

**Matter of Estate of Robbins v DeRosa**

2014 NY Slip Op 31381(U)

May 28, 2014

Supreme Court, New York County

Docket Number: 102945/2012

Judge: Joan A. Madden

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN PART 11  
*Justice*

*Rubbins, Lorraine*

INDEX NO.: *102945/12*

Plaintiff,

MOTION DATE: *4/17/14*

- v -

MOTION SEQ. NO.: *005*

*De Rosa*

MOTION CAL. NO.:

Defendant.

The following papers, numbered 1 to _____ were read on this motion to/for <i>dismiss cross motion to amend</i>	<u>PAPERS NUMBERED</u> _____ _____ _____
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	
Answering Affidavits — Exhibits _____	
Replying Affidavits _____	

*This motion + cross motion are decided in accordance with the annexed Memorandum Decision Order.*

**FILED**

MAY 29 2014

NEW YORK COUNTY CLERK'S OFFICE

Dated: *May 28, 2014*

*[Signature]*  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

----- X  
The Estate of LORRAINE S. ROBBINS  
Plaintiff,

-against-

Decision and Order  
Index No. 102945/2012

LORRAINE, DEROSA and  
MORGAN STANLEY SMITH BARNEY, LLC.,

**FILED**

Defendant.

-----  
Joan A. Madden, J.:

**MAY 29 2014**

**NEW YORK  
COUNTY CLERKS OFFICE**

Defendant Lorraine DeRosa ("DeRosa") moves to dismiss the action on the grounds that plaintiff, an estate, is not a proper party, and that the action must be brought by the personal representative of the estate. Plaintiff opposes the motion and cross moves to amend the complaint to "join" James Robbins, as the Executor of the Estate of Lorraine Robbins, as plaintiff. For the reasons below, the motion is denied, and the cross motion is granted.

In this action, plaintiff seeks declaratory relief for the title to a \$1.1 million dollar Morgan Stanley brokerage account ("the Account") held by the now deceased Lorraine S. Robbins ("the Decedent") and to recover moneys DeRosa allegedly obtained from the Decedent. At the time of her death, Decedent was on an extended visit to DeRosa, her cousin once removed. Before her visit to DeRosa, Decedent's will left her entire estate to her two children, Mr. Robbins and Jennifer Hurdle. During her visit with DeRosa, and approximately one month before her death, Decedent transferred \$1.1 million in her Morgan Stanley account to DeRosa. Mr. Robbins is the Executor of the Decedent's Estate.

DeRosa now moves to dismiss, arguing that this action is improperly brought by the Estate, which is not a legal entity, and that the action must be brought by the Estate's personal

representative. DeRosa notes that the complaint refers to Mr. Robbins as the personal representative of the Estate in Virginia and asserts that as a foreign personal representative, he or some other qualified person, must be qualified by the New York court to bring litigation here pursuant to EPTL 13-3.5, within 10 days of the commencement of the action.

As indicated above, plaintiff opposes the motion and cross moves to “join” James Robbins as a party in his capacity of personal representative and to amend the caption to identify James Robbins as the Executor of the Estate of Lorraine Robbins as the plaintiff. In support of the cross motion, plaintiff submits a copy of the June 6, 2012 Letter of Qualification from the Commonwealth of Virginia, appointing James Robbins as the Executor of the Estate of Lorraine S. Robbins. Plaintiff also submits proof that by Notice of Compliance dated December 13, 2013, Mr. Robbins complied with EPTL §13-3.5. Plaintiff further argues that DeRosa waived any defense based on lack of capacity to sue and that she only raised the alleged defect after litigating this action for the past 17 months, which included her unsuccessful motion to change venue.

In reply, DeRosa argues, *inter alia*, that Mr. Robbins is not in compliance with EPTL § 13-3.5 as the notice of compliance with filed eighteen months after the deadline for such compliance under the statute.

DeRosa’s position is without merit. First, DeRosa’s argument that since plaintiff failed to bring the action on behalf of a personal representative the action is a nullity is unavailing. The cases cited by DeRosa in support of this position are inapposite as they involve dismissal of actions improperly filed against, and served upon, a dead person . See e.g. Marte v. Graber, 58AD3d 1 (1<sup>st</sup> Dept 2008)(an action commenced three months after the death of the only named defendant is a nullity); Maldonado v. Law Office of Mary A. Bjork, 64 AD3d 425 (1<sup>st</sup> Dept

2009)( personal injury action against driver of motor vehicle after his death must be dismissed for lack of jurisdiction); Jordan v. City of New York, 23 AD3d 436 (2d Dept 2005)(where defendant died before action was commenced and no representative had been appointed action must be dismissed).

In contrast, when an estate is named as a plaintiff, the court permits the personal representative to be substituted *nunc pro tunc* for the estate. See e.g. Estate of Schneider v. Finman, 15 NY3d 306 (2010). In fact, even where action is mistakenly brought in the name of a decedent, the court permits the error to be corrected when an executor has been appointed for the decedent. Rosenberg v. Caban, 16 NY2d 905 (1965)(the existence of an executor of decedent competent to bring an action at the time of service of the complaint rendered the rendered the misdescription of the plaintiff in the title of the complaint a mere irregularity); Kramer v. Twin County Grocers, 151 AD2d 722 (2d Dept 1989)(the court did not improvidently exercise its discretion in correcting misdescription of decedent as plaintiff which was a mere irregularity or mistake which did not prejudice defendant); Heimer v. Johnson, Drake & Piper, Inc., 26 AD2d 547 (2d Dept 1966)(substitution of the executor for the deceased plaintiff was properly permitted as a correction of an irregularity under CPLR 2001).

The complaint in this action identifies Mr. Robbins as the Executor of the Estate of Lorraine Robbins and annexed to it is the June 6, 2012 Letter of Qualification from the Commonwealth of Virginia, appointing Mr. Robbins as Executor of the Estate. Moreover, DeRosa , who has participated in this litigation for 17 months, cannot assert any prejudice with respect to the correction.

The court further notes that, in essence, DeRosa’s challenges the Estate’s “legal capacity

to sue.” Such defense to the Estate’s capacity to sue is a waived pursuant to CPLR 3211(e) if not raised in a pre-answer motion to dismiss or in the answer as an affirmative defense. Security Pacific Nat. Bank v. Evans, 31 AD3d 278 (1<sup>st</sup> Dept 2006), appeal dismissed, 8 NY3d 837 (2007). Here, as DeRosa did not make a pre-answer motion to dismiss based on lack of capacity or assert it as a defense in her answer, this defense is waived.

Finally, as to DeRosa’s argument that Mr. Robbins failed to file his letters of qualification and the affidavit required under EPTL §13-3.5, as noted above, plaintiff has filed proof of compliance with these requirements as of December 13, 2013. In addition, contrary to DeRosa’s argument, plaintiff’s prior non-compliance does not require dismissal. Instead, EPTL §13-3.5 provides that non-compliance stays the action and that defendant’s time to answer or move is extended 20 days after such compliance.

In view of the above, it is

ORDERED that DeRosa’s motion to dismiss is denied; and it is further

ORDERED that plaintiff’s cross motion is granted, and it is further

ORDERED that James S. Robbins, as Executor of the Estate of Lorraine Robbins, be substituted, *nunc pro tunc*, as plaintiff in the above-entitled action in the place and stead of plaintiff, the Estate of Lorraine Robbins; and it is further

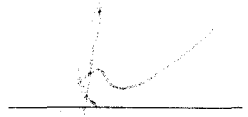
ORDERED that all papers, pleadings and proceedings in the above-entitled action be amended by substituting the name of James S. Robbins, as Executor of the Estate of Lorraine Robbins, as plaintiff in the place and stead of the Estate of Lorraine Robbins, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that counsel for James S. Robbins, as Executor of the Estate of Lorraine

Robbins, shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (room 158), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that the parties shall appear for a status conference on June 12, 2014, at 9:30 am, in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: May 28, 2014

  
\_\_\_\_\_  
J.S.C.

**FILED**  
MAY 29 2014  
NEW YORK  
COUNTY CLERKS OFFICE