

Rojas v DJBL Realty Corp.

2024 NY Slip Op 33335(U)

September 19, 2024

Supreme Court, New York County

Docket Number: Index No. 154839/2019

Judge: Nicholas W. Moyne

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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. NICHOLAS W. MOYNE PART 41M

Justice

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JORGE ROJAS,

Plaintiff,

- v -

DJBL REALTY CORP., MIGUEL POLANCO

Defendant.

-----X

INDEX NO. 154839/2019

MOTION DATE 04/01/2024

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

Plaintiff, Jorge Rojas, commenced this action against defendants, DJBL Realty Corp. (“DJBL”) and Miguel Polanco (“Polanco”), to recover for personal injuries allegedly sustained on November 25, 2018, as a result of a trip and fall due to an unsafe, dangerous, or defective condition at the subject premises, located at 480 Audubon Avenue, New York, New York. Now, in Motion Sequence 002, DJBL and Polanco move for an order, pursuant to CPLR §§ 3211(a)(3) and (a)(5), to dismiss the complaint in its entirety. The motion is unopposed, and for the reasons set forth below, is granted.

In Motion Sequence 001, defendants, D. J. & B. Realty Corporation i/s/h/a DJBL Realty Corp. and Miguel Polanco, moved for an order, pursuant to CPLR §§ 3126, 3043, and 3124, to strike the complaint, preclude plaintiff from offering evidence, and/or compel plaintiff to respond to discovery demands. However, in a letter to the Court, dated September 12, 2019, plaintiff’s counsel advised that the plaintiff had passed away on August 23, 2019 (NYSCEF Doc. No. 18). Subsequently, on or around October 10, 2019, the action was stayed pending substitution of a

legal representative and pursuant to the accompanying stipulation, Motion Sequence 001 was withdrawn without prejudice to refile upon lifting of the automatic stay (NYSCEF Doc. No. 21).

In letters from both December 2019 and January 2020, plaintiff's attorney advised the Court of its efforts to prepare a petition and obtain letters of administration (NYSCEF Doc. No. 22; 25). However, as per the Status Conference Order dated October 27, 2020, plaintiff was allegedly awaiting a decision on the petition for letters of administration filed with the Surrogate's Court in August 2020 (NYSCEF Doc. No. 32). The matter was adjourned for an update as to the Surrogate Court action, however, to date there have been no further communications or updates regarding the status of such.

CPLR §§ 3211(a)(3) and (a)(5):

Accordingly, defendants now move to dismiss the complaint, alleging that as the plaintiff is deceased and the time for which to substitute a representative of plaintiff's estate has expired, the plaintiff lacks standing. CPLR § 3211(a)(3) provides that a motion to dismiss a cause of action may be made on the grounds that the party asserting the cause of action lacks the legal capacity to sue. Where a plaintiff is deceased, a personal representative who has received letters of administration of the estate of a decedent is the only party who is authorized to bring a survival action for personal injuries sustained by the decedent, and a wrongful death action to recover the damages sustained by the decedent's distributees on account of their death (*Jordan v Jordan*, 120 AD3d 632 [2d Dept 2014]). Therefore, a plaintiff which is not a duly appointed representative lacks standing to maintain the action on behalf of the estate (*Sam Kyung Cho v Yongshin Cho*, 45 AD3d 388, 389 [1st Dept 2007]).

CPLR § 1021, which governs the procedure for substitution and dismissal for the failure to substitute, provides that, if substitution is not made within a reasonable time, the action may

be dismissed as to the party for whom substitution should have been made; 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. Here, as it has now been over five years since both the action was commenced and the plaintiff's death, a reasonable time has elapsed and there has been no proper substitution effectuated. Despite the early correspondence from plaintiff's attorney representing there were efforts to obtain letters of administration, and in light of recent communications from defendants' counsel regarding the status and possibility of dismissal, there has been no representative or administrator appointed within a reasonable time, application made to substitute on plaintiff's behalf and excuse offered for the delay, or any effort made to otherwise demonstrate an interest in pursuing this action (*see Perez v City of New York*, 95 AD3d 675, 677 [1st Dept 2012]; *Sanders v New York City Hous. Auth.*, 85 AD3d 1005, 1006 [2d Dept 2011]; *Washington v Min Chung Hwan*, 20 AD3d 303, 305 [1st Dept 2005]; *Palmer v Selpan Elec. Co., Inc.*, 5 AD3d 248 [1st Dept 2004]). Accordingly, there is no plaintiff with standing in this action and dismissal is warranted.

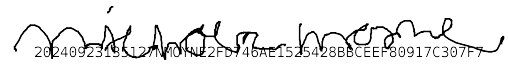
Additionally, defendants assert that the complaint should be dismissed as the statute of limitations for a wrongful death claim and a survival action have expired. CPLR § 3211(a)(5) directs that a motion to dismiss may be made on the grounds that the cause of action cannot be maintained because of the applicable statute of limitations. A wrongful death action may only be brought by the personal representative of the decedent who is survived by distributees, and a party which is not the personal representative lacks standing to bring such a claim (*Barry & Sons, Inc. v Instinct Productions LLC*, 15 AD3d 62, 66 [1st Dept 2005]). Additionally, under the

New York Estates, Powers & Trusts Law (EPTL), a decedent’s personal representatives have two years, measured from the date of death, to commence a cause of action for wrongful death (EPTL § 5-4.1; *Baez v New York City Health and Hosps. Corp.*, 80 NY2d 571, 576 [1992]). The plaintiff in this action died in 2019, and as more than two-years have passed since his death, any cause of action under the statute for wrongful death would be time barred. Similarly, the governing time period in which a personal representative could have brought a survival action, an action for personal injuries sustained by the decedent, has expired (*see* CPLR §_210[a]; EPTL § 11-3.2[b]; *Heslin v County of Greene*, 14 NY3d 67, 78 [2010]; *Matter of Hidalgo v New York City Health & Hosps. Corp.*, 210 AD2d 481, 482 [2d Dept 1994]). Accordingly, any claims of a survival action would be time-barred.

Accordingly, it is

ORDERED that the motion by defendants, D. J. & B. Realty Corporation i/s/h/a DJBL Realty Corp. and Miguel Polanco, is GRANTED, and the complaint and this action are hereby dismissed.

This constitutes the decision and order of the court.



<u>9/19/2024</u> DATE					<u>NICHOLAS W. MOYNE, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/>	REFERENCE