

**Anonymous Dan v Big Bros. Big Sisters of Am.**

2022 NY Slip Op 33179(U)

September 20, 2022

Supreme Court, New York County

Docket Number: Index No. 950739/2020

Judge: Laurence L. Love

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE PART 63M

Justice

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ANONYMOUS DAN,

Plaintiff,

- v -

BIG BROTHERS BIG SISTERS OF AMERICA, BIG BROTHERS BIG SISTERS ASSOCIATION OF NEW YORK, INC., BIG BROTHERS BIG SISTERS OF NEW YORK CITY, INC.

Defendants.

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INDEX NO. 950739/2020
MOTION DATE 04/14/2021, 12/09/2021
MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 28, 29

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for DISMISS

Upon the foregoing documents, it is

The following read on Defendant – Big Brothers Big Sisters of New York City, Inc. to dismiss, CPLR 3211(a), “with prejudice the claims against it in Plaintiff’s Verified Complaint; and Defendant – Big Brothers Big Sisters of America’s motion “for an order pursuant to CPLR 3211(a)(3) dismissing with prejudice the claims against it in Plaintiff’s Complaint.”

Plaintiff alleges abuse per the Child Victims Act, CPLR 214-g, with causes of action for negligence, and (ii) negligent hiring, retention and supervision, against all defendants.

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit

of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (see *Leon v. Martinez*, 84 N.Y.2d 83 [1994]).

Defendant – Big Brothers Big Sisters of New York City, Inc.’s memorandum of law in support states,

“First, there is no proper plaintiff in this action. As Plaintiff’s counsel recently represented to the Court, Plaintiff died on November 16, 2020 – before this lawsuit commenced. It is a well – established tenet of New York law that a deceased plaintiff lacks capacity to sue. Nor can substitution of parties remedy this defect: while substitution is available where a plaintiff dies while litigation is pending, the mechanisms for substitution are inapplicable where, as here, the plaintiff’s death occurs before the action was initiated. Second, ... the Complaint fails to state a cause of action with respect to any of the alleged claims. Rather, Child Victims Act complaints must still plead non – conclusory facts to suggest some wrongdoing or negligence by those organizations” (see NYSCEF Doc. No. 26 Ps. 5 - 6).

CPLR 3211(a)(3) states, “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that the party asserting the cause of action has not legal capacity to sue.” New York Courts have long held that “[a]fter death, no person ... can be the owner of a cause of action or can appear in court and litigate a controversy” (see *MacAffer v. Boston & Me. R.R.*, 268 N.Y. 400 [1935]). “Since the infant plaintiff was deceased prior to the commencement of the action ... the complaint must be dismissed insofar as it purports to assert any claim on the infant’s behalf” (see *Zervis v. N.Y.C. Health and Hosp. Corp.*, No. 20744/2009, 2018 WL 169276, at \*1 [Sup. Ct. Queens Cty. Jan. 30, 2018]).

Defendant – Big Brothers Big Sisters of New York City, Inc.’s memorandum of law in support continues, “[a]lthough CPLR 1015(a) and CPLR 1021 allow for substitution of successor or representative parties in the event of a plaintiff’s death, these provisions ‘presuppose ... that an action must be commenced by a living person against a living defendant, that one of the

parties subsequently dies, and that substitution is then sought after the post-commencement death of that party” *Sokoloff*, 176 A.D.3d at 134; *Marte v. Graber*, 58 A.D.3d 1, 4 (1st Dept. 2008) (see NYSCEF Doc. No. 26 P. 10).

The attorney for Plaintiff affirms,

“Subsequent to retaining counsel for Plaintiff, on November 16, 2020, Plaintiff passed-away by suicide. Unaware of Plaintiff’s death, on December 3, 2020, counsel for the Plaintiff filed the current lawsuit on behalf of Plaintiff. As of the date of this Affirmation, there has been no administrator or personal representative appointed for Plaintiff’s estate, to the extent there is an estate. Counsel for Plaintiff have not been retained to represent the estate of Plaintiff or to represent any administrator or personal representative. Counsel for Plaintiff does not intend to represent the estate of Plaintiff, personal representative, or administrator of the estate. If the plaintiff has already files such a lawsuit, and then passes away while the lawsuit is pending, the proper procedure is for the Court to substitute the duly appointed personal representative of the Plaintiff’s estate as the Plaintiff. CPLR 1015(a). However, if there is no lawsuit pending when Plaintiff passes away, the decedent/Plaintiff does not have the capacity to sue. *Sokoloff v. Schor*, 176 A.D.3d 120, 134-35, 109 N.Y.S.3d 58 (2019). To the extent a lawsuit remains viable, it must be brought by the personal representative of the Plaintiff’s estate. *Id.* On March 22, 2021, counsel for Plaintiff provided notice to this Court that Plaintiff was deceased. Counsel for Plaintiff remain unable to take any action, including opposing the Motion to Dismiss filed by Defendants, in the current lawsuit because counsel no longer represents any party in this matter” (see NYSCEF Doc. No. 28 Pars. 3, 5 – 7, 9, 10, 12).

A letter to this Court has been submitted with regards to said passing (see NYSCEF Doc. No. 20). The CPLR and case law show plaintiff’s lack of standing and “has not legal capacity to sue”.

The Court further notes that no additional documents have been filed subsequent to the instant motion by plaintiff’s counsel or new counsel or family as of this date it is now,

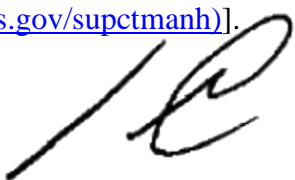
ORDERED that the motion of defendants Big Brothers Big Sisters of New York City, Inc. and Big Brothers Big Sisters of America to dismiss the complaint herein is granted and the

complaint is dismissed in its entirety as against ALL defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

9/20/2022  
DATE

  
LAURENCE L. LOVE, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE