

Scala v Napolitano

2020 NY Slip Op 35099(U)

March 22, 2020

Supreme Court, Orange County

Docket Number: Index No. 69464/2017

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
FANNY SCALA,

Plaintiffs,

-against-

DECISION AND ORDER
Index No. 69464/2017
Seq# 1

SAVINO A. NAPOLITANO and SOFIA C. CASTROSCALA,

Defendants.
-----X

The following papers were read on the plaintiff's and the defendant's motions:

Notice of Motion/Affirmation in Support/Exhibits A-D	1-6
Notice of Motion/Affirmation in Support/Exhibits A-I	7-17
Affirmation	18
Affirmation in Opposition/Exhibits A-G	19-26

Upon the foregoing papers it is ordered that the motion to dismiss is denied and the motion to lift the stay and substitute a defendant is granted.

The plaintiff, Fanny Scala ("Scala") commenced this action on November 27, 2017, by filing a summons and complaint, seeking damages for alleged serious injuries sustained by Scala, while she was a passenger on a vehicle owned and operated by the defendant, Sofia C. Castroscala ("Castroscala") and that vehicle with another vehicle owned and operated by Savino A. Napolitano ("Napolitano"). The defendants filed answers, joining issue and the parties proceeded to discovery. Then, on January 28, 2019, Napolitano's attorney filed a Notice of Death, advising that Napolitano had been deceased since June 18, 2018. The action was stayed, due to the death.

Napolitano's attorney now files the instant motion pursuant to CPLR 1021, seeking to lift the stay and dismiss the complaint with prejudice and costs, for the plaintiff's failure to timely substitute an administrator for the deceased defendant. The attorney argues that the matter remained dormant for more than ten months and more than a reasonable time has elapsed since the defendant's death. She argues that the plaintiff's attorney has not made a motion for substitution to have an administrator/executor on behalf of the defendant within a reasonable time and therefore, the Court should dismiss the action pursuant to CPLR 1021.

Subsequently, the plaintiff, Scala, also filed a motion, seeking an order to lift the stay and substitute The Estate of Savino A. Napolitano ("The Estate") in place of Napolitano, pursuant to CPLR 1015[a] and to amend the caption to reflect the substitution and to permit discovery to go forward in the matter.

The attorney for Castroscala submitted an affirmation on behalf of his client, stating that there is no object or opposition to the relief sought by Scala.

DISCUSSION

CPLR 1015[a] states generally that, "if a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties" (NY CPLR 1015). "The death of a party divests the court of jurisdiction and stays the proceedings until a proper substitution has been made pursuant to CPLR 1015(a)" (*Singer v Riskin*, 32 AD3d 839, 839-840 [2d Dept. 2006]). However, the determination of a motion pursuant to CPLR 1021 made by the successors of representatives of a party or by any

party is an exception to a court's lack of jurisdiction (*Vicari v Kleinwaks*, 157 AD3d 975, 977 [2d Dept 2018]).

CPLR 1021 states that "if 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...." (NY CPLR 1021). "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" (*McDonnell v. Draizin*, 24 AD3d 628 [2d Dept 2005]; see also *Borruso v. New York Methodist Hosp.*, 84 AD3d 1293, 1294 [2d Dept 2011]).

The Court has also considered the factors involved in this action, including whether the action has merit, the diligence of the attorney to seek substitution and prejudice to the defendants and has determined that a request for substitution was made within a reasonable time. The attorney has also proffered an explanation for the delay in her having to attend to the medical needs of her dying mother as a solo practitioner. The Court also finds that the delay of ten months was not so significant as to prejudice the defendants and all of the evidence is still available.

Accordingly, based on the foregoing, it is

ORDERED that the stay is lifted; and it is further

ORDERED that the motion to dismiss is denied and it is further;

ORDERED that the motion to lift the stay and substitute Savino A. Napolitano with the Maria Nadler, Executor of the Estate of Savino A. Napolitano; and it is further

ORDERED that the caption shall be amended as follows:

-----X
FANNY SCALA,

Plaintiffs,

Index No. 69464/2017

-against-

MARIA NADLER, EXECUTOR OF THE ESTATE OF
SAVINO A. NAPOLITANO and SOFIA C. CASTROSCALA,

Defendants.
-----X

The foregoing shall constitute the Decision and Order of the Court.

Sam Walker

Dated: White Plains, New York
March 22 , 2020

Sam D. Walker

HON. SAM D. WALKER, J.S.C.