

Carlisle v One Hudson Yards Owner, LLC

2023 NY Slip Op 34496(U)

December 22, 2023

Supreme Court, New York County

Docket Number: Index No. 151893/2020

Judge: John J. Kelley

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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. JOHN J. KELLEY **PART** **56M**

Justice

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MAURICE CARLISLE,

Plaintiff,

- v -

ONE HUDSON YARDS OWNER, LLC, GILBANE BUILDING
COMPANY, and JOHN BOESCH,

Defendants.

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INDEX NO. 151893/2020

MOTION DATE 10/04/2023

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 86, 87, 88

were read on this motion to/for SEVER/APPOINT TEMPORARY ADMINISTRATOR

This is an action to recover damages for personal injuries, arising from a workplace accident. The plaintiff commenced the action on February 20, 2020. On July 30, 2022, the defendant John Boesch died, and the attorney representing him at the time informed the court of his death on September 15, 2022. In an order dated December 21, 2022, the court memorialized the automatic stay of proceedings that was imposed by operation of law upon Boesch’s death, and directed that the stay was to remain in effect until the proper substitution of a representative of Boesch’s estate as a party defendant. The plaintiff now moves pursuant to CPLR 603 to sever the action against Boesch or, in the alternative, to appoint the attorney who had been assigned by Boesch’s insurer to represent Boesch, as the temporary administrator of Boesch’s estate, for the limited purpose of appearing in and defending this action, up to the limits of Boesch’s insurance coverage. The defendants oppose the motion. The motion is granted to the extent that Denis J. Kennedy, Esq., is appointed to serve as temporary

administrator of Boesch's estate for the limited purpose of appearing in and defending this action, up to the limits of the available insurance coverage, and the motion is otherwise denied.

The plaintiff initially made a virtually identical motion seeking to appoint The Law Offices of William Boorstein as Boesch's temporary administrator (SEQ 004) but, by that time, The Law Offices of Denis J. Kennedy had replaced Boorstein as the attorney for Boesch's insurer. Although this court, in an interim order dated June 8, 2023, deemed that motion to have sought the appointment of Kennedy as temporary administrator, rather than Boorstein, on August 17, 2023, the plaintiff made the instant motion, expressly seeking Kennedy's appointment as temporary administrator. Hence, in an order dated August 30, 2023, this court denied the motion under sequence 004 as superseded by the instant motion.

"[T]he death of a party divests a court of jurisdiction to conduct proceedings in an action until a proper substitution has been made pursuant to CPLR 1015(a)" (*Griffin v Manning*, 36 AD3d 530, 532 [1st Dept 2007]; see CPLR 1015[a]; *Silvagnoli v Consolidated Edison Emps. Mut. Aid Socy.*, 112 AD2d 819, 820 [1st Dept 1985]). Any determination rendered or proceedings held without such a substitution generally is deemed a nullity (see *Griffin v Manning*, 36 AD3d at 532; *Stancu v Cheon Hyang Oh*, 74 AD3d 1322, 1322-1323 [2d Dept 2010]; *Morrison v Budget Rent A Car Syst., Inc.*, 230 AD2d 253 [2d Dept 1997]). "Thus, the IAS Court [i]s without jurisdiction to order the severance of the action," and any "order in that regard is void" (*Harding v Noble Taxi, Inc.*, 155 AD2d 265, 266 [1st Dept 1989]). Hence, the branch of the plaintiff's motion seeking severance must be denied.

Nonetheless, "[t]he Supreme Court is a court of general jurisdiction with the power to appoint a temporary administrator and may do so to avoid delay and prejudice in a pending action" (*Dieye v Royal Blue Servs., Inc.*, 104 AD3d 724, 726 [2d Dept 2013]). This court thus has discretion to determine whether to exercise its authority to appoint a temporary administrator for Boesch's estate (see *Lambert v Estren*, 126 AD3d 942, 944 [2d Dept 2015]; *Harding v Noble Taxi, Inc.*, 155 AD2d at 266; *Batan v Schmerler*, 155 Misc 2d 46, 47 [Sup Ct,

Queens County 1992]), particularly where the delays attendant in pursuing a remedy in the Surrogate's Court warrant this court's intervention (*see Harding v Noble Taxi, Inc.*, 155 AD2d at 266; *see also Bianco v Pierre*, 9 Misc 3d 1126[A], 2005 NY Slip Op 51801[U], *2, 2005 NY Misc LEXIS 2460, *4 [Civ Ct, Kings County, Nov. 3, 2005] [Civil Court also has authority to appoint a temporary administrator by virtue of New York City Civ Ct Act § 212]; *Abecasis v Fontenazza*, 10 Misc 3d 195, 196-197 [Civ Ct, Kings County 2005] [same]).

In the instant matter, The Law Offices of Denis J. Kennedy had represented Boesch because it was assigned by an insurer that provided liability insurance to Boesch. As courts frequently have recognized, under many circumstances, such as where a settlement or an agreement to discontinue an action has been or may be reached, the insurer is the real party in interest to the underlying dispute (*see George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA*, 92 AD3d 104, 118 [1st Dept 2012]). As the court explained it in *Batan*, the appointment of a temporary administrator

“is a proper one for the exercise of the court's power, since it is otherwise trial-ready, and has in fact been reached for trial. It should not be unduly delayed or forced to remain in limbo while the plaintiff, at unnecessary expense, proceeds in the Surrogate's Court.

“Further, it appears that the only asset of the estate which the plaintiffs seek to pursue is the decedent's contract of insurance with the Aetna Casualty Company. If this is in fact the case, and the plaintiffs do not seek to pursue other assets of the estate in the event of recovering a judgment, then the appointment of a temporary administrator will not infringe upon the jurisdiction of the Surrogate's Court”

(*Batan v Schmerler*, 155 Misc 2d at 47; *cf. Matter of Sheahan v Rodriguez*, 194 Misc 2d 179, 184 [Surr Ct, Bronx County 2002] [under the circumstances presented, SCPA 206 confers subject matter jurisdiction upon the Surrogate's Court in New York to issue temporary letters of administration in connection with the estate of a nondomiciliary, limited to the extent of insurance coverage]). Consequently, courts have appointed the attorney designated by the insurer to represent a defendant to serve as temporary administrator where an individual defendant dies during the pendency of litigation (*see Fahey v Zissis*, 2023 NY Slip Op 23152,

2023 NY Misc LEXIS 2367 [Sup Ct, Bronx County, May 16, 2023]; *Batan v Schmerler*, 155 Misc 2d at 47; *see also Ramirez v Zalak*, 10 Misc 3d 1080[A], 2006 NY Slip Op 50160[U], *1-2, 2006 NY Misc LEXIS 213, *3 [Sup Ct, Kings County, Feb. 6, 2006] [recognizing the practice, but declining to apply it because the plaintiff had commenced the action against a defendant after that defendant had died]). The court concludes that this is the appropriate remedy here (*see Bair v Windsor*, 2023 NY Slip Op 32999[U], *3, 2023 NY Misc LEXIS 4824, *5 [Sup Ct, N.Y. County, Aug. 29, 2023] [Kelley, J.]).

Since SCPA 707 provides that only a natural person may be appointed as a temporary administrator, the court concludes that it is appropriate to appoint Denis J. Kennedy, Esq., as attorney of record, with his authority and obligation limited to the defense and disposition of this action, and only to the extent of Boesch's insurance coverage (*see Biancono v Pierre*, 9 Misc. 3d 1126[A], 2005 NY Slip Op 51801[U], *2-3, 2005 NY Misc LEXIS 2460, *5-7).

The court further notes that, if, during the pendency of this action, any probate or administration proceeding has resulted in the issuance of letters testamentary or letters of administration to an appropriate representative of Boesch's estate, that representative or Kennedy shall be required to obtain approval from this court to establish who has the authority to continue the defense of this action on behalf of the estate.

Accordingly, it is,

ORDERED that the plaintiff's motion is granted to the extent that Denis J. Kennedy, Esq., is appointed as the temporary administrator of the estate of John Boesch, for the limited purpose of appearing on behalf of, and defending the estate of, John Boesch in this action, and only to extent of the limits of liability insurance coverage provided by the insurance policy pursuant to which Denis J. Kennedy, Esq., had been designated to defend John Boesch or his estate, and the motion is otherwise denied; and it is further,

ORDERED that, on the court's own motion, the stay of proceedings imposed by operation of law upon the death of John Boesch on July 30, 2022 is thereupon vacated and dissolved; and it is further,

ORDERED that the action is restored to active status; and it is further,

ORDERED that the caption of the action is amended to read as follows:

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MAURICE CARLISLE,

Plaintiff,

V

ONE HUDSON YARDS OWNER, LLC, GILBANE BUILDING COMPANY, and DENIS J. KENNEDY, ESQ., as Temporary Administrator of the Estate of JOHN BOESCH, deceased,

Defendants.

-----X;

and it is further,

ORDERED that, within 15 days of the entry of this decision and order, the plaintiff shall serve a copy of this decision and order upon both the County Clerk and the Clerk of the General Clerk's Office, which shall be effectuated in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases, accessible at the "E-Filing" page on the court's website at <https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/Efil-protocol.pdf> ([nycourts.gov](https://www.nycourts.gov)), and, to comply with those procedures, the plaintiff shall (1) upload the decision and order to the NYSCEF system under document title "SERVICE ON SUPREME COURT CLERK (GENL CLERK) W/COPY OF ORDER" **AND** (2) separately file and upload the notice required by CPLR 8019(c) in a completed Form EF-22, along with a copy of the decision and order, under document title "NOTICE TO COUNTY CLERK CPLR 8019(C)," and the County Clerk and all appropriate court support offices shall thereupon amend the court records accordingly.

This constitutes the Decision and Order of the court.

12/22/2023
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: