

Mortimer v Petrone

2013 NY Slip Op 32533(U)

October 16, 2013

Sup Ct, New York County

Docket Number: 100865/2007

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PART 5

Index Number : 100865/2007
MORTIMER, RICHARD
vs.
PETRONE, JOSEPH
SEQUENCE NUMBER : 003
AMEND CAPTION/PARTIES

FILED
Justi
OCT 21 2013

CAL: #40
COUNTY CLERK'S OFFICE
NEW YORK

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 10-16-13
OCT 16 2013


_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 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: Part 5

-----X
RICHARD MORTIMER,

Plaintiff,

-against-

JOSEPH J. PETRONE, MARTHA CARSON and
THE CITY OF NEW YORK,

Defendants.
-----X

KATHRYN E. FREED, JSC:

DECISION/ORDER
Index No. 100865/2007
Seq. No. 003

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NEW YORK

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS

NUMBERED

NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-2 (Exhs. A-J)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Plaintiff moves pursuant to CPLR§1021, substituting Ralph Carson, as Executor of the Estate of Martha Carson, deceased; and amending the caption to reflect the substitution of Ralph Carson, as Executor of the Estate of Martha Carson, deceased; lifting the stay imposed by the death of Martha Carson; and restoring the matter to active status on the Court's calendar under the new caption. No opposition has been submitted.

After a review of the papers presented, all relevant statutes and case law, the Court **grants** the motion.

Plaintiff seeks to recover monetary damages for personal injuries he sustained due to the negligence of defendants, who owned the premises wherein he tripped and fell. Plaintiff served a Summons and Complaint on or about February 20, 2007. Defendant, Martha Carson, subsequently died in June 2009, thus staying the instant matter. Plaintiff asserts that a prior motion dated March 7, 2010, requested similar relief to that requested herein. However, said motion was denied. Apparently, at that time, it was believed that Ms. Carson had not left a will, no probate proceedings had been instituted and her counsel had not anticipated such proceedings.

The aforementioned prior motion sought, inter alia, the substitution of Ethel J. Griffith as New York County Public Administratrix for the deceased defendant. However, pursuant to Surrogate's Court Procedure Act § 1102, public administrators are appointed by county surrogates such that the motion was denied and the stay remained in effect. Thereafter, plaintiff signed a Consent to Change Attorney, substituting the Law Office of Thomas E. Gorman, Esq., as attorney of record to replace out-going counsel, Barry, McTiernan & Moore, which had been filed with the court on September 27, 2011. Mr. Gorman asserts that discussions with Ms. Carson's attorney's office confirmed that she had died intestate and that her surviving family members exhibited no interest in pursuing her estate. Consequently, Mr. Gorman prepared the necessary paperwork for petition to the New York County Surrogate's Court, for the appointment of a public administrator.

At some point thereafter, contact was established with Ms. Carson's children, the distributees of her estate, in an effort to determine if they would consent to the appointment of an Administrator. It was also later determined that the New York County Surrogate's Court had issued Testamentary Letters to Ralph Carson, Ms. Carson's son, and her attorney prepared a Stipulation, stipulating to the relief requested therein. Said stipulation was signed by counsel of all the parties with the exception

of Corporation Counsel for the City of New York. Mr. Gorman also asserts that follow-up phone calls to Corporation Counsel went unheeded, necessitating the instant motion. He argues that granting the instant motion would not prejudice any of the defendants.

It is well settled that “[m]otions for leave to amend the pleadings should be freely granted...absent prejudice or surprise resulting therefrom..., unless the proposed amendment is palpably insufficient or patently devoid of merit” (CPLR §3025(b); see also *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 [1st Dept. 2010]; see also *Briarpatch Ltd., L.P. v. Briarpatch Film Corp.*, 60 A.D.3d 585, 585 [1st Dept. 2009]; *Thompson v. Cooper*, 24 A.D.3d 203, 205 [1st Dept. 2005]). Although leave to amend should be freely granted, an examination of the underlying merits of the proposed amendment is warranted in order to conserve judicial resources (see *Eighth Ave. Garage Corp. v. H.K.L. Rtly, Corp.*, 60 A.D.3d 404, 405 [1st Dept. 2009], *lv denied* 12 N.Y.3d 880 [2009]). Whether to permit amendment is within the sound discretion of the court (see *Pellegrino v. NYC Transit Auth.*, 177 A.D.2d 554, 557 [2d Dept. 1991], *lv denied* 80 N.Y.2d 760 [1992]; *Aurora Loan Services, LLC v. Dimura*, 104 A.D.3d 796 [2d Dept. 2013]).

In the case at bar, the Court finds that the proposed amendment would not cause any prejudice to defendants, and that it is palpably sufficient.

Therefore, in consideration of the foregoing, it is hereby

ORDERED that plaintiff’s motion for leave to amend the caption is granted; and it is also

ORDERED that the new caption shall read:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
RICHARD MORTIMER,

Plaintiff,

-against-

JOSEPH J. PETRONE, RALPH CARSON, as
Executor of the Estate of MARTHA CARSON, Deceased,
and THE CITY OF NEW YORK,

Defendants.

FILED

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COUNTY CLERK'S OFFICE
NEW YORK

-----X

and it is further

ORDERED that the stay imposed by the death of Martha Carson is now lifted, and the case is restored to active status on the court's calendar; and it is further

ORDERED that movant, within 30 days from service of a copy of this order with notice of entry, serve the summons so amended upon defendants and file same with the County Clerk with proof of service; and it is further

ORDERED that movant shall also serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

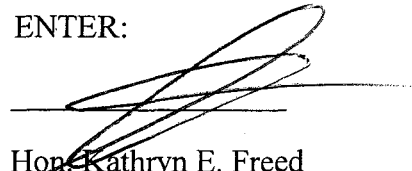
ORDERED that the parties shall appear for a compliance conference on November 12, 2013 at 80 Centre Street, Room 103 at 2:00 pm, and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: October 16, 2013

OCT 16 2013

ENTER:



Hon. Kathryn E. Freed
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT