

Evans v Perl

2012 NY Slip Op 31719(U)

June 27, 2012

Supreme Court, New York County

Docket Number: 602898/05

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. JUDITH J. GISCHE

PART 10

PRESENT: _____
Justice

Index Number : 602898/2005
PERL, SHARI
vs.
ANDREA PERL
SEQUENCE NUMBER : 077
AMEND CAPTION/PARTIES

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 077

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s) _____
Answering Affidavits — Exhibits _____	No(s) _____
Replying Affidavits _____	No(s) _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Stay vacated & case restored only for the purpose of decision of this motion. Having made this decision & order, case is stayed again

FILED

JUN 29 2012

Dated: 6/27/12

NEW YORK COUNTY CLERK'S OFFICE
HON. JUDITH J. GISCHE, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASONS:

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

Supreme Court of the State of New York
County of New York: IAS Part 10

-----X
Martin Evans, as guardian of the property
of Shari Perl, individually and on behalf of
Shari Perl as trustee of the Shari Perl Family
Trust and derivatively on behalf of Perl Properties, Inc.,
494 Braodway Realty co., LLC., 223-227
West 36th Street Realty Co., LLC.,
Perlrose Realty Co., LLC, 143 Mulberry
Realty Co. LLC., and Martin Evans and
Herbert Rubin as co-trustees of the Shari Perl Family Trust
derivatively on behalf of 145-147 Mulberry
Realty Co. LLC., 143 Mulberry Realty Co., LLC
and 494 Broadway Realty Co., LLC,

Decision/Order
Index # 602898/05
Motion Seq. #77

Plaintiff,

-against-

Andrea Perl, individually and as a trustee of the
Shari Perl Family Trust, Gerald Shallo, 145-147 Mulberry
Realty Co. LLC, Perl Properties Inc.. 495 Broadway
Realty Co., LLC, 256-258 West 36th Street Realty Co., LLC,
Perlrose Realty Co., Mulberry Realty Co., LLC
and Conrad Roncati, Stephen H. Rosen,

Defendants,

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Bridget Hannah Herman, a minor, and Rebecca Perl,

Nominal Defendants.

-----X
Pursuant to CPLR 2219(a) the following numbered papers were considered by
the court:

PAPERS	NUMBERED
Notice of Motion, DHP affirm., exhibits.....	1
Notice of cross-motion, JVH affirm, exhibits.....	2
DHP reply affirm., exhibits.....	3

Upon the foregoing papers the decision and order is as follows:

In this action, Martin Evans is a named plaintiff in two different capacities. He is

a named plaintiff, as the Article 81 Guardian of Shari Perl. Martin Evans is also a named plaintiff in his capacity as co-trustee, with Herbert Rubin, of the Shari Perl Family Trust. Martin Evans died on November 4, 2011. By order dated December 7, 2011, Nina Epstein was appointed the successor Article 81 Guardian. Problems in obtaining a bond (having nothing to do with Ms. Epstein's fitness to serve) delayed obtaining a formal commission. At the time the instant motion and cross-motion were submitted to the court, Ms. Epstein had still not obtained her formal commission, but it is expected shortly.

Ms Epstein has now moved to be substituted for the plaintiff, Martin Evans, but only in his capacity as Article 81 Guardian. She seeks to have the caption amended accordingly. Andrea Perl is the only party who has opposed the motion and she has also cross-moved for various relief. To the extent that this motion and cross-motion, either implicitly or explicitly, seek leave of court to make the motions, leave is granted only to the limited extent of the issues decided herein.¹

As the successor Article 81 Guardian, Nina Epstein is a proper party to continue as a named plaintiff in this action. The court rejects Andrea Perl's argument that the failure to seek such substitution sooner warrants the dismissal of this action. Here the

¹Prior to Martin Evans' death, by order dated September 8, 2011, the court required the parties to obtain prior approval before making further motions. This was based upon the inordinate number of prior motions made and the fact that the parties were appearing before J.H.O. Renee Roth, who was assisting the parties in settlement discussions. The death of Martin Evans, however, automatically stayed the action until proper substitutions were made. CPLR 1021; Anderson v. Gillian, 245 AD2d 654 (3rd dept. 1997). Notwithstanding that it is necessary for the court to decide the substitution issues before any further substantive matters can be addressed in this case, the parties have raised technical issues about whether these motions require compliance with the September 8, 2011 order.

"delay" was not lengthy, but this motion was made within six months of Ms. Epstein's appointment. During that period Ms. Epstein was addressing issues with respect to obtaining a bond, which was necessary before a formal commission could be issued. In any event, a motion to substitute a party which is made even after lengthy delay should be granted absent a showing of prejudice to the other side. Peters v. City of New York Health and Hospitals Corp., 48 AD3d 329 (1st dept 2008); see also: Largo-Chicaiza v. Westchester Scaffold Equipment Corp., 90 AD3d 716 (2nd dept. 2011). The motion for substitution should be granted because: [1] Nina Epstein is the legal successor to Martin Evans, in his capacity as Shari Perl's Article 81 Guardian, [2] the delay in seeking substitution was not lengthy, [3] there was a reasonable basis provided for the time taken to make the motion and [4] there is no prejudice to Andrea Perl. For the same reasons, there is no basis for Andrea Perl's cross-motion to dismiss the action. Ms. Epstein's substitution is conditioned upon her obtaining a formal commission to act in the Article 81 proceeding.

It is black letter law that the death of a party automatically stays an action until a proper personal representative is substituted. CPLR 1021, Rumola v. Maimonides Medical Center, 37 AD3d 696 (2nd dept. 2007), Anderson v. Gillian, *supra*. In this case, although the substitution of Nina Epstein, as the successor Article 81 Guardian, solves one aspect of substitution necessary following the death of Martin Evans, it does not satisfy the substitution required to the extent Martin Evans also sued as the co-trustee of the Shari Perl Family Trust. Consequently, the automatic stay, following Martin Evans' death remains in place. Herbert Rubin, the co-trustee, has not made any representations to the court regarding his authority under the trust instrument to

continue prosecuting this action alone, nor has any motion been made to substitute any successor trustee.² This needs to be determined before the court can lift the automatic stay and permit the parties to move forward in this action.

In this regard, Andrea Perl's cross-motion to substitute in the estate of Martin Evans, as a party, does not resolve the issue, and it must be denied. While pursuant to CPLR 1021, the opposing party can move to substitute an appropriate successor for a deceased party, the estate of Martin Evans is not an appropriate successor in this case³. Firstly, it would be the representative of Martin Evans' estate, and not the estate itself, that would need to be named as the party. See: Tag 380, LLC v. Estate of Ronson, 69 AD3d 471 (1st dept. 2010). In any event, however, even if Andrea Perl had identified the representative of Martin Evans' estate, the cross-motion would still be denied, because Martin Evans was not proceeding in this case in a personal capacity and/or for his own benefit. He was proceeding as a co-trustee.⁴ Thus, the authority to continue this action devolves in accordance with the terms of the Shari Perl family Trust. It does not involve Martin Evans' estate.

Andrea Perl has cross-moved for the court to consider pending motions

²The appointment of a successor trustee is a matter that is apparently controlled by the trust instrument and is not subject to judicial oversight and/or confirmation.

³There are two related proceedings (index #s115839/09 and 109049/10) which are also automatically stayed on account of Martin Evan's death.

⁴He was also proceeding as an Article 81 Guardian, but that substitution issue has already been addressed by the court.

sequence numbers # 68, 69, 71, 73, 74 and 75.⁵ Since this action remains in stay status until all of the substitution issues following Martin Evans' death are resolved, Andrea Perl's cross-motion must be denied. Other than issues related to the substitution itself, no substantive decisions can be made by the court until all the substitutions required on account of Martin Evans' death are completed.

Finally, Andrea Perl moves to have this court absolve her of appearing for further settlement conferences before a JHO, namely former Surrogate Renee R. Roth. The court has no authority to order Andrea Perl to attempt settlement of this matter. Consequently, the court will not "order" that Andrea Perl is absolved from engaging in settlement negotiations. Cooperation in settlement efforts is a voluntary matter on her part, should she chose that course of action. The court does note, however, that it would be prudent for Andrea Perl to pursue settlement. Despite some harsh remarks made by Andrea Perl's counsel, Judge Roth remains ready to apply her considerable skills in assisting the parties. The other parties have expressed their gratitude and willingness to further pursue settlement discussion with Judge Roth.

Judge Roth has incredible experience and expertise in the areas of law that are implicated in this dispute, which is largely a fight between two sisters on the management of their inherited wealth. Judge Roth has generously donated her valuable time and expertise to the court and the parties to help resolve their protracted dispute, which has now spanned almost seven years.

This highly contentious litigation (with multiple proceedings and nearly 100

⁵The court has not verified one way or the other whether Andrea Perl is correct in identifying the outstanding motions.

combined motions) has squandered not only the assets of the parties, but also the scarce resources of the court. Given what remains of the parties' assets, the enormous legal fees already generated in these matters, and the fees that will be generated if these matters were actually tried to completion, it is obvious to the court that whichever party ultimately succeeds, the benefit will hardly justify the costs. It is for this reason that the court has, over the years, strongly encouraged settlement and provided many valuable court resources to the parties for that objective.

Conclusion

In accordance herewith, it is hereby:


ORDERED that the motion to substitute Nina Epstein as a plaintiff in the place and stead of Martin Evans insofar as he was the Article 81 Guardian for Shari Perl is granted upon the condition that Nina Epstein obtain a formal commission in the Article 81 proceeding , and it is further

ORDERED that upon the satisfaction of such condition, Nina Epstein shall settle, on notice, an order in a form acceptable to the clerk of the court, amending the caption to include her as a party plaintiff, and it is further

ORDERED that the cross-motion is denied in its entirety , and it is further

ORDERED that any requested relief not otherwise granted herein is denied and that this constitutes the decision and order of the court.

Dated: New York, NY
June 27 2012

SO ORDERED:
J.G. J.S.C.


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JUN 29 2012

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