

Kam Ching Chiu v Trump Mar. Casino Resort

2011 NY Slip Op 30841(U)

April 6, 2011

Sup Ct, NY County

Docket Number: 114385/2002

Judge: Carol R. Edmead

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

HON. CAROL EDMEAD

PRESENT: _____

Justice

PART 35

Kam Ching Chiu

INDEX NO.

114324/02

MOTION DATE

MOTION SEQ. NO.

007

MOTION CAL. NO.

Trump Marina Casino

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED

Cross-Motion: Yes No

APR 07 2011

Upon the foregoing papers, It is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of third-party defendant Otis Elevator Company pursuant to CPLR §§1015 and 1021, dismissing the claims of the plaintiff Kam Ching Chiu, now deceased, is granted; the claims on behalf of the plaintiff Kam Ching Chiu are hereby severed and dismissed with prejudice; and it is further

ORDERED that the remaining parties shall appear on May 10, 2011, 3:00 p.m., at Part 35, Room 438, 60 Centre Street, New York, for an in-court status conference.

This constitutes the decision and order of the court.

Dated: 4/6/11

[Signature]

HON. CAROL EDMEAD

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
KAM CHING CHIU, LING SHUM CHIU
and YIN CHON TSIO,

Plaintiffs,

- against-

Index No.: 114385/2002
DECISION/ORDER

TRUMP MARINA CASINO RESORT,

Defendant.

-----X
TRUMP MARINA CASINO RESORT,

Third-Party Plaintiff,

Third-Party
Index No.: 590256/2003

-against-

OTIS ELEVATOR COMPANY,

Third-Party Defendant.

-----X
HON. CAROL R. EDMEAD, J.S.C.

FILED

APR 07 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

DECISION AND ORDER

Plaintiffs Ling Shum Chiu and Yin Chon Tsio and now deceased Kam Ching Chiu (“plaintiffs”) commenced this personal injury action against the defendant Trump Marina Casino Resort (“Trump”), and Trump brought a third-party action against the third-party defendant Otis Elevator Company (“Otis”). Otis now moves pursuant to CPLR §1015¹ and §1021, by Order to Show Cause, to dismiss the complaint of the deceased plaintiff Kam Ching Chiu on the ground that a substitution of an estate representative in place of the deceased plaintiff had not been made within a reasonable time.

¹ Pursuant to CPLR §1015 (Substitution upon death), “[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.”

Factual Background

Plaintiffs allege that on April 13, 2002 they were injured, while riding an escalator at one of the Trump casinos in Atlantic City. Thereafter, during a court mediation on October 20, 2006, plaintiffs' attorney informed defendants that Kam Ching Chiu, who had been terminally ill, died. The parties nevertheless proceeded with settlement negotiations and eventually agreed to settle, provided that an administrator would be appointed on behalf of the decedent's estate and substituted for Kam Ching Chiu. The case was marked "settled" on the court's calendar.

Thereafter, in January 2009, Otis moved by an order to show cause to restore this action to the active calendar and dismiss the claim asserted on behalf of the Kam Ching Chiu, on the ground that the substitution for the deceased plaintiff was not made.² By order dated January 20, 2009, this court directed plaintiff's counsel to arrange for the substitution within 120 days and that the failure to comply would result in dismissal of the decedent's claim (the "January 2009 order"). No substitution was made following the January 2009 order, and Otis now moves again seeking the dismissal with prejudice. Neither the remaining plaintiffs, nor anyone on behalf of the decedent, oppose the motion.

Discussion

CPLR §1201 provides in relevant part:

"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."

Pursuant to CPLR §1021, if a party dies "and timely substitution has not been made, the

² Based on the court's record, Otis moved to restore this matter to the court's calendar for the sole purpose of addressing the dismissal.

court, before proceeding 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" (*Washington v Min Chung Hwan*, 20 AD3d 303, 799 NYS2d 21 [1st Dept 2005]).

The court may dismiss an action as to the party for whom substitution should have been made, if substitution is not made within a "reasonable time" (*Washington v Min Chung Hwan, supra* [dismissing the complaint as to the deceased plaintiff where the action was nine years old, seven years had elapsed since plaintiff's death, and no representative had been substituted]; *Palmer v Selpan Elec. Co.*, 5 AD3d 248 [1st Dept 2004][reversing the denial of a CPLR §1021 motion and dismissing the complaint where plaintiff's estate waited four years after death without seeking substitution]; CPLR §1201).

Here, almost five years have passed since Kim Chang Chiu's death, and approximately two years have passed since the January 2009 order was issued, without anyone seeking a substitution for the deceased plaintiff. Therefore, and in the absence of any opposition, Otis's motion is granted and the claims asserted on behalf of the now deceased Kim Chang Chiu, are severed and dismissed with prejudice.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of third-party defendant Otis Elevator Company pursuant to CPLR §§1015 and 1021, dismissing the claims of the plaintiff Kam Ching Chiu, now deceased, is granted; the claims on behalf of the plaintiff Kam Ching Chiu are hereby severed and dismissed with prejudice; and it is further

ORDERED that the remaining parties shall appear on May 10, 2011, 3:00 p.m., at Part

35, Room 438, 60 Centre Street, New York, for an in-court status conference.

This constitutes the decision and order of the court.

Dated: April 6, 2011



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
APR 07 2011
NEW YORK
COUNTY CLERK'S OFFICE