

Castrillon v Cassena Care, LLC
2021 NY Slip Op 30995(U)
March 24, 2021
Supreme Court, New York County
Docket Number: 158043/2016
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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INDEX NO. 158043/2016

JIMMY CASTRILLON, as guardian of the property and
chattels of LUZ CHAMORRO,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 003

- v -

CASSENA CARE, LLC d/b/a UPPER EAST SIDE
REHABILITATION AND NURSING CENTER,

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document numbers 56, 57, 58, 59, 60, 61, 62, 63,
64, 65, 66, 67, 6869, 70, 71, 72

were read on this motion to DISMISS

In this negligence action arising out of injuries allegedly suffered by Luz
Chamorro during her admission at the defendant facility, defendant moves,
pursuant to CPLR 1015 and CPLR 1021, to dismiss the complaint for plaintiff's
failure to timely substitute a representative for Luz Chamorro (hereinafter
"decedent" or "Ms. Chamorro"), following her death. Plaintiff opposes the motion.

Background

This action seeks damages in connection with a September 2, 2016 incident
when Ms. Chamorro, who was at the defendant facility for rehabilitation from a
heart attack, tripped and fell on a towel. Discovery was delayed after it became
apparent during a deposition of Ms. Chamorro in October 2017 that she lacked the
capacity to complete her deposition (NYSCEF # 61). Defendant subsequently
requested that a guardian be substituted in the place of Ms. Chamorro and moved
for a stay (NYSCEF # 62, 63). By Decision and Order dated October 1, 2018, the
court granted defendant's motion for a stay of discovery pending the guardian's
appointment (NYSCEF #65.).

On or about February 13, 2019, the parties stipulated to amend the caption to
substitute Ms. Chamorro's son, Jimmy Castrillon ("Castrillon" or "plaintiff"), who
had been appointed as Ms. Chamorro's guardian, as plaintiff in this action
(NYSCEF #66). Castrillon was deposed on June 27, 2019. At a February 2, 2020
conference, plaintiff's counsel notified the court that Ms. Chamorro died, and the
court issued an order staying the action pending the appointment of an

administrator and directed that the parties update the court by monthly emails as to the appointment of an administrator (NYSCEF # 67). The parties did not provide the monthly updates.

On February 22, 2021, defendant filed this motion to dismiss the complaint for failure to timely substitute a representative for decedent's estate (NYSCEF # 56). Defendant argues that under CPLR 1021 dismissal is warranted as plaintiff has failed to substitute a representative of the decedent's estate for over a year, and has no excuse for the delay, particularly as this case has been pending since 2016. In addition, defendant argues that the delay has been prejudicial as it may now be impossible to locate and identify witnesses, employees, records and other documents.

In opposition, plaintiff argues that the motion should be denied as defendant failed to move by order to show cause on notice to "persons interested in decedent estate" as required under CPLR 1021. In addition, plaintiff asserts that he has diligently sought to substitute an administrator of decedent's estate as plaintiff, but that the process has been delayed due to the COVID-19 pandemic and other issues surrounding the substitution.

In support of his opposition, plaintiff submits the February 23, 2021 affirmation of Lawrence M. Flait ("Flait"), an attorney who was retained to facilitate the appointment of a representative for decedent in the Surrogate's Court of New York County (NYSCEF #69). According to Flait, the appointment has been delayed as a result of the reductions in the work force at the court caused by (i) the COVID pandemic which lengthened the processing times in the already busy court; (ii) difficulties in getting notarized papers from decedent's daughter; and (iii) various other issues with drafting the papers. Flait states that once he receives the signatures and notarizations from the witnesses to the decedent's will, and is able to correct minor errors in the filings, he will be able to "facilitate the completion of the project" (*id.*, ¶¶ 22, 23). As for allegations of prejudice, plaintiff argues that defendant cannot show prejudice as it has not been prevented from collecting relevant evidence while this matter has been stayed.

In reply, defendant asserts, *inter alia*, that dismissal is warranted as plaintiff has failed to provide any affidavit or affirmation of merit as part of his papers.

Discussion

At issue on this motion is whether plaintiff's failure to substitute a representative of the estate of decedent for more than a year following her death in February 2020 provides a basis for dismissing this action.

“[T]he death of a party divests a court of jurisdiction to conduct proceedings in an action until a proper substitution has been made pursuant to CPLR 1015(a)” (*Griffin v Manning*, 36 AD3d 530, 532 [1st Dept 2007]). With regard to seeking dismissal for the failure to make a substitution, CPLR 1021 provides, in relevant part, that “if... 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.” To determine whether the time for substitution is reasonable the court considers, “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 (*Borruso v New York Methodist Hosp*, 84 AD3d 1293, 1294 [2d Dept 2011] [internal citations and quotations omitted]).

At the outset, “when a timely substitution is not made, 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” (*Noriega v Presbyterian Hosp. in the City of New York*, 305 AD2d 220 [1st Dept 2003]). Here, as defendant failed to move by order to show cause on notice to decedent's family members, the motion has not satisfied the requirements of CPLR 1021. Moreover, even assuming *arguendo* that notice to counsel for plaintiff were sufficient, for the reasons below, dismissal is not warranted under the circumstances here.

To defeat a motion to dismiss for failure to make timely substitution of an estate representative pursuant to CPLR 1021, “a plaintiff must provide a reasonable excuse for the delay and make a prima facie showing of merit” (*Public Adm'r v Levine*, 142 AD3d 467, 468 [1st Dept 2016] [internal citations and quotations omitted]). Here, plaintiff has shown a reasonable excuse for the delay based on the affirmation of Flait, who explains the difficulties of obtaining the appointment of a representative of the estate during the pandemic. In addition, plaintiff has shown due diligence in retaining counsel to facilitate the substitution in Surrogate's Court. With regard to the merits of the action, the underlying pleadings and the petition of Castrillon in support of his appointment as guardian (NYSCEF # 28) are sufficient to establish the prima facie merit of the action, particularly in the absence proof by defendant to the contrary (*see Leonardelli v Presbyterian Hosp. in City of New York*, 288 AD2d 105, 106 [1st Dept. 2001] [finding that “plaintiff's bill of particular and verified complaint alleged sufficient detailed facts to establish the case has merit, especially since opposing affidavits offer nothing to dispute the merit of the cause of action”]; *Ronsco Constr. Co. v 30 E. 85th St. Co*, 219 AD2d 281, 284 [1st Dept 1996] [“Plaintiff's factually scant showing as to the merit of its cause of action is nevertheless sufficient...”][internal citation and quotation omitted]).

In addition, defendant's unsubstantiated claims of harm are insufficient to demonstrate “undue prejudice” resulting from plaintiff's failure to secure timely

substitution (*Noriega v Presbyterian Hosp. in the City of New York*, 305 AD2d at 221; see also *Largo-Chicaiza v Westchester Scaffold Equipment Corp.*, 90 AD3d 716, 717 [2d Dept 2011])[upholding trial court’s grant of leave to substitute a representative of estate as plaintiff despite failure to provide explanation for lengthy delay in seeking such substitution where third-party defendant “suffered no prejudice by the [court] granting the motion”)].

In view of the above and in light of the strong public policy favoring disposition of cases on the merits (*Public Adm’r v Levine*, 142 AD3d at 470, citing *Peters v. City of New York Health & Hosps. Corp.*, 48 AD3d 329 [1st Dept 2008]), the motion to dismiss for failure to timely substitute is denied.

Conclusion

Accordingly, it is

ORDERED that defendant’s motion to dismiss for failure to timely substitute a representative of decedent’s estate is denied; and it is further

ORDERED that a telephone conference shall be held on April 12, 2021 at 11 am to report as to the status of plaintiff’s efforts to substitute a representative of the decedent’s estate with call in information to be provided by the court.

3/24/21
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	OTHER
	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE