

**Butler v DTS, Inc.**

2018 NY Slip Op 33996(U)

October 9, 2018

Supreme Court, Bronx County

Docket Number: 22930/2012E

Judge: Lizbeth Gonzalez

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 10(e)

-----X  
MAURICE BUTLER,

Plaintiff,

DECISION and ORDER  
Index No 22930/2012E

-against-

DTS, INC. and RAUL ARANGO,

Defendants.

-----X  
HON. LIZBETH GONZÁLEZ

By Notice of Motion dated 1/30/18, defendants moved pursuant to CPLR § 1021 to dismiss plaintiff's complaint for failing to appoint an Administrator or amend the caption. The plaintiff opposed the motion. By Decision and Order dated 6/25/18, this court granted the defendants' motion.

Now, in the instant motion, counsel for plaintiff-decedent Butler moves to renew and reargue his opposition to defendants' motion to dismiss. The defendants oppose the motion and plaintiff submits a reply.

DISCUSSION

A motion to reargue is based on matters of fact or law that the Court allegedly misapprehended or overlooked in determining the prior motion (CPLR 2221[d][2]). A motion for leave to renew is intended to bring to the court's attention new or additional facts which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore, not brought to the court's attention. This requirement, however, is a flexible one and the court, in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made (*Tishman Construction Corporation of New York v City of New York*, 280 AD2d 374 [1<sup>st</sup> Dept 2001]).

Plaintiff's counsel argues in support of his motion that:

- A. The defendants did not have standing to move this Court to dismiss the complaint when the application was made on January

30, 2018 pursuant to a liquidation stay in place by Order of The Honorable Shlomo Hagler dated November 20, 2017;

B. The Administratrix Arlene Rodriguez has finally been issued Letters of Administration from the Surrogate's Court since Your Honor's Decision to dismiss plaintiff's complaint;

C. In the interest of justice for the plaintiff's decedent's 3 year old infant child, who stands to collect the proceeds from this personal injury action, reinstating the complaint is warranted.

D. There is no prejudice to the defendants.

Appointed Administrator

Plaintiff's counsel submits that contrary to this court's determination in its 6/25/18 Order that his actions were delayed in appointing an administrator for the plaintiff-decedent Maurice Butler's estate, efforts were made toward this goal. Counsel proffers documentary evidence including previously issued Letters of Temporary Administration. Significantly, plaintiff proffers the 7/17/18 Letters of Limited Administration issued by the Bronx County Surrogate's Court appointing Arlene Rodriguez as fiduciary of Mr. Butler's estate which refutes the defendants' contention that an administrator has not been appointed.

Order to Show Cause and Staying the Action

Plaintiff's counsel, for the first time, proffers a copy of an Order to Show Cause ("OSC") dated 10/19/17 regarding a liquidation stay. The OSC was filed by the Superintendent of Financial Services against Park Insurance Company and signed by New York Supreme Court Justice Shlomo Hagler. Counsel specifically references paragraph seven<sup>1</sup> to establish that the defendants had no legal permission to file a motion to dismiss since the action was stayed. This court notes that the OSC's last paragraph states in relevant part:

[P]ending the hearing of ths application, Park, its officers, directors, shareholders, members, trustees, agents, servants,

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<sup>1</sup> OSC paragraph 7 enjoins and restrains "all parties to actions, lawsuits, and special or other proceedings in which Park's policyholders or insureds are a party or are obligated to defend a party pursuant to an insurance policy, bond, contract or otherwise, from proceeding with any discovery, court proceedings or other litigation tasks or procedure, including, but not limited to, conferences, trials, applications for judgment or proceedings on settlement or judgment, for a period of 180 days from the date an order of liquidation is signed."

employees, policyholders, attorneys, and managers, and all other persons, are hereby restrained, except as authorized by the Superintendent, from transacting Park's business...or disposing of Park's property, and all persons are restrained from wasting any of Park's property.

Justice Hagler directed the parties to appear for a hearing on 11/20/17. By letter dated 11/22/17, defendants' counsel notified plaintiff's counsel that all actions were stayed and provided him with a copy of the OSC.

In opposition, defendants DTS, Inc. and Arango contend that contrary to plaintiff's claim, they had standing to file a motion to dismiss. The defendants reference paragraphs 1-3 of an undated stipulation signed by Thomas Polsinelli (President of Park Insurance Company) and D. Stan O'Loughlin (Counsel for the Superintendent of Financial Service). The stipulation states in pertinent part that defendants were authorized to:

- 1) collect premiums and cancel an insured's insurance policy;
- 2) pay ordinary course business expenses;
- 3) adjust, settle and pay claims and loss adjustments expenses up to \$25,000;
- 4) negotiate new financing (via debt or equity) with approval; and
- 5) other transactions of business that the Superintendent agrees to in writing.

The stipulation was not so-ordered. The defendants' counsel posits that the stipulation permits "Park Insurance Company to continue to conduct business pursuant to certain restrictions, which are intended to preserve its assets and property" and argues that "dismissing this action constitutes a preservation of Park's assets and property." Counsel also states that the OSC was adjourned to 12/4/18, after the submission date of the defendants' motion to dismiss.

In reply, plaintiff's counsel maintains his position that the defendants had no legal permission to submit their motion and their authority pursuant to the stipulation is limited as delineated above.

#### CONCLUSION

Counsel for plaintiff-decedent seeks to renew his opposition to the defendants' motion to dismiss. It is within the court's discretion to grant renewal, in the interest of justice, upon

facts which were known to the movant at the time the original motion was made (*Tishman Construction Corporation of New York v City of New York*, 280 AD2d 374, *supra*). In that vein, although plaintiff's counsel was aware of the OSC but failed to proffer same in opposition to the defendants' motion, the court grants the plaintiff's motion to renew.

After a review of the evidence, the court finds that the OSC is explicit regarding the stay of all court action. The defendants contend that an undated stipulation provided them with limited authority which included the filing of a motion to dismiss. This limited authority does not supersede a court-ordered stay.

Based on the foregoing, the court reverses its conclusion in its 6/25/18 Decision and Order granting the defendants' motion to dismiss plaintiff's complaint. The clerk of the court is directed to restore the action to the calendar but the matter is stayed in accordance with the pending OSC in New York County Supreme Court scheduled to be heard on December 4, 2018.

This is the Decision and Order of the court. A copy with Notice of Entry shall be served within 30 days.

Dated: October 9, 2018

So ordered,

  
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Hon. Lizbeth González, JSC