

<b>Williams v Hertz Vehs., LLC</b>
2020 NY Slip Op 31153(U)
March 4, 2020
Supreme Court, Bronx County
Docket Number: 26197/2015E
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 15

ANDRE WILLIAMS, et al.,

Index No. 26197/2015E

-against-

Hon. MARY ANN BRIGANTTI

HERTZ VEHICLES, LLC, et al.

Justice Supreme Court

The following papers numbered 1 to 4 were read on this motion ( Seq. No. 5 )  
for DISMISSAL noticed on September 25, 2019.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s)1,2
Answering Affidavit and Exhibits	No(s).3,4
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, the defendants Neo Taxi Corp. and Sherap Gyatso (“Neo

Defendants”) move for an order dismissing the complaint of the plaintiffs Andre Williams (“Andre”), Jose Eddie Jimenez (“Jimenez”), and Norma Williams (“Norma”) and any cross-claims asserted against them, for failure to prosecute and failure to appoint an administrator pursuant to CPLR 3216 and 1021. The plaintiffs Andre and Jimenez oppose the motion.

*Background*

This matter arises out of an alleged motor vehicle accident that occurred on April 3, 2015. Plaintiffs commenced this action by filing a summons and complaint on November 9, 2015. At the time the action was commenced, all three plaintiffs were represented by the Law Office of Marina Trubitsky, P.C. (“Trubitsky”). Movants Neo Defendants interposed an answer on December 8, 2015. Co-defendants Hertz Vehicles LLC and Peter M. Brown (“Hertz Defendants”) interposed an answer on April 12, 2016. Defendants served discovery demands on or about October, November, and December 2016. Plaintiffs served responses on October 14, 2016. As of today’s date, Neo Defendants allege that no discovery has proceeded in this action, there have been no EBTs or IMEs, and no provision of no-fault or employment records.

Movants state that an initial preliminary conference was adjourned because it was noted that plaintiff Jimenez was deceased. Movants allege that they were never provided with a death certificate or the name of the estate's administrator. A preliminary conference was scheduled for May 29, 2018, but Plaintiffs failed to appear and the conference was adjourned to June 14, 2018. Plaintiffs again failed to appear and the conference was adjourned again to July 17, 2018. Thereafter, the conference was adjourned more times in 2018 and 2019 due to “confusion” as to who was representing which party. The matter was eventually rescheduled to October 29, 2019.

Motion is Respectfully Referred to Justice:  
Dated:

The Court takes judicial notice of its own undisputed records (*see Leary v. Bendow*, 161 A.D.3d 420, 421 [1st Dept. 2018])[court permitted to take judicial notice of undisputed court records and files]. According to Bronx County Clerk e-filings, on May 17, 2017, attorneys Andreder & George, Esqs, as attorneys for Norma, moved to compel the Trubitsky law office to turn over the legal file to them and extinguish any claimed lien for legal services. By order dated June 9, 2017, Justice Fernando Tapia granted the unopposed motion finding that Trubitsky was discharged “for cause,” thus he issued an order directing Trubitsky to turn over her legal file and extinguishing any lien sought by Trubitsky on recovery by Norma.

In October 2016, the Neo Defendants made a motion to consolidate this action with the action Peter M. Brown v. NEO Taxi Corp., et al., Bronx County Index Number 303430/2015. By order dated November 22, 2017, Justice Laura Douglas issued a decision and order denying the motion with leave to renew because “plaintiff [Jimenez] is deceased.”

By notice of motion filed on November 27, 2017, plaintiffs Andre and Jimenez - represented by the Trubitsky law office - moved to “restore this case to the trial calendar.” The affirmation of counsel in support indicates that this case was “marked off” on November 22, 2017. No order was issued marking this case off the trial calendar, and the case remained administratively active. On February 7, 2018, Justice Tapia issued an order referring the motion to restore to Justice Douglas. On April 11, 2018, Justice Douglas issued an order stating: “...motion is denied. Plaintiffs have failed to appear on three occasions.” On April 26, 2018, a stipulation of discontinuance was filed, wherein plaintiff Norma discontinued her claims against the Hertz Defendants only.

The next activity on this case, aside from the adjourned conferences, was this motion to dismiss. Neo Defendants argue that, to date, no administrator has been appointed for Jimenez, and they have not received responses to other discovery demands. Plaintiffs oppose the motion on the grounds that they have excuses for failure to provide discovery demands. Plaintiffs counsel appears to acknowledge that Jimenez is deceased. Plaintiffs counsel states that she has been in touch with Jimenez’s mother in an effort to obtain a death certificate and to appoint her as the administrator of Jimenez’s estate. No further detail is given. Plaintiffs’ office also states that there was confusion over whether they were representing Andre so that is why they failed to appear for conferences. Plaintiffs’ opposition also apparently contains a verified bill of particulars dated October 14, 2016, which was allegedly faxed to the Neo Defendants’ counsel on September 23, 2019 in response to this motion. The Court notes that the bill of particulars contains allegations on behalf of plaintiff Norma even though it is apparent that the Trubitsky law firm no longer represents that plaintiff. No reply papers have been filed responding to Plaintiffs’ opposition.

#### *Applicable Law and Analysis*

When a party dies, the party’s attorney has no authority to act until a proper party is substituted (*see Wisdom v. Wisdom*, 111 A.D.2d 13 [1<sup>st</sup> Dept. 1985]). Further, a party’s death divests a court of jurisdiction

to conduct proceedings in an action until a proper substitution is made pursuant to CPLR1015(a). While the action is stayed, however, courts are vested with jurisdiction in certain situations to dismiss the action (*see Washington v. Min Chung Hwan*, 20 A.D.3d 303, 305 [1st Dept. 2005]).

In this case, on or about November 22, 2017, the Court was apprised that plaintiff Jimenez was deceased. This matter was therefore effectively stayed and this Court was divested of jurisdiction until an appropriate substitution was made. Plaintiffs thereafter made a motion to "restore" this matter to the "trial calendar," although this case was never on the "trial calendar" since no note of issue was ever filed. Furthermore, at the time Plaintiffs made that motion, no order had been issued formally dismissing this action pursuant 22 NYCRR 202.27. The action, accordingly, was never formally dismissed (*see Wells Fargo Bank, N.A. v. Drago*, 170 A.D.3d 1083, 1084 [2d Dept. 2019]). Since Jimenez was deceased at the time, any order dismissing the action would have been a nullity in any event (*see Griffin v. Manning*, 36 A.D.3d 530, 532 [1st Dept. 2007]; *Harding v. Noble Taxi Corp.*, 155 A.D.2d 265, 266 [1st Dept. 1989]). Plaintiffs' motion to restore was denied on the grounds that Plaintiffs failed to appear on three occasions. Still, this matter remained administratively active and continued to appear on this Court's preliminary conference calendar, resulting in multiple adjournments. Eventually, the Neo Defendants made this motion which would in effect formally dismiss the Plaintiffs' complaint. Although this matter was "marked off" earlier in the life of the case, and was never restored, this Court deems it necessary to resolve this motion to dismiss on its merits, because the matter was never actually dismissed and disposed of.

CPLR 1021 provides that: "[i]f the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made, however, such dismissal shall not be on the merits unless the court shall so indicate." When a substitution is not made within a reasonable time, a court may not order dismissal without first ordering the persons interested in the decedent's estate to show cause why the action should not be dismissed (CPLR 1021; *Noriega v. Presbyterian Hospital*, 305 A.D.2d 220 [1st Dept. 2003]; *see also Velez v. New York Presbyterian Hosp.*, 145 A.D.3d 632 [1st Dept. 2016]). "The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has merit" (*see Reed v. Grossi*, 59 A.D.3d 509 [2d Dept. 2009][internal citations omitted]; *Cueller v. Betanes Food Corp.*, 24 A.D.3d 201 [1st Dept.. 2005]).

The present motion sufficiently vested this Court with jurisdiction over the matter (*see Washington*, 20 A.D.3d at 305; *see also Green v. Maimonides Medical Center*, 172 A.D.3d 824, 825 [2d Dept. 2019]). In this case, there has been no formal prior order directing Plaintiffs to show cause as to why this action should not be dismissed for failing to appoint a representative of the decedent's estate within a reasonable time (*see Velez v. New York Presbyterian Hosp.*, 145 A.D.3d 632 [1st Dept. 2016]; CPLR 1021). Furthermore, "[i]n order to prevail on a CPLR 1021 motion to dismiss, a defendant must show that the

plaintiff's failure to secure substitution in a timely fashion resulted in undue prejudice" (see Public Adm'r v. Levine, 142 A.D.3d 467, 468 [1st Dept. 2016], citing Noriega v. Presbyterian Hosp. in City of New York, 305 A.D.2d 220). In this matter, Neo Defendants failed to show that they have endured tangible prejudice as a result of Plaintiff's delay in appointing an appropriate representative of the estate (see Noriega, 305 A.D.2d at 221). While it has been some time since Jimenez passed - and to date there is no death certificate - the passage of time alone is not enough to show prejudice (see, e.g., Jacobson v. Croman, 107 A.D.3d 644 [1st Dept. 2013]), and it is the strong public policy of this State to dispose of matters on their merits (see Peters v. City of New York Health and Hospitals Corp., 48 A.D.3d 329 [1st Dept. 2008]).

Neo Defendants' motion, therefore, will be denied without prejudice, and Plaintiffs will be directed to make the appropriate application in Surrogate's Court to have a representative appointed for the estate of Jimenez. Should Plaintiff fail to take such steps within the allotted time, Defendants may make a new motion to dismiss, if so advised, in full compliance with the requirements of CPLR 1021.

Conclusion

Accordingly, it is hereby

ORDERED, that Neo Defendants' motion to dismiss is denied without prejudice, and Plaintiffs are directed to make the appropriate petition in Surrogate's Court for letters of administration for the decedent and to make the appropriate substitution within sixty (60) days after service of a copy of this Order with Notice of Entry. In the event that Plaintiffs fail to comply with this order, Neo Defendants may make a new motion to dismiss, if so advised, and it is further,

ORDERED, that all parties are to appear for a control date of 5/22/20, 2020, at 9:30AM, IAS Part 15, Room 702.

This constitutes the Decision and Order of this Court.

Dated: 3/4/20

Hon. Mary Ann Brigantti  
Hon. Mary Ann Brigantti J.S.C.

- 1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY  CASE STILL ACTIVE
- 2. MOTION IS.....  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE.....  SETTLE ORDER  SUBMIT ORDER  SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT  REFEREE APPOINTMENT