

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33284
G/ct

_____AD3d_____

Submitted - November 30, 2011

MARK C. DILLON, J.P.
THOMAS A. DICKERSON
JOHN M. LEVENTHAL
LEONARD B. AUSTIN
ROBERT J. MILLER, JJ.

2011-05479

DECISION & ORDER

Jorge Largo-Chicaiza, plaintiff, v Westchester Scaffold
Equipment Corp., defendant, Vermont Slate Roof Co.,
et al., defendants third-party plaintiffs, Catherine
McCaffrey, etc., defendant third-party plaintiff-respondent,
Salvatore Sanzo, defendant third-party defendant-appellant.

(Index No. 9826/00)

Baxter Smith & Shapiro, P.C., Hicksville, N.Y. (Sim R. Shapiro of counsel), for
appellant.

In an action to recover damages for personal injuries, the defendant third-party defendant appeals from an order of the Supreme Court, Queens County (Schulman, J.), entered April 26, 2011, which granted the motion of the defendant third-party plaintiff Catherine McCaffrey, executor of the estate of Peter B. McCaffrey, for leave to substitute herself in place of Peter B. McCaffrey, to amend the caption accordingly, and to restore the action to the trial calendar, and denied his cross motion, in effect, to dismiss the third-party complaint insofar as asserted by Peter B. McCaffrey for failure to timely substitute a representative.

ORDERED that the order is affirmed, without costs or disbursements.

CPLR 1021 provides, in pertinent part, that “[i]f 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.” “CPLR 1021 requires a motion for

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substitution to be made within a reasonable time. The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has [potential] merit” (*Reed v Grossi*, 59 AD3d 509, 511, quoting *McDonnell v Draizin*, 24 AD3d 628, 628-629; see *Borruso v New York Methodist Hosp.*, 84 AD3d 1293, 1294; *Bauer v Mars Assoc.*, 35 AD3d 333, 333-334).

Applying these principles to this case, the Supreme Court providently exercised its discretion in granting the motion of the defendant third-party plaintiff Catherine McCaffrey (hereinafter the executor), for leave to substitute herself in place of Peter B. McCaffrey (hereinafter the decedent), to amend the caption accordingly, and to restore the action to the trial calendar, and in denying the third-party defendant’s cross motion, in effect, to dismiss the third-party complaint insofar as asserted by the decedent for failure to timely substitute a representative. Although the third-party defendant is correct that the executor failed to provide any explanation for the lengthy delay in moving to substitute herself in place of the decedent, the third-party defendant suffered no prejudice by the Supreme Court’s granting of the motion (see *Peters v City of N.Y. Health & Hosps. Corp.*, 48 AD3d 329, 329; *Wynter v Our Lady of Mercy Med. Ctr.*, 3 AD3d 376, 378; *Noriega v Presbyterian Hosp. in City of N.Y.*, 305 AD2d 220, 221). Moreover, the third-party action has potential merit, given the Court of Appeals’ opinion reinstating the third-party complaint (see *Rubeis v Aqua Club, Inc.*, 3 NY3d 408, revg *Largo-Chicaiza v Westchester Scaffold Equip. Corp.*, 5 AD3d 355).

DILLON, J.P., DICKERSON, LEVENTHAL, AUSTIN and MILLER, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court