

Tarwacki v HVT, Inc.

2008 NY Slip Op 30651(U)

February 11, 2008

Supreme Court, Richmond County

Docket Number: 0102362/2005

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND PART DCM 3**

**Index No.:102362/2005
Motion No.:002**

NOREEN TARWACKI and ROBERT TARWACKI,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**HVT, INC.,
FRANK AQUILINO,
MICHAEL AQUILINO, and
CARMELA CAMERLENGO**

Defendants

The following items were considered in the review of this motion for a

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Plaintiffs motion pursuant to CPLR § 1015 seeking to substitute the law firm of Kay & Gray as temporary Administrator for the Estate of Carmela Camerlengo is denied. Instead the Public Administrator of Richmond County is hereby appointed as the Temporary Administrator of the Estate of Carmela Camerlengo.

Facts

On October 7, 2006 defendant Carmela Camerlengo (hereinafter “Camerlengo”) died. Camerlengo’s attorneys, Kay & Gray, became aware of the passing of their client on or about October 13, 2006 and thereafter notified, the court and all parties. Kay & Gray contacted Camerlengo’s surviving family members in an attempt to ascertain the name of the Estate’s Administrator and obtain a certified copy of Camerlengo’s death certificate.

Camerlengo’s surviving family informed Kay & Gray that no administrator would be appointed. Camerlengo’s family did not cooperate in turning over a certified copy of the death

certificate until October 2, 2007. On that same day Kay & Gray sent a copy of decedent's death certificate to plaintiffs' attorney via overnight mail.

Plaintiffs now move the court pursuant to CPLR § 1015 and CPLR § 1021 to have Kay & Gray appointed Temporary Administrator for the Estate of Carmela Camerlengo for the purpose of defending the personal injury claims brought against Camerlengo.

Discussion

A. General Jurisdiction of the Supreme Court

The New York State Constitution confers general original jurisdiction in law and equity to the Supreme Court¹. The legislature defined the general jurisdiction of the court in Judiciary Law § 140-b, wherein it states:

The general jurisdiction in law and equity which the supreme court possesses under the provisions of the constitution includes all the jurisdiction which was possessed and exercised by the supreme court of the colony of New York at any time, and by the court of chancery in England on the fourth day of July, seventeen hundred seventy-six, with the exceptions, additions and limitations created and imposed by the constitution and laws of the state. Subject to those exceptions and limitations the supreme court of the state has all the powers and authority of each of those courts and may exercise them in like manner.²

The Appellate Division, First Department specifically recognized that the Supreme Court has jurisdiction to entertain applications for the appointment of temporary administrators. In *Harding v. Noble Taxi Corp.* the court stated that the statutory provisions of CPLR § 1015(a) and 1021 “. . .do not require the plaintiff to proceed in Surrogate's court . . . The Supreme Court is a court of general jurisdiction with the power to appoint a guardian to serve as temporary administrator, and that court also has broad discretion to act in matters involving substitution.”³

¹ NY Const art VI, § 7.

² *Judiciary Law* § 140-b

³ 155 A.D.2d 265 (1989)

Therefore, it is without question that this court has concurrent authority with the Surrogate's Court to grant temporary letters of administration.

B. Substitution upon the death of a party

Upon the death of a party to an action, the CPLR § 1015 directs the court to substitute a proper party. The statute, in relevant part states 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.⁴

The procedure governing substitution of parties is found in CPLR § 1021. That statute states in pertinent part that:

[a] motion for substitution may be made by the successors or representatives of a party or by any party. If a person who should be substituted does not appear voluntarily he may be made a party defendant. . .⁵

Plaintiffs argue that the holding in *Harding v. Noble Taxi Corp.*⁶ is controlling in this case. However, *Harding* is distinguishable from the facts presented before this court. In *Harding* the Appellate Division overturned the ruling of the Supreme Court that improperly denied a “. . . motion for the substitution and appointment of a temporary administrator, and instead *sua sponte* ordered the severance of [the plaintiff's] cause of action, and all the cross-claims against the deceased . . .” on the eve of trial.

Here, plaintiffs make no representation that this case is on the eve of trial. In addition, the decision in *Harding*, is silent with respect to who plaintiff sought to be substituted and named temporary administrator of the Estate. Instead, plaintiffs argue that Kay & Gray had the responsibility to have an administrator appointed.

⁴ CPLR § 1015(a)

⁵ CPLR § 1021

⁶ 155 A.D.2d 265 (1989).

In *Wisdom v. Wisdom*,⁷ the Appellate Division, First Department, stated:

[j]ust as the death of a principal ordinarily revokes the authority of the agent, so the death of a party to an action revokes the power of the attorney. . . . Where a party to an action dies, any surviving interest in the action passes from the decedent to his or her representative who may well have unique interests. The new party cannot be required to rely on decedent's counsel, no matter how capable. (internal citations omitted)

Kay & Gray's authority to act on behalf of Camerlengo ceased on her death. Furthermore, plaintiffs' argument that Kay & Gray would be the likely choice as counsel to the Estate is without any basis. Kay & Gray is a member of GEICO's Staff Counsel Office which handles insurance defense. Camerlengo was insured by GEICO Insurance Company. This relationship differs from other attorney client relationships. The Supreme Court for Westchester County in *Castrovinci v. Edwards*, acknowledged that where a liability insurance carrier retains an attorney to defend an insured the ". . . usual personal attorney-client relationship . . ." does not exist.⁸

Plaintiffs further rely on the Appellate Division, First Department's decision in *Vanarthros v. St. Francis Hosp.*⁹ to advance their position that a law firm may be substituted and appointed as a temporary administrator of an estate. In that case, the trial court granted plaintiffs' motion ". . . to appoint a temporary administrator for the estate of Dr. "John" Boyd and appointed the law firm of Wilson, Elser, Moskowitz, Edelman & Dicker as guardian to act as temporary administrator of the estate of the defendant Dr. "John" Boyd for purposes of defending the action . . ." The Appellate Division did not reach a decision with respect to the propriety of the appointment of Wilson, Elser, Moskowitz, Edelman & Dicker to act as guardian and temporary administrator. Instead, the Appellate Division, found that the appellant St. Francis Hospital lacked standing to ". . . complain about the representation of the estate of "John" Boyd . . ."

Professor Seigel in his treatise *New York Practice*, 4th Ed., commented on the fact pattern

⁷ 111 A.D.2d 13 (1985).

⁸ *Castrovinci v. Edwards*, 59 Misc.2d 696.

⁹ 234 A.D.2d 450

currently before the court. In that treatise he states:

If the defendant dies, and the defendant's estate is insubstantial, the plaintiff may find the defendant's family singularly unenthusiastic about having a personal representative appointed and substituted – they have little motive to expedite the plaintiff's suit—and yet the action can't proceed until that is done. The plaintiff in that situation can make the application to have a representative appointed and substituted for the deceased defendant. . . (internal citations omitted)¹⁰

The laws controlling the appointment of an administrator of an estate are found in Surrogate's Court Procedure Act §§ 1001 and 1002. Plaintiffs have not supported their application for the appointment of a temporary administrator with any of the appropriate authorities as set out in those statutes. The Supreme Court, although a court of general jurisdiction, must enforce the applicable laws relating to the administration of estates.

Conclusion

The plaintiffs in this action have failed to base their selection of a temporary administrator in accordance with the laws as set forth in Surrogate's Court Procedure Act §§ 1001 and 1002. The Supreme Court is not without the authority to appoint a temporary administrator and herein appoints Gary Gotlin, the Public Administrator of Richmond County. Accordingly it is further;

ORDERED, that plaintiffs motion to substitute Kay & Gray as temporary Administrator of the Estate of Carmela Camerlengo is denied in its entirety; and it is further

ORDERED, that Gary Gotlin, the Public Administrator of Richmond County located at 130 Stuyvesant Place, Staten Island, NY 10301, is hereby appointed as Temporary Administrator of the Estate of Carmela Camerlengo; and it is further

ORDERED, that the Public Administrator and the State of New York shall be held harmless for any proceeds possibly recovered by the plaintiffs beyond the insurance coverage maintained by the decedent, Carmela Camerlengo; and it is further

¹⁰ (Seigel, NY Prac §184, at 313-314 [4th ed])

ORDERED, that all parties return to DCM 3 at 9:30AM on February 20, 2008 for a compliance conference.

ENTER,

DATED: February 11, 2008

Joseph J. Maltese
Justice of the Supreme Court