

**Salam v Chowdhury**

2025 NY Slip Op 35373(U)

January 23, 2025

Supreme Court, Bronx County

Docket Number: Index No. 803582/2022E

Judge: Michael A. Frishman

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.

NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 34

-----X  
ABDUS SALAM and FETEMA BEGUM,

Index №. 803582/2022E

Plaintiff(s),

- against -

Hon. Michael A. Frishman  
Justice of the Supreme Court

ATAUL HAKIM CHOWDHURY, M.D., AMMAR  
TAHA, M.D., NYCDOS and SARLING  
DIAGNOSTICS, L.L.C. d/b/a STARLING  
DIAGNOSTICS & IMAGING CENTER,

Defendant(s).

-----X

The following papers numbered 18 – 25, 28 – 30; 32 – 36, and 39 were read on this motion to dismiss (**Seq. No. 1**)

Sequence No. 1	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	18 – 25
Cross Motion – Exhibits and Affidavits Annexed	28 – 30; 32 – 36
Answering Affidavit and Exhibits, Memorandum of Law	39
Reply Affidavit	

Upon deliberation of the application duly made by defendant, AMMAR TAHA, M.D. (hereinafter “Dr. Taha”), by **NOTICE OF MOTION**, for an Order dismissing plaintiff’s Complaint for failure to substitute within a reasonable time pursuant to CPLR §1021, is heretofore denied.

Upon deliberation of the application duly made by defendant, STARLING DIAGNOSTICS, L.L.C., by **NOTICE OF CROSS MOTION**, for an Order dismissing plaintiff’s Complaint for failure to substitute within a reasonable time pursuant to CPLR §1021, is heretofore denied.<sup>1</sup>

Upon deliberation of the application duly made by plaintiffs, ABDUS SALAM and FATEMA BEGUM, by **NOTICE OF CROSS MOTION**, for an Order: (1) amending plaintiff’s Complaint to assert a cause of action for the wrongful death pursuant to CPLR §3025; (2) substituting RUBAL SALAM as the Administrator of the Estate of ABDUS SALAM pursuant to CPLR §1015; (3) amending the caption to reflect said substitution; and (4) validating the proceedings heretofore conducted herewith<sup>2</sup>, is heretofore granted in part.

<sup>1</sup> “The rule is that a cross motion is an improper vehicle for seeking relief from a nonmoving party” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]). The cross motion by defendant STARLING DIAGNOSTICS is improper has plaintiff has not brought the initial application before the Court, therefore the papers will not be considered.

<sup>2</sup> The Court does not believe the relief requested to validate the proceeding is applicable to this type of action, therefore it is denied.

Pursuant to CPLR §1015, the death of a party stays the action pending the substitution of a legal representative, and the Court is divested of jurisdiction to act rendering any determination without such a substitution a nullity (CPLR §1015). A motion for substitution may be made by the successors or representatives of a party or by any party (*see* CPLR §1021). Although CPLR §1021 is an exception to this principle, the court must first obtain jurisdiction over the persons interested in the decedent's estate by serving them as prescribed in CPLR Article 3 (CPLR §1021; *Gonzalez v Ford Motor Co.*, 295 AD2d 474, 475 [2d Dept 2002]). Just as the death of a principal ordinarily revokes the authority of the agent, so the death of a party to an action revokes the power of the attorney (*Wisdom v Wisdom*, 111 AD2d 13, 14-15 [1st Dept. 1985]). Notice solely to the attorney previously representing the decedent is ineffective because the decedent's death revokes such attorney's authority to act (*Gonzalez* at 475).

In the instant action, persons interested in the decedent's estate were not provided notice of the defendant's motion to dismiss the Complaint pursuant to CPLR §1021. A review of the Notice of Motion submitted by defendant's counsel shows that they served decedent's attorney prior to his death. Furthermore, the statute requires a motion by Order to Show Cause (Vincent C. Alexander, *Prac Commentaries*, McKinney's Cons Law of NY, CPLR §1021:2); therefore, the defendant's motion to dismiss is denied.

Plaintiff cross moves to amend the Complaint to add a cause of action for wrongful death, substitute Rubal Salam, as the Administrator of the Estate of Abdul Salam, instead of Abdul Salam as plaintiff, and to amend the caption to reflect such substitution.

Leave to amend a pleading pursuant to CPLR §3025(b) should be freely granted, so long as there is no surprise or prejudice resulting from the delay to the opposing party and the proposed amendment is not palpably insufficient or patently devoid of merit (*Ferrer v Go New York Tours Inc.*, 221 AD3d 499 [1st Dept 2023]). Mere delay is insufficient to defeat a motion for leave to amend (*Sheppard v Blitman/Atlas Building Corp.*, 288AD2d 33, 34 [1st Dept 2001]). The type of prejudice necessary to warrant denial of the motion requires some indication that the [opposing party] has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position (*Tri-Tec Design, Inc. v Zatek Corp.*, 123 AD3d 420 [1st Dept 2014]). Whether to grant the amendment is committed to the court's discretion (*Heller v Louis Prevenzano, Inc.*, 303 AD2d 20, 22 [1st Dept 2003]).

Here, the plaintiff's expert affirmation "laid out with exactitude that the same departures supporting decedent's claims for medical malpractice precipitated [his] untimely death" (*Gambles v Davis*, 32 AD 3d 224, 226 [1st Dept 2006]). Moreover, this case is in early stages of pretrial discovery, and plaintiffs have not yet been afforded access to certain evidence necessary to prove their allegations of malpractice (*id.*), therefore the portion of the motion seeking to add a wrongful death claim is granted.

Moving defendant states they have been prejudiced by plaintiff's failure to make Dr. Taha aware of the claims against him, however, the First Department has ruled dismissal is warranted where [a] representative [hasn't] been substituted seven years following the death of decedent (*Washington v Min Chung Hwan*, 20 AD3d 303, 305 [1st Dept 2005]). Decedent's administrator was appointed less than a year after his death and is moving to be substituted two years following his death. The Court does not believe moving defendant has made a showing of prejudice that would warrant denial

of plaintiff's motion for substitution; therefore, the portion of the motion seeking to substitute plaintiff and amend the caption is granted.

Accordingly, it is hereby

ORDERED that the motion by defendant, AMMAR TAHA, M.D., to dismiss plaintiff's Complaint for failure to substitute within a reasonable time pursuant to CPLR §1021, is heretofore denied; and it is further

ORDERED that the cross-motion by defendant, STARLING DIAGNOSTICS, L.L.C., to dismiss plaintiff's Complaint for failure to substitute within a reasonable time pursuant to CPLR §1021, is heretofore denied; and it is further

ORDERED that the cross-motion by plaintiffs, ABDUS SALAM and FATEMA BEGUM, to: (1) amend plaintiff's Complaint to assert a cause of action for the wrongful death pursuant to CPLR §3025; (2) substitute RUBAL SALAM as the Administrator of the Estate of ABDUS SALAM pursuant to CPLR §1015; (3) amend the caption to reflect said substitution; and (4) validate the proceedings heretofore conducted herewith, is heretofore granted in part; and it is further

ORDERED that the Amended Summons and Complaint is deemed served upon defendants with the electronic filing and service of the motion; and it is further

[this portion of the motion is intentionally left blank]

ORDERED that the caption of the matter shall now read:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

-----X  
RUBAL SALAM as the Administrator of the Estate of  
ABDUS SALAM and FETEMA BEGUM,

Index No. 803582/2022E

Plaintiff(s),

- against -

ATAUL HAKIM CHOWDHURY, M.D., AMMAR  
TAHA, M.D., NYCDOS and SARLING DIAGNOSTICS,  
L.L.C. d/b/a STARLING DIAGNOSTICS & IMAGING  
CENTER,

Defendant(s).


-----X

ORDERED that this matter is scheduled for a preliminary conference on Feb 24, 2025 at 9:30 am in Room 705 of Supreme Court, Bronx County, Civil Division, located at 851 Grand Concourse, Bronx, NY 10451; and it is further

ORDERED that counsel for defendant, AMMAR TAHA, M.D., shall serve a copy of this Decision with Notice of Entry by first class mail within twenty (20) days of its entry.

This constitutes the Decision and Order of the Court.

Dated: 1/23/25

Hon.   
MICHAEL A. FRISHMAN, J.S.C.

- 1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY  CASE STILL ACTIVE
- 2. MOTION IS.....  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE.....  SETTLE ORDER  SUBMIT ORDER