

Lestyne v Bronx Ctr. for Rehabilitation & Healthcare, LLC
2018 NY Slip Op 30770(U)
March 6, 2018
Supreme Court, Bronx County
Docket Number: 304356/13
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY

Part 4

-----x

Virginia Lestyne ,

Decision and Order

Plaintiff

-against-

Index No. 304356/13

**Bronx Center for Rehabilitation and
Healthcare, LLC and Rainbow Ambulette
Service, Inc.,**

Howard H. Sherman
J.S.C.

Defendants

-----x

The following papers numbered 1-5 read on the motion by Defendant Rainbow Ambulette Service and cross-motion by co-defendant to dismiss for failure to timely move for substitution of the deceased plaintiff

PAPERS NUMBERED

Order to Show Cause, Affirmation , Exhibits A-H [Rainbow]	1	
Notice of Cross-Motion , Affirmation, Exhibit A	2	
Affirmation in Opposition , Exhibits 1-4	3	
Affirmations in Reply, Rainbow, Bronx Center	4,5	

By order to show cause noticed on the law firm that represented the now deceased plaintiff, and “her children and beneficiaries “, Defendant Rainbow Ambulette Service Inc. (Rainbow Ambulette) moves for dismissal of the complaint pursuant to CPLR 1021 for failure to timely move for substitution of the plaintiff Virginia Lestyne , who died on October 16, 2013, fifteen months after the commencement of this action. Defendant Bronx Center for Rehabilitation and Healthcare , LLC (BCRH) cross-moves for the same relief.

The motion is opposed by affidavit of Tyrone Lestyne , one of the two children noticed in the order to show cause. In pertinent part, he attests that his “[s]ister should

be the administrator of the Estate and we filed papers to have same done ..." He also states that defendants are not prejudiced because there was an agreed settlement with Rainbow Ambulette as confirmed by correspondence of counsel [Exhibit 4].

In reply, Rainbow Ambulette contends that Tyrone Lestyne has offered no reason for the nearly two -year delay in moving for letters of administration , and submits no documentary proof of the status of the application . Concerning any offer of settlement, counsel notes that the matter is not settled because "there is no one with authority to settle this matter since plaintiff's death .."

In reply, BCRH notes that any offer was made only by the co-defendant , and argues that the affidavit in opposition fails to provide an explanation why substitution has not been made in a reasonable amount of time.

Discussion and Conclusions

If a required substitution is not made pursuant to CPLR 1021 within a "reasonable time," the action is subject to dismissal for this reason alone as to the party for whom substitution should have been made. Despite a certain liberality regarding the issue of delay because of "the strong public policy" favoring disposition of cases on the merits (see *Peters v. City of N.Y. Health & Hosps. Corp.*, 48 A.D.3d 329, 851 N.Y.S.2d 527 [1st Dept.2008]), the failure to demonstrate a reasonable excuse for this delay will warrant dismissal of the action (see, *Rose v. Frankel*, 83 A.D.3d 607, 920 N.Y.S.2d 912 [1st

Dept.2011).

Neither sibling , nor any other person having an interest in plaintiff's estate, has moved for substitution, and letters of administration remain unissued more than three years after the death of plaintiff. Tyrone Lestyne articulates no explanation for this ,much less a reasonable excuse . Nor does he address the specific concern i.e., what affirmative steps, if any , have been taken to secure letters of administration since the 06/12/15 filing with Surrogate's Court, and for the more than one and one-half years preceding that filing.

In light of the offer of settlement made by the defendant, and in recognition of the "strong public policy" for disposition on the merits, the court will grant a conditional order of dismissal providing plaintiff's heirs a final opportunity to secure the letters of administration, and to move for substitution.

Accordingly , it is

ORDERED that the motion and cross-motion be and hereby are granted and the above-entitled action dismissed unless within sixty (60) days after service of a copy of this decision and order by movant and cross-movant upon all parties noticed on the order to show cause , a motion is made for substitution of the deceased plaintiff.

This shall constitute the decision and order of this court.

Dated: March 6, 2018

A handwritten signature in black ink, consisting of several overlapping loops and a vertical stroke, positioned above a horizontal line.

Howard H. Sherman