

Fatkhiyeva v Travitsky

2023 NY Slip Op 33830(U)

October 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 515925/2019

Judge: Patria Frias-Colón

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Part 20

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Aleksandra Fatkhiyeva and Aleksandr Fatkhiyev,

Index # 515925/2019
Part 20 Case Conference
Motion Sequence # 3

Plaintiffs,

-against-

DECISION / ORDER

Abraham Travitsky, Batya Travitsky a/k/a Betty
Travitsky, the City of New York, Joseph Durzieh,
1882 East 12th Street LLC, US Demco of Brooklyn, Inc.,
J& G General Contracting Inc., and Skyrise Building Services Inc.,

Defendants.
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Recitation per CPLR §§ 2219 and 3212 of Papers consider on Review of Motion:

Papers:	NYSCEF Doc #s
Plaintiff’s Motion Sequence 3.....	119-135
Defendants Durzieh and 1882 East 12 th Street’s Cross-Motion (Seq. 4).....	136-147
D NYC’s X-Mo. Supporting Ds Durzieh/1882 E 12 th ’s Motion to Strike/Preclude/Compel..	148
Defendants A. Travitsky and B. Travitsky’s Cross-Motion (Mot. Seq. 5).....	151-156
Additional Documents Reviewed.....	74, 111, 157-161

As a result of the parties corresponding with Chambers, virtual case conferences were held August 4, 2023 and October 2, 2023 via Microsoft Teams. Present for each virtual case conference were the attorneys for Plaintiff, Defendants Abraham and Batya Travitsky a/k/a Betty Travitsky, Defendant City of New York (City), Defendants Joseph Durzieh and 1882 East 12th Street, LLC, and the son of the Travitsky Defendants (Baruch Travitsky). The purpose of the virtual conference was to discuss a stay ordered on the case and whether said stay was triggered by the death of Defendant Abraham Travitsky and/or the incapacitation of Defendant Batya Travitsky. If so, whether said stay should be lifted to allow the Court to decide Plaintiffs’ motion *inter alia* to restore the case to the active discovery calendar (Mot. Seq. 3) and the Travitsky Defendants’ cross motion *inter alia* opposing restoring the case to the discovery calendar (Mot. Seq. 5).

PROCEDURAL HISTORY

Defendant Abraham Travitsky died March 19, 2021. *See* NYSCEF Doc. # 149; *see also* Doc. #s 157, 161. His death generally would trigger a stay of the proceedings pending substitution of a legal representative. *See., e.g., Medlock v Dr. William O. Benenson Rehabilitation Pavilion*, 167 A.D.3d 994 (2nd Dep’t 2018).¹ *See also* CPLR § 1015(a) (“Generally. If a party dies and the

¹The May 3, 2022 Decision and Order (Mallafre-Melendez, J.) that granted Mot. Seq. 1 (issuing a default judgment pursuant to CPLR § 3215(a) against Defendants US Demco of Brooklyn Inc., J & G General Contracting Inc., and

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claim for or against him is not thereby extinguished the court shall order substitution of the proper parties.”). The Universal Case Management System (“UCMS”) for the Unified Court System reflects that, after Defendant Abraham Travitsky’s death, this case was on the court’s calendar several times.²

Correspondence dated April 20, 2023 from counsel for the Travitsky Defendants, informed the Court and other parties that Mr. Travitsky passed away on March 19, 2021. *See* NYSCEF Doc. #s 149, 150. Said correspondence also informed that an estate was established after Mrs. Travitsky’s heart-attack, and she would be unable to provide counsel with the letter of administration for Mr. Travitsky until after she was released from the hospital. *See* NYSCEF Doc. # 149. It further stated, “As the death of our client stays the present litigation, please note that plaintiff filed a motion to restore this case...returnable...May 10, 2023...[Defendants]...request that the motions be adjourned pending amendment of the caption substituting an executor for our deceased client.” NYSCEF Doc. # 149.

On August 4, 2023, the Court held a virtual case conference and counsel for the Travitsky Defendants stated she was mistaken when she initially represented that an estate was established for Defendant Abraham Travitsky, and confirmed no letters of administration were secured as a result of his death. The Court directed that the Travitskys’ counsel file the appropriate application to have an administrator appointed, directed a progress update by September 8, 2023, and scheduled a status conference for September 12, 2023, which had to be postponed because of the Travitskys’ counsel’s unavailability. The September 12, 2023 case conference was adjourned to October 2, 2023.

In advance of the October 2, 2023 case conference, Defendant Batya Travitsky wrote a September 27, 2023 letter (uploaded to NYSCEF on September 28, 2023) notifying the Court and all parties that “[t]he property located at 1890 East 12th Street, Brooklyn...which is the subject of this litigation, was transferred to...our children, Morris a/k/a Moshe Travitsky and Baruch

Skyrise Building Services Inc., and ordering an inquest at the time of trial) does not need to be vacated as a result of the death of one of the parties. (NYSCEF Doc. # 111); “where a party’s demise does not affect the merits of the case, there is no need for strict adherence to the requirement that the proceedings be stayed pending substitution.” *See, e.g., Paterno v. CYC, LLC*, 46 A.D.3d 788 (2nd Dep’t 2007) (no stay required where one of the spousal plaintiffs died as death did not “affect the merits of the case” and spouse had “clear identity of interest with her husband...”); *see also Matter of National Fuel Gas Supply Corp. v. Schueckler*, 35 N.Y.3d 297, 305 n. 2 (2020) (While respondent Joseph Schueckler died during pendency of appeal, substitution was not required because the property was owned by Joseph and Theresa Schueckler as tenants by the entirety and so his interest vested in her by operation of law). The *Paterno* Court stated that “Where, as here, the cause of action survives as to the only other plaintiff, the action should have proceeded without a substitution and with the decedent’s death merely noted on the record.” 46 A.D.3d at 788; CPLR § 1015(b) (“Upon the death of one or more of the plaintiffs or defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or against the surviving defendants, the action does not abate. The death shall be noted on the record and the action shall proceed.”).

²These post-death calendar dates include March 26, 2021 (marked on UCMS as note of issue being “dismissed”), February 26, 2022 (Mot. Seq. 2 “withdrawn”), April 13, 2022 (Mot. Seq. 1 “granted”), May 10, 2023 (Mot. Seq. 4 “adjourned”), and August 10, 2023 (Mot. Seq. 3-5 “adjourned”).

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Travitsky, via an irrevocable trust...prior to my husband's death...and [a]fter speaking with my personal attorney [Martin L. Price] I informed Jacobson and Schwartz, LLP [counsel for the Travitsky Defendants] that they are not authorized to file for Letters of Administration on my behalf under any circumstances...nor was it ever the intention of myself or my husband...to form an estate...Jacobson and Schwartz, LLP are solely representing myself, and my husband prior to his death, for this insurance related lawsuit only....I am still am (sic) in very poor health...my son, Baruch Travitsky, will be available Monday October 2, 2023...should your Honor have any questions regarding the above, as he has personal knowledge with the facts and circumstances...." See NYSCEF Doc. # 157.

During the October 2, 2023 virtual case conference, Baruch Travitsky advised the Court that a Petition for Letters of Administration had been prepared, but not filed. At the conclusion of the October 2, 2023 virtual case conference, the matter was adjourned November 6, 2023 for another update. In the interim, the Court directed the Travitsky Defendants to submit a Petition to appoint an Administrator for the Estate of Abraham Travitsky, to submit proof of such filing, and to have the insurance adjuster present for the November 6, 2023.

On October 4, 2023, counsel for the Travitsky Defendants uploaded to NYSCEF a document from the Surrogate's Court of the State of New York, Kings County, Certificate # 90476, File # 2023-4026, being a "Certificate of Voluntary Administration", bearing what appears to be the stamped signature of the Surrogate Court's Chief Clerk and the Raised Seal of that court. See NYSCEF Doc. # 159. The certificate lists Baruch Travitsky as Voluntary Administrator, further stating that he "is only authorized to collect and receive the following personal property of the decedent [Abraham Travitsky]: Permission to Open an Estate Acct in NY State for No More than \$4,000.00 without Further Order from this Court." NYSCEF Doc. # 159.

On October 4, 2023, Baruch Travitsky emailed the Court and all parties (which has since been uploaded to NYSCEF) a New York Statutory Short Form Power of Attorney bearing the notarized signatures of Defendant Batya a/k/a Betty Travitsky, Baruch Travitsky and Moshe a/k/a Morris C. Travitsky appointing and designating her sons as "agents" authorized "to spend your money and sell or dispose of your property" with the "Grant of Authority" including, but not limited to, "claims and litigation" and "all other matters." See NYSCEF Doc. # 160.

DISCUSSION

Based on the virtual case conferences and subsequent filings, Plaintiffs' motion to restore the case (Motion Sequence 3) is stayed and adjourned to November 22, 2023 (Part 20 Calendar), for arguments on motion sequence 3, including but not limited to their motion to extend their time to file their Note of Issue and to compel Defendants (including the substitution of Baruch Travitsky for Abraham Travitsky and/or the substitution of Baruch Travitsky or Moshe Travitsky a/k/a Morris C. Travitsky for Betty Travitsky a/k/a Batya Travitsky) to appear for deposition. Also during the November 22, 2023 court date, the Court will also hear argument of Defendants Joseph

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Durzieh and 1182 East 12th Street LLC’s cross motion (Motion Sequence 4), *inter alia* to strike the Plaintiffs’ complaint and/or to preclude and/or to compel (joined by co-Defendant City of New York) pursuant to CPLR §§ 3124 and 3126 and the remaining portions of motion sequence 5, namely the Travitsky Defendants’ cross motion to dismiss the complaint pursuant to CPLR §§ 3216 and 3404 and to strike the complaint pursuant to CPLR §§ 3124 and 3126.

The Clerk of the Court shall amend the caption as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS Part 20

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Aleksandra Fatkhiyeva and Aleksandr Fatkhiyev,

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Plaintiffs,

-against-

Baruch Travitsky, as administrator of the estate of
Abraham Travitsky, Batya Travitsky a/k/a Betty Travitsky,
the City of New York, Joseph Durzieh, 1882 East 12th Street LLC,
US Demco of Brooklyn, Inc., J& G General Contracting Inc., and
Skyrise Building Services Inc.,

Defendants.

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Past pleadings, Decisions and Orders shall stand and be amended to reflect the proper substitution for Defendant Abraham Travitsky, and the case is adjourned to November 22, 2023 to hear argument on undecided portions of Motion Sequences 3 through 5, as stated previously.

This constitutes the Decision and Order of this Court.

Date: October 24, 2023
Brooklyn, New York



Hon. Patria Frias-Colón, J.S.C.