

Rivera v Viva Bar & Lounge

2010 NY Slip Op 30595(U)

March 11, 2010

Supreme Court, New York County

Docket Number: 101161/09

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. M. delw

PART 11

Index Number : 101161/2009

RIVERA, FRANCES

VS.

VIVA BAR & LOUNGE

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 10-15-09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

+ cross motion
this motion to/for dismiss / summary judgment.

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 *and cross motion* are decided *in accordance with the answered Memorandum Decision + Order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
MAR 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: March 11, 2010

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
FRANCES RIVERA, as Temporary Administratrix of
the Estate of TABITHA PEREZ,

Plaintiff,

-against-

Index No. 101161/09

VIVA BAR & LOUNGE, NR PROPERTY 2 LLC,
CHAVETTEZ INC d/b/a VIVA BAR & LOUNGE and
ALEXANDER HALL,

Defendants.

FILED
MAR 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X
MADDEN, J.:

This is a personal injury action in which plaintiff Frances Rivera, as temporary administratrix of the estate of Tabitha Perez, seeks damages for the negligent homicide of Ms. Perez, who, on October 12, 2005, was shot in the back and killed by a stray bullet from a handgun fired by defendant Alexander Hall outside the premises of defendant Viva Bar & Lounge. Viva Bar & Lounge is owned and operated by Defendant Chavettez, Inc. d/b/a Viva Bar & Lounge (Viva). Defendant NR Property 2 LLC (NR Property) is the owner of the building in which the bar is located.

Viva now moves for an order, pursuant to CPLR 3211 (a) (5), dismissing the complaint on the ground that the applicable statute of limitations has expired.

NR Property cross-moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing this action, as well as for an order dismissing this action on the ground that it is barred by the statute of limitations. NR Property has withdrawn this motion at present, and it will be denied without prejudice.

For the reasons set forth below, Viva's motion to dismiss is denied.

BACKGROUND

Prior to her death, Ms. Perez was a single, unmarried mother of 24. She is survived only by an infant, her eight-year old son, Branden Leo Ortiz. Because of the lack of distributees to administer the estate, plaintiff, the great-grandmother of the decedent, applied for guardianship of the person of the infant in Family Court, Bronx County, which was granted in September 2006 (*see* 9/26/06 Order Appointing Guardian of the Person [Aff. of Steven C. November, Esq., Exh B]). In April of 2007, plaintiff submitted her application for letters of administration to the Surrogates Court, Bronx County.

Plaintiff first commenced this action on September 21, 2007 in the Supreme Court, Bronx County, alleging wrongful death and conscious pain and suffering. Due to delays in the grant of letters of administration, plaintiff commenced the action in the capacity of the "Proposed Administratrix of the goods, chattels and credits of TABITHA PEREZ" (*see* Bronx County Complaint [Aff. of Allison J. Seidman, Exh A]).

On April 3, 2008, while plaintiff's application for letters of administration was still pending, defendant Viva cross-moved to dismiss, pursuant to CPLR 3211 (a) (3), on the ground that, as a proposed administrator, plaintiff lacked capacity to sue. On July 21, 2008, Justice Edgar G. Walker granted the cross motion, without prejudice to recommencing the action once an administrator or executor was appointed (*see* 7/21/08 Decision and Order [Seidman Aff., Exh C]). The order was entered in the County Clerk's office on July 30, 2008, and was first served with notice of entry on August 4, 2008.

On January 14, 2009, the Surrogate's Court issued temporary letters of administration to plaintiff on an emergency basis (*see* November Aff., Exh F). Mr. November,

plaintiff's attorney, alleges that the letters of administration were not received by his firm until January 23, 2009 (*see id.*, Aff., ¶ 6). On January 28, 2009, plaintiff recommenced suit by filing this action for wrongful death, in which she alleges that Viva was negligent in failing to eject an intoxicated person from its premises, and failing to prevent the incident by notifying the authorities.

On April 7, 2009, plaintiff received limited letters of administration (*see id.*, Exh I). Plaintiff has applied to the Surrogate's Court for guardianship over the property of the infant, which application is still pending (*see id.*, Exh J).

ANALYSIS

Viva contends that the complaint must be dismissed because it was not filed or served prior to the expiration of the six-month statute of limitations set forth in CPLR 205.

CPLR 3211 (a) (5) provides for the dismissal of a cause of action that is time-barred by the applicable statute of limitations. It is well-settled that an action by a personal representative for damages for the wrongful death of its decedent must be commenced within two years after the decedent's death (Estates Powers and Trusts Law [EPTL] § 5-4.1; *see Hernandez v New York City Health & Hosps. Corp.*, 78 NY2d 687 [1991]).

A wrongful death action may only be maintained by a personal representative of the decedent who is duly appointed to administer the decedent's estate (*see Chong v New York City Transit Auth.*, 83 AD2d 546 [2d Dept 1981]; *accord MFUM v Metropolitan Transportation Auth.*, 2009 WL 1433055, 2009 NY Slip Op 31094[U] [Sup Ct, NY County 2009]). A "proposed administrator" lacks the capacity to bring a wrongful death action (*Carrick v Central Gen. Hosp.*, 51 NY2d 242, 247 [1980] ["since the appointment of a qualified administrator is an

essential element of the right to bring suit for wrongful death, plaintiff's first action, which was commenced prior to issuance of letters of administration, was 'tantamount to no suit whatsoever'" (citation omitted)].

CPLR 205 (a) provides:

New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of the commencement of the prior action and that service upon the defendant is effected within such six-month period.

The function of the tolling provision set forth in CPLR 205 (a) "is to provide a second opportunity to the claimant who has failed the first time around because of some error pertaining neither to the claimant's willingness to prosecute in a timely fashion nor to the merits of the underlying claim" (*George v Mt. Sinai Hosp.*, 47 NY2d 170, 178-179 [1979]). Thus, CPLR 205 (a) "may be applied when a prior wrongful death action has been dismissed due to the lack of an appointed administrator" (*Carrick v Central Gen. Hosp.*, 51 NY2d at 253).

In support of its motion to dismiss, Viva contends that, pursuant to CPLR 205 (a), plaintiff had six months from the termination of the prior Bronx County action in which to commence this action, but failed to timely do so.

Courts have repeatedly held that the six-month tolling period begins to run "when the first action was 'terminated,'" i.e., the date the decision was rendered, and "not when the

judgment was eventually entered,” as “[t]he entry of the subsequent judgment was a mere ministerial act” (*Burns v Pace University*, 25 AD3d 334, 335 [1st Dept], *lv denied* 7 NY3d 705 [2006]; *see also Pi Ju Tang v St. Francis Hosp.*, 37 AD3d 690, 691 [2d Dept 2007] [“CPLR 205 (a) clearly provides that the six-month period runs from the date of termination of the earlier action” and “we reject the plaintiff’s contention that the six-month period should be calculated from the date of service of the judgment in the earlier action with notice of entry”]).

Ms. Perez was killed on October 12, 2005. On September 21, 2007, plaintiff first commenced suit in the Supreme Court, Bronx County. Thus, the original action was timely asserted under the two-year wrongful death statute of limitations. On July 21, 2008, the Bronx County action was dismissed, without prejudice, by Judge Walker. Viva argues that, therefore, pursuant to CPLR 205 (a), plaintiff had six months from the July 21, 2008 date of dismissal, rather than from the July 30, 2008 date of entry, i.e, until January 21, 2009, to commence the instant action. Viva asserts that because plaintiff did not commence this action until January 28, 2009, one week past the applicable six-month statute of limitations, the complaint is barred by the statute of limitations, and must be dismissed.

Contrary to Viva’s arguments, however, CPLR 205 (a) does not apply here, and this action is not barred by the statute of the limitations. Rather, in the unique circumstances presented by this case, the statute of limitations is tolled due to the infancy of the sole distributee, Branden Leo Ortiz, pursuant to CPLR 208.

CPLR 208 provides that where the “person entitled to commence an action is under a disability because of infancy ... at the time the cause of action accrues,” the statute of limitation is tolled for the period of disability.

It is well established that, in wrongful death cases, where the sole distributee is an infant, the statute of limitations is tolled, pursuant to CPLR 208, until a person has been appointed who has the ability to bring suit, either the guardian of the infant's property, or the administrator of the estate (see e.g. *Hernandez v New York City Health & Hosps. Corp.*, 78 NY2d 687, *supra*; *Baker v Bronx Lebanon Hosp. Ctr.*, 53 AD3d 21 [1st Dept 2008]).

Hernandez is directly on point. In that case, the decedent died, leaving an infant son as her sole distributee. Six months later, his grandmother applied for letters of guardianship over the infants' person, but then renounced her right to letters of administration in favor of the decedent's niece, who was granted letters one week later. Because of the delay in receiving letters of administration, the complaint was served after expiration of the one-year and 90-day statute of limitations then applicable to claims against the New York City Health and Hospitals Corporation. The defendant moved to dismiss the claim as time-barred, arguing that the infancy toll was inapplicable. The Court of Appeals disagreed, finding that where the decedent's sole distributee is an infant, and no one is eligible to receive letters of administration to bring a wrongful death action as a personal representative of the estate, CPLR 208 will toll the statute of limitations "until the earliest moment there is a personal representative or potential personal representative who can bring the action, whether by appointment of a guardian or majority of the distributee, whichever occurs first" (*id.* at 693).

Prior to reaching this conclusion, the Court analyzed the competing concerns of both CPLR 208 and EPTL 5-4.1, and found that a "problem arises in the application of [the toll set forth in CPLR 208] to the wrongful death cause of action," in that the "the 'person entitled to commence' a wrongful death action is not the decedent's distributee – who is the beneficiary of

the claim – but the decedent’s personal representative” (*id.* at 690-691). The issue before the Court was whether “the infancy of the sole distributee” could be considered to be “a disability attributable to the ‘person entitled to commence an action’ in the unusual situation where no personal representative can be appointed to bring a wrongful death action until the infant obtains a guardian” (*id.* at 691).

In resolving that issue, the Court examined the relevant statutory scheme:

The wrongful death cause of action in New York is exclusively statutory ... Under the wrongful death statute, a decedent’s personal representative may maintain the action for the benefit of the distributees of the estate (EPTL 5-4.1; *see also* 5-4.4). “Personal representative” is defined as “a person who has received letters to administer the estate of a decedent” (EPTL 1-2.13).

Under the [Surrogate’s Court Procedure Act (SCPA)], distributees have a prior right to letters of administration (SCPA 1001); an infant, however is ineligible to receive such letters (SCPA 707 [1] [a]). Thus, as the Appellate Division observed, “where the sole distributee is an infant, no one is eligible to receive letters of administration until such time as a guardian is appointed” (169 AD2d 535, 536, 564 NYS2d 387; *see also* SCPA 1001 [2], [6]). It follows that in the present case, at the time of decedent’s death, no one could be granted letters of administration – and consequently no one could commence the wrongful death action – until a guardian was appointed for the child

(*id.* at 692-693).

The Court found that “[g]iven these circumstances, we conclude that the infant/sole distributee should have the benefit of the toll provided by CPLR 208” (*id.* at 694), which applies “until the earliest moment there is a personal representative or potential personal representative who can bring the action, whether by appointment of a guardian or majority of the distributee, whichever occurs first” (*id.* at 693; *accord Baker v Bronx Lebanon Hosp. Ctr.*, 53

AD3d at 27 [only upon the appointment of a guardian of the property for the infant/sole distributee would there be deemed to be “a potential personal representative entitled to ‘commence an action,’” and thus the infancy toll terminated only at that time]; *see e.g. Vasquez v Wood*, 18 AD3d 645 [2d Dept 2005] [statute of limitations applicable to wrongful death action was tolled until guardian was actually appointed for decedent’s infant son, who was his only distributee]; *Weed v St. Joseph’s Hosp.*, 245 AD2d 713 [3d Dept 1997] [since decedent’s sole distributee was an infant, and no one was eligible to receive letters of administration to bring wrongful death action as personal representative of estate, statute of limitations for wrongful death action was tolled until putative father was appointed guardian of the infant]; *Rivera v Westchester County Medical Ctr.*, 222 AD2d 680, 680 [2d Dept 1995], *lv denied* 88 Ny2d 808 [1996] [“under the particular circumstances presented here, where the decedent was survived only by infant distributees, the Supreme Court properly concluded that the Statute of Limitations was tolled until April 28, 1992, the date of the issuance of letters of guardianship to the claimant”]).

The particular facts presented here warrant application of the exception specified in *Hernandez*. Here, as in *Hernandez*, a wrongful death cause of action is being sought on behalf of Branden Lee Ortiz, the sole infant intestate distributee, and plaintiff was not qualified to commence an action on his behalf prior to the issuance of letters of temporary administration on January 14, 2009. Accordingly, the statute of limitations was tolled until plaintiff’s appointment on January 14, 2009, as that date was the “earliest time for removal of the disability in the unusual situation presented” (*Hernandez v New York City Health & Hosps. Corp.*, 78 NY2d at 694). As this action was commenced on January 28, 2009, within two weeks of such

appointment, it is clearly timely (*see id.*).

Viva contends, for the first time on reply, that CPLR 208 does not apply because “no wrongful death cause of action is alleged on behalf of the distributees of Perez’s estate” (*see* Seidman Reply Aff., ¶ 6). Viva further contends that, because this case is nothing more than a personal injury action, the CPLR 208 toll does not apply because a survival action for personal injuries belongs only to the decedent’s estate, and cannot be revived by the appointment of a proper representative of the estate (*see* Reply Mem. of Law, at 4, citing *Baker v Bronx Lebanon Hosp. Ctr.*, 53 Ad3d 21, *supra*).

The court rejects these arguments. In her affirmation in support of the motion to dismiss, Ms. Seidman concedes that this action is “for the wrongful death of the plaintiff’s decedent” (Seidman Aff., ¶ 4), and refers to the two-year wrongful death statute of limitations in the memorandum of law (*see* Def. Mem., at 3).

In any event, it is clear that the complaint states a cause of action for wrongful death. “The elements of a cause of action to recover damages for wrongful death are (1) the death of a human being, (2) the wrongful act, neglect or default of the defendant by which the decedent’s death was caused, (3) the survival of distributees who suffered pecuniary loss by reason of the death of decedent and (4) the appointment of a personal representative of the decedent” (*Chong v New York City Transit Auth.*, 83 AD2d at 547; *accord Slazak v Capozzi*, 265 AD2d 877 [4th Dept 1999]; *Sloban v Boasiako* 19 Misc3d 1110[A], 2008 NY Slip Op 50628[U] [Sup Ct, Nassau County 2008]). It is undisputed that plaintiff alleges all of those elements here.

Accordingly, Viva’s motion to dismiss on the ground that the statute of limitations has expired is denied.

Accordingly, it is

ORDERED that defendant Viva Bar & Lounge's motion to dismiss the complaint is denied; and it is further

ORDERED that defendant NR Property 2 LLC's cross motion to dismiss the complaint is permitted to be withdrawn, without prejudice to be restored on affidavit upon five days notice; and it is further

ORDERED that the parties shall appear in Part 11, room 351, on March 25, 2010, at 9:30 am for a preliminary conference.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

Dated: March 11/2010

ENTER:



J.S.C.

FILED
MAR 23 2010
NEW YORK
COUNTY CLERK'S OFFICE