

Verizon N.Y., Inc. v Fair Only Real Estate Corp.
2015 NY Slip Op 32165(U)
November 13, 2015
Supreme Court, New York County
Docket Number: 152867/13
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 42**

-----X
VERIZON NEW YORK, INC.

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 152867/13

**FAIR ONLY REAL ESTATE CORPORATION,
SOLOMON A. SCHEINFELD, JACK SCHEINFELD,
and RALPH SHERMAN**

(And a third-party action)

Defendants

-----X
NANCY M. BANNON, J.

I. Background

This action to recover damages arising from a fire at premises located at 289 Grand Street in Manhattan was commenced in March 2013. On April 7, 2014, defendant/third-party plaintiff Solomon Scheinfeld died. Counsel for Scheinfeld and defendants Fair Only Real Estate Corp. and Ralph Sherman (the "Fair Only defendants"), Noah Katz, of Lester Schwab Katz & Dwyer, LLP, informed opposing counsel of Scheinfeld's passing on April 10, 2014. Shortly thereafter, counsel informed the court (Tingling, J.) of the death and the court stayed the action for several weeks, after which discovery continued. Since May of 2014, the parties have conducted approximately 50 depositions, expert inspections of the premises and testing of the electrical equipment alleged to be the cause of the fire, and appeared for several discovery conferences. Upon Justice Tingling's retirement from the bench in December 2014 and subsequent reassignment of the case, the parties also informed this court of Scheinfeld's death and all proceedings were stayed pending substitution of a legal representative of Scheinfeld's estate pursuant to CPLR 1015(a).

The Fair Only defendants now move to substitute "David M. Brickman, as Temporary Executor of the Estate of Solomon Al Scheinfeld" in place of Scheinfeld, nunc pro tunc, and, in effect, to vacate the stay of this action. Brickman, named as executor in Scheinfeld's will, submitted a petition for probate with the Surrogate's Court, Nassau County, shortly after Scheinfeld's death in August 2014, and preliminary letters testamentary were issued to him sometime prior to March 2015. The parties, by stipulation dated October 2, 2015, have

effectively joined in the motion. This motion, as well as three other motions in related actions seeking the same relief, are granted.

II. Discussion

The motion is granted inasmuch as the plaintiffs have shown that, since the death of defendant Solomon Scheinfeld there has been active participation in the litigation, i.e. extensive discovery and discovery conferences, by all parties as well as the attorney for the personal representative who was to be substituted for the decedent and who, in fact had been named as executor in his will. See Griffin v Manning, 36 AD3d 530 (1st Dept. 2007); Nieves v 331 E. 109th St. Corp., 112 AD2d 59 (1st Dept. 1985).

It is, of course, well settled that “the death of a party divests a court of jurisdiction to conduct proceedings in an action until a proper substitution has been made pursuant to CPLR 1015(a).” Griffin v Manning, *supra* at 532; *see* Manto v Cerbone, 71 AD3d 1099 (2nd Dept. 2010). Any determination rendered or proceedings held without such a substitution is generally deemed a nullity. *See* Griffin v Manning, *supra*; Stancu v Cheon Hyang Oh, 74 AD3d 1322 (2nd Dept. 2010); Morrison v Budget Rent A Car Syst., Inc., 230 AD2d 253 (2nd Dept. 1997); Nieves v 331 E. 109th St. Corp., 112 AD2d 59 (1st Dept. 1985). Nor can the parties “by agreement confer subject matter jurisdiction upon [a] court where there is none.” Cuomo v Long Island Lighting Co., 71 NY2d 349, 351 (1988); Haverstraw Park, Inc. v Runcible Properties Corp., 33 NY2d 637 (1973); Cheon Hyang Oh, 74 AD3d 1322 (2nd Dept. 2010). Indeed, any such stipulation is “legally inoperative.” Morrison v Budget Rent A Car Syst., Inc., *supra* at 261. Thus, contrary to the parties’ contention, their purported stipulation does not confer jurisdiction on the court to grant the relief requested, nunc pro tunc. The stipulation, to the extent it can be given any effect in light of the stay, would serve only as the non-moving parties’ consent to any prospective relief.

However, the parties need not rely upon the stipulation for nunc pro tunc relief. It has been held that any such jurisdictional issue arising from the death of a party to a lawsuit may be waived under ‘special circumstances.’” Griffin v Manning, *supra* at 532; *see* Nieves v 331 E. 109th St. Corp., 112 AD2d 59 (1st Dept. 1985). Specifically, waiver occurs where “there has been *active participation* in the litigation by the personal representative who would have been substituted for the decedent” (Griffin v Manning, *supra* at 532 [emphasis added]; *see* Aziz v City of New York, 130 AD3d 451 [1st Dept. 2015]) without objection by the other parties (*see* Fitzpatrick v Palazzo, 46 AD3d 1414 [4th Dept. 2007]; Durrant v Kelly, 186 AD2d 237 [2nd Dept. 1992]; Nieves v 331 E. 109th St. Corp., *supra*; Kucher v Kucher, 60 AD2d 644 [2nd Dept. 1977]) such that substitution may be ordered nunc pro tunc. *See* Humphries v Consolidated Edison Co. of N.Y., Inc., 106 AD3d 634 (1st Dept. 2013).

That relief is warranted in this case for several reasons. First, the court finds that there was “active participation” by all remaining parties in the litigation after the death of Scheinfeld, as that term has been defined by the decisional authority. The First Department has found the requisite “active participation” based on far less participation than that which occurred here, such as, where the defendant participated in a traverse hearing knowing that the legal representative of the deceased plaintiff had not yet been properly substituted (see Abramowitz v Am. Gen. Contracting Co., 239 AD2d 303 [1st Dept. 1997]), where the decedent’s counsel participated in a Workers’ Compensation Board hearing and proceedings before the court prior to a formal substitution (see Humphries v Consolidated Edison Co. of N.Y., Inc., supra) and where the defendants, fully aware of a co-plaintiff’s death, participated in an inquest and did not object until filing a post-judgment motion. See Nieves v 331 E. 109th St. Corp., supra.

Here, following a brief stay, all remaining parties continued with the litigation and proceeded to conduct some 50 depositions, inspection and testing, and appeared for several discovery conferences. No party objected to the proceedings continuing after the death of Scheinfeld. Compare Sills v Fleet National Bank, 81 AD3d 1422 (4th Dept. 2011) [executor sent court letter stating that decedent’s death divested it of jurisdiction]. In that regard, it has been held that the active participation of the remaining parties in the litigation after learning of the death constitutes a waiver of any subsequent claim that the proceedings were a nullity. See Fitzpatrick v Palazzo, supra; Abramowitz v Am. Gen. Contracting Co., supra; Durrant v Kelly, supra. Indeed, the parties here affirmatively waived that argument in writing by way of their stipulation. See Fitzpatrick v Palazzo, supra.

Further, here, as in Humphries, the proposed representative had been appointed as executor of the decedent’s estate and retained the same counsel as the decedent. As previously stated, Lester Schwab Katz & Dwyer, LLP represented all three Fair Only defendants, including the decedent prior to his death, and continued to appear on behalf of the two remaining Fair Only defendants after the death. As soon as temporary letters were issued to Brickman, Lester Schwab Katz & Dwyer, LLP was retained by him and they thereafter appeared on his behalf. Moreover, Brickman had petitioned for and was issued letters testamentary by the Nassau County Surrogate’s Court within a year of the Scheinfeld’s death, and it is undisputed that he was kept apprised of all proceedings during this period while his Surrogate’s Court petition was pending. See Aziz v City of New York, supra. Also weighing in favor of the relief requested is the fact that Scheinfeld was a principal and managing agent of the corporate defendant also being represented by Lester Schwab Katz & Dwyer, LLP. “Prejudice will ordinarily not be found given an identity of interest between the decedent and the remaining parties.” Rocha Toussier y Asociados v Rivero, 184 AD2d 398, 399 (1st Dept. 1992); see also Nieves v 331 E. 109th St. Corp., supra.

III. Conclusion

The stay is vacated, the Fair Only defendants' motion to substitute "David M. Brickman, as Temporary Executor of the Estate of Solomon Al Scheinfeld", in place of Solomon Scheinfeld, nunc pro tunc to the date of Scheinfeld's death is granted, and the caption shall be amended to reflect the substitution.

Accordingly, it is

ORDERED that the motion is granted in its entirety, without opposition, the stay is vacated, and "DAVID M. BRICKMAN, as Temporary Executor of the Estate of SOLOMON AL SCHEINFELD" shall be substituted in place of defendant/third-party plaintiff SOLOMON SCHEINFELD, now deceased, nunc pro tunc, and the caption shall be so amended, and it is further,

ORDERED that the movants shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office, who are directed to mark the court's records to reflect the amendment to the pleadings, and it is further,

ORDERED that the parties shall appear for a status conference on February 11, 2016, at 2:30 p.m., as previously scheduled.

This constitutes the Decision and Order of the court.

Dated: November 13, 2015

A handwritten signature in black ink, appearing to read "NMB", followed by a horizontal line and the letters "JSC".

HON. NANCY M. BANNON