

Sragow v Jaffin

2024 NY Slip Op 34435(U)

December 6, 2024

Supreme Court, New York County

Docket Number: Index No. 805279/2019

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. JOHN J. KELLEY</u>	PART	56M
	<i>Justice</i>		
-----X		INDEX NO.	<u>805279/2019</u>
ELLEN SRAGOW and ALPHONSE VAN WOERKOM,		MOTION DATE	<u>10/01/2024</u>
Plaintiffs,		MOTION SEQ. NO.	<u>006</u>

- v -

BARRY JAFFIN, M.D., CARNEGIE HILL ENDOSCOPY GROUP, ELAN LEVY, M.D., MIRTHA MACRI, D.O., ALYSSA GAMBINO, R.N., NORTHWELL HEALTH-LENOX HEALTH GREENWICH VILLAGE, JOHN DOES & MARY DOES, M.D., R.N., L.P.N., N.P., etc. I-X, ABC CORPORATION, I-X, and XYZ PARTNERSHIP I-X, heretofore unknown defendants,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In this action to recover damages for medical malpractice, Alphonse van Woerkom, as the executor of the estate of the deceased plaintiff, Ellen Sragow, moves pursuant to CPLR 1015 and 1021 to be substituted as a party plaintiff in place and instead of Sragow, to vacate the automatic stay of proceedings imposed by operation of law upon Sragow's death, pursuant to CPLR 305(c) for leave to amend the caption accordingly, and pursuant to CPLR 3025(b) for leave to amend the complaint accordingly, to add a wrongful death cause of action, and purportedly to reinstate causes of action against the defendant Alyssa Gambino, R.N. The defendant Barry Jaffin M.D., and the defendant Carnegie Hill Endoscopy Group separately oppose so much of the motion as seeks to amend the complaint to add a wrongful death cause of action, and the defendants Elan Levy, M.D., Mirtha Macri, D.O., Alyssa Gambino, R.N., and Northwell Health-Lenox Health Greenwich Village (collectively the Northwell defendants) separately oppose the entirety of the motion. The motion is granted to the extent that the stay is

lifted, the plaintiff Alphonse van Woerkom is substituted as the plaintiff in place and instead of Sragow, the caption and complaint are amended to reflect the substitution, and the plaintiff is permitted to serve and file an amended complaint reflecting the substitution. The plaintiff's motion is otherwise denied, and the complaint may not be amended to reinstate claims against Gambino or to add a wrongful death cause of action, although the denial is without prejudice to renewal upon proper papers with respect to adding a wrongful death cause of action.

On August 23, 2019, the plaintiff Ellen Sragow commenced this action to recover damages for medical malpractice arising from care and treatment rendered to her by the defendants, with her husband, van Woerkom, asserting a cause of action to recover for loss of consortium. Between April 8, 2021 and February 8, 2023, the court issued a series of case management orders. On July 27, 2023, the plaintiffs served and filed a note of issue and certificate of readiness. April 20, 2024, Sragow died, and all proceedings in this action thus automatically were stayed by operation of law on that date (*see Perez v City of New York*, 95 AD3d 675, 677 [1st Dept 2012]). On or about May 15, 2024, the plaintiffs' attorneys informed the court of Sragow's death and, in an order dated May 15, 2024, the court memorialized the automatic stay of proceedings imposed by operation of law retroactive to the date of her death. Pursuant to two separate so-ordered stipulations, both dated April 19, 2024, and, thus, prior to Sragow's death, the plaintiffs discontinued the action against Macri and Gambino, respectively.

On August 7, 2024, the Surrogate's Court, New York County, issued letters testamentary to van Woerkom, and appointed him as the executor of Sragow's estate, thus permitting him to prosecute this action. He now moves to be substituted in this action as party plaintiff in place of Sragow, to vacate the automatic stay, for leave to amend the caption and complaint accordingly, and for leave to serve and file an amended complaint asserting a wrongful death cause of action and purportedly asserting and reinstating all discontinued causes of action against Gambino.

It is well settled that, where an administrator or executor is appointed as the representative of the estate of a decedent who was the 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]). Contrary to the Northwell defendants' contention, van Woerkom may make the instant motion, and the court has the authority to entertain it.

"CPLR 1021 provides, in part, that '[a] motion for substitution may be made by the successors or representatives of a party or by any party.' Although a determination rendered without such substitution will generally be deemed a nullity, determinations regarding substitution 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 *Barnabas v Boodoo*, 134 AD3d 970, 972 [2d Dept 2015]; *Vapnersh v Tabak*, 131 AD3d 472, 474 [2d Dept 2015]). Van Woerkom has submitted sufficient proof that he has been duly appointed as the executor of Sragow's estate. Hence, those branches of his motion seeking to be substituted as party plaintiff, to vacate the stay, and to amend the caption and complaint accordingly must be granted. Moreover, upon substitution, the court is not barred from considering any request made by van Woerkom for substantive relief, including his request to add a wrongful death cause of action (see *Barnabas v Boodoo*, 134 AD3d at 972 [upon granting a substitution motion by the representative of a deceased defendant's estate, court may consider the representative's simultaneous motion seeking to vacate an order that permitted the plaintiffs to discontinue a prior related action]). Nonetheless, the court is constrained to deny that branch of van Woerkom's motion seeking leave to serve an amended complaint adding a wrongful death cause of action.

Leave to amend a pleading is to be freely given absent prejudice or surprise resulting from the amendment (see CPLR 3025[b]; *McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp.*, 59 NY2d 755, 757 [1983]; *360 West 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552, 553 [1st Dept 2011]; *Smith-Hoy v AMC Prop. Evaluations, Inc.*, 52 AD3d 809, 811 [1st Dept 2008]; *Daniels v Kromo Lenox Assoc.*, 275 AD2d 608, 608 [1st Dept 2000]; *Bellini v Gesalle Realty Corp.*, 120 AD2d 345, 347 [1st Dept 1986]). Thus, leave to amend

should be granted unless the proposed amended pleading is “palpably insufficient or clearly devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; see *Hill v 2016 Realty Assoc.*, 42 AD3d 432 [2d Dept 2007]) or the amendment would prejudice the opposing party (*Blue Diamond Fuel Oil Corp. v Lev Mgt. Corp.*, 103 AD3d 675, 676 [2d Dept 2013]). Where a plaintiff moves for leave to amend a complaint so as to assert a wrongful death cause of action, and, as here, the two-year limitations period applicable to that wrongful death cause of action had yet to expire when the motion was made, the statute of limitations is tolled from the date that the motion papers are served until the entry of the order granting leave to amend (see *Vastola v Maer*, 48 AD2d 561 [2d Dept 1975], *affd* 39 NY2d 1019 [1976]). In its decision affirming the Appellate Division, the Court of Appeals in *Vastola* explained that, where a complaint is amended to add a wrongful death cause of action,

“even if the claim for wrongful death had been interposed more than two years after the death of the plaintiff’s [decedent], the claim would still have been timely since it would relate back, for limitations purposes, to the date of commencement of the personal injury action”

(*id.* at 1021). Stated another way, where the complaint in the pending action gives the defendants

“notice of the transactions, occurrences, or series of transactions or occurrences on which the wrongful death cause of action in the amended complaint was based, the wrongful death cause of action asserted in the amended complaint relates back to the original complaint and is deemed to have been timely interposed”

(*DeLuca v PSCH, Inc.*, 170 AD3d 800, 802 [2d Dept 2019] [internal quotation marks omitted]; see CPLR 203[f]; EPTL 11-3.3[b] [2]; *Caffaro v Trayna*, 35 NY2d 245, 250 [1974]; *Assevero v Hamilton & Church Props., LLC*, 154 AD3d 728 [2d Dept 2017]).

Nonetheless, where a plaintiff in a medical malpractice action dies, his or her representative thereafter is substituted as the plaintiff, and the representative seeks leave to amend the complaint to add a cause of action to recover for wrongful death, the motion “must be supported by competent medical proof of the causal connection between the alleged

malpractice and the death of the original plaintiff” (*Imperati v Lee*, 132 AD3d 591, 592 [1st Dept 2015], quoting *McGuire v Small*, 129 AD2d 429, 429 [1st Dept 1987]; see *Cruz v Brown*, 129 AD3d 455, 456 [1st Dept 2015]; *Katechis v Our Lady of Mercy Med. Ctr.*, 36 AD3d 514, 517 [1st Dept 2007]; *Leibowitz v Mt. Sinai Hosp.*, 296 AD2d 340, 341-342 [1st Dept 2002]; *Johnson v Goertz*, 2022 NY Slip Op 33516[U], *3, 2022 NY Misc LEXIS 10401, *4 [Sup Ct, N.Y. County, Oct. 11, 2022] [Kelley, J.]; cf. *Smith v Tyras*, 265 AD2d 217 [1st Dept 1999] [concluding that affidavit of physician in support of plaintiff’s motion for leave to amend was sufficient to establish a causal connection between defendant’s malpractice and decedent’s death]). Although the court recognizes that, in *Lucido v Mancuso* (49 AD3d 220 [2d Dept 2008]), the Appellate Division, Second Department, overruled years of precedent, and determined that no such medical proof is required on a motion for leave to add a wrongful death cause of action, this court is bound to adhere to the precedent established in the First Department (see *D’Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]), which continues to require such proof.

Inasmuch as the plaintiff did not submit any expert medical affirmation or affidavit demonstrating the causal connection between the defendants’ alleged malpractice and Sragow’s death, this court is constrained to deny that branch of van Woerkom’s motion which was for leave to amend the complaint to add a wrongful death cause of action, albeit without prejudice to renewal upon proper papers.

Moreover, inasmuch as the plaintiffs’ already have discontinued the action against Gambino, that branch of van Woerkom’s motion which was for leave to amend the complaint so as to reinstate or any claims against Gambino, or allege any new claims against her, must be denied as wekk.

Accordingly, it is,

ORDERED that the motion of the plaintiff Alphonse van Woerkom is granted to the extent that the automatic stay of proceedings imposed by operation of law on April 20, 2024, be, and hereby is, lifted, vacated, and dissolved, Alphonse van Woerkom, as executor of the estate

of Ellen Sragow is substituted as a party in place and instead of Ellen Sragow, and the complaint and caption are amended to read as follows:

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ALPHONSE VAN WOERKOM, as executor of the estate of ELLEN SRAGOW, deceased, and ALPHONSE VAN WOERKOM, individually,

Plaintiff,

v

BARRY JAFFIN, M.D., CARNEGIE HILL ENDOSCOPY GROUP, ELAN LEVY, M.D., LENOX HEALTH GREENWICH VILLAGE, A DIVISION OF LENOX HILL HOSPITAL, JOHN DOES & MARY DOES, M.D., R.N., L.P.N., N.P., etc. I-X, ABC CORPORATION, I-X, and XYZ PARTNERSHIP I-X, heretofore unknown defendants,

Defendants.

-----X,

and the motion is otherwise denied, without prejudice to renewal upon proper papers with respect to the that branch of the motion which sought leave to serve and file an amended complaint that added a wrongful death cause of action; and it is further,

ORDERED that, on or before January 15, 2025, the plaintiff shall serve and file an amended complaint which reflects the amended caption, which does not name Alyssa Gambino, R.N., as a party defendant, which does not include allegations against Alyssa Gambino, R.N., in any cause of action, and which does not include a wrongful death cause of action; 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 at <https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/Efil-protocol.pdf> ([nycourts.gov](https://www.nycourts.gov)), 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.

12/6/2024
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: