

Hirschfeld v Cazja

2014 NY Slip Op 30085(U)

January 14, 2014

Sup Ct, New York County

Docket Number: 600923/

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK**
J.S.C. Justice

PART 39

Index Number : 600923/2005
HERSCHFELD, ELIE
vs.
CZAJA, RICHARD F.
SEQUENCE NUMBER : 002
OTHER RELIEFS

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

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 1/14/14



J.S.C.
BARBARA R. KAPNICK

- 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: IA PART 39**

-----x
ELIE HIRSCHFELD, individually, and
ELIE HIRSCHFELD and HERBERT RUBIN, as
Temporary Limited Guardians of ABRAHAM
HIRSCHFELD

Plaintiffs,

DECISION/ORDER

Index No. 600923/05

Motion Seq. No. 002

-against-

RICHARD F. CZAJA and GREGG WOLPERT, as
Co-Executors of the Estate of Stanley
Stahl, deceased, and RICHARD F. CZAJA,
as Successor Trustee for the Benefit
of Lillian Schlossberg, under the Will
of Sonia Schlossberg, deceased, BEATRICE
MARANA, JAMES MATERA and RACHEL HIRSCHFELD

Defendants.

-----x
BARBARA R. KAPNICK, J.:

This action was stayed in August 2005 upon the death of plaintiff Abraham Hirschfeld and remains stayed today. After Abraham Hirschfeld's death, his co-guardians Elie Hirschfeld and Herbert Rubin were discharged and letters of administration for Mr. Hirschfeld's estate were issued to the Public Administrator. Beatrice Marans, who is a defendant here, is also deceased. The executor of her estate is defendant Richard F. Czaja.

Plaintiff Elie Hirschfeld now moves (1) pursuant to CPLR 1015(a) and CPLR 1021, for an order substituting the Public Administrator of New York County as plaintiff in place of Abraham Hirschfeld's limited co-guardians, and substituting Richard F.

Czaja as a defendant in place of Beatrice Marans; and (2) upon substitution, for an order pursuant to CPLR 3217(b), discontinuing this action without prejudice.

Defendant Rachel Hirschfeld filed papers in opposition to this motion, however, Ms. Hirschfeld's opposition will not be considered since her Answer and Counterclaim was electronically filed on December 9, 2012 (Notice of Mot. Ex. B), approximately seven years after she was served with the Complaint (*id.* at Ex. D) and while this action was stayed. Moreover, the Answer was rejected by plaintiff Elie Hirschfeld by letter dated December 12, 2012 (*id.* at Ex. C), which was sent to Rachel Hirschfeld's counsel. The Court is unaware of any response to this letter, nor does Ms. Hirschfeld address this issue in her papers.

The remaining defendants oppose this motion on the grounds that the Court does not have jurisdiction to consider that portion of the motion which seeks discontinuance of this action without prejudice until an order is issued substituting the estates of the deceased parties and the substituted parties are served and permitted to answer. Also, defendants argue that defendant Richard Czaja in his capacity as executor of Beatrice Marans' estate, and

the Public Administrator, should have been personally served with this motion, rather than served through their attorneys.¹

The Court finds that the arguments in opposition are without merit. It is well settled that a plaintiff should be permitted to discontinue a pending action at any time "unless substantial rights have accrued or his adversary's rights would be prejudiced thereby." *Louis R. Shapiro, Inc. v. Milspemes Corp.*, 20 AD2d 857 (1st Dep't 1964). Here, there is no showing of prejudice, especially in light of the fact that a) plaintiff seeks to discontinue this action without prejudice, b) there is a 2009 action pending between almost all the same parties for substantially similar relief and c) this case was never litigated beyond the pleading stage.

Accordingly, it is hereby ORDERED that this motion by plaintiff Elie Hirschfeld, pursuant to CPLR 1015(a) and CPLR 1021, for an order substituting the Public Administrator of New York County as plaintiff in place of Abraham Hirschfeld's limited co-guardians, and substituting Richard F. Czaja as a defendant in

¹ The Court notes that in his Affirmation in Support of Motion to Voluntarily Discontinue Action Without Prejudice, counsel for Elie Hirschfeld states that "[c]ounsel for the Public Administrator of New York County . . . has advised me that the Public Administrator consents to the relief sought in the Motion." (Gayer Aff. ¶ 2.)

place of Beatrice Marans is granted and the case is restored to the active Part 39 calendar.

Upon restoration, it is further ORDERED, that plaintiff Elie Hirschfeld's motion for an order pursuant to CPLR 3217(b), discontinuing this action without prejudice, is granted.

This constitutes the decision and order of this Court.

Dated: January 17, 2014


BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.