

**Furtado v City of New York**

2023 NY Slip Op 31144(U)

April 12, 2023

Supreme Court, New York County

Docket Number: Index No. 160152/2020

Judge: J. Mabelle Sweeting

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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. J. MACHELLE SWEETING PART 62**

*Justice*

-----X

BRETT FURTADO,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY HOUSING  
AUTHORITY, FORTE CONSTRUCTION MANAGEMENT  
INC., FORTE CONSTRUCTION CORP., ARBRIS CORP.,

Defendants.

-----X

NEW YORK CITY HOUSING AUTHORITY

Third-Party Plaintiff,

-against-

IDL COMMUNICATIONS & ELECTRIC INCORPORATED

Third-Party Defendant.

-----X

FORTE CONSTRUCTION CORP.

Second Third-Party Plaintiff,

-against-

IDL COMMUNICATIONS & ELECTRIC INCORPORATED

Second Third-Party Defendant.

-----X

INDEX NO. 160152/2020

MOTION DATE 12/21/2022,  
01/09/2023

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595392/2021

Second Third-Party  
Index No. 595458/2021

The following e-filed documents, listed by NYSCEF document number (Motion 001) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 57, 59, 60, 62, 64, 65, 66, 70

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 61, 63, 67, 68, 69, 71, 72

were read on this motion to/for DISMISS.

In the underlying action, plaintiff Brett Furtado alleges to have sustained injuries on December 17, 2019 and on January 14, 2020 at a construction site at the East River Housing Project in East Harlem, New York.

It is undisputed that plaintiff passed away on June 28, 2021.

Now pending before the court are two motions sequences. In Motion Sequence #001, defendant FORTE CONSTRUCTION CORP. ("Forte") seeks an order, pursuant to Civil Procedure Law and Rules ("CPLR") 1021, dismissing the action in its entirety, with prejudice, based upon the failure to substitute an estate representative as plaintiff within a reasonable time after plaintiff-decedent's death. In Motion Sequence #002, third-party defendant IDL COMMUNICATIONS & ELECTRIC INCORPORATED ("IDL") seeks an order dismissing this action pursuant to CPLR 1021 based on the failure to appoint and substitute an estate representative within a reasonable time after plaintiff-decedent Brett Furtado's death. Also pending under Motion Sequence #002 is a cross-motion filed by first-party defendant/third-party plaintiff NEW YORK CITY HOUSING AUTHORITY ("NYCHA") seeking an order dismissing plaintiff's complaint for failure to obtain Letters of Administration and/or attempting to obtain such Letters of Administration.

### Arguments Made by the Parties

Movants Forte, IDL and NYCHA each argue that plaintiff's estate and counsel failed to demonstrate the necessary efforts to substitute an estate representative in place of the plaintiff, who is deceased.

Forte argues that since plaintiff's passing on June 28, 2021, the decedent's estate/counsel has made "zero apparent efforts to effectuate a substitution," and have failed to respond to repeated requests regarding the status on the appointment of an administrator. Forte argues that "It appears that the family has abandoned the case and the only rational conclusion is that the estate has no interest in prosecuting same."

IDL argues that the defendants have made good faith efforts to remind plaintiff's counsel of the status of the case, but plaintiff-decedent's estate and counsel has failed to make any efforts to see that an administrator is appointed. IDL argues that this case should be dismissed, with prejudice.

NYCHA argues that plaintiff's counsel has failed to respond to NYCHA's inquiries regarding the status of an administrator being appointed, and that plaintiff's complaint should be dismissed because the case is abandoned.

In opposition, plaintiff's counsel does not deny that he failed to respond to inquiries made by the movants regarding the status of an administrator being appointed, and does not address the argument made by the movants that this case has been abandoned by plaintiff's estate.

However, plaintiff's counsel does aver:

Our office is aware that an application requesting Letters of Administration is pending in the State of New Jersey Essex County Surrogate's Court to appoint Lauren Furtado, the decedent's widow, as the administratrix of Mr. Futurado's estate. We have not received notification that an administratrix has been appointed yet. Upon receipt of Letters of Administration, our office will take the proper steps to continue this action.

Plaintiff's counsel also argues that the defendants' motions and cross-motion are procedurally defective, because the requested relief can not be requested in a notice of motion but must be made by order to show cause. Plaintiff's counsel further argues that this court does not have jurisdiction to decide the pending motions, because they were filed in contravention of CPLR 1021, as the motions were served only on the office of plaintiff's counsel and not on the "parties interested in the decedent's estate."

In Reply, the movants argue that plaintiff's counsel had refused to respond to all prior inquires about the status of appointing an administrator and had never named or identified Lauren Furtado prior to the filing of the opposition filings in the instant motions. The movants argue that if they are required to serve the pending motions upon plaintiff's estate, plaintiff's counsel should be required to provide the address for Lauren Furtado, who plaintiff's counsel now represents is seeking to be the administrator of plaintiff-decedent's estate.

### Conclusions of Law

CPLR 1021 provides, in relevant part:

§ 1021. Substitution procedure; dismissal for failure to substitute; presentation of appeal

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. If the event requiring substitution occurs after final judgment, substitution may be made in either the court from or to which an appeal could be or is taken, or the court of original instance, and if substitution is not made within four months after the event requiring substitution, the court to which the appeal is or could be taken may dismiss the appeal, impose conditions or prevent it from being taken. Whether or not it occurs before or after final judgment, *if the event requiring substitution is the death of a party, and timely substitution has not been made, 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 or appeal should not be dismissed* [emphasis added] .

Pursuant to CPLR 1021, if a party dies “and timely substitution has not been made, 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 or appeal should not be dismissed.” *See, Washington v Min Chung Hwan, 20 AD3d 303, 305 [1st Dept 2005].*

Here, plaintiff’s counsel does not deny that he failed to respond to numerous inquiries made by the movants regarding the status of an administrator being appointed. In fact, plaintiff’s counsel does not refute the argument made by the movants that this case has been abandoned by plaintiff’s estate. Further, aside from stating that there is an application “pending” in Essex County, New Jersey, plaintiff’s counsel fails to provide any useful or significant updates on the status of the appointment. He does not provide an index or docket number, or date of filing.

Nevertheless, the CPLR provides that the court, before proceeding further, shall “order the persons interested in the decedent's estate to show cause why the action or appeal should not be dismissed.” Here, plaintiff’s counsel has represented that Lauren Furtado, the decedent's widow, has made an application seeking to have herself appointed as administratrix of plaintiff's estate. As an “interested person” Lauren Furtado must be given notice of this proceeding and such notice must be made by order to show cause. *See, e.g., Petty v Meadowbrook Distrib. Corp., 266 AD2d 88 (1st Dept 1999)* (“If a party dies and the claim is not thereby extinguished, the court is required to order substitution of parties [CPLR 1015]. In the event a timely substitution is not made, 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 [CPLR 1021]. There never was any *order to show such cause* in this instance”); *Noriega v Presbyt. Hosp. in City of New York*, 305 AD2d 220 (1st Dept 2003) (“When a timely substitution is not made, a court may not order dismissal without first ordering the persons interested in the decedent's estate to show cause

why the action should not be dismissed [see CPLR 1021]. Here, there was no *order to show cause* served upon an interested party”) [emphasis added].

For the reasons set forth above, it is hereby:

**ORDERED** that the pending motions and cross-motion are each DENIED without prejudice; and it is further

**ORDERED** that movants are granted leave to re-file, at their election, under CRPL 1021, with service upon Lauren Furtado and all interested persons in a manner consistent with the CPLR 1021, all applicable law, and this decision; and it is further

**ORDERED** that plaintiff’s counsel must, within 30 days of the date of this order, submit a letter to the court and counsel setting forth the name and address of Lauren Furtado, and any other person known to plaintiff’s counsel to be interested in plaintiff’s estate.

4/12/2023  
DATE

  
J. MACHELLE SWEETING, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
 REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: