

Pinto Ventures LLC v Fountain
2022 NY Slip Op 32031(U)
April 1, 2022
Supreme Court, Kings County
Docket Number: Index No. 518411/2021
Judge: Francois A. Rivera
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At IAS Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof, 360 Adams Street, Brooklyn, New York on the 1st of April 2022

HONORABLE FRANCOIS A. RIVERA
-----X
PINTO VENTURES LLC,

Plaintiff,

-against-

PATRICIA FOUNTAIN AND FLETCHER FOUNTAIN
Defendants
-----X

ORDER

INDEX NO. 518411/2021

ORAL ARGUMENT: 3-31-22

CAL NO. 33, MS 1

Plaintiff Pinto Ventures Llc, having moved this Court by Notice of Motion dated September 13, 2021, seeking the following relief:

(a) An Order pursuant to CPLR section 1015, 1021 and 3025 (b), granting Plaintiff leave to file a Supplemental Summons, Amended Complaint and Amended Notice of Pendency to substitute the Estate and Unknown Heirs of the Estate of Defendant Fletcher Fountain in the place instead of Defendant Fletcher Fountain.

(b) An Order, pursuant to CPLR section 308(5) and 316, granting Plaintiff leave to serve the Defendants the Estate of Fletcher Fountain and Unknown Heirs of the Estate of Fletcher Fountain by publication.

(c) An Order, pursuant to CPLR section 1202, appointing a Guardian Ad Litem to represent the interests of Defendants the Estate of Fletcher Fountain and Unknown Heirs of the Estate of Fletcher Fountain; and

(d) Such other and further relief as this court deems just and proper; and

The motion having come on to be heard on the 31st day of March 2022 and David R. Smith, Esq. appearing on behalf of the Plaintiff and Anthony M. Bramante, Esq. appearing on behalf of Defendant Patricia Fountain and the Court having rendered its decision on the record NOW, on motion of Anthony M. Bramante, Esq. it is

ORDERED, that the application contained in the Notice of Motion dated September 13, 2021, is hereby denied in its entirety for the following reason.

On July 23, 2021, the plaintiff commenced the instant action pursuant to Article 15 of the Real Property Actions and Proceedings law of the State of New York (“RPAPL”), seeking, inter alia, to quiet title to the property located at 375 Webster Avenue, Brooklyn, New York 11230, by filing a summons and verified complaint (hereinafter the commencement papers) with the Kings County Clerk’s office. The plaintiff believed that it had effectuated service upon defendant Fletcher Fountain pursuant to CPLR 308 (2) by personally delivering the commencement papers to his daughter, co-defendant Patricia Fountain, followed by a mailing and a filing of the affidavit of service. The plaintiff later discovered that Fletcher Fountain had passed away on May 9, 2008, over a decade before the instant action was commenced. It is well settled that the 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) ..., and any order rendered after the death of a party and before the substitution of a legal representative is void (*see Matter of Sills v. Fleet Natl. Bank*, 81 AD3d 1422, 1423 [4th Dept 2011], *citing Griffin v. Manning*, 36 AD3d 530, 532 [1st Dept 2007]).

Only under special circumstances, such as where there has been active participation in the litigation by the personal representative who would have been substituted for decedent is the rule

waived (*id.*). It is also well established that the dead cannot be sued (*Marte v. Graber*, 58 AD3d 1 [1st Dept 2008]; *HSBC Bank USA, N.A. v. Brunson*, 40 Misc 3d 1219 (A) [Sup. Ct. 2013]).

The substitution provisions of CPLR 1015 (a) and 1021 presuppose that an action was commenced against a living person—someone who has the legal capacity to be “a party”—and the action was pending at the time such party died. In *Marte v. Graver* (58 AD3d 1 [1st Dept 2008]), the putative defendant was already dead at the time the summons and complaint was filed, rendering the action a nullity from the outset as to that defendant. Since the decedent was never a party to the action, the substitution provisions of CPLR 1015 and 1021 were unavailable to correct the defect, and dismissal was required (*see Rivera v. Bruchim*, 100 AD3d 700 [2nd Dept 2013]). A personal representative should have been named as the defendant at the outset (Vincent C. Alexander Practice Commentaries, McKinney's Cons. Law of NY, Book 7B, CPLR C1015:3. Substitution Upon Death of a Party).

In the instant action, the defendant had passed away over a decade prior to the commencement date of the instant action. Consequently, this action as against Fletcher Fountain is a nullity and cannot be remedied.

CONCLUSION

The motion by Pinto Ventures Llc for an order pursuant to CPLR section 1015, 1021 and 3025 (b), granting it leave to file a Supplemental Summons, Amended Complaint and Amended Notice of Pendency to substitute the Estate and Unknown Heirs of the Estate of Defendant Fletcher Fountain in the place instead of Defendant Fletcher Fountain is denied.

The motion by Pinto Ventures Llc for an order pursuant to CPLR section 308(5) and 316, granting it leave to serve the Defendants the Estate of Fletcher Fountain and Unknown Heirs of the Estate of Fletcher Fountain by publication is denied.

The motion by Pinto Ventures Llc for an order pursuant to CPLR section 1202, appointing a Guardian Ad Litem to represent the interests of Defendants the Estate of Fletcher Fountain and Unknown Heirs of the Estate of Fletcher Fountain is denied.

ENTER

A handwritten signature in black ink, reading "Francis A. Rivera". The signature is written in a cursive style. Below the signature is a horizontal dashed line that ends with a small "x" on the right side.

J.S.C.