

Damiano v Holck

2011 NY Slip Op 33329(U)

June 28, 2011

Supreme Court, Richmond County

Docket Number: 101039/08

Judge: Joseph J. Maltese

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

**Index No.: 101039/08
Motion No.: 2**

**EILEEN KELLY HOLCK DAMIANO; and
JOSEPH DAMIANO;
As Co-Administrators of the Estate of
CHRISTOPHER DAMIANO, Deceased; and
JOSEPH DAMIANO and
EILEEN KELLY HOLCK DAMIANO, Individually**

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**AEKI HOLCK,
ROBERT HOLCK, and
DOMINICK DAMIANO**

Defendants

The following items were considered in the review of this motion to dismiss the defendants Aeki Holck and Robert Holck.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed Exhibits	1 Attached to Papers

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

A motion is made by the defendants, Aeki Holck and Robert Holck [the “Holcks”] seeking dismissal of the complaint against them brought by the plaintiffs Eileen Kelly Holck Damiano and Joseph Damiano as co-administrators of the estate of Christopher Damiano and for themselves individually. Their motion is denied. However, as just and proper relief, the complaint against the defendant Dominick Damiano is dismissed without prejudice.

On March 17, 2006, Christopher Damiano, the two-and-a-half year old child of the plaintiffs Eileen and Joseph Damiano was in the bedroom on the third floor of 321 Nelson Avenue, Staten Island, New York. A television fell from its stand and onto Christopher – killing him. Eileen and Joseph Damiano filed a Summons and Verified Complaint on March 6, 2008

against the defendants Aeki Holck, Robert Holck and Dominick Damiano. The Holck's served a Verified Answer on July 1, 2008. No Answer was received from Dominick Damiano. An Examination Before Trial of the Holcks was scheduled for May 12, 2009. The Holcks notified the plaintiffs that Dominick Damiano had died sometime in March of 2009. Upon learning of Dominick Damiano's death, no depositions were taken.

A Compliance Conference was held on August 20, 2009 and the action was stayed pending a Notice to Substitute for Dominick Damiano by appointment of an administrator. The order to substitute was served on the plaintiffs on August 21, 2009. However, the plaintiffs failed to move for substitution. On December 10, 2010, the Holcks moved for their dismissal under CPLR § 1021. On February 7, 2011, a conditional order was made requiring the plaintiffs to move for the appointment of an administrator for Dominick Damiano within forty-five days. Failing substitution Dominick Damiano was to be dismissed without prejudice.

The forty-five days during which compliance was to have been effected have passed. The Holcks now move for dismissal of the action against them based upon the failure of the plaintiff to properly apply for a substitute.

Discussion

The Holcks move for dismissal of the action against them under CPLR § 3126 for failure by the plaintiff to comply with the order of February 7, 2011. Where there is a wilful failure to disclose, "the court may make such orders with regard to the failure or refusal as are just."¹ However, the import of this section falls upon a refusal to obey an order for disclosure or wilful failure to disclose information. Here, the plaintiff has failed to appoint an administrator and there is no order to disclose. Therefore, the Holcks are not eligible to be dismissed from this action on the grounds of CPLR § 3126 which pertains to wilfully failing to disclose information or refusal to obey an order for disclosure.

¹CPLR § 3126; and *Cooper v. Cooper*, ___ AD 3d ___, 2011 NY Slip Op3989, *4 [2d Dept 2011].

The Holcks also move for their own dismissal based upon CPLR § 1021, and the failure of the plaintiffs to move to substitute an administrator for the deceased Dominick Damiano. Substitution is a “designation of a person or thing to take the place of another person or thing.”²

A motion for substitution may be made by the successors or representatives of a party or by any party ... 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 ... if the event requiring substitution is the death of a party, and timely substitution has not been made, the court, before proceeding further, shall, on 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.³

Dismissal is prescribed for a deceased party for whom there is no substitution. It is discretionary upon a court to order persons interested in the decedent’s estate to show cause why this action should not be dismissed. In their motion, the Holcks themselves move for dismissal. The Holcks’s argument is that if Dominick Damiano is dismissed, so should they. However, the Holcks fail to specify their interest in the decedent’s estate. In their Partial Opposition made previously, the plaintiffs state they are willing to dismiss Dominick Damiano from this action. They do not wish to have the Holcks dismissed. Therefore, the court exercises its discretion and declines to dismiss the Holcks from the action based upon the plaintiff’s failure to substitute for Dominick Damiano.

However, the court did exercise its discretion by issuing a conditional order requiring the plaintiffs to move for substitution, and failing substitution for Dominick Damiano, to dismiss without prejudice. This order is “sufficiently specific to be enforceable.”⁴ As applied to disclosure, a conditional order is one “that grants the motion and imposes the sanction ‘unless’

²Black’s Law Dictionary [Third Pocket ed. 2006].

³CPLR § 1021.

⁴*Trabanco v. City of New York*, 81 AD 3d 490, 492 [1st Dept 2011].

within a specified time the resisting party submits to the disclosure.”⁵ “CPLR 3126 therefore broadly empowers a trial court to impose a conditional order.”⁶ Under CPLR § 3126, it is the broadly discretionary powers⁷ of the court that enables the conditional powers. Broad discretion is similar in both CPLR §§ 1021 and 3126. In contrast to CPLR § 3126, CPLR § 1021 empowers only limited consequences to a conditional order under CPLR § 1021.

Here, the court exercised that broad discretion to impose a conditional order based upon precedence.⁸ The consequences for failure to comply with the order fall within the limits specified by CPLR § 1021. In the failure by the plaintiffs to move for substitution was to result in dismissal of the deceased party without prejudice. “If the party fails to [comply] by the specified date, the conditional order becomes absolute.”⁹ Here, the conditional order was made, and the condition precedent established by the order was fulfilled.

Because conditional orders for failure to disclose and those for failure to substitute are analogous, relief from either conditional order would require “a reasonable excuse” and a “meritorious defense”¹⁰ for failure to comply. The plaintiff has not offered any excuse nor any meritorious defense. Additionally, it is logical that enforcement of this conditional order should not be unfairly prejudicial to the defendants. The Holcks do not offer any argument to justify modifying the discretionary conditional order with regard to Dominick Damiano. Because a conditional order pertaining to failure to disclose and one related to failure to substitute should be similar in their elements and purpose, they should have similar force of compulsion. Here, the conditional order requiring appointment of an administrator to substitute for the deceased Dominick Damiano will be enforced and he is dismissed.

⁵*Gibbs v. St. Barnabas Hosp.*, 16 NY 3d 74, 79 [2010].

⁶*Id.*

⁷*Id.*

⁸*Meehan v. Robinson*, 242 AD 2d 286, 287 [2d Dept 1997].

⁹*Wei Hung Hu v. Sadiqi*, ___ AD 3d ___, 2011 NY Slip Op 3051, *2 [2d Dept 2011].

¹⁰*Gibbs v. St. Barnabas Hosp.*, 16 NY 3d at 80.

Accordingly, it is hereby:

ORDERED, that the motion to dismiss the defendants Aeki Holck and Robert Holck from the action brought by Eileen Kelly Holck Damiano and Joseph Damiano as Co-Administrators of the Estate of Christopher Damiano, Deceased; and Joseph Damiano and Eileen Kelly Holck Damiano, Individually is denied; and it is further

ORDERED, that the defendant Dominick Damiano is dismissed from the current action without prejudice; and it is further

ORDERED, that the remaining parties shall return to **DCM Part 3, 130 Stuyvesant Place, Third Floor** for a conference on **August 15, 2011 at 9:30 AM.**

ENTER,

DATED: June 28, 2011

Joseph J. Maltese
Justice of the Supreme Court