before moving to dismiss the complaint, or that there has been a “protracted” delay on the part of the decedent’s next of kin in seeking substitution, let alone that they would be prejudiced by the substitution sought here (see *Dugger v Conrad*, 189 AD3d 478, 479-480 [1st Dept 2020]; *Petion v New York City Health & Hosps. Corp.*, 175 AD3d 519, 520 [2d Dept 2019] [lapse of almost five years between plaintiff’s death and appointment of representative of plaintiff’s estate, and additional lapse of one more year before representative moved to be substituted, was insufficient to support defendant’s cross motion to dismiss complaint pursuant to CPLR 1021, where it could not demonstrate prejudice]; *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, as here, the case revolved around medical records already in defendant's possession]; see also *Lee v Leeds, Morelli & Brown, P.C.*, 233 AD3d at 1076-1077 [despite the fact that the record did not establish diligence in seeking substitution, "there has been no prejudice to the defendants"] cf. *Kelly v St. Francis Hosp.*, 100 AD3d 707, 708 [2d Dept 2012] [affirming dismissal of complaint where no attempt at substitution was made during the three years following the plaintiff's death]; *Palmer v Selpan Elec. Co.*, 5 AD3d 248, 248 [1st Dept 2004] [dismissing complaint where no substitution had been effectuated for more than four years after the decedent's death]). The defendants' remaining contentions are without merit. Hence, the defendants' motion must be denied.

It is well settled that, where an administrator or executor is appointed as a representative of the estate of a decedent who was a 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]). Christopher James Attinello has submitted sufficient proof of his due appointment as administrator and ancillary administrator of the decedent's estate. Hence, his cross motion must be granted.

Accordingly, it is,

ORDERED that the defendants' motion to dismiss the complaint is denied; and it is further,

ORDERED that the cross motion of Christopher James Attinello is granted, the automatic stay of proceedings imposed by operation of law upon the death of his decedent, James Attinello, on September 2, 2022, is vacated and dissolved, and Christopher James Attinello, as ancillary administrator of the estate of James Attinello, is substituted as a party plaintiff in place and instead of James Attinello; and it is further,

ORDERED that the caption of the action is amended to read as follows:

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**CHRISTOPHER JAMES ATTINELLO, as Ancillary
Administrator of the Estate of JAMES ATTINELLO, Deceased,**

Plaintiff,

v

**MARIO F.L. GAUDINO, M.D., THE NEW YORK AND
PRESBYTERIAN HOSPITAL, and WEILL CORNELL
MEDICAL CENTER,**

Defendants.

-----X;
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 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.

JOHN J. KELLEY, J.S.C.

7/2/2025
DATE

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