

Antipova v City of New York

2020 NY Slip Op 33233(U)

October 1, 2020

Supreme Court, New York County

Docket Number: 159572/2015

Judge: Dakota D. Ramseur

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR PART IAS MOTION 5

Justice

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INDEX NO. 159572/2015

NATALIA ANTIPOVA, Plaintiff,

MOTION DATE 9/15/2020

- v -

MOTION SEQ. NO. 002

THE CITY OF NEW YORK, THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION/DEPARTMENT OF SOCIAL SERVICES, AGELESS HOME HEALTH CARE LLC, CARDIE DORVIL, KIM MENCINO, SENIOR HEALTH PARTNERS, INC., CHRISTINA WILLIAMS, LISA NEMCHEK, HEALTHFIRST, INC., HEALTHFIRST PHSP, INC., JOHN DOE AND MARY DOE, Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number, were read on this motion to lift stay/dismiss (seq 002): 31-42

Plaintiff Natalia Antipova, "as guardian for" Decedent Clark Goldberg, commenced this action to recover for injuries sustained in Goldberg's June 21, 2014 accident at 335 East 33rd Street, Apartment 1B, New York, New York, allegedly as a result of negligent care by Defendants. Defendants Ageless Home Health Care LLC, Cardie Dorvil, and Kim Mencino have not answered. Corporation Counsel represents Defendants City of New York and New York City Human Resources Administration/Department of Social Services ("HRA", collectively the "City"). Defendants Senior Health Partners, Inc., Healthfirst, Inc., Healthfirst PHSP, Inc., Christina Williams, and Lisa Nemchek (collectively the "Senior Health Defendants") are jointly represented. The Senior Health Defendants move, pursuant to CPLR 1015 and 1021, to lift the stay imposed upon Goldberg's death and dismiss the action for Plaintiff's failure to timely appoint an administrator for Goldberg's estate. The City joins the Senior Health Defendants' motion. Plaintiff opposes. After oral argument and surreply, and for the reasons and to the extent discussed below, the Court grants the motion in part and dismisses the action without prejudice.

1 Goldberg suffered from dementia at the time of the subject incident.

2 When oral argument had nearly concluded, Plaintiff, for the first time, requested a surreply to the City's opposition papers, arguing that they had been served less than 24 hours before oral argument. Plaintiff's reliance upon Black's Law Dictionary is unavailing (see Connors, CPLR 2214:9 commentary ["...[P]roblems can be avoided altogether if lawyers voluntarily take the extra step, after serving the reply in accordance with CPLR 2103(b)(2), of promptly forwarding the papers via facsimile, email, or personal delivery to assure their receipt, if at all possible, a reasonable time prior to the hearing on the return day."]) [emphasis added]; 2214:10 ["Hence the movant need only drop the reply papers in a mailbox one day before the motion is returnable. He thereby accomplishes two remarkable things. First, he assures that his reply is timely. Second, he makes sure there is no way the other side is going to get the reply in time to peruse it and, if need be, respond to it. This is a longstanding fact of life in New York civil practice."]). Nevertheless, the Court exercised its discretion to permit a surreply, and considers it here.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff commenced this action on September 17, 2015 (*NYSCEF 1*). On March 3, 2017, the Senior Health Defendants filed a motion to compel discovery (*NYSCEF 12, et seq.*). The Senior Health Defendants contend, and Plaintiff does not dispute, that Goldberg passed away on January 26, 2018, and that the matter was adjourned several times to allow time to appoint an administrator.³ According to Plaintiff's counsel, efforts to appoint Plaintiff as an administrator began on February 6, 2018, comprising, among other things, several dozen instances of "research" and communications with Plaintiff, the law firm possessing Goldberg's original will, and Surrogate's Court, New York County (*NYSCEF 40 ¶ 14*).⁴ According to the Senior Health Defendants, "Plaintiff's counsel indicated at the [June 2018 appearance] that they were waiting for letters of appointment to be issued by the Surrogate Court but that a formal application had to be made to convert the decedent's spouse from guardian to administrator status" (*NYSCEF 31 ¶ 9*).

On September 18, 2018, the parties informed the Court (Saunders, J.) that the "incapacitated plaintiff, Clark Goldberg," is now deceased and the process of the appointment of an administrator for his estate has since commenced" (*NYSCEF 30* [motion sequence 001]). Based on the representation, Justice Saunders denied the motion to compel "with leave to renew upon the appointment of an administrator" for Goldberg's estate (*id.*). The most recent court appearance was a conference on January 14, 2020, at which time the Court marked the matter stayed due to Plaintiff's failure to appoint an administrator. According to Plaintiff's counsel, they eventually decided to consult with estates attorney Regina Rabinoff on January 21, 2020 (*NYSCEF 40 ¶ 14[ff]*, 16). As of the filing of Plaintiff's opposition papers on September 5, 2020, there is no indication that Plaintiff has been appointed as an administrator, or that any application to that effect has been filed with Surrogate's Court, New York County.

DISCUSSION

CPLR 1015 provides that "[i]f a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties." CPLR 1021 provides that:

A motion for substitution may be made by the successors or representatives of a party or by any party. ... 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. ... Whether or not it occurs before or after final judgment, if the event requiring substitution is the death of a party, and timely substitution has not been made, the court, before proceeding

³ According to Plaintiff, Goldberg died testate, with a will that named his nephews as executors (*NYSCEF 41 p 7*).

⁴ The subject matter of these calls and research is not detailed. Plaintiff's counsel also explains that, between March 22, 2020 and June 22, 2020, when Governor Cuomo's Executive Order closed professional services offices, counsel also engaged in other "unrecorded" discussions, continued work, and phone conversations (*NYSCEF 40 ¶ 14*).

further, shall, on such notice as it may in its discretion direct, order the persons interested in the decedent's estate to show cause why the action or appeal should not be dismissed.

The Senior Health Defendants and the City argue that the action should be dismissed because Plaintiff has not moved, within a "reasonable time" after Goldberg's death, to substitute an estate representative as a plaintiff in this action, and have not presented an excuse for the failure to do so, thereby prejudicing Defendants. Plaintiff disputes the characterization of the delay as unreasonable, and argues that it has expended significant efforts over the last two years to effectuate the appointment of Plaintiff as administrator of Goldberg's estate.

I. Length of delay

"In determining reasonableness, a court should consider the plaintiff's diligence in seeking substitution, prejudice to the other parties, and whether the action is shown to have potential merit" (*Navas v NY Hosp. Med. Ctr. of Queens*, 180 AD3d 796, 797 [2d Dept 2020]). With respect to delay, the proper measure is from the time of death (*Navas v NY Hosp. Med. Ctr. of Queens*, 180 AD3d 796, 798 [2d Dept 2020]). While there is no bright-line threshold regarding the length of time qualifying as unreasonable, delays as short as two years have been found unreasonable (*see e.g. Sopcheck v Long Is. Jewish-Hillside Med. Ctr.*, 161 AD2d 577, 578 [2d Dept 1990] [affirming dismissal for "almost two year" delay without reasonable excuse]; *Navas*, 180 AD3d at 798 [4-year period of inactivity "reflects a lack of diligence in pursuit of the action"]; *Suciu v City of NY*, 239 AD2d 338, 338 [2d Dept 1997] [five-year delay in obtaining letters of administration held unreasonable]; *Washington v Min Chung Hwan*, 20 AD3d 303, 305 [1st Dept 2005] [7-year delay held unreasonable]; *Meier v Shively*, 10 AD2d 566 [1st Dept 1960] [Administrator who did not make application for substitution and continuance until seven years after cause of action accrued, five years after plaintiff's death, and three years after issuance of letters of administration, and offered no satisfactory excuse therefor, was denied relief because of laches.]; *cf Caridi v Durst*, 228 AD2d 396 [1st Dept 1996] [Failure to properly substitute deceased defendant was waived by defendant's carrier's active participation in litigation for more than 2 years after death of its insured where there was no showing of prejudice, deceased defendant having been only nominal party to action.]).

Here, over two years have passed since Goldberg's death on January 26, 2018. While Plaintiff's counsel affirms at least 37 individual entries (and the existence of other, unrecorded entries), Plaintiff does not attach the fruits of the research—for example, a draft petition for Letters of Administration. Other than approximately one dozen entries referencing calls to Surrogate's Court, the last of which was on December 28, 2018, and calls to Goldberg's attorney, there are very few entries which are readily relatable to Plaintiff's efforts to be appointed administrator; to the contrary, numerous entries are for compliance conferences in Supreme Court in furtherance of this action. Plaintiff attaches just one documentary exhibit, an email to Surrogate's Court on November 2, 2018 asking six procedural questions related to Plaintiff's efforts to be appointed as administrator.⁵ The letter is not persuasive, as it essentially

⁵ The reason for the redaction is unclear. Before argument, the Court asked Plaintiff to provide an unredacted copy of the email, and Plaintiff complied (*NYSCEF 44*).

asks the Court for advice and/or an advisory opinion about how to proceed; moreover, it is undisputed that Plaintiff never proceeded to actually file any petition.

To the extent that Plaintiff asks the Court to consider the impact of the Covid-19 pandemic, as Defendants argue in reply, the bulk of the delay occurred well before March of 2020. Moreover, as of July 8, Surrogate's Court, New York County has resumed in-person and virtual/e-file operations, albeit with limited staff, including on contested matters, which are "being determined on a case-by-case basis" (*see* <http://ww2.nycourts.gov/courts/1jd/surrogates/index.shtml> [accessed September 10, 2020]). Accordingly, the Court finds that the ongoing delay in appointing Plaintiff as an administrator is unreasonable and merits dismissal.

II. Merit of the underlying action

"Even if the plaintiff's explanation for the delay is not satisfactory, the court may still grant [a] motion for substitution if there is no showing of prejudice and there is potential merit to the action, in light of the strong public policy in favor of disposing of matters on the merits" (*Navas*, 180 AD3d at 797-798). With respect to merit, "[t]he affidavit submitted from such individual must make sufficient factual allegations; it must do more than merely make conclusory allegations or vague assertions" (*Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997] ["For example, on a plaintiff's claim that defendant's negligent work caused property damage, defendant's affidavit was sufficient to demonstrate a meritorious defense where, having conducted an investigation, defendant could set forth specific facts to the effect that its employees were not working at the site at the time in question."])).

Here, Plaintiff's affidavit of merit cites essentially no facts; indeed, it fails to mention the City and, as to the other Defendants, appears to merely parrot, in condensed form, the allegations of the Complaint. This is, by itself, insufficient to survive a motion to dismiss.

III. Prejudice to Defendants

As to prejudice, the Court agrees with Plaintiff that Defendants have not sufficiently demonstrated prejudice. As Plaintiff argues in surreply, much of the evidence is likely to be based on documents, not testimony, thereby mitigating prejudice to Defendants. Nevertheless, the shortcomings discussed above ultimately distinguish cases such as *Navas*, which permit a court to consider more than the mere length of the delay. That is, such cases generally contemplate that a substitution has already occurred, or at least been set into motion. This action is procedurally distinct; years after Goldberg's death, there is no evidence that Plaintiff has made any affirmative filing, meaning that the delay remains ongoing, and may continue indefinitely.

However, the Court notes that CPLR 1021 provides that any dismissal "shall not be on the merits unless the court shall so indicate." To that end, despite Defendants' request, this dismissal is not made on the merits. Provided that Plaintiff is able, at a future date, to obtain appointment as administrator of Goldberg's estate within a reasonable period of time and demonstrate that the underlying action has merit, Plaintiff may move to substitute and/or restore this action. Today, however, the action must be dismissed.

CONCLUSION/ORDER

For the above reasons, it is

ORDERED that Defendants' motion to dismiss is GRANTED to the extent that the Clerk of Court shall enter judgment dismissing the Complaint, without prejudice as to Plaintiff's right to restore, within a reasonable time, the action upon appointment as administrator of Clark Goldberg's estate and a demonstration of merit and lack of prejudice to Defendants; and it is further

ORDERED that the Senior Health Defendants shall, within 30 days, e-file and serve a copy of this order with notice of entry upon all parties.

This constitutes the decision and order of the Court.

DAKOTA D. RAMSEUR, J.S.C.

10/1/2020
DATE

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: