

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

D71084  
T/htr

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Argued - December 6, 2022

FRANCESCA E. CONNOLLY, J.P.  
PAUL WOOTEN  
JOSEPH A. ZAYAS  
LILLIAN WAN, JJ.

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2020-03692

DECISION & ORDER

Franklyn Franco, appellant, v Estate  
of Arthur C. Ketterer, etc., respondent.

(Index No. 520626/19)

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Pontisakos & Brandman, P.C. (Auciello Law Group, P.C., Brooklyn, NY [Anthony J. Auciello], of counsel), for appellant.

Buratti, Rothenberg & Burns, East Meadow, NY (Scott R. Dinstell of counsel), for respondent.

In an action, inter alia, to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Robin K. Sheares, J.), dated February 27, 2020. The order granted a motion purportedly made on behalf of the defendant pursuant to CPLR 3211(a)(5) to dismiss the complaint as time-barred, and, in effect, denied the plaintiff's cross-motion for the appointment of the Public Administrator of Kings County as temporary administrator to represent the defendant in this action.

ORDERED that the order is reversed, on the law and in the exercise of discretion, with costs, the motion is denied, the cross-motion is granted, and the matter is remitted to the Supreme Court, Kings County, for further proceedings consistent herewith.

The plaintiff, seeking, inter alia, to recover damages for personal injuries allegedly sustained in a motor vehicle accident, commenced this action against the estate of Arthur C. Ketterer, the driver of the vehicle that allegedly caused the accident. Purported counsel for the estate moved pursuant to CPLR 3211(a)(5) to dismiss the complaint as time-barred, and the plaintiff cross-moved for the appointment of the Public Administrator of Kings County (hereinafter the Public Administrator) as temporary administrator to represent the defendant in this action. The Supreme

Court granted the motion and, in effect, denied the cross-motion. The plaintiff appeals.


Although the motion to dismiss the complaint purportedly was made on behalf of the defendant estate, the moving papers did not indicate that purported defense counsel was retained by the estate. Instead, counsel's affirmation stated that he "was retained by Truck Insurance Exchange to represent the interests of their insured Arthur Ketterer herein." Under these circumstances, moving counsel lacked authority to represent the defendant estate, and the motion to dismiss the complaint as time-barred therefore should have been denied (*cf. Vicari v Kleinwaks*, 157 AD3d 975, 976-977; *Matter of Eaton v Rosenberg*, 109 AD3d 770; *Velasquez v Katz*, 42 AD3d 566, 567).

In appropriate circumstances, the Supreme Court is empowered to appoint a temporary administrator, in order to "avoid delay and prejudice in a pending action" (*Dieye v Royal Blue Servs., Inc.*, 104 AD3d 724, 726). Such a determination is addressed to the broad discretion of the court (*see Rosenfeld v Hotel Corp. of Am.*, 20 NY2d 25, 28; *Lambert v Estren*, 126 AD3d 942, 943). Here, a Surrogate's Court decree appointed the Public Administrator to represent the estate of Arthur C. Ketterer in a related prior action. That decree did not expressly grant to the Public Administrator the authority to represent the defendant estate in this action. Under these circumstances, the plaintiff's cross-motion should have been granted, and we remit the matter to the Supreme Court, Kings County, for the appointment of a temporary administrator to represent the defendant in the instant action (*see Dieye v Royal Blue Servs., Inc.*, 104 AD3d at 726; *see also Meczkowski v E.W. Howell Co., Inc.*, 63 AD3d 803).

In light of our determination, we do not reach the parties' remaining contentions.

CONNOLLY, J.P., WOOTEN, ZAYAS and WAN, JJ., concur.

ENTER:

  
Maria T. Fasulo  
Clerk of the Court