

**Peterkin v Inspirational Book Serv., Inc.**

2013 NY Slip Op 32717(U)

November 3, 2013

Sup Ct, Queens County

Docket Number: 14390/07

Judge: James J. Golia

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable JAMES J. GOLIA  
Justice

IAS TERM, PART 33

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PECOLIA LYNCH PETERKIN,

Index No: 14390/07

Plaintiff(s),

Motion Date: 06/24/13

-- against --

Cal. Nos: 108 and 109

INSPIRATIONAL BOOK SERVICE, INC.,  
ELIZABETH BRIAN, DANIEL'S REALTY,  
INC., AND THE DANIEL'S AGENCY,

Sequence Nos. 4 and 5

Defendant(s).

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The following papers were read on this motion by plaintiff for an order lifting the stay in this action and pursuant to CPLR 1021, appointing a temporary administrator and separate motion by defendant Karen Brian and cross motion by defendant Inspirational Book Service, Inc. each for an order lifting the stay and dismissing the action for plaintiff's delay in filing for a temporary administrator.

	<u>PAPERS</u> <u>NUMBERED</u>
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Upon the foregoing papers it is ordered that this motion is decided as follows:

This is a negligence action that was previously stayed as a result of the death of defendant Elizabeth Brian. By this motion

plaintiff seeks an order lifting the stay and substituting Donald Sullivan as the temporary administrator for Elizabeth Brian.

By separate motion and cross motion defendants Elizabeth Brian and Inspirational Book Service, Inc., respectively, seek an order lifting the stay and dismissing the plaintiff's complaint, with prejudice, for failing to substitute an administrator within a reasonable time.

Turning first to the motion and cross motion by the defendants seeking an order, pursuant to CPLR §1021 dismissing the complaint, CPLR §1021 provides, in pertinent part, that "[i]f 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."

In the complaint plaintiff alleges she sustained personal injuries as the result of a dangerous condition that existed on property owned and operated by the defendants. The alleged incident occurred on June 11, 2004 and this action was commenced on June 6, 2007. Defendant Elizabeth Brian passed away on November 2, 2005, and plaintiff was notified of her death on May 20, 2008, at which time the action was stayed. In April 2013, defendant Inspirational Book Service, Inc. made a motion to dismiss the complaint or appoint Donald Sullivan as temporary administrator that motion was withdrawn by stipulation, on consent of all parties.

In support of the instant motions defendants submit, a letter dated June 4, 2012, addressed to plaintiff's counsel from defendant Brian's counsel, which transmitted a copy of Ms. Brian's death certificate and advised that Ms. Brian's son-in-law, Donald Sullivan, agreed to be substituted in her place in this case. Additionally, defendants submit copies of letters dated June 11, 2012, August 13, 2012 and September 26, 2012 requesting information on how plaintiff intends to proceed with the action. Defendants argue that plaintiff's failure to move for substitution in the five years since notified of defendant Brian's death or the ten month period beginning June 2012, the date of the letter that transmitted the death certificate, is unreasonable and warrants the dismissal of the complaint.

CPLR §1021 requires a motion for substitution to be made within a reasonable time. The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, prejudice to the

other parties, and whether the party to be substituted has shown that the action or the defense has [potential] merit'" (Largo-Chicaiza v Westchester Scaffold Equip. Corp., 90 A.D.3d 716, 717 (N.Y. App. Div. 2d Dep't 2011)).

Defendants have not sufficiently demonstrated a lack of diligence on the part of plaintiff and further have failed to demonstrate prejudice and a meritorious defense. Therefore, the motion and cross motion by defendants are denied in their entirety.

Moreover, as previously noted CPLR §1021 states if "substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made". As defendant Inspirational Book Service Inc. is not the party for whom substitution is sought, the relief requested cannot be provided pursuant to CPLR §1021.

With respect to plaintiff's motion, the Supreme Court, as a court of general jurisdiction, has the authority to appoint a temporary administrator for the purpose of acting for the estate in a pending civil action (Harding v Noble Taxi Corp., 155 AD2d 265, 547 N.Y.S.2d 29 [1st Dept.1989]), this authority should be used sparingly in deference to the expertise of the Surrogate Court, the usual forum for the appointment of estate fiduciaries (Dieye v Royal Blue Servs., Inc., 104 A.D.3d 724, 726 (N.Y. App. Div. 2d Dep't 2013)).

Here, however, in light of the fact that plaintiff has agreed to limit the amount of recovery sought to the limit of the insurance coverage available to defendant Elizabeth Brian, her estate will not be adversely affected by the continuation of this action. (Dieye v Royal Blue Servs., Inc., 104 A.D.3d 724, 726 (N.Y. App. Div. 2d Dep't 2013)).

Therefore, plaintiff's motion is granted. The stay is lifted; pursuant to CPLR 1015(b) Donald Sullivan is appointed temporary administrator for defendant Elizabeth Brian; and the caption of this action is amended to read as follows<sup>1</sup>:

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<sup>1</sup>The action has been discontinued as against defendant's Daniel's Realty, Inc. and The Daniels Agency

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PECOLIA LYNCH PETERKIN,

Index No: 14390/07

Plaintiff(s),

-- against --

INSPIRATIONAL BOOK SERVICE, INC.,  
and DONALD SULLIVAN as Temporary  
Administrator for ELIZABETH BRIAN,

Defendant(s).

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Accordingly, the motion and cross motion by defendants are denied in their entirety and the motion by plaintiff is granted. Plaintiff is directed to serve a copy of this order with notice of entry on all parties to this action.

This constitutes the Order of the Court.

Dated: September 3, 2013

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JAMES J. GOLIA, J.S.C.