

Nicholas v City of New. York
2023 NY Slip Op 30100(U)
January 12, 2023
Supreme Court, New York County
Docket Number: Index No. 150459/2019
Judge: Leslie Stroth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LESLIE A. STROTH PART 52

Justice

-----X

INDEX NO. 150459/2019

GEORGE NICHOLAS, STACEY NICHOLAS,

MOTION DATE 9/7/2022

Plaintiff,

MOTION SEQ. NO. 002

- v -

THE CITY OF NEW YORK, THE DEPARTMENT OF
TRANSPORTATION, THE DEPARTMENT OF DESIGN
AND CONSTRUCTION, ROSE ASSOCIATES, THE 333
WEST 57TH STREET CONDOMINIUM

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

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, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for

DISMISSAL

Defendant Rose Associates (Rose) moves pursuant to CPLR 1021 to dismiss plaintiff's complaint for failure to substitute an administrator on behalf of the deceased plaintiff, George Nicholas (deceased plaintiff), within a reasonable time following his death, and to dismiss all cross-claims against Rose. Defendant 333 West 57th Street Condominium (333 West) joins in such request, moving for the same relief. The deceased plaintiff's estate cross-moves for an order lifting the stay in this matter and for an order, pursuant to CPLR 1015 (b), granting it leave to appoint Anastasia Nicholas as administrator of the estate, as well as to amend the caption accordingly.

This is an action for alleged personal injuries sustained by the deceased plaintiff, who passed away on March 28, 2020. *See* NYSCEF doc. no. 55. Letters of Administration were granted to Anastasia Nicholas, as executor of his estate on May 2, 2022.

CPLR 1021 provides that when a plaintiff dies during a litigation, a motion for substitution may be made by the plaintiff's successors or representative; however, it states that if the death "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." CPLR 1021 (emphasis added). Factors to consider on a motion to dismiss pursuant to CPLR 1021 include (1) whether there is a reasonable excuse for the delay, (2) prejudice to the other parties, and (3) whether the party to be substituted has shown that the action has merit. *See Rose v Frankel*, 83 AD3d 607, 608 (1st Dept 2011); *Wynter v Our Lady of Mercy Med. Ctr.*, 3 AD3d 376, 376 (1st Dept 2004).

Rose argues that because the plaintiff's estate has made no attempt to substitute as the party of record in the two years since deceased plaintiff's death, it has abandoned this action. Rose maintains that plaintiff's estate has no excuse for the delay in appointing an administrator, that Rose has been prejudiced by the delay, and that the deceased plaintiff's estate does not have a meritorious claim against Rose. Rose also alleges that, should plaintiff's estate's cross-motion be granted, it will not be able to establish its *prima facie* case, because the alleged accident was unwitnessed and the deceased plaintiff's General Municipal Law § 50-h hearing is inadmissible at trial. Defendant 333 West adopts and incorporates Rose's arguments in support of its requested relief.

Plaintiff argues that, to the extent there was any delay in obtaining Letters of Administration in this matter, this was due solely to the fact that New York Surrogate's Court was operating under severe restraints, including the requirement of remote filings, the prohibition of in-person appearances, and the tremendous increase in caseload due to the COVID-19 pandemic.

To the extent Rose and 333 West raise issues of availability of witnesses, plaintiff argues that such issues are more properly the subject of a motion for summary judgment.

The Court agrees. Plaintiff's estate demonstrates a reasonable excuse for the delay in appointing an administrator and moving to substitute same, namely, the global COVID-19 pandemic and its effect on the New York State court system. The Court notes that the deceased plaintiff passed away at the start of the COVID-19 pandemic, on March 28, 2020, and that it is reasonable that the ensuing limitations would have caused a delay in appointing an administrator. Moreover, the sufficiency of the potential evidence is not appropriately reviewed on a motion pursuant to CPLR 1021.

Accordingly, it is

ORDERED that the motions of Rose Associates and 333 West 57th Street Condominium to dismiss the complaint pursuant to CPLR 1021 is denied; and it is further

ORDERED that plaintiff's estate's cross-motion is granted, and that Anastasia Nicholas, as executor of the estate of George Nicholas, deceased, be substituted as plaintiff in the above-entitled action in the place and stead of the plaintiff, George Nicholas, without prejudice to any proceedings heretofore had herein; and it is further

ORDERED that all papers, pleadings, and proceedings in the above-entitled action be amended*by substituting the name of Anastasia Nicholas, as executor of the estate of George Nicholas, deceased, as plaintiff in the place and stead of said decedent, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to amend their records to reflect such change in the caption herein; and it is further

Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website).

This constitutes the decision and order of the Court.

1/12/2023
DATE


LESLIE STROTH, J.S.C.

CHECK ONE:

<input type="checkbox"/>
<input checked="" type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

<input checked="" type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: