

Ambrosino v RCB1 Nominee

2023 NY Slip Op 32905(U)

August 18, 2023

Supreme Court, New York County

Docket Number: Index No. 161312/2019

Judge: Alexander M. Tisch

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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. ALEXANDER M. TISCH PART 18

Justice

ANTHONY AMBROSINO, RACHELE AMBROSINO,
Plaintiffs,
- v -
RCB1 NOMINEE, TISHMAN CONSTRUCTION CORPORATION, PINNACLE INDUSTRIES II, LLC,
Defendants.
INDEX NO. 161312/2019
MOTION DATE 05/12/2023, 04/27/2023
MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 48, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for AMEND CAPTION/PLEADINGS

Upon the foregoing documents, defendant Tishman Construction Corporation moves to dismiss the complaint for failing to timely substitute the estate representative for the deceased plaintiff (motion sequence no. 002) and plaintiff's counsel moves for leave to substitute the estate administrator in the place and stead of the deceased plaintiff and leave to amend and supplement the complaint (motion sequence no. 003).

Deceased plaintiff Anthony Ambrosino commenced the instant action on November 20, 2019 seeking damages for personal injuries allegedly sustained as a result of a trip and fall accident while he was working on a construction site on March 20, 2018. Issue was joined upon defendants' filing and service of an answer on January 7, 2020. Defendants commenced a third-party complaint against the decedent's employer on March 11, 2020, and the third-party defendant filed and served its answer on October 15, 2020. Shortly before that, plaintiff's

counsel notified the parties and the Court of the decedent's passing on October 7, 2020 (see NYSCEF Doc No 30).

CPLR 1015 (a) provides that “[i]f a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties.” CPLR 1021 provides that “[i]f 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.”

“[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” (Noriega v Presbyt. Hosp. in City of New York, 305 AD2d 220, 220-21 [1st Dept 2003]). Here, defendant's motion was simply filed on NYSCEF by notice of motion instead of order to show cause (see id.; Velez v New York Presbyt. Hosp., 145 AD3d 632, 633 [1st Dept 2016]) nor is there any proof that the motion was served in a manner “as prescribed in CPLR article 3” in order for the court to “obtain jurisdiction over the persons interested in the decedent's estate” (Gonzalez v Ford Motor Co., 295 AD2d 474, 474-75 [2d Dept 2002], citing Macomber v Cipollina, 226 AD2d 435, 437 [2d Dept 1996]; Velez, 145 AD3d at 633).

In opposing plaintiff's motion for substitution, defendants argue that the motion should be denied because there was no reason for the delay in commencing probate proceedings in 2022 when the decedent passed in October of 2020 and that defendant would be severely prejudiced in their defense as evidence or witnesses may no longer be available. For example, the construction project has now been completed and therefore evidence may have “grown stale or disappeared” (NYSCEF Doc No 49 at ¶¶ 6-7).

“In determining reasonableness [under CPLR 1021], a court should consider the plaintiff’s diligence in seeking substitution, prejudice to the other parties, and whether the action is shown to have potential merit” (Navas v New York Hosp. Med. Ctr. of Queens, 180 AD3d 796, 797 [2d Dept 2020]).

Here, the Court finds that the delay was not unreasonable and that plaintiff was diligent in seeking substitution under the circumstances. This motion was made approximately 2 ½ years after decedent’s passing, which notably occurred during the COVID pandemic. The decedent’s wife gathered all documents in early 2022 and filed the petition in Queens County Surrogates Court in August of 2022, demonstrating enough diligence under the circumstances — namely, considering that Ms. Ambrosino had to manage all the household affairs and gained numerous responsibilities that generally accompany a spouse’s passing, including caring for four children (two minors and one that was starting college) and also cared for her ill father, whom has also since passed (see NYSCEF Doc No 58). Once testamentary letters were issued on March 15, 2023, the instant motion was made less than a month later. Accordingly, there was no inordinate delay, weighing in favor of granting substitution (see Velez v New York Presbyt. Hosp., 145 AD3d 632, 632-33 [1st Dept 2016] [“in the absence of any prejudice to defendants, and in light of the strong public policy of deciding cases on the merits, the motion to substitute, made less than two years after Velez’s death, should have been granted”]).

“Even if the plaintiff’s explanation for the delay is not satisfactory, the court may still grant the motion for substitution if there is no showing of prejudice and there is potential merit to the action, in light of the strong public policy in favor of disposing of matters on the merits” (Navas, 180 AD3d at 797-798; see Peters v City of New York Health and Hosps. Corp., 48 AD3d 329 [1st Dept 2008] [noting the strong public policy of disposing matters on the merits

and that “a motion to substitute a party after a lengthy delay should be granted absent a showing of prejudice by the defendant”).

“[T]he fact that time has passed, . . . standing alone, [is] an insufficient basis for finding prejudice” (Wynter v Our Lady of Mercy Med. Ctr., 3 AD3d 376, 378 [1st Dept 2004]). The claim that the accident location no longer exists as it did on the date of the accident is without merit in light of the allegations that decedent tripped and fell on debris at the site, which would have been cleaned up within days anyway. Instead, as submitted in reply, it appears as though defendants had already begun investigated the matter upon learning of the claims. Accordingly, the Court finds no undue prejudice to defendants in resuming to litigate this matter.

That branch of the plaintiff’s motion for leave to amend and supplement the complaint is granted only to the extent of directing substitution in the caption, as the motion papers failed to comply with CPLR 3025 [b], requiring the motion to be “accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading” (see, e.g., Cafe Lughnasa Inc. v A & R Kalimian LLC, 176 AD3d 523 [1st Dept 2019]).

Accordingly, it is hereby ORDERED that defendant’s motion to dismiss pursuant to CPLR 1021 is denied (motion sequence no. 002); and it is further

ORDERED that plaintiff’s motion (motion sequence no. 003) is granted to the extent of lifting the automatic stay and restoring the matter to active status, permitting substitution of the decedent’s estate representative and leave to amend the caption and pleadings to reflect such substitution; and it is further

ORDERED that the motion is otherwise denied without prejudice to the extent of seeking leave to amend the complaint to assert new or amended allegations and/or claims; and it is further

ORDERED that RACHELE AMBROSINO as Administrator of the Estate of Anthony Ambrosino, deceased, shall be substituted in the place and stead of plaintiff Anthony Ambrosino; and it is further

ORDERED that the action shall bear the following caption:

RACHELE AMBROSINO, as Administrator for the Estate of ANTHONY AMBROSINO, deceased; and RACHELE AMBROSINO, individually ,

Plaintiff(s),

-against-

RCB1 NOMINEE; TISHMAN CONSTRUCTION CORPORATION; and PINNACLE II INDUSTRIES LLC,

Defendants.

INDEX No.:
161312/2019

RCB1 NOMINEE LLC i/s/h/a RCB1 NOMINEE; TISHMAN CONSTRUCTION CORPORATION; and PINNACLE II INDUSTRIES LLC,

Third-Party Plaintiffs,

-against-

FRED GELLER ELECTRICAL, INC.,

Third-Party Defendant.

THIRD-PARTY
INDEX No.:
595266/2020

And it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (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 including the parties being added pursuant hereto; and it is further

ORDERED that service of this order 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* (see section J).¹

This constitutes the decision and order of the Court.

8/18/2023
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

¹ The *Protocol* is accessible at the "E-Filing" page on the Court's website: www.nycourts.gov/supctmanh.