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| Falcone v Croman Real Estate, Inc. |
| 2021 NY Slip Op 30859(U) |
| March 19, 2021 |
| Supreme Court, New York County |
| Docket Number: 152550/2016 |
| Judge: Frank P. Nervo |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

-----X
DONNA FALCONE

plaintiff,

-against-

CROMAN REAL ESTATE, INC. and 138 EAST 16,
LLC

defendants

DECISION AND ORDER

Index No.
152550/2016

Mot. Seq. 001 & 002

-----X
NERVO, J.

By December 14, 2020 Order, the Court, sua sponte, moved to dismiss the action for failure to timely substitute the proper party(ies) following the death of plaintiff (*see* NYSCEF Doc. No. 24, mot. seq. 001). Plaintiff's counsel opposes, contending that law office failure, vis-à-vis his paralegal leaving his employ and the failure to provide his current contact information on the New York State Courts Electronic Filing (NYSCEF) system and with the Court, contributed to his failure to respond to the Court's inquiry. Plaintiff's counsel thereafter filed a motion for substitution (mot. seq. 002). Defendants support dismissal, for the reasons set forth in the Court's December 14, 2020 Order and oppose substitution. As the motions are related, the Court adjourned mot. seq. 001 to correspond with the return date of mot. seq. 002, and now addresses both motions in this single Decision and Order.

DISMISS

Pursuant to CPLR § 1015, the Court may direct substitution of the proper parties following the death of a party, after commencement of an action, where the claim for or

against the decedent survives. A party's motion to substitute, prior to final judgment, must be made "within a reasonable time," and failure for a party to timely move is grounds to dismiss an action (CPLR § 1021). The "reasonable time" afforded to move for substitution not unlimited (*Silvagnoli v. Consolidated Edison Employees Mutual Aid Soc'y*, 112 AD2d 819 [1st Dept]). While a party's death generally divests the Court of jurisdiction until a duly appointed representative is substituted for the decedent, the Court retains jurisdiction related to dismissal of the action for failure to timely move to substitute (*Griffin v. Manning*, 36 AD3d 530 [1st Dept 2007]; *Washington v. Min Chung Hwan*, 20 AD3d 303 [1st Dept 2005]). Notwithstanding, public policy favors adjudication on the merits, necessitating an opportunity for a showing why the matter should not be dismissed for failure to substitute (*id.*; *Peters v. City of New York Health and Hospitals Corp.*, 48 AD3d 329 [1st Dept 2008]).

Here, the delay in moving for substitution is a consequence of the law office failures of plaintiff's counsel, plaintiff's counsel's failure to provide up to date contact information with the Court, and a misplaced order from Surrogate's Court appointing Dorian M. Rancio as administrator of decedent's estate (Plaintiff's affirmation at 2-3, NYSCEF Doc. No. 25). The Court reminds Counsel of his obligation to provide, and keep current, his contact information (*see generally* 22 NYCRR § 1240.22 et. seq.). Given the foregoing, and that plaintiff has moved for substitution, the Court, in its discretion, will not dismiss the action pursuant to CPLR § 1021.

SUBSTITUTION

Generally, personal injury actions survive a party's death, that is, the claims do not abate upon death (*see generally* EPTL § 11-3.2). Where a plaintiff dies after bringing a personal injury suit, substitution of the plaintiff is appropriate (CPLR § 1015, *supra*), and the matter is automatically stayed pending substitution (*see Gonzales v. Ford Motor Co.*, 295 AD2d 474 [2d Dept 2002]).

Here, although the administrator of plaintiff's estate had been given the requisite letters of administration for her substitution in this matter in May of 2019, neither she nor her attorney were aware Surrogate's Court had issued letters. Consequently, the instant motion to substitute was not made until after the Court's motion to dismiss for failure to substitute and the discovery of letters of administration.

Defendants oppose the substitution, alleging that the delay has prejudiced their ability to defend this matter. They further contend that this prejudice is compounded because plaintiff was not deposed prior to her death, did not serve a verified bill of particulars, and failed to respond to outstanding discovery demands.

The failure of plaintiff's counsel, and the administrator of her estate, to make reasonable efforts to follow-up, track, or manage the matter pending in Surrogates Court has led to a nearly two-year delay in this matter. It is beyond cavil that the passage of time erodes memories. Notwithstanding, this action will likely rely on documentary evidence, as plaintiff's counsel avers there are no known witnesses to the alleged accident. Consequently, any prejudice to defendants is minimal, and substitution here

is proper, given the strong public policy to address matters on the merits (*see Peters v. City of New York Health and Hospitals Corp.*, 48 AD3d 329 [1st Dept 2008]; *Noriega v. Presb. Hosp. in City of N.Y.*, 305 AD2d 220 [1st Dept 2003]; *Schwartz v. Montefiore Hosp. & Med. Ctr.*, 305 AD2d 174 [1st Dept 2003]; *Wynter v. Our Lady of Mercy Med. Ctr.*, 3 AD3d 376 [1st Dept 2004]).

Accordingly, it is

ORDERED that the stay is vacated; and it is further

ORDERED that Dorian M. Rancio, as executor of the estate of Donna Falcone, deceased, be substituted as plaintiff in the above-entitled action in the place and stead of the plaintiff, without prejudice to any proceedings heretofore had herein; and it is further

ORDERED that all papers, pleadings, and proceedings in the above-entitled action be amended by substituting the name of Dorian M. Rancio, as executor of the estate of Donna Falcone, deceased, as plaintiff in the place and stead of said decedent, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that upon service of the instant order, as above, the Clerk shall amend the caption to reflect the substitution of Dorian M. Rancio as Administrator of the estate of Donna Falcone, and such caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
DORIAN M. RANCIO AS ADMINISTRATOR OF
THE ESTATE OF DONNA FALCONE,

Plaintiff,

-against-

CROMAN REAL ESTATE, INC., and 138 EAST
16 LLC,

Defendants.
-----X

;and it is further

ORDERED that the parties shall appear for a preliminary conference on April 20, 2021 at 2:15pm, via Microsoft Teams; and it is further

ORDERED that the parties shall submit a proposed preliminary conference order form, to the extent agreement can be reached, via NYSCEF by April 19, 2021 (available at: <https://www.nycourts.gov/LegacyPDFS/courts/1jd/suptmanh/PC-Genl.pdf>); and it is further


ORDERED that where counsel cannot reach agreement regarding material contained in the preliminary conference form, they shall submit a letter outlining same contemporaneously with the proposed preliminary conference order, as above; and it is further

ORDERED the parties are reminded of the Part rules, available on the Court's website, including those related to the adjournment of preliminary conferences.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: March 19, 2021

ENTER:



J.S.C.
HON. FRANK P. NERVO
J.S.C.