

Urgiles v Heredia
2022 NY Slip Op 35209(U)
October 11, 2022
Supreme Court, Westchester County
Docket Number: Index No. 6613/2016
Judge: David S. Zuckerman
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DISPO Motion Seq 4 and Case

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
WILSON C. URGILES,

Plaintiff,

-against -

JUAN J. HEREDIA and KARLA HEREDIA,

Defendants.
-----X

ZUCKERMAN, J.

DECISION/ORDER

Index No.
66313/2016

The papers filed in NYSCEF as Documents 1 through 76 were read in connection with this motion by Defendants, pursuant to CPLR 1021 and 3216, to dismiss the Complaint. There is no opposition to the motion.

FACTS

The relevant facts are not in dispute. On October 28, 2016, Plaintiff Wilson C. Urgiles commenced this action by filing a Summons and Complaint. The Complaint sets forth a single cause of action sounding in negligence. On November 23, 2016, Defendants

Juan J. Heredia and Karla Heredia filed a Verified Answer. It contains general denials, nine affirmative defenses and a counterclaim. Along with the Answer, Defendants served assorted discovery demands, releases, and notices. In the intervening years, the court held numerous discovery compliance conferences resulting in approximately eleven discovery orders.

On February 4, 2019, Defendant Juan J. Heredia passed away in Ecuador. He left no will. No one has ever been appointed to represent Mr. Heredia's interests.

CONTENTIONS OF THE PARTIES

Defendants contend that the Complaint "should be dismissed in its entirety because it has been over three and a half years since plaintiff's counsel was informed of defendant Juan Heredia's passing and there has been no action to appoint an estate representative to substitute the deceased defendant" (Affirmation in Support, p. 4). They argue that, pursuant to CPLR 1021, Plaintiff was required to move for substitution within a reasonable time. Since, for the past three and one half years, Plaintiff's counsel has been aware of Defendant Juan J. Heredia's passing and have not sought to have a representative appointed to substitute for him, the action must be dismissed.

Defendants also argue that, pursuant to CPLR 3216, the action must be dismissed because Plaintiff has unreasonably neglected to proceed in the action. There is no opposition to the motion.

DISCUSSION

1. Plaintiff's Failure to Substitute

Pursuant to CPLR 1015(a), "if a party dies and the claim for or against him is not thereby extinguished, the court shall order substitution of the party." Pursuant to CPLR 1021:

A motion for substitution may be made by the successors or representatives of the party or by any party... 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...

"The death of a party terminates the attorney's authority to act on her behalf and divests a court of jurisdiction to conduct proceedings in the action until a proper substitution has been made" (*Homemakers Inc. of Long Island v Williams*, 131 AD2d 636, 638 [2d Dept 1987][interior citation omitted]). The time for appointment of a representative for a deceased party "does not stretch into infinity. Action must be taken seasonably" (*Milam v Gibson & Cushman of N.Y.*, 81 AD2d 555 [1st Dept 1981][delay of two years compels dismissal]).

"The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has potential merit" (*Terpis v Regal Heights Rehab. & Health Care Ctr., Inc.*, 108 AD3d 618, 619 [2d Dept 2013]). On the other hand, "there exists a strong public policy that litigated matters be disposed of on the merits" (*Paul v Ascher*, 106 AD2d 619, 621 [2d Dept 1984]). In *Sopcheck v Long Island Jewish-Hillside Medical Center*, 161 AD2d 577 [2d Dept 1990], the court upheld dismissal of a complaint where almost two years passed between the plaintiff's death and appointment of a representative of the estate. In its decision, the court noted that "no reasonable excuse for this inordinate delay was proffered" (*id.* at 588).

In support of the motion, Defendants assert that, in the three and one half years since Defendant Juan J. Heredia's death, Plaintiff's counsel has not taken any steps to substitute an administrator. Nor has anyone appeared to represent Defendant Juan J. Heredia's interests. Defendants go on to assert that they have been prejudiced by the delay.

Defendants have demonstrated inordinate delay and prejudice. Since there is no opposition to the motion, Plaintiff has "failed

to demonstrate that (s)he made any diligent efforts to substitute a representative for the deceased plaintiff...a reasonable excuse for failing to seek a substitution...and did not rebut the contention of the defendant...that they were prejudiced in their ability to defend the case" (*Howlader v Lucky Star Grocery, Inc.*, 153 AD3d 610, 611 [2d Dept 2017]). Therefore, Defendants' motion, pursuant to CPLR 1021, to dismiss the Complaint for failure to substitute for deceased Defendant Juan J. Heredia must be granted.

2. Plaintiff's Failure to Prosecute

Pursuant to CPLR 3216,

(a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, with notice to the parties, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits.

(b) No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:

(3) The court or party seeking such relief, as the case may be, shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him or her

for unreasonably neglecting to proceed. Where the written demand is served by the court, the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

"[W]here there is no evidence that the 90-day notice was served upon the plaintiff, there is no basis on which to dismiss the action" (Hon. Mark C Dillon, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3216:14; *Wilmington Trust, N.A. v Mausler*, 192 AD3d 1212 [3rd Dept 2021]). Here, Defendants do not allege that they served a 90-day notice. Therefore, Defendants' motion, pursuant to CPLR 3216, to dismiss the action for want of prosecution must be denied.

Upon the foregoing papers, it is hereby

ORDERED, that Defendants unopposed motion, pursuant to CPLR 1021, to dismiss the Complaint is granted and the same is dismissed.

The foregoing constitutes the Opinion, Decision & Order of the Court.

Dated: White Plains, New York
October 11, 2022



HON. DAVID S. ZUCKERMAN, A.J.S.C.

TO: All parties via NYSCEF