Samuel v Grant
2024 NY Slip Op 32953(U)
August 19, 2024
Supreme Court, Kings County
Docket Number: Index No. 514264/2018
Judge: Carolyn Walker-Diallo
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At an IAS Term, Part DJMP2, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse at 320 Jay Street, Brooklyn, New York, on the 19th day of August 2024.

PRESENT:

HON. CAROLYN WALKER-DIALLO, J.S.C.

-- X

PAULETTE M. SAMUEL,

Plaintiff,

- against -

DAISY GRANT and
GLERENE GAYLE,

Defendants.

-- X

Index No.: 514264/2018

DECISION AND ORDER

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion:

Papers Numbered

Defendant's Notice of Motion, Affirmation, Exhibits	NYSCEF Doc. No(s). 25-34
Notice of Cross-Motion, Affirmations, Affidavit, Exhibits	NYSCEF Doc. No(s). 35-41
Affirmation in Opposition to Cross-Motion, Exhibits	NYSCEF Doc. No(s). 42-44

Papers considered: Motion Sequences 2-3

INTRODUCTION

Defendant Glerene Gayle ("Defendant Gayle") moves for an order pursuant to CPLR 3211(a) (10)[1], 1001, and 1003, dismissing the action for failure to join a necessary party. Plaintiff Paulette M. Samuel ("Plaintiff") opposes Defendant Gayle's motion asserting that the Estate of

1 Defendant's Notice of Motion (NYSCEF Doc. No. 25) requests relief under CPLR 3211(a), while the Affirmation in Support (NYSCEF Doc. No. 26) specifies 3211 (a)(10). Further, although CPLR 1003 is entirely absent from the Notice of Motion and mentioned for the first time in the Affirmation, the Court shall consider this request for relief. A notice of motion must list the relief demanded and the grounds therefor. CPLR 2214(a). "Although in specifying the grounds of the motion, it does no harm to cite chapter and verse, and that may be the better practice as it clearly puts the party on notice of the grounds alleged, there is no requirement that the notice of motion list the statute or regulation that is the basis of the sanctions motion as long as some grounds are mentioned." *Shields v. Carbone,* 99 A.D.3d 1100, 1102 (3d Dep't 2012) (internal citations omitted).

Daisy Defendant Grant is not a necessary party. Plaintiff cross-moves for an order seeking to: (1) restore the case to active status; and (2) schedule the matter for a discovery conference. Plaintiff also requests to amend the caption to reflect the discontinuance against deceased Defendant Daisy Grant.

Upon the foregoing papers and for the reasons set forth below, Defendant Gayle's motion is DENIED in its entirety. Plaintiff's cross-motion is GRANTED to the extent that the case is restored to active status and the matter is scheduled for a discovery conference. While the Court orders that Defendant Grant's name be removed from the action, the basis upon which Plaintiff requests such relief is DENIED as inoperative as a matter of law.

FACTUAL AND PROCEDURAL HISTORY

This action stems from alleged personal injuries sustained by Plaintiff in a trip-and-fall accident on March 22, 2017 at 2115 Regent Place in Brooklyn ("Regent Place"). *See* Summons and Complaint, ¶ 46 (NYSCEF Doc. No. 1). Plaintiff commenced this action against both Defendant Grant and Defendant Gayle, who acquired Regent Place on April 12, 1985 as tenants-in-common, by filing a Summons and Complaint on July 12, 2018. *See* Summons and Complaint (NYSCEF Doc. No. 1); Property Deed (NYSCEF Doc. No. 9). Defendant Gayle interposed an answer on August 29, 2018. *See* Answer (NYSCEF Doc. No. 4) Defendant Grant did not answer the complaint.

By letter dated October 22, 2018, Defendant Gayle's counsel advised Plaintiff's counsel that Defendant Grant passed away on July 11, 2013, before Plaintiff sustained the alleged injuries and before the instant action was commenced. *See* Letter dated October 22, 2018 (NYSCEF Doc. No. 29). The letter included a copy of Defendant Grant's death certificate. *See Id.* As such, Defendant Gayle requested that Plaintiff amend the caption to reflect a discontinuance against

Defendant Grant. *See Id.* Plaintiff's counsel affirms that Defendant Grant's death was unknown when the action was commenced. *See* Affirmation of Support in Opposition to Motion and in Support of Cross-Motion of Michael Zogala, dated June 4, 2024 ("Zogala Aff.") at ¶ 6 (NYSCEF Doc. No. 36).

Subsequently, on February 14, 2019, Plaintiff moved for default judgment against Defendant Grant. At a hearing on the motion, Defendant Gayle alleges that on March 19, 2019, the Honorable Richard Montelione stayed the matter pending the appointment of an administrator for the Estate of Daisy Defendant Grant. *See* Exhibit E to the Affirmation of Mari Milorava-Kelman, dated April 24, 2024 ("Milorava-Kelman Aff. I") (NYSCEF Doc. Nos. 26 and 31.) The order staying the case is not provided by the parties for the Court's review, nor is a copy available on NYSCEF. The only memorialization of the stay is a notation contained on the eCourts appearance detail provided by Defendant Gayle. *See Id.*

The case was scheduled for a status conference on January 18, 2024 before the Honorable Lawrence Knipel, at which time the court issued an Order directing Plaintiff to file paperwork with the Surrogate's Court within ninety (90) days or the stay would be vacated. *See* Order of the Hon. Lawrence Knipel, dated January 18, 2024, annexed as Exhibit F to the Milorava-Kelman Aff. (NYSCEF Doc. No. 32). Plaintiff did not file any documentation with Surrogate's Court. A second conference was scheduled for April 25, 2024. On that date, Plaintiff's counsel Seth MacArthur missed the calendar call while in another courtroom waiting for a separate matter to be called. *See* Affirmation of Support of Seth McArthur, dated June 4, 2024 ("MacArthur aff.) at ¶ 2-9, annexed as Exhibit 5 to the Zogala Aff. (NYSCEF Doc. No. 41).

One day prior to the scheduled conference, Defendant Gayle filed the instant motion on April 24, 2024, and Plaintiff cross-moved on June 4, 2024. Additionally, on June 4, 2024, Plaintiff

executed a unilateral stipulation of discontinuance against Defendant Grant, which was filed as part of her motion papers. *See* Stipulation of Discontinuance, annexed as Exhibit 3 to the Zogala Aff. (NYSCEF Doc. No. 39). Defendant Gayle filed an Affirmation in Opposition to Plaintiff's cross-motion on June 7, 2024 (NYSCEF Doc. Nos. 42-44).

DISCUSSION

I. Defendant Gayle's Motion to Dismiss is Denied.

Defendant Gayle moves to dismiss the complaint asserting that Plaintiff failed to join Defendant Grant's estate as a necessary party. A necessary party is one who ought to be a party "if complete relief is to be accorded between the persons who are parties in the action or who might be inequitably affected by a judgment in the action..." CPLR 1001 (a). The Court has discretion to allow a case to continue in the absence of a party as justice requires; dismissal for failure to join a necessary party is a last resort. *See Red Hook/Gowanus Chamber of Commerce v. New York City Bd. Of Standards and Appeals*, 5 N.Y.3d 452, 459 (2005), *citing* Siegel, NY Prac § 133 (4th ed) ("Before reaching that point, the court should stretch its judicial imagination to see if it can devise some way of allowing the action to proceed without that person's joinder."). Because a tenancy in common gives each co-tenant full possession of the entire premises unless they contract otherwise, a defective condition causing injury to a third party results in joint and severable liability as to each co-tenant. *See Butler v. Rafferty*, 100 N.Y.2d 265, 269-270 (2003), *citing* Restatement (Second) of Torts § 878 ("If the duty (to remedy a defective condition) is not performed, each (co-tenant) is liable for all the harm resulting from its breach"). "When two or more tort-feasors act concurrently or in concert to produce a single injury, they may be held jointly and severally liable…This is so because such concerted wrongdoers are considered "joint tort-feasors" and in legal contemplation, there is a joint enterprise and a mutual agency, such that the act of one is the

act of all and liability for all that is done is visited upon each." *Ravo by Ravo v Rogatnick*, 70 NY2d 305, 309 (1987).

Although this action concerns real property, it does so only tangentially. Rather, the crux of the case involves a personal injury action. Accordingly, Defendant Gayle's reliance on *Censi v. Cove Landings, Inc.,* 65 A.D.3d 1066 (2d Dep't 2009) to suggest that the Estate is a necessary party because its interest in the property "might be inequitably affected by the judgment" is misplaced. *See* Affirmation in Support of Motion at ¶ 20 (NYSCEF Doc. No. 26). The *Censi* case involved multiple landowners who owned lots along a stretch of Fish Cove Road in the town of Southampton and whose claim of ownership would have been adversely affected by the outcome of the court's decision in the case. As such, the Court found the record indicated "the possible existence of necessary parties who have not been joined, namely, the owners of the remainder of the roadbed of Fish Cove Road. Those parties' interests in real property may be affected by that portion of the Supreme Court's order…" *Censi v Cove Landings, Inc.*, 65 A.D.3d at 1068. The present case does not involve interest in property ownership and any such lack of representation. Therefore, there is no prejudice in the instant matter as the Defendants were tenants-in-common and co-owners of one property.

Similarly, comparisons to foreclosure actions, where all parties in interest must be named is inapposite. "Pursuant to RPAPL 1311, the plaintiff in a mortgage foreclosure action is required to join, as a party defendant, any person 'whose interest is claimed to be subject and subordinate to the plaintiff's lien,' including '[e]very person having an estate or interest in possession ... in the property as tenant in fee'." *1426 46 St., LLC v Klein*, 60 AD3d 740, 742 (2d Dep't 2009). Foreclosure actions seek to determine the ownership rights to real property. Such determinations require all individuals and entities with an ownership interest in that real property be given an

opportunity to respond (including the estate of a deceased owner), or risk voiding a subsequent transfer of ownership. *See Dime Sav. Bank of N.Y. FSB v. Luna*, 302 A.D.2d 558 (2d Dep't 2003). In *Dime Sav. Bank,* Silvia Luna, the owner of a property located at 183 Maujer Street in Brooklyn, passed away four months before the foreclosure proceeding was commenced. The foreclosure proceeded after Silvia Luna was served a summons and complaint by substitute service on January 22, 2000, and the property was later sold at auction on April 25, 2001. The plaintiff Dime Bank was unaware that Silvia Luna had died, and never joined the Estate as a necessary party. Thus, on September 5, 2001, the Public Administrator commenced proceedings to set aside the sale. By order of Honorable Barbaro dated March 15, 2002, the judgment of foreclosure and sale was vacated and the deed of sale was voided. This order was affirmed on appeal.

In contrast to *Luna* and other foreclosure cases, the present personal injury case will not make a determination on the ownership interest of the property owners; it merely seeks to determine liability for an injury suffered on the property. Personal injury actions resulting from slip and fall claims do not require every owner of a property to be named as a defendant; whether a property owner is subject to liability often hinges on the degree to which they exercise control over the premises. For instance, "[i]t is well settled that an out-of-possession lessor is not liable for injuries that occur on the premises unless the lessor has retained control or is contractually obligated to repair an unsafe condition." *Schreiber v Goldlein Realty Corp.*, 251 A.D.2d 315, 316 (2d Dep't 1998).

Here, since Defendant Gayle was a tenant-in-common with Defendant Grant, Defendant Gayle alone may be held liable for the entire harm caused by an allegedly defective condition on the premises they held in common. Accordingly, complete relief can be accorded between Plaintiff and Defendant Gayle. Mere delay in prosecuting does not constitute prejudice to Defendant Gayle.

There must be clear evidence that a delay has caused prejudice. "Prejudice may be established by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay." *Skrodelis v Norbergs*, 272 A.D.2d 316, 316-17 (2d Dep't 2000).

Much like in the present case, in *Arroyo v. Bd. of Educ. of City of New York*, 110 A.D.3d 17 (2d Dep't 2013), following a slip and fall and the filing of a suit to recover for injuries, the case was marked off the calendar when the plaintiff failed to appear for a conference. After twelve years, the plaintiff moved to have the case restored. The Appellate Division, Second Department held that the Court has no power to dismiss a pre-note of issue case for failure to prosecute, when the defendant has not served a 90-day demand to serve and file a note of issue. "A defendant cannot sit idly by while memories fade and evidence spoils. Although an extensive delay in prosecuting an action may, at times, prejudice a defendant's ability to defend against a suit, a defendant has the statutory means of avoiding such prejudicial delay by serving a 90–day demand." *Arroyo v. Bd. of Educ. of City of New York*, 110 A.D.3d 17, 21 (2d Dep't 2013) (internal citations omitted). *See also Premier Capital, LLC v. Best Traders, Inc.*, 88 A.D.3d 677, 678 (2d Dep't 2011). Moreover, contrary to Defendant Gayle's assertions, there is no evidence in the record that a judgment against Defendant Gayle would inequitably affect Defendant Grant's estate. Therefore, Defendant Grant's estate is not a necessary party, and this action will continue in the absence thereof.

Even if Defendant Grant's estate were a necessary party, the required CPLR 1001 (b) analysis would not result in dismissal. *See Red Hook/Gowanus Chamber of Commerce*, 5 N.Y.3d at 457-459. Since the applicable statute of limitations has expired, as Defendant Gayle notes, the drastic remedy of dismissal would leave Plaintiff without effective recourse. *See* CPLR 1001 (b). There is no evidence in the record to demonstrate that Defendant Grant's estate would be prejudiced by the nonjoinder, and Defendant Gayle has not established prejudice beyond the mere

fact of a delay. *See* CPLR 1001 (b)(2); (b)(3). As Defendant Gayle is a tenant-in-common and thus subject to joint and several liability, an effective judgment may be rendered in the absence of Defendant Grant's estate. *See* CPLR 1001 (b)(5). Moreover, in a case commenced after the death of a party named therein, substitution of the deceased party by his personal representative is impossible because the action was never commenced against the deceased defendant. *See Jordan v. City of New York*, 23 A.D.3d 436 (2d Dep't 2005); HSBC *Bank USA v. Ungar Family Realty Corp.*, 111 A.D.3d 673 (2d Dep't 2013). *See also Vicari v. Kleinwaks,* 157 A.D.3d 975 (2d Dep't 2018); *Wendover Fin. Serv. v Ridgeway*, 93 A.D.3d 1156 (4th Dep't 2012).

In her papers, Defendant Gayle contends that Plaintiff unjustifiably delayed the case by not adding Defendant Grant's estate, not responding to discovery, and by failing to appear for court dates, all of which which has greatly prejudiced Defendant Gayle. *See* Affirmation of Mari Milorava-Kelman in Opposition to Cross-Motion and in Further Support of Motion, dated June 7, 2024 ("Milorava-Kelman Aff. II) at ¶ 16-18 (NYSCEF Doc. No. 42). Further, Defendant Gayle denies having received Plaintiff's responses to the discovery demands that she served on August 29, 2018, because the responses were mailed to her counsel's former office address from which they moved in 2019. *Id.* at ¶ 28. Plaintiff responds that even though the case was stayed, she did respond to the discovery demands via mail on April 16, 2021. *See* Zogala Aff at ¶12; Verified Bill of Particulars annexed as Exhibit 4 to the Zogala Aff. (NYSCEF Doc. No. 40).

The Court finds that Defendant Gayle's arguments are without merit. The legal standards for moving to dismiss an action for failure to prosecute are contained within CPLR 3216. Defendant Gayle, as the movant requesting dismissal, did not serve a ninety (90) day notice to resume prosecution and a subsequent motion for dismissal based upon this section. Rather, she

raises these contentions as an aside in her papers. As to Defendant Gayle's non-receipt of the discovery responses, this argument is also without merit.

To date, Defendant Gayle's counsel has not filed a notice of its change of address with the court in this action. In fact, the only indication that the address of Defendant Gayle's counsel had changed is contained within the signature block of the instant motion papers that were filed on April 24, 2024. *See* Notice of Motion to Dismiss, dated April 24, 2024. (NYSCEF Doc. No. 25). Three years have passed since the discovery responses were mailed, and Defendant Gayle has not alleged she has failed to receive any other correspondence or filings related to this case, regardless of the case itself being stayed. Furthermore, Defendant Gayle has not alleged that she ever followed up with these discovery requests, nor that she filed a motion to compel discovery. If Defendant Gayle requires additional and/or updated discovery, she may serve additional requests upon Plaintiff or move to compel discovery. As such, Plaintiff's discovery responses, which are annexed to her motion papers, are deemed served. (NYSCEF Doc. No. 40). Accordingly, Defendant Gayle's motion to dismiss the complaint is denied.

II. Plaintiff's Cross-Motion to Restore is Granted.

Plaintiff cross-moves to restore this matter to active status and to schedule a discovery conference. In order to prevail on a motion to restore a case to active status, the movant must demonstrate a reasonable excuse for the default, a meritorious claim, and that there was no pattern of persistent neglect or intent to abandon the action. *See Infante v. Breslin Realty Dev. Corp.*, 95 A.D.3d 1075 (2d Dep't 2012). Here, Plaintiff's counsel submits an affirmation stating that he was present in the courthouse at the time of the default and answered the first calendar call but was then obliged to present an oral argument in a different Part, which caused him to miss the second calendar call by minutes when he returned after the argument. *See* MacArthur Aff. at ¶ 2-9.

He also avers that he left his phone number for opposing counsel on the posted calendar in the hallway, as is the custom when an attorney has multiple appearances in the courthouse. The Court finds that Plaintiff has demonstrated a reasonable excuse. *See Polsky v. Simon*, 145 A.D.3d 693 (2d Dep't 2016) (holding that the Supreme Court improvidently exercised its discretion in finding that the plaintiff did not demonstrate a reasonable excuse for missing the calendar calls on June 11, 2015, as the plaintiff submitted an affirmation of counsel explaining her lateness in missing the second call of the calendar by minutes, thereby providing a reasonable excuse for failing to timely appear.) In opposition, Defendant Gayle's counsel notably does not address the calendar notation. *See* Milorava-Kelman Aff. II at ¶ 20-24, NYSCEF Doc. No. 42).

The Court further finds that Plaintiff demonstrates a good faith effort to prosecute the action. *See* Zogala Aff. at ¶11-12. Plaintiff intended to appear for the conference, executed a stipulation of discontinuance against Defendant Grant shortly following the dismissal on default, and timely moved to restore the action. Finally, Plaintiff's Affidavit of Merit sufficiently establishes a meritorious claim by stating that a negligently maintained loose doorknob at Regent Place came off in Plaintiff's hand as she was closing the door to leave, causing her to fall down the front steps and break her ankle. *See* Affidavit of Merit, Exhibit 1 to the Zogala Aff. (NYSCEF Doc. No. 37); *Coven v. Trust Co. of New Jersey*, 225 A.D.2d 576 (2d Dep't 1996).

Plaintiff also moves to amend the caption to reflect the stipulation of discontinuance against Defendant Grant. However, a plaintiff is unable to commence an action during the period between the death of a potential defendant and the appointment of a representative of the estate. *See Laurenti v. Teatom*, 210 A.D.2d 300, 301 (2d Dep't 1994). The death of a named defendant prior to the commencement of an action renders the action, insofar as asserted against a deceased defendant, a legal nullity from its inception which leaves the court without jurisdiction to provide

Defendant Gayle with the relief requested. *See Rivera v. Bruchim*, 103 A.D.3d 700 (2d Dep't 2013).

Here, Defendant Grant died five years prior to the commencement of the action, and no representative has been appointed. As such, the action against Defendant Grant was a nullity from its inception. *See Arbelaez v. Chun Kuei Wu*, 18 A.D.3d 583 (2d Dep't 2005) (finding the complaint a nullity only against defendant who died prior to the commencement of the action). *See also Hussain v. Chain*, 217 A.D.3d 929 (2d Dep't 2023); *Krysa v. Estate of Qyra*, 136 A.d.3d 760 (2d Dep't 2016); Rivera *v. Bruchim*, 103 A.D.3d 700 (2d Dep't 2013); *JP Morgan Chase Bank, N.A. v. Rosemberg*, 90 A.D.3d 713 (2d Dep't 2011).

Although Plaintiff's request for discontinuance is inoperative as a matter of law, the Court orders that Defendant Grant's name be removed from the action, as Defendant Grant has been deceased from the outset of the action and a death certificate has been provided. *See JP Morgan Chase Bank, N.A. v. Hyman*, 46 Misc.3d 1203(A) (Sup. Ct. Kings Co. 2014). "A court may amend pleadings before or after judgment to conform them to the evidence (see CPLR 3025[c])." *MRI Enterprises, Inc. v Comprehensive Med. Care of New York, P.C.*, 122 A.D.3d 595, 596 (2d Dep't 2014). Furthermore, the inclusion of the deceased Defendant's name in the caption is a mistake within the Court's purview to correct. *See DJL Mortgage Captial, Inc. v. 44 Brushy Neck, LTD.*, 51 A.D.3d 857 (2d Dep't 2008). Accordingly, it is hereby ordered that the caption of this action shall henceforth read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART DJMP2
--X
PAULETTE M. SAMUEL,
Plaintiff,

-against- Index No.: 514264/2018

GLERENE GAYLE,

Defendant.

---X

The Clerk is directed to amend the caption upon presentment of this Order.

CONCLUSION

Based on the foregoing, Defendant Gayle's motion to dismiss the complaint for failure to join a necessary party is **DENIED**. Plaintiff's cross-motion to restore this matter to active status and to schedule this matter for a discovery conference is **GRANTED**. Accordingly, this action is restored to the calendar. A discovery conference will be held in the Central Compliance Part on October 10, 2024 at 9:30am. Since the action against Defendant Grant is a nullity from its inception, and the Court does not have jurisdiction to provide Plaintiff relief with respect to the action against Defendant Grant, the proposed discontinuance is rendered academic. Plaintiff is directed to serve a copy of this order with notice of its entry within twenty (20) days of the date of this order.

This constitutes the Decision and Order of the Court.

ENTER:

____
Hon. Carolyn Walker-Diallo, J.S.C.