Morris v Solow Management Corp.
2003 NY Slip Op 30122(U)
December 23, 2003
Supreme Court, New York County
Docket Number:
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER Justice

PART IA Part 16

Morris a Pavel Rep of the estate of Morris B

- v -

Salon Mgmt Corp.

INDEX NO. 109209-02

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ *Yes* ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

SCANNED JAN 07 2004

Dated: DEC 23 2003

ALICE SCHLESINGER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

IN ACCORDANCE TO THIS DECISION IS

JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

X

DIANE MORRIS, as Personal Representative of the Estate of Brian Morris,

Plaintiff,

-against-

SOLOW MANAGEMENT CORPORATION, TOWNHOUSES COMPANY, LLC, SOLOW BUILDING COMPANY, LLC, and ELI ATTIA,

Defendants.

X

Index No. 109209/02

Motion Seq. 001

SCANNED
JAN 07 2004

SCHLESINGER, J.:

The plaintiff Diane Morris ("Morris"), in her capacity as personal representative of her deceased husband Brian Morris, commenced this wrongful death action against Solow Management Corp., Townhouse Company, L.L.C., and Solow Building Company, L.L.C. ("defendants"), entities that either owned, managed or built the apartment building at 224 East 67th Street, New York, NY where Brian Morris resided when he died.[1] In the complaint, Morris alleges various causes of action sounding in common law negligence and a violation of Section 78 of the Multiple Dwelling Law. Before the Court at this time is plaintiffs motion to amend the complaint to add six new parties and defendants' cross-motion to amend their answer to assert the defense of lack of capacity to sue and to dismiss on that ground. For the reasons set forth herein, plaintiffs motion is granted and defendants' cross-motion is denied.

The underlying facts are as follows. Brian Morris entered into a lease with defendants

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[1] In addition, plaintiff originally named Eli Attia, the building's architect, as a defendant but subsequently discontinued against him.

in May of **2001** for a duplex apartment located on the fourth and fifth floors of the building. The apartment contained two floor-to-ceiling sliding glass doors on the fourth floor that opened directly to the outside of the building. Significantly, there was no balcony, platform, landing, or, for that matter, any safety guards protecting people from falling after opening the doors. Thus, on the night of August 3, 2001, Mr. Morris opened the sliding glass doors and fell to his death.

Morns is seeking leave to amend the complaint to add six new parties pursuant to CPLR §3025(b) based upon facts learned during discovery. Specifically, Morris is seeking to add: (1) Sheldon Solow, a principal of the defendant Solow companies; (2) East Sixty-Seventh Street Townhouse Building Corp. ("Townhouse"), a construction company which worked on the building; (3) HRH Construction Corp. ("HRH"), the construction manager when the glass doors were installed; **(4)** Thermal insulated Products ("TIP), a subcontractor responsible for the design and installation of the glass doors; *(5)* Heitmann & Associates ("Heitmann"), a consultant responsible for the window construction when the glass doors were installed; and ***(6)*** Traco Inc., ("Traco"), the manufacturer of the glass doors.

Plaintiffs motion to add new parties is granted. Defendants in their papers have consented to the addition of the last four parties noted above; namely, HRH, TIP, Heitmann, and Traco. Defendants have objected only to the addition of Sheldon Solow and Townhouse. However, defendants' objections are unavailing.

As the First Department recently reiterated in ***Valdes v. Marbrose Realty,*** Inc., et a/. when reversing the lower court's denial of a motion to amend the complaint following depositions:

> Leave to amend is freely given absent prejudice or surprise resulting from the delay (CPLR 3025[b]). Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment.

289 AD2d 28, 29 (First Dep't 2001), citing *Whalen v. Kawasaki Motors Corp.*, 92 NY2d 288, 293 (1998); ***Abdelnabi v. New*** *York City Tr. Auth.*, 273 AD+2d 114, 115 (1st Dep't 2000).

Here, defendants have failed to assert a single persuasive argument that the proposed amendments would prejudice them in any manner. Indeed, no such argument exists. As a principal of two of the originally named defendants, Sheldon Solow has had notice of this action since it was commenced. What is more, Mr. Solow was involved in the project at issue and apparently has knowledge of some relevant facts, as his approval was required for all aspects of the design and construction of the building. Nor can any prejudice or surprise be reasonably alleged with respect to Townhouse, which was involved in the construction of the building when the glass doors were added. In addition, plaintiff has not delayed unduly in seeking to add the new defendants, having moved within a reasonable time after she learned of the relevant facts during discovery.

Defendants' primary argument in opposition to the proposed amendment is that the statute of limitations has expired. This Court rejects the proffered argument. Here, the motion was filed on July 24, 2003 and the statute of limitations for the wrongful death action expired on August 3, 2003, thereby making the claim timely under the recent decision by the Court of Appeals in ***Perez v. Paramount Communications, Inc., et al.,*** 92 NY2d 749

(1999).

In Perez the question certified by the Appellate Division was whether the filing of a motion for leave to amend a complaint to add a defendant can, for statute of limitations purposes, be considered the timely commencement of the action as against the party sought to be added. The Court answered this question in the affirmative. 92 NY2d at 753. In so doing, the Court of Appeals departed from its decision in *Arnold v Mayal Realty* Co., 299 NY 57 (1949), which had been the leading case on the issue for fifty years.

In *Arnold*, the Court of Appeals had held that the service of a motion for leave to amend to add a defendant could ***not*** be considered the commencement of the action against the party sought to be added. Nor could it serve to toll the statute of limitations. This conclusion was based on CPLR 1003, which provided that the joinder of additional defendants could be accomplished ***only*** with prior judicial permission, and the rule then in effect (CPLR 203) that an action was commenced by the service of process. 92 NY2d at 753.

However, the *Perez* Court agreed with the plaintiff that *Arnold* had to be limited due to this State's transition in 1992 from a commencement-by-service rule to a commencement-by-filing rule. ***Id.*** at 753-54. Noting that CPLR 1003 continues to require prior judicial permission when adding a party in most instances, the Court concluded that the new commencement-by-filing rule necessarily results in the tolling of the statute of limitations upon the filing of a motion to amend with a supplemental summons and amended complaint attached. 92 NY2d at 754 The Court found this result far more reasonable than the alternative of compelling a plaintiff to file multiple suits to avoid risking the expiration of the statute of limitations while a motion to amend was pending. Specifically,

the Court held that:

> Where the motion, including the proposed supplemental summons and amended complaint, is filed with the court within the applicable limitations period, but the ruling by the court does not occur until after expiration, dismissal is inappropriate and would offend the CPLR's liberal policies of promoting judicial economy and preventing a multiplicity of suits ...

92 NY2d at 754 (citations omitted).

The Court went on to state that its newly announced rule was wholly consistent with the purpose behind the statute of limitations and public policy in general:

> Statutes of Limitation are designed to promote justice by preventing prejudice through the revival of stale claims . . . That goal would not be served by a rule which would render the timeliness of a claim dependent upon the speed with which a court decides a motion . . .

92 NY 2d at 754 (citations omitted).

There can be no dispute in the case at bar that the instant motion to amend was filed before the expiration of the statute of limitations. Accordingly, pursuant to Perez, plaintiffs filing of the instant motion with the supplemental summons and amended complaint attached has tolled the statute of limitations pending the entry of this order granting the motion to amend.

Turning now to the cross-motion, defendants are seeking leave to amend their answer to include the affirmative defense of "lack of capacity to sue" and, upon such amendment, to dismiss the wrongful death action against them pursuant to CPLR § 3211(a), subd. 3. The cross-motion is denied. In determining whether to grant a motion to amend an answer, the court should consider the merits of the proposed defense

and whether the plaintiff will be prejudiced by the delay in raising it. *Norwood v. City of New York,* 203 AD2d 147, 148 (1st Dep't, 1994), lv. app. dismissed ***84 NY2d 849 (1994);*** see also, Thomas *Crimmins* Contr. Co. v. *City of* New *York,* 74 NY2d 166, 170 (1989); *Herrick v.* Second Cuthouse, 64 NY2d 692 (1984). This Court finds both a lack of merit to the proposed defense, as well as prejudice resulting from the delay.

Defendants argue that since plaintiff Diane Morris was never issued ancillary letters in New York, this wrongful death action should be dismissed. However, ancillary letters are not required for this lawsuit to continue. The instant wrongful death action was brought on behalf of the decedent's distributees. not on behalf of the decedent's estate. See E.P.T.L. § 5-4.1. The damages sought are for the injuries suffered by the distributees as a result of the decedent's death, not as compensation to the estate for any pain and suffering or injury sustained by the decedent. See E.P.T.L. § 5-4.3. Significantly, only damages for pain and suffering payable to the estate are available to creditors.

Over fifty years ago, the Court of Appeals discussed at length the circumstances under which a personal representative appointed in a foreign jurisdiction may sue in New York without obtaining ancillary letters in New York. That case, Wiener v. Specific *Pharmaceuticals, Inc.*, 298 NY 346, 351 (1949), was a wrongful death action commenced in New York by the father of a five-year-old child who had died in Michigan allegedly due to pharmaceutical products administered to the child. The father had been appointed administrator of the estate in Michigan, and the action sought damages on behalf of the decedent's parents. No damages for pain and suffering were claimed on behalf of the estate. Noting that the father had been duly appointed in Michigan, and that none of the damages sought were available to creditors, the Court held that the action could proceed

without letters ancillary in New York.

Specifically, the Court held that:

> It has been repeatedly observed that the reason for insisting that a foreign administrator obtain ancillary letters before suing in another State is to assure that the decedent's domestic creditors shall have their claims paid out of any fund recovered for the benefit of the debtor's estate... The rule barring foreign administrators from our courts is just and reasonable only if applied in cases, first, where there are domestic creditors, and second, where the foreign administrator sues to recover a fund in which such creditors may share.

298 NY at 351. As previously noted, the complaint here contains no allegation of pain and suffering on the part of the decedent. Thus, under ***Wiener,*** letters ancillary are not required in New York because plaintiff is not suing to recover a fund in which domestic creditors, if any existed, could share.

Defendants argue that plaintiff Diane Morns nevertheless lacks capacity to sue because she was never actually appointed as personal representative of Brian Morris's estate. The Court rejects this argument. Diane Morris and the decedent Brian Morris were husband and wife when Brian Morris died. On December 12, 2001, the High Court of Justice of England and Wales authorized Diane Morris, through her attorney, to act as the personal representative of the Estate of Brian Morris. The paperwork from the United Kingdom attached to plaintiffs papers, along with the evidence of a New York filing, convinces the Court that Ms. Morris has been duly appointed as the personal representative.

The relevant statute, E.P.T.L. § **5-4.1,** provides that the "personal representative, duly appointed in this state ***or any other jurisdiction***, of a decedent who is survived by

distributees may maintain an action to recover damages [based on wrongful death]." (Emphasis added). Based on the plain language of the statute recognizing an appointment in "any other jurisdiction", the Court finds that the statutory requirement was met when the United Kingdom appointed Diane Morris as the personal representative of her husband's estate.

In reaching this conclusion, the Court notes that under early common law in New York, there was no recovery for the wrongful death of a person. See, *Ratka v. St. Francis Hosp.*, 44 NY2d 604,610-611 (1978). The New York Legislature, to remedy this injustice, enacted its wrongful death statutes. E.P.T.L. 5-4.1 et *seq*. In the construction of statutes, the intent of language is to be determined from its natural and obvious meaning. See, McKinney's, Statutes 594. Furthermore, a basic consideration in the "interpretation of a statute is the general spirit and purpose underlying its enactment, and that construction is to be preferred which furthers the object, spirit and purpose of the statute." See McKinney's Statutes §96. In the case at bar, considering the history and purpose of E.P.T.L § 5-4.1 and the result to be accomplished by it, i.e., to remedy the injustice whereby a defendant could avoid liability under common law for wrongful death, the Court finds that the principles of justice and fairness would not be furthered by dismissing this wrongful death action.

Yet another reason exists why the cross-motion must be denied. The law is clear that a party must raise the legal argument of lack of standing to sue in its answer to a complaint or in a motion before the service of their answer. See, CPLR §3211(e). The failure to do so is fatal in that it constitutes a waiver of the argument at all subsequent phases of the litigation. See, *e.g., Prudco Realty Corp. v. Palermo*, 60 NY2d 656, 657 (1983). Here, defendants waited for more than sixteen months after this litigation was

commenced before first seeking to assert the defense. If this Court grants defendants' motion to amend and dismiss, Morris would be prejudiced because the statute of limitations has passed and Morris could not bring this claim anew.

Accordingly, it is hereby

ORDERED that plaintiff's motion to amend is granted in its entirety, and plaintiff shall proceed forthwith to serve the six new parties Sheldon Solow, East Sixty-Seventh Street Townhouse Building Corp., HRH Construction Corp., Thermal Insulated Products, Heitmann & Associates, and Traco Inc. with the supplemental summons and complaint in the form attached to the moving papers; and it is further

ORDERED that all papers, pleadings and proceedings in the above-entitled action be amended by adding the names of the six new parties; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that defendants' cross-motion to amend their answer and dismiss the complaint is denied.

This constitutes the decision and order of the Court.

Dated: December 23, 2003

DEC 23 2003

J.S.C.
ALICE SCHLESINGER