

Anderson v Quest Bldrs. Group, Inc.

2022 NY Slip Op 32358(U)

July 15, 2022

Supreme Court, Kings County

Docket Number: Index No. 510675/2017

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

-----X
CHRISTINE ANDERSON,

Plaintiff,

-against-

**QUEST BUILDERS GROUP, INC.
45 MAIN ASSOCIATES LLC and
TWO TREES MANAGEMENT CO. LLC,**

Defendants.
----- X

**45 MAIN ASSOCIATES LLC and
TWO TREES MANAGEMENT CO. LLC,**

Third-Party Plaintiffs,

-against-

HUGE LLC,

Third-Party Defendant.
-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants 45 Main Associates LLC and Two Trees Management Co. LLC's motion to dismiss the complaint

Papers	NYSCEF Doc
Order to Show Cause, Affirmation, Exhibits Annexed.....	<u>57-70</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>71-74</u>
Reply.....	<u> </u>

Upon the foregoing cited papers, the decision/order on this motion is as follows:

Defendants move to dismiss the complaint in this action, which has been stayed due to the plaintiff's death on March 4, 2019, on the grounds that after a reasonable period of time an estate representative has not been appointed to proceed with the action (see CPLR 1021; *Milam v Gibson*, 81 AD2d 555 [1st Dept 1981]). Two years has been held to be a long enough period to warrant dismissal without good cause.

(See *Sopcheck v Long Island Jewish-Hillside Medical Center*, 161 AD2d 577 [2d Dept 1990]).

This is the third motion for this relief in this action. First, the other defendant, Quest Builders Group, Inc., made a motion, Motion Seq. #4, by notice of motion, which was denied by order dated February 17, 2021, on the grounds that the decedent's distributees were not notified of the motion. The moving defendants made the identical motion, Motion Seq. #3, which was filed first but submitted for decision later, which was denied for the same reason, by order dated April 9, 2021.

Now, movants have brought the application by order to show cause, as is required, but they have not served the motion as was required therein, nor have they provided an affirmation or affidavit as to the status of the matter in the Kings County Surrogate's Court, as was also required therein.

The motion is opposed by the deceased plaintiff's former attorney. It is not clear why he has done so. Perhaps it was because the family's attorney is in Florida and not admitted in New York, but it is not said. He states that there is a New York attorney for the estate but does not provide an affirmation from him. He does not provide the File number for the estate file, but he states that the papers to appoint Carl Anderson Jr. as successor estate representative were to be submitted to the Kings County Surrogate's Court in April of 2022, shortly after the date of his affirmation. He states that the submission was delayed as the applicant (Carl Anderson Jr., plaintiff/decedent's brother) was out of the country and had to have the papers notarized at the US Embassy in Colombia, which, due to Covid, required a scheduled appointment weeks away. He further alleges that the decedent's sole distributees at the time of her death were her parents, and that her father, Carl Anderson Sr., had obtained Letters from

Kings County Surrogate's Court, but then he passed away in 2021 before he could be substituted for plaintiff in this action. It is further alleged that plaintiff decedent's mother is ill, and that her brother, Carl Anderson Jr., has retained a New York attorney, Vlad Portnoy, Esq.¹, who has applied for Letters, but that they have not as yet been issued. Nothing is submitted in support of any of these statements.

CPLR 1021 advises us that if no timely substitution for a deceased party has occurred, "the court, before proceeding further, shall, on such notice as it may in its discretion direct, order the persons interested in the decedent's estate to show cause why the action should not be dismissed". This language appears to require this motion to be brought by order to show cause, and it clearly requires notice to the decedent's distributees. As they are not parties to this action, personal service in the manner required for service of a summons is generally required (see *Topal v BFG Corp.*, 108 AD2d 849 [2d Dept 1985]).

The Order to Show Cause for this motion states that "Movant is directed to serve the decedent's distributees, that is, those persons who would inherit from her pursuant to EPTL 4-1.1, by personal service on or before February 4, 2022, and to e-file both an affidavit of service for each such person and an affirmation or affidavit that no petition has been filed in Surrogate's Court. Here, movants' counsel merely claims that he served a "family" attorney in Florida, and that this attorney [Doc 68] "indicated that a petition was filed in regard to the estate of Christine Anderson in Kings County by the

¹ The court's attorney registration website states his information to be as follows:

Law Offices of Vlad Portnoy, P.C.
450 Fashion Ave Ste 1408
New York, NY 10123
Business Phone: (212) 920-6371
E-mail Address: vportnoy@nywillsandestates.com

father Carl Anderson and he was granted letters of administration. The father Carl Anderson thereafter passed away in 2020. He indicated that a petition was filed by the mother but never acted upon." Needless to say, this is hearsay. It is not possible to surmise why counsel was unable to find out what was in the court file here in Brooklyn instead of providing the Florida attorney's understanding. Movants' counsel does not aver that he or any of his staff checked to see if an estate representative was ever sought, or if an application was ever filed by decedent's brother.

The court finds that there has been good cause shown for the delay in substituting an estate representative for the deceased plaintiff. First, the Covid-19 pandemic essentially shut down the Kings County Surrogate's Court. Further, the decedent's father died in 2021 (a copy of the death certificate is supplied), and decedent's mother is alleged to be ill. The Surrogate (judge) who would handle this matter, as decedent passed away in an odd month, just took the bench on January 1, 2022, after the prior judge retired. In addition, the service requirement in the order to show cause was not complied with, nor was an affirmation provided by movant's counsel based upon any personal knowledge of what is in the Kings County Surrogate's Court file. The court suggests that defendants' counsel contact Mr. Portnoy, a New York attorney, to learn the status of the estate's application. The court has provided his information above.

Accordingly, the motion is denied.

The foregoing constitutes the decision and order of the court.

Dated: July 15, 2022

ENTER :



Hon. Debra Silber, J.S.C.