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| <b>Matter of New York City Tr. Auth. v Kenet</b>                                                                                                                                                                               |
| 2018 NY Slip Op 31256(U)                                                                                                                                                                                                       |
| June 19, 2018                                                                                                                                                                                                                  |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 450868/2018                                                                                                                                                                                                     |
| Judge: Kelly A. O'Neill Levy                                                                                                                                                                                                   |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

**KELLY O'NEILL LEVY  
JSC**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 19-----X  
In the Matter of the Application of  
NEW YORK CITY TRANSIT AUTHORITY,INDEX NO. 450868/2018

Petitioner,

MOTION DATE 06/18/2018

- v -

MOTION SEQ. NO. 001

DAVID S. KENET and VALERIE D. KENET

Respondents.

**DECISION, ORDER  
AND JUDGMENT**-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 14, 15, 16, 17, 18, 19, 24, 25, 26, 27, 28, 29

were read on this motion to/for

GUARDIAN AD LITEM

HON. KELLY O'NEILL LEVY:

Petitioner New York City Transit Authority (hereinafter, NYCTA) moves for an order, (1) pursuant to CPLR §§ 1201 and 1202, finding respondent David S. Kenet as an adult legally incapable of adequately prosecuting or defending his rights, and/or handling his affairs, warranting the appointment of a guardian *ad litem* and (2) pursuant to General Municipal Law § 50-h, directing the guardian *ad litem* for David S. Kenet to appear for a municipal hearing related to a Notice of Claim for an alleged incident that took place on June 8, 2017. Respondents David S. Kenet and Valerie D. Kenet oppose.

A Notice of Claim was served on behalf of David S. Kenet for injuries Mr. Kenet allegedly sustained on June 8, 2017 while attempting to step down from a public sidewalk at the southwest corner of Second Avenue and East 72<sup>nd</sup> Street in Manhattan. On November 1, 2017, NYCTA served Notice of 50-h Examination upon David S. Kenet, directing him to appear for oral examination under oath, pursuant to General Municipal Law § 50-h, on January 25, 2018.

Counsel for David S. Kenet advised that David S. Kenet was suffering from “dementia, mental incompetence, and the progression of Alzheimer’s,” according to his family and spouse, Valerie D. Kenet. Medical records for David S. Kenet were provided indicating that he was suffering from Alzheimer’s disease and numerous neurological deficits and that he was unable to participate in the assessment [Medical Records (ex. D and E to the Newman aff.)].

Pursuant to CPLR § 1201, “... a person shall appear by his guardian *ad litem* ... if he is an adult incapable of adequately prosecuting or defending his rights.” CPLR § 1202(a) entitled “Appointment of guardian *ad litem*” states, in pertinent part, “The court in which an action is triable may appoint a guardian *ad litem* at any stage in the action upon its own initiative or upon the motion of ... a relative, friend or a guardian, committee of the property, or conservator ...”

NYCTA asserts that based on David S. Kenet’s medical records and the representation of his counsel, it is clear that he is incapable of adequately prosecuting or defending his rights, and thus the court should appoint a guardian *ad litem*. NYCTA also asserts that the court should compel the guardian *ad litem* for David S. Kenet to appear for the 50-h examination.

Respondents assert that an appointment of a guardian *ad litem* is not the least restrictive means necessary to protect the interests of David S. Kenet, as he had already appointed his wife, Valerie D. Kenet, to act on his behalf, including handling his claims and litigation and making his health care decisions, pursuant to a durable Power of Attorney he executed on July 10, 2014 and a Health Care Proxy he executed on July 10, 2014 [Durable Power of Attorney (ex. B to Valerie D. Kenet aff.); Health Care Proxy (ex. C to Valerie D. Kenet aff.)]. Respondents assert that Valerie D. Kenet has the authority under the Power of Attorney to continue her husband’s claim as his agent and she is willing to move forward with the 50-h examination.

General Obligations Law § 5-1502H entitled “Construction—claims and litigation” dictates that the general authority conferred by David S. Kenet through the durable Power of Attorney to his wife, Valerie D. Kenet, must be construed to mean that he authorizes her:

1. To assert and to prosecute before any court, administrative board, department, commissioner or other tribunal, any cause of action, claim, counterclaim, offset or defense, which the principal has, or claims to have, against any individual, partnership, association, corporation, government, or other person or instrumentality, including, by way of illustration and not of restriction, power to sue for the recovery of land or of any other thing of value, for the recovery of damages sustained by the principal in any manner, for the elimination or modification of tax liability, for an injunction, for specific performance, or for any other relief;

...

10. In general, and in addition to all the specific acts in this section enumerated, to do any other act or acts, which the principal can do through an agent, in connection with any claim by or against the principal or with litigation to which the principal is or may become or be designated a party.

As David S. Kenet conferred the durable Power of Attorney to his wife, Valerie D. Kenet, granting her the authority to act as his agent with respect to claims and litigation, the court finds that Valerie D. Kenet has the full authority to continue to prosecute David S. Kenet’s claim, obviating the need for the appointment of a guardian *ad litem*.

Upon the foregoing, it is

**ORDERED** that Petitioner New York City Transit Authority’s motion for an order, pursuant to CPLR §§ 1201 and 1202, finding respondent David S. Kenet as an adult legally incapable of adequately prosecuting or defending his rights, and/or handling his affairs, warranting the appointment of a guardian *ad litem* is denied; and it is further

**ORDERED** that Petitioner New York City Transit Authority’s motion for an order, pursuant to General Municipal Law § 50-h, directing guardian *ad litem* for David S. Kenet to appear for a municipal hearing related to a Notice of Claim for an alleged incident that took place on June 8, 2017 is denied; and it is further

**ORDERED AND ADJUDGED** that Respondent Valerie D. Kenet may prosecute David S. Kenet's claim, including appear for a 50-h examination, on David S. Kenet's behalf, pursuant to the durable Power of Attorney executed by David S. Kenet on July 10, 2014.

This constitutes the decision, order and judgment of the court.

June 19, 2018  
DATE

Kelly O'Neill Levy  
KELLY O'NEILL LEVY, J.S.C.  
**KELLY O'NEILL LEVY**  
**JSC**

CHECK ONE:

☒

CASE DISPOSED

☐

GRANTED

☒

DENIED

☐

SETTLE ORDER

☐

INCLUDES TRANSFER/REASSIGN

☐

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: