

Nelissen v MFM Contr. Corp.
2022 NY Slip Op 30323(U)
February 1, 2022
Supreme Court, New York County
Docket Number: Index No. 157230/2017
Judge: William Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. WILLIAM PERRY PART 23

Justice

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ALEXANDER NELISSEN, INDIVIDUALLY AND AS THE
PROPOSED ADMINISTRATOR OF THE ESTATE OF
MARLENE CVETKOVIC,

Plaintiff,

INDEX NO. 157230/2017

MOTION DATE N/A

MOTION SEQ. NO. 001

- v -

MFM CONTRACTING CORP., THE CITY OF NEW YORK,
THE NEW YORK CITY DEPARTMENT OF
TRANSPORTATION, WATER SERVICE OF NEW YORK

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE

This action was commenced by Alexander Nelissen (“Alexander”), individually and as the “proposed administrator” of the estate of decedent Marlene Cvetkovic, on August 4, 2017. Alexander alleged that the Defendants MFM Contracting Corp., the City of New York, the New York City Department of Transportation, and the Water Service of New York caused Ms. Cvetkovic to trip and fall on May 14, 2016, leading to injuries that caused her to die on March 9, 2017. Alexander set forth claims for negligence and wrongful death against each Defendant. (NYSCEF Doc No. 1, Complaint.) Defendants answered on September 26, 2017. (NYSCEF Doc No. 6.)

There was no further activity in this case until the filing of motion sequence 001 on February 23, 2021, when Plaintiff moved to substitute “Reinhold Nelissen as Executor for the Estate of Marlene Cvetkovic, deceased in place of Alexander Nelissen, as the proposed administrator of the Estate of Marlene Cvetkovic.” (NYSCEF Doc No. 9, Pl.’s Memo, at ¶ 2.) In

support, Plaintiff submitted letters testamentary issued by the Surrogate's Court of the County of Suffolk to Reinhold on February 4, 2021. (NYSCEF Doc No. 12.)

Defendants cross-move for dismissal. First, Defendants argue that the action was improperly commenced by Alexander as the "proposed administrator", as actions brought on behalf of another require the existence of an actual administrator. (NYSCEF Doc No. 16, Defs.' Memo, at ¶ 3.) Secondly, Defendants move to dismiss pursuant to CPLR 1021, for failure to substitute an administrator within a reasonable time. (*Id.* at ¶ 4.) Defendants argue that Plaintiff's delay in prosecuting this matter has resulted in substantial prejudice to them, as the underlying accident occurred 6 years ago, and no discovery has been completed. In support, Defendants submit three letters from 2017 and 2018 in which they request Plaintiff's bill of particulars, discovery responses, and proof that Alexander was substituted as the administrator for Ms. Cvetkovic. (NYSCEF Doc No. 21.) Defendants allege that Plaintiff did not respond.

In reply, Plaintiff alleges that Alexander diligently sought appointment of the Executor, that the motion was made within a reasonable time of the issuance of letters testamentary, and that there is minimal prejudice as Defendants already took Ms. Cvetkovic's testimony on January 18, 2017 pursuant to GML §50-H. (NYSCEF Doc No. 22, Reply.)

Discussion

Pursuant to CPLR 1021, "[a] motion for substitution may be made by the successors or representatives of a party or by any party. ... 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[.]" The motion "is not a mere technicality. ... [and t]he determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, the prejudice to the other parties, and whether the

party to be substituted has shown that the action or defense has potential merit.” (*Green v Maimonides Med. Ctr.*, 172 AD3d 824, 826 [2d Dept 2019].)

Here, Plaintiff fails to demonstrate entitlement to substitution under CPLR 1021. Preliminarily, Plaintiff fails to demonstrate or allege that Reinhold is duly qualified as a “successor or representative of a party[.]” Further, there is no explanation of why Alexander failed to move for identical relief and become a proper plaintiff, as “[a] proposed administrator lacks the capacity to bring an action since the appointment of a qualified administrator is an essential element of the right to bring suit.” (*Doe v Bali*, 2020 WL 12739945, at *1 [Sup Ct, NY County 2020].)

Next, “the record does not support a finding that [Plaintiff] diligently sought to substitute a representative for the decedent.” (*Green*, 172 AD3d at 826.) There is no explanation for why letters testamentary were issued to Reinhold on February 4, 2021 despite Alexander commencing this action on August 4, 2017, nor is there an explanation as to why Plaintiff failed to respond to Defendants’ numerous letters seeking discovery or letters testamentary. Although Plaintiff alleges that he was diligent in seeking substitution “a mere nineteen days after the appointment of the Executor” (Reply at ¶ 22), the “true measure of delay is more than four years, commencing with the death of the plaintiff[.]” (*Navas v New York Hosp. Med. Ctr. of Queens*, 180 AD3d 796, 798 [2d Dept 2020]; *compare with Leung v Sun*, 2021 WL 5861976 [Sup Ct, NY County 2021] [denying motion to dismiss pursuant to CPLR 1021 where plaintiff diligently moved for substitution within a reasonable time].)

Defendants also sufficiently demonstrate prejudice, as if the court were to grant the instant motion, Defendants would be forced to defend against causes of action for wrongful death and personal injury, for which the statutes of limitation are two- and three-years, respectively, based on an accident that occurred almost six years ago, on May 14, 2016. Finally, Plaintiff fails to show

that the action has potential merit and merely states that "Plaintiff's claims are meritorious. See transcript from Plaintiff's hearing pursuant to GML 50-H attached hereto[.]" (Reply at ¶ 30.)

However, Defendants' cross motion to dismiss for failure to timely substitute an estate administrator as plaintiff must be denied, albeit without prejudice. (*McKinney v Saul*, 2016 N.Y. Misc. LEXIS 3006 at *6 [Sup Ct, New York County 2016]; *Dixon v Jamaica Hosp. Med. Ctr.*, 2008 WL 9760601 [Sup Ct, Queens County 2008] ["a motion to dismiss on the ground that a timely substitution has not been made must be brought by order to show cause upon notice to the persons interested in the decedent's estate"]; see also *Greenstein v North Shore University Hosp.*, 2010 WL 9594638, at *1 [Sup Ct, Nassau County 2010], citing *Blank v Schafrann*, 206 AD2d 771, 773 [3d Dept. 1994].) It is clear from CPLR §1021's mandatory language that "[w]hen 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 City of New York*, 305 AD2d 220, 221 [1st Dept 2003]; *Petty v Meadowbrook Distrib. Corp.*, 266 AD2d 88 [1st Dept 1999].) Such individuals must be given an opportunity to establish that the delay in effectuating substitution has not been unreasonable. (*McKinney v Saul*, 2016 N.Y. Misc. LEXIS 3006 at *6.)

Defendants' cross motion is denied without prejudice to their prompt renewal of their application, which shall be brought by order to show cause, upon notice to the persons interested in the estate of decedent Marlene Cvetkovic. "If proper notice is given to the persons interested in the decedent's estate, the court may then effectively proceed to decide the motion to dismiss (*Citations omitted*)." (*McKinney v Saul*, 2016 N.Y. Misc. LEXIS 3006 at *6, citing, Vincent C. Alexander, Practice Commentaries, *McKinney's Cons Laws of NY*, Book 78, CPLR C1021:2.)

Accordingly, it is

ORDERED that Plaintiff's motion sequence 001 is denied; and it is further

ORDERED that Defendants' cross-motion to dismiss is denied without prejudice.

2/1/2022

DATE



CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE