

Mangin v City of New York

2019 NY Slip Op 32261(U)

June 4, 2019

Supreme Court, Richmond County

Docket Number: 150799/2017

Judge: Thomas P. Aliotta

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2

-----X
KOBY MANGIN,

Plaintiff,

-against-

THE CITY OF NEW YORK, PENNY
SUE BROWN AND MARILYN W. LIPSITZ,

Defendants.
-----X

DECISION & ORDER

Index No.: 150799/2017
Motion No.: 1019 - 002
1442 - 003

The following papers numbered "1" through "6" were fully submitted on the 25th day
of April 2019.

	Papers Numbered
Notice of Motion for Summary Judgment by Defendant The City of New York, with Supporting Papers (dated February 28, 2019).....	1
Plaintiff's Affirmation in Opposition (dated March 28, 2019).....	2
Reply Affirmation by Defendant, The City of New York (dated April 17, 2019).....	3
Notice of Cross Motion for Summary Judgment by Defendant Penny Sue Brown, with Supporting Papers (dated April 1, 2019).....	4
Plaintiff's Affirmation in Opposition to Cross Motion (dated April 17, 2019).....	5
Reply Affirmation by Defendant Penny Sue Brown (dated April 23, 2019).....	6

Upon the foregoing papers, the motion (Seq. No. 002) of defendant The City of New
York for summary judgment dismissing the Complaint, and the cross motion (Seq. No. 003) of

defendant Penny Sue Brown for like relief are denied with leave to renew in accordance with the following:

On April 13, 2017, Koby Mangin commenced this action to recover damages for personal injuries he allegedly sustained on September 28, 2016 when he tripped and fell on a “broken, uneven, depressed and unlevel” portion of the curb abutting the premises located at 3542 Richmond Avenue, Staten Island, New York. On May 22, 2017, defendant, Marilyn W. Lipsitz, appeared and answered through her counsel (Brown’s Ex. “C”). On November 24, 2017, Ms. Lipsitz passed away (see Death Certificate, Brown’s Ex. “D”).

Presently before the Court is a motion for summary judgment dismissing the Complaint and all cross-claims against the City on the grounds, *inter alia*, that it had no prior written notice of the alleged defect, as prescribed by Section 7-201(c)(2) of the NYC Administrative Code. Co-defendant, Penny Sue Brown, cross-moves for summary judgment on the grounds that plaintiff’s accident occurred due to a defective curb, which is not within the purview of the landowner’s responsibility, and that she had no actual or constructive notice of the alleged hazard, nor did she cause or create the alleged defective condition of the curb.

It is well established that the death of a party automatically stays the proceedings in an action pending the substitution of a legal representative for the decedent (*see U & Me Homes, LLC v. County of Suffolk*, 169 AD3d 853, 854-855 [2d Dept 2019]; *Medlock v. Dr. William O. Benenson Rehabilitation Pavilion*, 167 AD3d 994, 995 [2d Dept 2018]; *Vapnersh v. Tabak*, 131 AD3d 472, 473 [2d Dept 2015]; CPLR §1015[a]). The death of a party also divests the court of jurisdiction to conduct proceedings in an action and stays the action until a proper substitution has been made pursuant to CPLR §1015(a) (*see Medlock v. Dr. William O. Benenson Rehabilitation Pavilion*, 167 AD3d at 995; *Vapnersh v. Tabak*, 131 AD3d at 473; *Stancu v.*

Cheon Hyang Oh, 74 AD3d 1322, 1323, [2d Dept 2010]). “A motion for substitution pursuant to CPLR §1021 is the method by which the court acquires jurisdiction over the deceased party’s personal representative, and such a motion “is not a mere technicality” (*U & Me Homes, LLC v. County of Suffolk*, 169 AD3d at 855 [citation omitted]).

Moreover, “any determination rendered without such substitution will generally be deemed a nullity” (*Vapnersh v. Tabak*, 131 AD3d at 473-474, citing *JP Morgan Chase Bank, N.A. v. Rosemberg*, 90 AD3d 713, 714 [2d Dept 2015]; see *U & Me Homes, LLC v. County of Suffolk*, 169 AD3d at 855; CPLR §1015 and CPLR §1021). Furthermore, the death of a party terminates his or her attorney’s authority to act on behalf of the deceased party (see *Vapnersh v. Tabak*, 131 AD3d at 474).

Here, since Ms. Lipsitz died before the pending motions for summary judgment were served and a proper substitution has not been made “by the successors or representatives of a party or by *any* party” (CPLR § 1015 and § 1021 and SCPA § 101[8][c]), *e.g.*, a motion by plaintiff’s counsel to substitute a legal representative or a Limited Administrator upon a waiver by plaintiff’s counsel to seek compensation above the limits of Lipsitz’ policy of insurance, both motions must be denied. This Court may not determine the merits of the instant motions even though Brown’s motion does not seek affirmative relief against Lipsitz and more pertinently, since the City’s motion seeks a dismissal of all cross-claims, including those interposed on behalf of the deceased (see *U & Me Homes, LLC v. County of Suffolk*, 169 AD3d at 855).

Accordingly, it is

ORDERED, that the motions for summary judgment by defendants The City of New York and Penny Sue Brown, are denied with leave to renew after the substitution of a legal representative for the deceased defendant pursuant to CPLR §1015(a) and CPLR §1021.

ENTER,



Dated:

JUN 04 2019

HON. THOMAS P. ALIOTTA, J.S.C.