

Nelissen v MFM Contr. Corp.
2022 NY Slip Op 31600(U)
May 18, 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 4/7/2022

MOTION SEQ. NO. 002 003

- v -

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

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 41, 46, 47, 48, 50, 51

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 34, 35, 36, 37, 38, 39, 40, 43, 44, 45, 49, 50, 51

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

By decision and order dated February 1, 2022, this court denied motion sequence 001, wherein Alexander Nelissen, the “proposed administrator of the Estate of Marlene Cvetkovic”, sought an Order pursuant to CPLR 1021, to substitute Reinhold Nelissen, the newly appointed Executor of the Estate of Marlene Cvetkovic, as the Plaintiff in this action. The court held that Alexander failed “to demonstrate entitlement to substitution under CPLR 1021.” (NYSCEF Doc No. 24 at 3).

In its decision and order, the court denied without prejudice Defendants’ cross motion to dismiss for failure to timely substitute an estate administrator, finding that the text of CPLR 1021 required Defendants’ cross motion to be brought by order to show cause, such that notice would be provided to other “persons interested in the decedent’s estate.” (*Id.* at 4). Defendants’ cross

motion also sought dismissal of the complaint with prejudice for Alexander's lack of capacity to commence the action and for neglect to prosecute. (NYSCEF Doc No. 16, Ms001 Cross motion).

In motion sequence 002, Defendants, pursuant to CPLR 2221[a] and the court's directive, seek renewal of their cross motion to dismiss the action on the merits for failure to timely substitute an administrator and for neglect to prosecute.

In motion sequence 003, Alexander moves, pursuant to CPLR 2221[d], to reargue the court's decision and order, claiming that the court erred in *not* dismissing the complaint for Alexander's lack of capacity to commence the action and upon reargument seeks an order pursuant to CPLR 205(a) dismissing the action with leave to commence a new action. (NYSCEF Doc No. 35, Ms003). Oral argument was held before the court on April 7, 2022. (NYSCEF Doc No. 51, Transcript). The motions are consolidated for disposition.

BACKGROUND

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' negligence caused Ms. Cvetkovic, his mother, to trip and fall on May 14, 2016, causing her to sustain severe and permanent personal injuries. 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).

Thereafter, on November 1, 2017, Defendants requested from Plaintiff responses to their outstanding discovery demands served on September 26, 2017, proof that Alexander was appointed as Administrator of Plaintiff's Estate and copies of Ms. Cvetkovic's Death Certificate and Autopsy Report if one was prepared. (NYSCEF Doc. No. 21). Defendants sent two additional letters on January 8, 2018 and April 9, 2018, reiterating their request for proof from the Surrogate's

Court of Alexander's capacity to maintain the action and for responses to their outstanding discovery demands. There is no proof in the record that Plaintiff responded in any way to the Defendants' discovery demands or good faith letters.

There was no further activity in this case until the filing of motion sequence 001 on February 23, 2021, when Alexander moved pursuant to CPLR 1015(a) and 1021 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, Ms001 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 moved for dismissal, arguing that Alexander lacked capacity to commence this action as a "proposed administrator" and that Alexander failed to substitute an actual administrator within a reasonable time, pursuant to CPLR 1021. (NYSCEF Doc No. 16, Cross-motion). Defendants also moved for dismissal for Alexander's neglect to prosecute this action, submitting the three letters sent to Plaintiff from 2017 and 2018. (NYSCEF Doc No. 21). Defendants aver that Plaintiff ignored all three letters, and never responded to any of Defendants' demands for discovery.

Defendants maintained that they have been prejudiced by Plaintiff's lengthy inaction and failure to respond to discovery requests, particularly where the claims involved, wrongful death and negligence, carry two- and three-year statutes of limitations, respectively. Defendants noted that it had been approximately six years since Ms. Cvetkovic's alleged accident on May 14, 2016, and five years since her death on March 9, 2017.

Notably, while motion sequence 001 was pending, Reinhold Nelissen, the holder of letters testamentary dated February 4, 2021, and who Alexander sought to substitute as the Plaintiff, died on July 13, 2021. Alexander failed to inform the court or Defendants of Reinhold's death until the filing of his March 23, 2022 affidavit in opposition to Defendants' motion sequence 002. (NYSCEF Doc No. 47, Alexander Nelissen Affidavit, at ¶ 12).

Now before the court are Defendants' motion, filed pursuant to the court's directive, seeking renewal of their cross motion to dismiss the action on the merits for failure to timely substitute an administrator and for neglect to prosecute, and Plaintiff's motion to reargue, pursuant to CPLR 2221 [d] [2], claiming that the court misapprehended the law and overlooked the fact that the proposed administrator lacked capacity to bring claims on behalf of the decedent's estate and improperly found that substitution was not timely sought, and that Defendants would be prejudiced.

DISCUSSION

A motion to reargue is not designed to provide an opportunity for a party to advance arguments different from those originally tendered (*Amato v. Lord & Taylor, Inc.*, 10 AD3d 374, 375, 781 N.Y.S.2d 125 [2nd Dept. 2004]) or argue a new theory of law or raise new questions not previously advanced (*Levi v. Utica First Ins. Co.*, 12 AD3d 256, 258, 786 N.Y.S.2d 3 [1st Dept. 2004]; *Frisenda v. X Large Enterprises, Inc.*, 280 AD2d 514, 515, 720 N.Y.S.2d 187 [2nd Dept. 2001]). Instead, the movant must demonstrate, based solely upon the papers submitted in connection with the prior motion, that the matters of fact or law that he or she believes the court has misapprehended or overlooked (*Hoffmann v. Debello-Teheny*, 27 AD3d 743, 815 N.Y.S.2d 627 [2nd Dept. 2006]; *James v. Nestor*, 120 AD2d 442, 502 N.Y.S.2d 27 [1st Dept. 1986]; *Philips v. Village of Oriskany*, 57 A.D.2d 110, 394 N.Y.S.2d 941 [4th Dept. 1997]).

Here, Plaintiff's submissions improperly present arguments not previously advanced on the original motion (see CPLR 2221 [d] [2]). Plaintiff now argues that the court should have granted Defendants' cross motion to dismiss for lack of capacity, as Alexander had improperly commenced the action in his capacity as a "proposed administrator", but that the dismissal should have been without prejudice to Plaintiff's ability to commence a new action pursuant to the safe harbor provision in CPLR 205(a). (NYSCEF Doc No. 35, Ms003). In addition, Plaintiff submits affidavits containing facts that were not previously advanced on the original motion. (NYSCEF Doc No. 47, Alexander Nelissen Affidavit; Doc. No. 48, Lawrence P. Krasin Affidavit).

Plaintiff cavalierly glosses over the fact that he did not advise the court or Defendants that Reinhold Nelissen, the holder of letters testamentary dated February 4, 2021, and who Alexander sought to substitute as the Plaintiff, died on July 13, 2021, while the motion was pending before the court. (NYSCEF Doc No. 47, Alexander Nelissen Affidavit, at ¶ 12). The omission of this critical fact highlights the course that Plaintiff has charted from the onset of this litigation and demonstrates Plaintiff's lack of diligence, inaction, and laxity in litigating this action. Yet, Plaintiff maintains that even though the facts and arguments relied on in support of motion sequence 003 were not before the court when it decided motion sequence 001, this court overlooked the threshold question of whether the instant action must be dismissed for want of a duly appointed administrator, and that Reinhold Nelissen's death does not affect the determination of this threshold question.

In denying Plaintiff's motion to substitute Reinhold Nelissen, as Executor for the Estate of Marlene Cvetkovic, in place of Alexander Nelissen, the court noted that Plaintiff had not been diligent in seeking substitution and that Defendants had demonstrated prejudice caused by Plaintiff's delay and lack of diligence. (NYSCEF Doc. No. 24, p. 3). The court, however, denied

Defendants' cross motion without prejudice to renew by order to show cause on notice to persons interested in decedent's estate.

Plaintiff maintains that his motion to reargue is proper because the original motion seeking an order pursuant to CPLR 1021, while procedurally improper due to the decedent's pre-commencement death and the holding in *Sokoloff v. Schor*, 176 AD3d 120, 109 N.Y.S.3d 58 (2d Dept 2019), was made to promote judicial economy in lieu of dismissing the already commenced action and reviving it under CPLR 205(a) within six months of the dismissal. The court disagrees and finds this argument to be disingenuous in the extreme and an attempt to correct Plaintiff's procedurally improper original motion.

Based on review of the record, Plaintiff's motion to reargue is granted in part, only to the extent that the court acknowledges overlooking the procedural impropriety of motion sequence 001 due to the decedent's pre-commencement death, and thus, the issue of whether the purported substitution motion was filed within a reasonable time is irrelevant (see CPLR 1021). However, the motion to reargue is otherwise denied as Plaintiff submits facts and raises new legal arguments that were not contained in the original motion. As such, the court will not consider the affidavits and arguments not previously advanced on the original motion (see CPLR 2221 [d] [2]).

The court finds that Plaintiff's delay, inaction, and laxity in litigating this action has resulted in both the court and Defendants being forced to expend time and resources deciding a motion that was procedurally defective due to Plaintiff's mistakes and failure to advise the court that Reinhold Nelissen had died while the motion to substitute was *sub judice*, rendering the motion moot. Nonetheless, the function of CPLR 205(a) is to ameliorate the potentially harsh effect of the statute of limitations in cases in which the defendant has been given timely notice of a claim previously brought by a party, but not fully litigated for reasons not enumerated and

excluded in the statute. (*George v Mt. Sinai Hosp.*, 47 NY2d 170, 175, 390 NE2d 1156, 417 NYS2d 231 [1979]). “As a remedial statute, its broad and liberal purpose is not to be diminished by a narrow construction.” (*Id.*).

Additionally, while Plaintiff’s conduct in delaying this litigation has undoubtedly prejudiced Defendants’ ability to promptly obtain medical records, investigation records and identify potential witnesses to the accident, there is no proof that those records are unavailable. The court must balance the competing interests presented by the pending motions, made even more complicated by virtue of Plaintiff’s counsel’s lack of diligence, inaction, and ongoing laxity. And finally, the court will not punish the Plaintiff for his lawyers’ failure to meet deadlines and diligently litigate this action. (*cf. Andrea v. Armone, Hedin, Casker, Kennedy and Drake, Architects and Landscape Architects, P.C.*, 5 N.Y.3d 514, 521, 840 NE2d 565, 806 NYS2d 453 [2005]).

Accordingly, it is

ORDERED that Defendants’ motion sequence 002 for renewal is granted in part; and it is further

ORDERED that Plaintiff’s motion sequence 003 seeking leave to reargue this court’s February 1, 2022 decision and order is granted in part, only to the extent that the court overlooked the procedural impropriety of motion sequence 001 due to the decedent’s pre-commencement death, and is otherwise denied; and it is further

ORDERED that, upon renewal and reargument, the Court vacates its prior order, dated February 1, 2022; and it is further

ORDERED that upon renewal and reargument, Defendants’ cross-motion to dismiss the complaint for Alexander’s lack of capacity to commence this action is granted, the complaint is

dismissed, without prejudice to recommencement under CPLR 205[a], and the Clerk is directed to enter judgment accordingly.

5/18/2022

DATE

WILLIAM PERRY, J.S.C.

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