

EXHIBIT 10

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF [REDACTED]

-----X

[REDACTED]
Plaintiff,

NOTICE OF MOTION

Index No.: [REDACTED]

-against-

[REDACTED]
Defendant.
-----X

PLEASE TAKE NOTICE, that upon the annexed affirmation of WALTER OSUNA, duly affirmed on [REDACTED], together with the exhibits annexed thereto, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move before the Supreme Court, [REDACTED] in the [REDACTED] on the [REDACTED] at 9:30 a.m., or as soon thereafter as counsel may be heard, for an Order:

(1) Pursuant to CPLR §3025, granting the plaintiff's leave to amend the complaint to reflect a wrongful death cause of action in connection with the death of plaintiff's decedent [REDACTED] in the form annexed hereto as "Exhibit A";

(2) Substituting [REDACTED] as Administrator of the Estate of [REDACTED] as plaintiff in this matter pursuant to CPLR §§ 1015 and 1021;

(3) Amending the caption to reflect that [REDACTED] is now deceased and that [REDACTED] has been appointed as Administrator of her Estate;

(4) Deeming the Amended Complaint enclosed herein as "Exhibit A" served *nunc pro tunc*, or in the alternative, allow an Amended Complaint to be served on defendant's counsel;

- (5) Lifting the stay and placing this matter back to active status;
- (6) Compelling defendant to provide the outstanding discovery pursuant to CPLR §3124; and/or
- (7) Scheduling a Compliance Conference to set new dates for the completion of depositions and exchange of outstanding discovery;
- (8) Pursuant to CPLR § 2004 and 22 NYCRR §202.21(d) extending plaintiff's time to file a Note of Issue to permit the completion of discovery; and
- (9) For such other and further relief as to this Court seems just and proper.

PLEASE TAKE FURTHER NOTICE that answering affidavits, if any, are to be served at least seven days prior to the return date of this motion, pursuant to CPLR § 2214(b).

Dated: New York, New York

Respectfully submitted,

The Jacob D. Fuchsberg Law Firm, LLP
Attorneys for Plaintiff
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By: 
Walter Osuna

TO:



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF [REDACTED]

-----X
[REDACTED]

Plaintiff,

- against -

**AFFIRMATION
IN SUPPORT**

[REDACTED]
[REDACTED]

Index No.: [REDACTED]

Defendants.

-----X

WALTER OSUNA, an attorney duly admitted to practice law before the Courts of the State of New York affirms the following, upon information and belief, and with knowledge of the penalties of perjury:

1. I am an associate with The Jacob D. Fuchsberg Law Firm, LLP, attorneys for plaintiff. As such, I am fully familiar with the facts and circumstances of this case based upon a review of the files maintained by this office in the regular course of business.

2. This affirmation, together with all exhibits annexed to the moving papers hereto, is respectfully submitted in support of plaintiff's motion: (1) pursuant to CPLR §3025, for leave to amend the complaint to reflect a wrongful death cause of action in connection with the death of plaintiff's decedent [REDACTED]; (2) to substitute [REDACTED], as Administrator of the Estate of [REDACTED], as plaintiff in this matter; (3) to amend the caption to reflect that [REDACTED] is now deceased and that [REDACTED] has been appointed as Administrator of her Estate pursuant to CPLR §§ 1015 and 1021; (4) to deem the amended complaint enclosed as "Exhibit A" served *nunc pro tunc*, or in the alternative, allow an Amended Complaint to be served on defendant's counsel; (5) Lifting the stay and placing this

matter back to active status; (6) Compelling defendant to provide the outstanding discovery pursuant to CPLR §3124; and/or (7) scheduling a Compliance Conference to set new dates for the completion of depositions and exchange of outstanding discovery; (8) pursuant to CPLR § 2004 and 22 NYCRR §202.21(d) extending plaintiff's time to file a Note of Issue to permit the completion of discovery; and (9) for such other and further relief as to this Court seems just and proper.

**PROCEDURAL HISTORY &
STATEMENT OF FACTS**

3. This negligence and medical malpractice action arises out of the failure of defendant [REDACTED] (hereinafter "Defendant") to prevent the development and progression of plaintiff's decedent [REDACTED]'s multiple pressure ulcers, while he was a resident of [REDACTED] from on or about March 3, 2016 through on or about March 24, 2016. During his residency, plaintiff's decedent developed ulcers on his sacrum, left hip, right hip, ear and neck.

4. This action was commenced on [REDACTED] with the filing of a Summons and Complaint. A copy of the Summons and Complaint is attached herein as "**Exhibit B**".

5. Defendant [REDACTED] served an Answer on or about [REDACTED] (see enclosed as "**Exhibit C**" Defendant's Answer).

6. On [REDACTED] plaintiff filed an Order to Show Cause requesting that plaintiff's daughter, [REDACTED] be appointed Guardian Ad Litem and for the caption to be amended accordingly. On [REDACTED] the Order to Show Cause was granted without opposition. See annexed hereto as "**Exhibit D**".

7. On [REDACTED] Preliminary Conference was held in this action which, *inter alia*, directed defendant to provide within 30 days [REDACTED] the following: (1) Index/Table of Contents for the Rules and Regulations of the nursing home; (2) Identify employment status (or last known address if no longer employed) of individuals whose signatures, initials or otherwise are marked by plaintiff on a copy of the nursing home record including [REDACTED]; (3) Copies of any statements of plaintiff in defendant's possession; (4) Respond to plaintiff's combined demands dated [REDACTED]; (5) Respond to Demand for BP on Affirmative Defense dated [REDACTED]; (6) Respond to plaintiff's Notice for Discovery and Inspection for policies and staffing documents dated [REDACTED]; (7) Respond to plaintiff's Notice for Discovery and Inspection of patients documents dated [REDACTED]; and (8) Respond for plaintiff's demand for electronically stored information dated [REDACTED]. The deposition of plaintiff [REDACTED] and defendant were to be completed respectively on [REDACTED] and [REDACTED]. Furthermore, a Compliance Conference was to be held on [REDACTED] and plaintiff was to file the Note of Issue by [REDACTED]. See a copy of the Preliminary Conference Order attached as "Exhibit E" hereto.

8. Defendant did not provide the aforementioned discovery by the [REDACTED] date.

9. On [REDACTED] [REDACTED] unfortunately died at [REDACTED], which automatically stayed the case until a representative of his estate was appointed and substituted for the decedent (see *Gonzalez v. Ford Motor Co.*, 295 AD2d 474, 744 NYS2d 468 [2d Dept 2002]). A copy of the Death Certificate is attached as "Exhibit F".

10. On or about [REDACTED] the Surrogate's Court of [REDACTED] issued Letters of Administration to [REDACTED], the daughter of [REDACTED]. See Letters of Administration, attached as "Exhibit G".

11. Plaintiff's counsel contacted defendant's counsel and attempted in good faith to obtain a stipulation from opposing counsel to amend the complaint to avoid the necessity to request judicial intervention and avoid wasting judicial resources.

12. However, defense counsel declined to stipulate to amend the complaint despite plaintiff being within the statutory time to bring a cause of action for medical malpractice, nursing home neglect under New York Public Health Law, and wrongful death.

13. Consequently, plaintiff now seeks leave to amend the complaint and caption to reflect that [REDACTED] is now deceased and that [REDACTED] has been appointed as Administrator of his Estate, to substitute [REDACTED] as Administrator of the Estate of [REDACTED] as plaintiff in this matter, and to include a wrongful death cause of action in connection with the death of plaintiff's decedent [REDACTED].

ARGUMENT

I. PLAINTIFF SHOULD BE GRANTED LEAVE TO AMEND THE COMPLAINT AND THE CAPTION SHOULD REFLECT THE CHANGE IN PARTIES

14. Pursuant to CPLR §3025(b), absent prejudice to the defendant, "a party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." Thus, absent prejudice or surprise resulting directly from the delay, "[l]eave to amend the pleadings 'shall be freely given.'" Kiaer v. Gilligan, 63 A.D.3d 1009, 883 N.Y.S.2d 224 (2d Dep't 2009); quoting, N.Y. C.P.L.R. 3025(b); Lucido v. Mancuso, 49 A.D.3d 220, 222, 851 N.Y.S.2d 238 (2d Dep't 2008);

see also McCaskey, Davies and Assocs., Inc. v. New York City Health & Hosps. Corp., 59 N.Y.2d 755,757 (1983).

15. Furthermore, CPLR 1015[a] provides that “if a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties.” “[A] motion for substitution may be made by the successors or representatives of a party or by any party”. CPLR §1021.

16. In the instant case, plaintiff [REDACTED] passed away on [REDACTED], [REDACTED] and Letters of Administration were obtained on [REDACTED]. Thus, plaintiff seeks to amend the complaint to reflect the appointment of [REDACTED] as Administrator of [REDACTED] Estate pursuant to CPLR §§ 1015 and 1021, and to include a cause of action for wrongful death.

17. Moreover, plaintiff is still within the statutory period to be able to bring causes of action for medical malpractice, nursing home neglect, and wrongful death against Defendants arising from the multiple ulcers [REDACTED] developed while he was a resident at defendant [REDACTED] facility.

18. Specifically, the two-year statute of limitations for wrongful death, the additional cause of action in the amended complaint, does not expire until September 11, 2019 (see EPTL § 5-4.1). It is alleged *inter alia* that as the result of defendant’s negligence, including allowing multiple pressure ulcers to develop and progress, [REDACTED] medical condition deteriorated and significantly worsened, which ultimately caused and/or contributed to his death. According to the Department of Health and Mental Hygiene medical report plaintiff’s decedent’s immediate cause of death was severe sepsis. Infections in the blood, such as sepsis are a common complication of decubitus ulcers as these wounds function as an entryway for infection to the

body. Pursuant to [REDACTED] medical records, as of September 8, 2017, for instance, plaintiff's decedent's [REDACTED] still had multiple pressure ulcers. See "Exhibit H".

19. Moreover, Defendant will suffer no prejudice as a result of allowing plaintiff to make the proposed amendments. "Prejudice...requires some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." *Cherebin v. Empress Ambulance Service, Inc.*, 43 A.D.3d 364; 841 N.Y.S.2d 277 (1st Dept. 2007); *Loomis v. Civetta Corrino Const. Corp.*, 54 N.Y.2d 18, 23; 444 N.Y.S.2d 571 (1981); *Abdelnabi v. NYCTA*, 273 A.D.2d 114, 115; 709 N.Y.S.2d 548 (1st Dept. 2000), which did not occur in this case.

20. Thus, Defendants cannot claim any insufficiency, lack of merit, or prejudice they would suffer if plaintiff were granted leave to file the proposed amended complaint annexed herein as "Exhibit A".

21. In addition, pursuant to defendant's answer of January 19, 2017, plaintiff improperly sued defendant as [REDACTED] while defendant should be used under [REDACTED]. Thus, plaintiff also requests for the caption to be amended to reflect the correct name of defendant as purported by defense counsel.

22. Therefore, plaintiff's request to amend the complaint should be granted and consequently, that the caption of the case be modified to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF [REDACTED]

-----X
[REDACTED] as Administrator of the Estate of [REDACTED]
[REDACTED] and [REDACTED] individually,
Plaintiff,

Index No.: [REDACTED]

- against -

[REDACTED]
[REDACTED]
[REDACTED]

Defendants.

-----X

II. DEFENDANT SHOULD BE COMPELLED TO PROVIDE OUTSTANDING DISCOVERY

21. Furthermore, pursuant to CPLR §3124, it is respectfully requested that defendant should be compelled to provide the owed discovery and/or for a Compliance Conference to be scheduled to enter into a new Court Order setting new dates for defendant's to provide the same and for the completion of the parties' depositions.

22. Pursuant to the Preliminary Conference of [REDACTED] defendant was to provide various discovery within 30 days of the order, [REDACTED] prior to the unfortunate death of plaintiff's decedent on [REDACTED] (see Exhibit "E"). However, the aforementioned discovery was not provided prior to the stay.

23. Furthermore, as a result of the automatic stay upon plaintiff's decedent death, the depositions that were supposed to be completed by [REDACTED] were not held.

24. A Compliance Conference was scheduled for [REDACTED], however, the same did not proceed as plaintiff [REDACTED] had not yet been substituted as a plaintiff in her capacity as Administrator of the Estate of [REDACTED]

25. Therefore, upon restoring the case to the active calendar, scheduling new dates for the depositions of plaintiff [REDACTED] and a witness on behalf of defendant is also necessary.

26. By reason of the foregoing, we respectfully request that the Court schedules a new Compliance Conference and/or compels defendant to provide the aforementioned owed discovery pursuant to CPLR §3124 and to schedule new dates for the completion of the depositions, as good cause exists for this request.

III. PLAINTIFF'S TIME TO FILE THE NOTE OF ISSUE SHOULD BE EXTENDED

27. Plaintiff's time to file the Note of Issue should be extended sometime after new dates are set for defendant to provide the owed discovery and for the completion of the parties' depositions. Currently, plaintiff is supposed to file the Note of Issue by [REDACTED], less than two months from the date of this application. Plaintiff has diligently pursued the instant action and had the intention to complete discovery by ordered dates. However, due to the unfortunate passing of [REDACTED] the case was automatically stayed and counsel was not able to move forward with discovery within the time prescribed by the Court.

28. The Court has broad discretion to grant extensions of time pursuant to CPLR §2004, which states as follows:

Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.

29. Furthermore, 22 NYCRR §202.21(d) provides that when a party is unable to file a note of issue and certificate of readiness due to a pretrial proceeding not being completed “for any reason beyond the control of the party” the Court may permit the party to file the same “upon such conditions as the court deems appropriate”.

30. In exercising its discretion, this Court may “consider the length of the delay in making the application, the reason for the delay, and any prejudice to be caused to the opposing party.” Oliver v. Town of Hempstead, 68 A.D.3d 1079, 1080; 891 N.Y.S.2d 456, 457 (2d Dep’t 2009).

31. For the reasons set forth, plaintiff moves for an order compelling defendants to provide the outstanding discovery and for new dates to be set for the completion of the parties’ depositions, and consequently, extending plaintiff’s time to file their Note of Issue, pursuant to CPLR § 2004 and 22 NYCRR 202.21(d), until after the depositions are completed and the outstanding discovery is provided.

32. No prior request for the relief requested herein has heretofore been made.

CONCLUSION

33. For the reasons set forth herein, plaintiff should be entitled to the relief requested and the motion should be granted in its entirety.

WHEREFORE, plaintiff’s requests that the Court grant plaintiff’s motion in its entirety along with any further relief this Court deems just and proper.

Dated: New York, New York


Respectfully submitted,

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By: Walter Osuna

TO:

