

<b>Martin Weiszberger in Trust v Husarsky</b>
2021 NY Slip Op 30986(U)
March 12, 2021
Supreme Court, Kings County
Docket Number: 12898/08
Judge: Lawrence S. Knipel
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At an IAS Term, Part NJTP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12<sup>th</sup> day of March, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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MARTIN WEISZBERGER IN TRUST,

Plaintiff,

- against -

Index No. 12898/08

MORDECHAI D. HUSARSKY AND MALKA HUSARSKY,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) \_\_\_\_\_

17      3-8

Opposing Affidavits (Affirmations) \_\_\_\_\_

6      12-16

Reply Affidavits (Affirmations) \_\_\_\_\_

18      19-20

Upon the foregoing papers in this adverse possession action for a prescriptive easement over defendants' property at 1079 East 18<sup>th</sup> Street in Brooklyn (Defendants' Property), defendants Mordechai D. Husarsky and Malka Husarsky (collectively, defendants) move (in motion sequence [mot. seq.] 24) for an order, pursuant to CPLR 1015 (a), staying this action until there has been a proper substitution for Martin Weiszberger, who is now deceased.

Esther Spitzer (Spitzer) as "plaintiff"<sup>1</sup> moves (in mot. seq. 25) for an order: (1)

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<sup>1</sup>

Hereinafter, Spitzer will be referenced as "plaintiff."

amending the caption to substitute her as plaintiff in place of “Martin Weiszberger in Trust,” and (2) directing defendant Malka Husarsky to submit to a medical examination “selected by Plaintiff for the purpose of determining whether [she] suffers from a medical condition that warrants adjournment of the trial . . .”

### *Background*

#### *Defendants’ Motion for a Stay*

Defendants move to stay this action until there has been a proper substitution for the plaintiff “Martin Weiszberger in Trust” because Martin Weiszberger (Weiszberger) died on December 15, 2019. Defense counsel affirms that a June 29, 1997 deed reflects that the owner of the property at 1075 East 18<sup>th</sup> Street in Brooklyn, next door to Defendants’ Property, is “Weiszberger in trust” (Weiszberger Property), but according to Weiszberger’s deposition testimony before he died, there are no written documents evidencing any trust. Defense counsel asserts that “there is a real question if a trust was ever created.”

Defense counsel submits an unrecorded deed reflecting that a portion of the Weiszberger Property may have been transferred on June 22, 2011 to Martin Weiszberger TR LLC (LLC) with a right of survivorship. Defense counsel recounts that, after he discovered that Weiszberger died, he wrote to plaintiff’s counsel “asking if he would be making an appropriate substitution so that the LLC is a party to the action (and thus bound by any determination herein).” Defense counsel asserts that “[t]his case must be stayed pending a substitution of the late Weiszberger.”

Plaintiff, in opposition, argues that the Weiszberger Property was transferred by Shirley Agnes Kappel, nee Weiszberger (Kappel), Barbara Mary Farkas, nee Weiszberger (Farkas) and Spitzer, “the three (3) sole heirs at law of Plaintiff Martin Weiszberger[,]” by a January 8, 2021 quitclaim deed to Spitzer, a copy of which is submitted to the court. Plaintiff submits an “Affirmation of Heirship” from Kappel, who affirms that at the time of Weiszberger’s death, his only lawful surviving heirs were his daughters, Kappel, Farkas and Spitzer. Kappel further affirms that her father “did not have a[n] executed trust agreement and any property held by decedent at the time of his passing devolved to his . . . heirs at law as his sole intestate heirs.”

Defendants, in reply, contend that Kappel’s affirmation of heirship should be disregarded because “an affidavit of heirship must be from someone with no interest (and accompanied by a family tree).” Defense counsel further argues that plaintiff’s counsel “ignores the June 22, 2011 deed . . .” which reflects that a portion of the Weiszberger Property was transferred to the LLC and to Weiszberger as tenants in common with a right of survivorship. Defense counsel thus argues that “if Plaintiff died (as he has), the property would pass to the LLC, not to Spitzer.”

### ***Plaintiff’s Motion to Amend the Caption***

Plaintiff moves to amend the caption to substitute Spitzer for “Martin Weiszberger in Trust” “to reflect that ownership of the [Weiszberger Property] has been deeded by all of the heirs of the deceased plaintiff to Esther Spitzer.”

Plaintiff also seeks an order directing defendant Malka Husarsky to submit to a medical examination “selected by Plaintiff for the purpose of determining whether [she] suffers from a medical condition that warrants adjournment of the trial . . .” Plaintiff’s counsel recounts that defendants requested an adjournment of the December 16, 2020 trial of this action because Malka Husarsky was afflicted with COVID-19. According to plaintiff’s counsel, “[a]t the January 19, 2021 appearance the Court put the matter over to January 26, 2021 with the direction that Defendant Malka Husarsky submit medical proof that her condition precluded her from participating at the trial” and “[o]n January 26, 2021 Defendant Malka Husarsky’s counsel produced a statement from another Doctor as to her condition.” Malka Husarsky’s treating physician, Mark L. Meyer, M.D., provided the following written statement:

“Mrs. Malka Husarsky had COVID with hypoxia and significant impairment. While she continues to improve, she is still significantly debilitated from her COVID recovery, with her heart racing and feeling shortness of breath. The stress of a court case at this time would not be good for her recovery. I suggest a reassessment in April of this year.”

Plaintiff’s counsel claims that this statement from Malka Husarsky’s doctor is “deficient” since it is not an affirmation. Plaintiff seeks an order directing that Malka Husarsky “submit to examination by a licensed physician so that a determination can be made that will allow the trial of this matter to proceed.”

Defendants, in opposition, argue that CPLR 3025 (b) specifically requires that a motion to amend be accompanied by a proposed amended pleading, which plaintiff has failed to do. Defense counsel reiterates that Kappel’s affirmation of heirship should be

disregarded because “an affidavit of heirship must be from someone with no interest (and accompanied by a family tree).” Defense counsel also raises the issue of the June 22, 2011 deed, pursuant to which a portion of the Weiszberger Property was transferred to the LLC and Weiszberger as tenants in common. Based on the 2011 deed, defendants argue that the Weiszberger Property passed to the LLC, and not to Spitzer. Defense counsel notes that “[t]here is no order of a court or document transferring the property in question to [Weiszberger’s daughters]” and “we have no proof that the three daughters acquired any interest in the Plaintiff’s property to transfer to Esther Spitzer.”

Defendants also submit an *affirmation* from Dr. Mark L. Meyer, Malka Husarsky’s treating physician, who affirms that Malka Husarsky “has been diagnosed with COVID-19 with hypoxia and significant impairment.” Dr. Meyer affirms that Malka Husarsky is “still significantly debilitated from her COVID-19 recovery, with her heart racing and feeling of shortness of breath” and opined that “[t]he stress of a court case at this time would not be good for her recovery.” Dr. Meyer affirms that he will reassess Malka Husarsky’s condition in April 2021.

Plaintiff, in reply, argues that Kappel’s affirmation of heirship is not deficient because Kappel “has no pecuniary interest in the asset that is the subject of this litigation.” Plaintiff’s counsel affirms that the 2011 deed to the LLC “was prepared in contemplation of a transaction” and “the deed was not delivered and was never recorded with the NYC Department of Finance on the ACRIS<sup>2</sup> registry.” Essentially, plaintiff’s

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counsel asserts “[t]hat a transaction [in favor of the LLC] was contemplated but never finalized . . .” so the deed executed by Weiszberger’s daughters in favor of Spitzer was a valid transfer.

### *Discussion*

CPLR 1015 (a) provides that “[i]f a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties.” Plaintiff has demonstrated that Weiszberger died intestate, the Weiszberger Property passed to Weiszberger’s sole heirs, his three daughters, who, in turn, deeded the Weiszberger Property to Spitzer by a January 8, 2021 quitclaim deed. Based on the record, substitution of Spitzer as plaintiff is warranted.

Plaintiff is not entitled to an order directing Malka Husarsky to submit to a medical examination “selected by Plaintiff for the purpose of determining whether [she] suffers from a medical condition that warrants adjournment of the trial . . .” Defendants have submitted an affirmation from Malka Husarsky’s treating physician, who affirms that she is still recovering from COVID-19, and that her medical condition will be reassessed in April 2021.

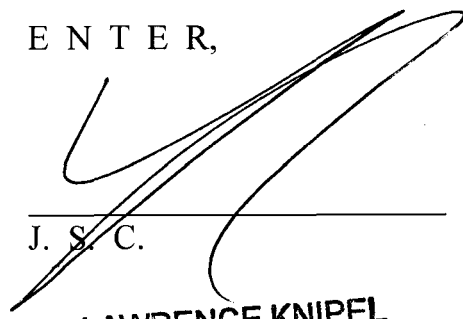
Accordingly, it is hereby

**ORDERED** that plaintiff’s motion (in mot. seq. 25) is only granted to the extent that Esther Spitzer is substituted as plaintiff instead of “Martin Weiszberger in Trust,” the caption is hereby amended to reflect the substitution, and the motion is otherwise denied; and it is further

**ORDERED** that defendant's motion (in mot. seq. 24) to stay the action until there has been a proper substitution for the deceased plaintiff, Martin Weiszberger, is denied as moot.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

**HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE**

**2021 MAR 22 AM 10:25  
KINGS COUNTY CLERK  
FILED**