

UMS Solutions, Inc. v Biosound Esaote, Inc.

2014 NY Slip Op 33812(U)

May 7, 2014

Supreme Court, Westchester County

Docket Number: 11590/10

Judge: Alan D. Scheinkman

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To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED ON MAY 7 2014 WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF WESTCHESTER COMMERCIAL DIVISION

Present: HON. ALAN D. SCHEINKMAN Justice.

-----X UMS SOLUTIONS, INC. d/b/a UNIVERSAL ULTRASOUND and UNIVERSAL MEDICAL SYSTEMS, INC.,

Plaintiffs,

-against-

BIOSOUND ESAOTE, INC., JEFF FISHEL, MICHAEL COLLINS, KEVIN GOUVIN, DR. PAUL BRAZZELL, VETEL DIAGNOSTICS, INC. and BOOTHROYD IMAGING SOLUTIONS, INC. d/b/a CANADA BOOTHROYD IMAGING SOLUTIONS (BIS), ESAOTE CANADA, BOOTHROYD IMAGING SOLUTIONS, CANADIAN VETERINARY IMAGING INC., and BIS, INC.,

Defendants. -----X

Scheinkman, J:

The court-appointed expert T& M Management Inc. ("T&M") moves by Order to Show Cause ("OTSC") to have this Court either

- (1) vacate the order entered on October 26, 2012 staying the proceedings in this action caused by the death of Jeff Fishel on or about October 18, 2012 (the "Stay Order") pursuant to CPLR 1015(b);
(2) dismiss this action as against Defendant Jeff Fishel pursuant to CPLR 1021 and vacate the Stay Order;
(3) vacate the Stay Order on the grounds that Jeff Fishel's

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DECISION & ORDER

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death does not affect the merits of the case nor a prior motion brought by OTSC on October 18, 2012 by T&M (the "Expert Fees Motion") to get paid the fees earned as the court-appointed expert; or

(4) vacate the Stay Order on the grounds that justice so requires so that this Court may grant T&M's Expert Fees Motion and require Plaintiffs UMS Solutions, Inc. d/b/a Universal Ultrasound and Universal Medical Systems, Inc. (individually or collectively, "Plaintiffs" or "Universal" or "UMS") to pay the fees due.

T&M also seeks an order directing Plaintiffs to pay T&M its reasonable costs and attorneys' fees relating to this motion.

Plaintiffs oppose the motion to the extent it seeks to vacate the Stay Order or dismiss this action in whole or in part. Plaintiffs, however, do not oppose the application to the extent T&M is seeking an order severing its claims for fees allegedly owed provided that: (1) this Court schedule an evidentiary hearing on the reasonableness of T&M's fees; and (2) this Court permit Plaintiffs to conduct discovery and retain an expert to counter the reasonableness of the fees sought by T&M.

FACTUAL AND PROCEDURAL HISTORY AND THE PARTIES' CONTENTIONS

A full recitation of the factual and procedural history underlying this action is found in this Court's Decisions and Orders dated October 9, 2012 in which this Court (1) dismissed the action as against Defendants Vetel Diagnostics, Inc. ("Vetel"), Jeff Fishel ("Fishel"), and Michael Collins ("Collins") (collectively, "Defendants") based on Plaintiffs' spoliation of evidence; and (2) dismissed the answer, affirmative defenses and counterclaims of Fishel based on his spoliation of evidence (the "Spoliation Decisions").

In the Spoliation Decisions, the Court also ordered (1) that the counterclaims asserted by Defendants Vetel and Collins were severed and continued; and (2) that unless the Court was notified within 20 days of the Spoliation Decisions that the outstanding invoices due T&M had been paid, the Court would schedule a hearing for the purpose of establishing the reasonableness of the fees and determining whether Plaintiff UMS Solutions, Inc. complied with this Court's order of April 19, 2011 requiring that it promptly pay for the services T&M provided.

T&M, premised on its understanding that no payment from Plaintiffs was going to be forthcoming, sought an Order to Show Cause to bring on its Expert Fees Motion. The Court issued the Order to Show Cause on October 18, 2012 and made it

returnable on October 26, 2012. On the return date, counsel apprised the Court that Fisher had died on October 18, 2012. The Court then issued the Stay Order.

In support of its motion, T&M submits: an affirmation from its counsel, Gail Rodgers, Esq. together with exhibits; an affirmation from Vetel's counsel, Jessica Kastner, Esq.; an affirmation from another of T&M's counsel, Abby Perer, Esq.; and a memorandum of law. In opposition, Plaintiffs submit an affirmation from their counsel Peter G. Goodman, Esq., together with its supporting exhibits. T&M also submits a second affirmation from Ms. Rodgers.

It is apparent from T&M's motion papers that since the entry of the Stay Order, it and/or Vetel have tried to obtain a substitution of Jeff Fishel's interests in this action. Ms. Kastner states that she called Jeff Fishel's parents, Robert and Donna who reside in Mooresville, Indiana, on March 27, 2013 "to discuss a potential substitution for Jeff Fishel" in this action (Affirmation of Jessica Kastner, Esq. dated January 10, 2014 at ¶ 3). She advised them about the nature of this action and that their son had been a party and "might have rights in the case, or in the appeal"; however, "Robert Fishel indicated that neither he, nor his wife, had any intention to appear and make a substitution here" (*id.* at ¶ 8). She avers that Robert Fishel did not want to take her contact information, but she left him her name and that she has not spoken or heard from the Fishels since March 27, 2013 (*id.* at ¶ 10). In the second affirmation supplied by Ms. Rodgers, she attaches an email dated January 17, 2014 from Scott Knierim, Esq., an attorney representing Robert and Donna Fishel. In the email, Mr. Knierim advises Ms. Kastner that his clients have no interest in being a part of or participating in this action (Affirmation of Gail Rodgers, Esq. in Further Support of T&M's Motion dated February 5, 2014, Ex. 1A). Ms. Rodgers further affirms that following Mr. Knierim's email, she spoke to him and he reaffirmed that Jeff Fishel's parents "have no interest whatsoever in being involved in this matter, now or at any point in the future" (*id.* at ¶ 4).

T&M details the work it performed under its appointment, the invoices totaling \$181,643.56 that have been outstanding for over two years despite two orders from this Court in April 2011¹ and October 2012 (the Spoliation Decisions) directing that such outstanding amounts be paid (Affirmation of Gail Rodgers, Esq. dated January 13, 2014 ["Rodgers Aff."] at ¶ 9). T&M also seeks to recover its costs (\$45,430.19) incurred in trying to recover the amounts owed. T&M asserts that because of the stay of the

¹The April 2011 order was the Order entered on April 19, 2011 by this Court which appointed T&M as the Court's expert to provide certain forensics to ascertain if spoliation had occurred with regard to discoverable information and to render a written report to this Court concerning its findings. The April 2011 Order further provided that Plaintiffs were to promptly pay for the services rendered upon receipt of an invoice from T&M (April 2011 Order at ¶ 4).

proceedings, this Court has been unable to entertain its Expert Fees Motion and, as a result, T&M has been unable to collect the fees due (Rodgers Aff. at ¶¶ 2, 4, 5, 7, 9). Ms. Rodgers points out that this Court's Stay Order was entered so that Jeff Fishel's estate could have time to effect a substitution but a year has passed since this Court's Stay Order and, based on the affirmation of Ms. Kastner, it is clear that "Mr. Fishel's Estate ... has no desire to get involved with this litigation in any way, and has no intent to make a substitution" (*id.* at ¶ 8).

In its memorandum of law, T&M argues that given the fact that the T&M continues to be prejudiced by not getting paid and because Fishel's estate "has no intent to make a substitution here, the stay could conceivably continue indefinitely, and T&M might never receive payment for services it rendered at the direction of this Court" (T&M Mem. at 2).

In support of this Court's either dismissing the action as against Fishel or, alternatively, vacating the Stay Order, T&M offers several contentions.

First, T&M argues that pursuant to CPLR 1015, while the death of a party triggers a stay of proceedings until a substitution may be made, "[w]here there are multiple plaintiffs or defendants in an action, and only one party dies, the action may continue without substitution, and the death simply noted on the record" (*id.* at 6). According to T&M, because this Court's Spoliation Decisions issued one week before Fishel's death had effectively removed Fishel from the case since the claims Plaintiffs had asserted against him were dismissed and Fishel's counterclaims had been dismissed, with the only claims remaining being Vetel's and Collins' counterclaims. T&M further notes that UMS had moved on June 26, 2012 for sanctions against Fishel based on his alleged spoliation of evidence and argues that "[a]lthough that motion was never decided (to the best of T&M's knowledge), it is questionable whether that motion survived Mr. Fishel's death. Even assuming that that motion survived Jeff Fishel's death, however, it has no effect on the merits of the extinguished breach-of-contract claims here" (*id.* at 8). Based on the foregoing, T&M asserts that a stay was not required and, instead, Fishel's death could have simply been noted on the record and the case may proceed without a substitution under CPLR 1015(b).

Second, T&M argues that in cases in which a stay is ordered, "the failure to make a substitution for the deceased party warrants dismissal of the action as against the deceased party, and a vacation of the stay" under CPLR 1021 (*id.* at 7). T&M asserts that pursuant to CPLR 1021, "where a party's death occurs after final judgment, there is a presumption that any delay in substitution for that party beyond four months is unreasonable" ... and "[W]here a party's death occurs before final judgment, and a substitution is not made within 'a reasonable time, the action may be dismissed as to the party for whom substitution should have been made" (*id.* at 9).

In support of its contention that Fishel's estate should have been

substituted within 4 months, T&M first argues that the Spoliation Decisions are final judgments based on its definition of a final judgment as “one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters” (T&M Mem at 9, quoting *Burke v Crosson*, 85 NY2d 10 [1995]) and that “[a]n order dismissing a state civil action is ordinarily a final, appealable judgment, even when the case is dismissed without prejudice” (*id.* at 9, quoting 4 Am Jur 2d Appellate Review § 155). T&M argues that because the Spoliation Decisions were final judgments against Fishel and because more than 13 months have passed without substitution, this Court should grant T&M’s motion to dismiss for failure to substitute pursuant to CPLR 1021. Upon this Court’s grant of a motion to dismiss under CPLR 1021, this Court will be re-vested with jurisdiction and the need for the stay of proceedings will be obviated (*id.* at 9).

Further, it is contended that, even if the Spoliation Decisions are not final judgments, Fishel’s estate was obligated to substitute within a reasonable time. Reasonableness is assessed by a consideration of “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 merit” (*id.* at 10, quoting *McDonnell v Draizin*, 24 AD3d 628, 629-629 [2d Dept 2005]). According to T&M, while some courts have found a delay of one year to be reasonable, other courts have found a delay of over one year to be unreasonable (*id.*). Further, because when assessing reasonableness, courts focus on whether the decedent’s estate has cooperated or shown an interest in getting involved in the proceedings, T&M asserts that the clear lack of intent on behalf of Fishel’s parents to have the estate substituted weighs in favor of dismissal. Finally, T&M argues that since it is not a party to this action, it continues to be prejudiced by the stay and delay in getting paid which is far more egregious than the prejudice to the parties in this case.

As its third ground for this Court’s vacation of the Stay Order, T&M argues that “where a party’s demise does not affect the merits of the case, there is no need for strict adherence to the requirement that the proceedings be stayed pending substitution” (*id.* at 13, quoting *Paterno v CYC, LLC*, 46 AD3d 788, 788-789 [1st Dept 2004]). Additionally, T&M argues that where the judicial relief sought is “uniquely separable from the cause of action to be proved at trial,’ such as an action for attorney’s fees, the proceedings for such relief need not be stayed” (*id.*, quoting *Matter of Giaquinto v Commissioner of NY State Dept. of Health*, 91 AD3d 1224 [3d Dept 2012], *lv denied* 20 NY3d 861 [2013]).

T&M argues that because all substantive claims were dismissed with regard to Fishel before his death, his death does not affect the merits of T&M’s Expert Fees Motion and the motion has nothing to do with Fishel since this Court has already ruled that Plaintiffs are solely responsible for the payment of T&M’s fees. Moreover, the issues of fees owed to T&M is separate from the underlying causes of action. Based on both points, the proceedings *vis a vis* T&M’s application for payment need not be

stayed.

As its fourth and final argument, T&M contends that even where a party's death affects the merits of the case or the relief sought is related to the causes of action, the stay may be vacated where it is no longer serving the ends of justice. Here, the reason for the stay, which was the substitution of Fishel's estate, is no longer valid or just, and T&M will continue to be prejudiced unless this Court vacates the stay.

In opposition, Mr. Goodman makes clear that Plaintiffs do not oppose T&M's motion to the extent it seeks a severance of its claim for fees. Further, he indicates that Plaintiffs consent to the Court's scheduling of a hearing for such a purpose as long as Plaintiffs are provided an opportunity for discovery and to engage an expert witness (Affirmation of Peter G. Goodman, Esq. in Opposition to T&M's Motion dated February 12, 2014 ["Goodman Opp. Aff."] at ¶ 2). However, to the extent T&M's motion seeks to vacate the stay or dismiss the action, counsel represents that Plaintiffs oppose that aspect to the motion (*id.* at ¶ 3).

Plaintiffs argue that under CPLR 1021, T&M has no standing to bring the motion since it is limited to motions made by parties or representatives of parties (*id.* at ¶ 4). Second, even if T&M had standing, dismissal under CPLR 1021 is not warranted because (1) the Spoliation Decisions were not final judgments, and (2) the passage of time in this case is not unreasonable and T&M's "research fails to identify a single case in which a delay of less than two years was held unreasonable" (*id.* at ¶ 5).

As their third argument in opposition, Plaintiffs request that the Court afford them the opportunity to move to appoint a successor or representative for Fishel and that while the task of finding a representative may be difficult because Fishel's parents want nothing to do with this action, it nevertheless cannot be ignored (*id.* at ¶ 6, *citing Dieye v Royal Blue Serv., Inc.*, 104 AD3d 724 [2d Dept 2013]).

Plaintiffs' fourth point is that there is no competent evidence to date as to whether there is an estate, estate proceeding, or an estate representative of Fishel somewhere. According to Plaintiffs, T&M relies entirely on Ms. Kastner's conversation with Fishel's parents (and then the subsequent conversation of Ms. Rodgers with the Fishels' counsel, Scott Knierim, Esq.) to the effect that the Fishels want nothing to do with this case, but, say Plaintiffs, that representation is insufficient to establish whether or not there is or there is not a representative of the Fishel estate.

As their fifth argument, Plaintiffs assert that there is insufficient evidence that the Fishels have even been given adequate notice of Jeff Fishel's estate's rights in this case and the prior proceedings that have been had and may yet to occur. Thus, while at present Plaintiffs have no claims against Fishel and Fishel has no claims against Plaintiffs, that could change as a result of a number of events – *i.e.*, (1) Plaintiffs' successful appeal of the Spoliation Decisions, and/or (2) Plaintiffs' successful vacatur of this Court's Spoliation Decisions based on a renewal motion Plaintiffs intend to file based on a false affidavit having been filed by Hunter Hill in the spoliation

motion.² And if either of these events occurs, the Fishels or the Fishel's estate "might have a different response to whether they do or do not want to be involved in these proceedings to defend against any claim by Plaintiffs" (*id.* at ¶ 17).

Plaintiffs' final argument is that rather than contacting Plaintiffs' counsel to see if there was a way to amicably resolve the motion without motion practice, Mr. Goodman states that T&M's counsel instead just "barreled ahead with filing papers, thereby unnecessarily driving up its otherwise unfounded claim for tens of thousands of dollars in collection costs" (*id.* at ¶ 18).

LEGAL ANALYSIS

There is no question that Fishel's death divested this Court's jurisdiction over the action and necessitated the Stay Order.

CPLR 1015 provides

(a) Generally. If a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties.

(b) Devolution of rights or liabilities on other parties. Upon the death of one or more of the plaintiffs or defendants in an action which the right sought to be enforced survives only to the surviving plaintiffs or against the surviving defendants, the action does not abate. The death shall be noted on the record and the action shall proceed (CPLR 1015).

As summarized in the Practice Commentary to the statute, it is clear that CPLR 1015(b) only applies "when a co-plaintiff or co-defendant dies and the decedent's rights or obligations pass by operation of law to the surviving co-party and no one else" (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C1015:4).³

²Plaintiffs also use their opposition as a vehicle to give this Court a prelude to their motion to renew they plan to file when and if the stay is properly lifted upon the substitution of a representative of Fishel's estate in this action. However, since these points are entirely irrelevant to whether or not this Court should dismiss this action against Fishel or vacate the stay, the Court will not summarize such arguments herein.

³Examples cited are cases involving injury to property, title to which passed, as a matter of law, to a surviving co-tenant upon the death of another co-tenant.

Because most claims survive a party's death as a matter of substantive law and most claims do not devolve by operation of law to the surviving co-plaintiff or co-defendant, generally speaking, the death of a party "divests the court of jurisdiction [and all proceedings in action are automatically stayed]—subject to the motion practice authorized by CPLR 1021—until a duly appointed personal representative is substituted for the deceased party" (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C1015:4). Here, because the claims by and against Fishel survived his death as a matter of substantive law and because the Fishel's rights and obligations in this lawsuit did not pass by operation of law to the surviving co-parties, the Court cannot agree with T&M's contention that there was no need for a substitution or a stay and the death of Fishel only needed to be noted on the record pursuant to CPLR 1015. In this regard, the cases upon which T&M relies are entirely *inapposite* since they involved situations in which the claim could be maintained in total by the co-plaintiff as, for example, a tenant by the entirety (*Paterno, supra*; *Bova v Vinciguerra*, 139 AD2d 797 [3d Dept 1988]; *Heller v Rogers*, 26 AD2d 640 [2d Dept 1966]).

The Court next turns to T&M's request that the action as against Fishel be dismissed pursuant to CPLR 1021. CPLR 1021 provides:

A motion for substitution may be made by the successors or representatives of a party or by any party.

If a person who should be substituted does not appear voluntarily he may be made a party defendant. If 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. If the event requiring substitution occurs after final judgment, substitution may be made in either the court from or to which an appeal could be or is taken, or the court of original instance, and if substitution is not made within four months after the event requiring substitution, the court to which the appeal is or could be taken may dismiss the appeal, impose conditions or prevent it from being taken. Whether or not it occurs before or after final judgment, if the event requiring substitution is the death of a party, and timely substitution has not been made, the court, before proceeding further, shall, on such notice as it may in its discretion direct, order the persons interested in the decedent's estate to show cause why the action or appeal should not be dismissed (CPLR 1021 [emphasis added]).

The statute by its terms provides that an application for substitution thereunder may only be brought by the decedent's personal representative or by a party. As T&M is neither, T&M lacks standing to seek substitution and would, by logical extension, lack standing to complain about the failure of either the decedent's personal representative or of a party to the litigation to seek substitution in a timely way. In other words, since T&M cannot apply for substitution, it cannot be heard to complain that someone who could have sought substitution did not exercise that prerogative. Accordingly, the branch of T&M's motion seeking dismissal pursuant to CPLR 1021 shall be denied on this basis alone (*see Mullen v Axelrod*, 74 NY2d 580 [1989]; *Hanys Serv., Inc. v Empire Blue Cross and Blue Shield*, 187 Misc 2d 253 [Sup Ct, Albany County 2001], *affd* 292 AD2d 61 [3d Dept 2002], *lv denied* 98 NY2d 612 [2002]).

Moreover, even if T&M had the standing to bring this application, the Court does not believe that T&M has satisfied the prerequisites for dismissal for failure to timely seek substitution.

First, the Practice Commentaries to CPLR 1021 make clear that "[t]he last sentence of CPLR 1021 provides special protections for the estate of a deceased plaintiff (or an appellant) where the opponent seeks dismissal of the action (or appeal) based on the estate's failure to make timely substitution" by requiring that the motion be made by an Order to Show Cause "with court-directed notice to the 'persons interested in the decedent's estate,' as to why the action or appeal should not be dismissed. Such notice is a jurisdictional prerequisite to the court's consideration of the motion to dismiss Counsel for the party seeking dismissal must do sufficient research to identify and locate the decedent's heirs so that proper notice may be given" (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C:1021:2, *citing Pena v Rucon Props., LLC*, 19 Misc 3d 655 [Sup Ct, Bronx County 2008]). While the Court is inclined to conclude that the service of the Order to Show Cause on this application upon Fishel's parents by overnight delivery was sufficient notice to Fishel's parents, there no evidence before the Court which would support the view that Fishel's parents were the only persons interested in Fishel's estate.

Second, the Court does not agree that the four month period applicable to final judgments applies in this circumstance. Thus, on their face, this Court's Spoliation Decisions were not final judgments disposing of all matters involved in this case since Vetel's and Collins' counterclaims were not dismissed. Therefore, the reasonable time determination applicable to all non-final orders would apply.

As to the issue of reasonable time, courts have held "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 the substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has merit" (*Terpis v Regal*

Heights Rehabilitation and Health Care Ctr., Inc., 108 AD3d 618, 618 [2d Dept 2013]; *McDonnell v Draizen*, 24 AD3d 628, 628-629 [2d Dept 2005]).

To begin with, none of the cases T&M cites found that a delay such as the one occasioned in this action (*i.e.*, approximately 18 months since Fishel's death) is an unreasonable length of time warranting the severe sanction of dismissal (*Terpis, supra* [three years]; *Washington v Hwan*, 20 AD3d 303 [1st Dept 2005] [seven years]; *McDonnell v Draizin*, 24 AD3d 628 [2d Dept 2005] [four years]; *Palmer v Selpan Elec. Co.*, 5 AD3d 248 [1st Dept 2004] [four years]; *Suciu v City of N.Y.*, 239 AD2d 338 [2d Dept 1997] [five years]; *Sopcheck v Long Island Jewish-Hillside Med. Ctr.*, 161 AD2d 577 [2d Dept 1990]).

In addition, all of those cases were in a far different procedural posture since they involved the death of a plaintiff and it was the plaintiff's representative who was seeking substitution after an unreasonable delay. Here, no party in this action has sought Fishel's substitution and until now, the only person seeming to care one way or another is T&M, a nonparty who apparently could obtain relief outside of this action.

This Court has repeatedly raised the prospect that T&M could bring an action directly against UMS in order to seek recovery of the amounts at issue. T&M has never explained to the Court – and does not explain now – why such a litigation is not a viable, practical remedy.

For this reason, the Court does not see a basis for concluding that T&M is prejudiced since it seemingly has in its own hands the key to the lock. Moreover, while the Court (as it has also repeatedly said) is sympathetic to the effort of its appointee to recover for the reasonable value of its services, only harm resulting from the delay is monetary in nature and potentially can be addressed with an award of interest at the statutory rate.⁴

On the other hand, dismissal would prejudice Plaintiffs to the extent that they need the assistance of the personal representative of Fishel to have the bond that Plaintiffs filed as a condition of the injunction issued by this Court discharged. Thus, the dismissal of this action prior to Plaintiffs obtaining a discharge of that bond would result in additional prejudice to Plaintiffs.

⁴The Court points out that it has already determined that Plaintiffs are solely responsible for the fees involved in T&M's work – the only question is whether the amount sought is reasonable. It may be that the determination of liability is binding on T&M unless and until an appellate court determines to the contrary, which appellate determination Plaintiffs could seek, provided that substitution is obtained.

The Court perceives Plaintiffs' present expression of interest in having the opportunity to move to appoint a successor or representative for Fishel as somewhat belated given that Plaintiffs have not done anything in that regard, though they have had significant time to make such an application and have not provided any explanation for their own inactivity (see Goodman Opp. Aff. at ¶ 6).

Plaintiffs profess to want to have the Court revisit their affirmative claims against Defendants Vetel, Fishel and Collins – something which cannot happen until the issue of a representative for Fishel is addressed. Moreover, Plaintiffs have maintained that they cannot even obtain a discharge of the bond without a proper representative of Fishel being in place (since Fishel has a claim on the bond).

The Court does not agree with the argument that the general rule of a stay upon death should not apply because the issue of the payment of T&M's fees do not implicate Fishel. The cases upon which T&M relies for this proposition are entirely distinguishable. In *Paterno, supra*, the court held that in an action to recover injury to property, the death of the plaintiff husband should not have resulted in a stay since the plaintiff wife, the tenant by the entirety of the property, which was the subject of the action for damages, "remained seized of the entire ownership of the subject property" and, therefore, the husband's death had no effect the merits of the case.

Likewise, in *Matter of Giaquinto v Commissioner of the NY State Dept of Health* (91 AD3d 1224 [3d Dept 2012]), petitioner, a resident of an adult care facility brought an Article 78 proceeding against the Commissioner of the Department of Health. Petitioner died after the Court of Appeals had remitted the matter and the Supreme Court nonetheless made a determination as to the remitted matter of attorneys' fees. On appeal of that judgment, the Appellate Division, Third Department noted that in light of the respondent's continued active litigation of the case following the petitioner's death, the issue of whether the Supreme Court should have addressed the limited scope of the remittal on counsel fees had been waived.

With regard to T&M's argument that this Court should vacate the stay because the interests of justice are no longer served, T&M fails to provide any case law to support the vacation of the stay in the interests of justice in a situation in which a case was stayed and the court was divested of jurisdiction pursuant to statute following the death of a party. Instead, the cases involved other discretionary stays where the interests of justice were no longer being served by the stay. Unless and until this Court is satisfied that all persons having an interest in Jeff Fishel's estate have no interest in pursuing Jeff Fishel's claims and that the interests of all other parties to this suit would

be served by an order vacating the stay, the Court does not perceive there to be any interests of justice furthered by a vacation at the present time.⁵

The Court does not see any basis to order a severance of T&M's claim for fees since T&M is not a party to this action, has no pleading in this action and, therefore, technically has no claims in this action. As such, there is nothing for this Court to sever. CPLR 603 provides

In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of others (CPLR 603).

For all the foregoing reasons, T&M's motion is denied.

CONCLUSION

The Court has considered the following papers in connection with these motions:

- 1) Order to Show Cause for Dismissal and/or Vacation of Stay of Proceedings dated January 14, 2017; Affirmation of Gail Rodgers, Esq. in Support of T&M Protection Resources, LLC's Order to Show Cause for Dismissal and/or Vacation of the Stay of Proceedings dated January 13, 2014 together with the exhibits annexed thereto; Affirmation of Jessica Kastner, Esq. in Support of Non-Party T&M Protection Resources, LLC's Order to Show Cause for Dismissal and/or Vacation of the Stay of Proceedings dated January 10, 2014; Affirmation of Abby R. Perer, Esq. Pursuant to CPLR 2217(B) dated January 13, 2014;
- 2) Non-Party T&M Protection Resources, LLC's Memorandum of Law in Support of Order to Show Cause for Dismissal and/or Vacation of the Stay of Proceedings dated January 13, 2014;

⁵Of course, if a party to this action were to bring a motion to dismiss pursuant to CPLR 1021 once a reasonable time has lapsed, there would be a credible basis to grant such dismissal.

- 3) Affirmation of Peter G. Goodman, Esq. in Opposition to Motion by Non-Party T&M Protection Resources LLC's Motion to Dismiss and/or Vacate the Automatic Stay dated February 12, 2014 together with the exhibits annexed thereto; and
- 4) Affirmation of Gail Rodgers, Esq. in Further Support of Non-Party T&M Protection Resources, LLC's Order to Show Cause for Dismissal and/or Vacation of the Stay of Proceedings dated February 5, 2014, together with the exhibit annexed thereto.

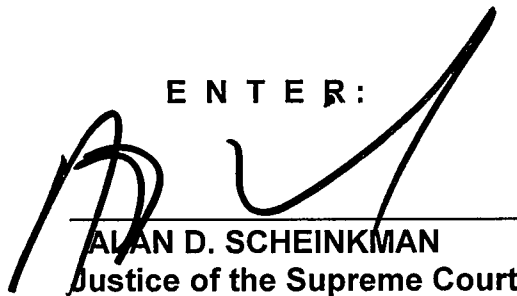
Accordingly, for the reasons stated and based upon the papers aforesaid, it is hereby

ORDERED that the motion by T&M Protection Resources, LLC to dismiss or to vacate the stay in this action is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
May 7, 2014

E N T E R :



ALAN D. SCHEINKMAN
Justice of the Supreme Court