

**Nagler v Little W. 12th St Realty, L.P.**

2022 NY Slip Op 34249(U)

December 12, 2022

Supreme Court, New York County

Docket Number: Index No. 154771/2018

Judge: John J. Kelley

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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. JOHN J. KELLEY PART 56M**

*Justice*

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PRISCILLA NAGLER,

Plaintiff,

- v -

LITTLE WEST 12TH ST REALTY, L.P., and CIELO, LTD.,

Defendants.

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INDEX NO. 154771/2018

MOTION DATE 09/28/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for DISMISSAL-CPLR 1021.

In this action to recover damages for personal injuries, the defendants move pursuant to CPLR 1021 to dissolve the stay imposed by operation of law upon the plaintiff's death, and thereupon to dismiss the complaint on the ground that no timely motion was made to substitute a representative of the deceased plaintiff's estate for the plaintiff in this action. The deceased plaintiff's former attorney submits opposition to the motion. The motion is denied.

The plaintiff commenced this action on May 22, 2018. The parties thereafter conducted some discovery, and this court issued three case-management orders between April 16, 2019 and December 18, 2019. The plaintiff died on December 27, 2019 and, hence, the action was automatically stayed on that date (*see Perez v City of New York*, 95 AD3d 675 [1st Dept 2012]), and the court was divested of jurisdiction to conduct proceedings in the action until a representative of the plaintiff's estate was substituted as part (*see Griffin v Manning*, 36 AD3d 530, 532 [1st Dept 2007]). The defendants nonetheless filed a notice of appeal from the status conference order on January 7, 2020, notwithstanding that a status conference order is not appealable as of right (*see Armstrong v B.R. Fries & Assoc., Inc.*, 95 AD3d 697, 698 [1st Dept 2012]) and despite the plaintiff's death, which was then was not known to the defendants. On or

about February 26, 2020, the deceased plaintiff's attorneys notified the court of her death. By order dated February 27, 2020 (SEQ 001), this court denied, as a nullity, the defendants' pending motion to vacate the status conference order entered December 18, 2019, and memorialized the automatic stay of proceedings that went into effect on the date of the plaintiff's death. The court nonetheless, on its own motion, vacated the status conference order because none of its provisions could be satisfied.

According to the decedent's former attorneys, in January and February 2020, and thus shortly after the plaintiff's death on December 27, 2019, they contacted her son, Ian Bednowitz, who then was residing in Singapore, regarding her estate and the procedures necessary for the appointment of an administrator to continue the instant action. In February 2020, Bednowitz provided the deceased plaintiff's former attorneys with contact information for the attorney in Texas that was handling the probate of the decedent's will. On March 17, 2020, all courts in New York were closed due to the COVID-19 pandemic, and did not reopen until June 10, 2020, and then only for justice and court personnel. In addition, all filings in electronically filed actions were suspended between March 20, 2020 and May 5, 2020, and all deadlines were tolled between March 20, 2020 and November 3, 2020 (see Executive Law § 29-a; Executive Orders 202.8, 202.67; *Brash v Richards*, 195 AD3d 582, 584 [2d Dept 2021]). According to the decedent's former attorneys, they nonetheless remained in contact with the Texas attorney handling the probate of the decedent's will.

On July 2, 2020, James Chung was appointed as Independent Administrator of the decedent's estate by the Texas Probate Court, Dallas County. Shortly thereafter, the decedent's former counsel contacted both Chung and that attorney concerning both the procedures for the appointment of an administrator in New York and to obtain documents necessary to effectuate that appointment, including a copy of the will and an original or certified death certificate. According to counsel, they also explored the possibility of locating an extended family member of the decedent to serve as the New York administrator of her estate.

In December 2020, the decedent's former counsel referred Chung to New York attorney Melody Sakhai to complete the process of having him appointed as the decedent's administrator in New York. Sakhai and Chung together obtained the necessary documentation to submit a petition to the Surrogate's Court for the appointment of Chung as the administrator in New York, which included obtaining original exemplified court documents from the Texas Probate Court, a waiver of citation and consent from the decedent's distributees, and both a similar waiver and a stipulation of reserving domicile from the New York State Department of Taxation and Finance (NYS DOTF). As counsel described it, the process for obtaining these included the dispatch of documents to Bednowitz for his signature and review, the provision of notice to the Consul General of Singapore of the pending administration of the decedent's estate, and the acquisition of specific historical information concerning the decedent's former residences, Internal Revenue Service (IRS) tax filings, licenses, employment history, voter registration, and property ownership, as well as the finalization of the decedent's tax returns and satisfaction of her tax obligations with the IRS and the NYS DOTF.

According to the decedent's former counsel, by October 2021 all documents necessary to obtain the waiver of citation and consent and stipulation reserving domicile had been received and provided to the NYS DOTF. On May 25, 2022, Chung filed, with the Surrogate's Court, New York County, a petition seeking to appoint him as administrator of the decedent's estate. In correspondence that was post-marked June 22, 2022, the NYS DOTF dispatched the executed waiver of citation and consent and a stipulation reserving domicile, which were then filed with the Surrogate's Court. No party has informed this court whether the Surrogate's Court has yet issued letters of administration.

On June 30, 2022, the defendants made the instant motion, seeking to dismiss the complaint on the ground that no representative of the decedent's estate had been substituted in a timely fashion.

CPLR 1021 provides, in relevant part, that

“A motion for substitution may be made by the successors or representatives of a party or by any party. If a person who should be substituted does not appear voluntarily he may be made a party defendant. 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, however, such dismissal shall not be on the merits unless the court shall so indicate.”

A court generally has subject matter jurisdiction to entertain a motion pursuant to CPLR 1021, notwithstanding the fact that a representative of the plaintiff's estate has yet to be substituted as a party plaintiff when the motion was made.

“Although a determination [of a motion] rendered without such substitution will generally be deemed a nullity, determinations regarding substitution pursuant to CPLR 1021 are a necessary exception to the general rule, and the court does not lack jurisdiction to consider such a motion”

(*Medlock v Dr. William O. Benenson Rehabilitation Pavilion*, 167 AD3d 994, 996 [2d Dept 2018]).

The issue of what constitutes a “reasonable time” within the meaning of the statute depends on the circumstances of the case (*see generally Randall v Two Bridges Assoc. Ltd. Partnership*, 139 AD3d 435 [1st Dept 2016]). Here, although the defendants waited approximately two years after the plaintiff's death to move to dismiss the complaint, the toll applicable to deadlines for court filings enacted in response to the pandemic was in effect for almost eight months during that period. Thus, the court concludes that the defendants did not wait for a sufficient period of time before moving to dismiss the complaint pursuant to CPLR 1021, particularly because the decedent's former counsel and the administrator of her estate in Texas were working diligently during the past 24 months to secure the latter's appointment as administrator in New York (*see Dugger v Conrad*, 189 AD3d 478 [1st Dept 2020] [where defendant waited only 16 months before moving to dismiss, and former counsel for deceased plaintiff was attempting to have the Public Administrator substituted as plaintiff, dismissal was premature]; *Tokar v Weissberg*, 163 AD3d 1031, 1032-1033 [2d Dept 2018] [lapse of 2½ years

between decedent's death and defendant's submission of motion to dismiss under CPLR 1021 was insufficient to support defendant's contention that substitution had not been made within a reasonable time, particularly where the case revolved around medical records already in defendant's possession]; *Wan Fund Leung v Yan Q. Sun*, 2021 NY Slip Op 32625[U], \*3-4, 2021 NY Misc LEXIS 6320, \*4-5 [Sup Ct, N.Y. County, Dec. 8, 2021] [where defendants waited only 18 months after decedent's death, and Surrogate's Court petition filed by decedent's heirs was pending, defendants did not wait a sufficient amount of time before motion]).

Moreover, the court "may not order dismissal for such failure without first ordering the persons interested in the decedent's estate to show cause why the action should not be dismissed" (*Petty v Meadowbrook Distributing Corp.*, 266 AD2d 88, 88 [1st Dept 1999]; see *Velez v New York Presbyterian Hosp.*, 145 AD3d 632, 633 [1st Dept 2016]). Upon the decedent's death, her former counsel no longer had an obligation to represent any person who was or will be appointed as the representative of her estate (see *Homemakers, Inc. of Long Is. v Williams*, 131 AD2d 636, 638 [2d Dept 1987]; *Wisdom v Wisdom*, 111 AD2d 13, 14-15 [1st Dept 1985]; *Hemphill v Rock*, 87 AD2d 836, 836 [2d Dept 1982]). Hence, service of the motion papers upon the decedent's former counsel, in and of itself, does not satisfy CPLR 1021. Consequently, the defendants' failure personally to serve the motion papers upon Bednowitz, the decedent's son and sole beneficiary, constitutes an additional ground for denial of the motion (see *Velez v New York Presbyterian Hosp.*, 145 AD3d at 633; *Noriega v Presbyterian Hosp.*, 305 AD2d 220, 221 [1st Dept 2003]), even though the defendants served the motion papers upon James Chung, who was misidentified in the affidavit of service as "Glenn Chung."

Accordingly, it is

ORDERED that, on the court's own motion, the stay of proceedings imposed by operation of law on December 27, 2019, upon the death of Priscilla Nagler, is dissolved for the limited purpose of permitting the court to consider this motion, and for no other purpose; and it is further,

ORDERED that the defendants' motion is denied.

This constitutes the Decision and Order of the court.

12/12/2022  
DATE

  
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JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: