

Odaly v Rite Aid of N.Y., Inc.

2024 NY Slip Op 34581(U)

November 25, 2024

Supreme Court, Kings County

Docket Number: Index No. 516928/2021

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of November 2024

HONORABLE FRANCOIS A. RIVERA

-----X

FERGUS ODALY III

Plaintiff,

- against -

RITE AID OF NEW YORK, INC., and
MILITARY CAR SALES, INC.,

Defendants.

-----X

RITE AID OF NEW YORK, INC., and
MILITARY CAR SALES, INC.,

Third-Party Plaintiff,

-against-

CONSOLIDATED EDISON, INC. and
CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

Third-Party Defendant,

-----X

**CORRECTED
DECISION & ORDER**

Index No.: 516928/2021

Oral Argument: 11/21/2024

Cal. No.: 40

Ms. Seq. No.: 5

The decision and order entered 12/23/24 is hereby vacated and replaced with the instant corrected decision and order.

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on September 5, 2024, under motion sequence number five, by Gregory S. Newman on behalf of Fergus Odaly III (hereinafter the plaintiff) seeking an order: (1) lifting the stay in this action marked by the court on June 20, 2024 pursuant to CPLR 1015, on the grounds that a Decree Granting Administration has been issued on June 11, 2024; and (2) permitting the caption in this matter to be amended, thereby reflecting Christine Dilandro, as Administrator of the Estate of the plaintiff, deceased; and (3) amending all papers, pleadings and proceedings accordingly.

The motion is unopposed.

- Notice of motion
- Affirmation in support
- Exhibits A-C
- Affirmation of good faith pursuant to NYCRR 202.7 (a)

BACKGROUND

On February 19, 2021, Fergus Odaly III commenced this action against the defendants, Rite Aid of New York, Inc., and Military Car Sales, Inc. to recover damages for personal injury, by filing a summons and verified complaint (hereinafter the commencement papers) with the Kings County Clerk's office. The prior counsel to the plaintiff, Gregory S. Newman, verified the complaint.

The decedent plaintiff alleged that he was injured due to a hazardous condition by defendants' negligence in maintaining safe conditions, such as providing sufficient lighting and ensuring safe passageways, leading to his injuries as he tripped and fell over a display pallet or other obstruction in the store following a sudden lighting failure.

On February 12, 2024, the plaintiff died of causes unrelated to the accident. On June 20, 2024, pursuant to CPLR 1015, the court marked this action stayed. On June 11, 2024, the plaintiff's sister, Christine Dilandro, was appointed Administrator of the Estate of the plaintiff.

MOTION PAPERS

The movant's motion consists of the notice of motion, an affirmation of good faith pursuant to NYCRR 202.7 (a), and an affirmation of plaintiff's counsel in support. In the affirmation in support, the prior counsel to the decedent plaintiff annexed exhibits A

through C. Exhibit A is a copy of the summons and verified complaint and affirmation of service. Exhibit B is copy of the court order issued on June 6, 2024, indicating that the matter is stayed pursuant to CPLR 1015. Exhibit C is a copy of the Certificate of Appointment of Administrator issued on June 11, 2024.

LAW AND APPLICATION

“Generally, the death of a party divests a court of jurisdiction to act, and automatically stays proceedings in the action pending the substitution of a legal representative for the decedent” (*Aurora Bank FSB v Albright*, 137 AD3d 1177, 1178 [2d Dept 2016], citing *NYCTL 2004-A Trust v Archer*, 131 AD3d 1213, 1214 [2d Dept 2015]; see CPLR 1015; see CPLR 1021). “Furthermore, ‘[t]he death of a party terminates the authority of the attorney for that person to act on his or her behalf’” (*Aurora Bank FSB*, 137 AD3d at 1178, quoting *Hyman v Booth Mem. Hosp.*, 306 AD2d 438 [2d Dept 2003]). CPLR 1021 creates “an exception to the court's lack of jurisdiction to the extent of permitting a motion for substitution and, conversely, a motion for dismissal for failure to make timely substitution” (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C1021:2; see CPLR 1021).

Here, the notice of motion was made by the plaintiff's prior counsel and the certificate of appointment that counsel annexed established that plaintiff Fergus Odaly III died on February 12, 2024. Consequently, the movant's authority to act on behalf of the plaintiff terminated on that date (see *Aurora Bank FSB*, 137 AD3d at 1178). Accordingly, the movant has no standing to make the instant motion.

Furthermore, when a motion for substitution is made by a party other than the administrator of the estate, the motion papers must be served on the decedent's personal representative with all the formalities that CPLR Article 3 prescribes for service of process (*Horseman Antiques, Inc. v Huch*, 50 AD3d 963, 964 [2d Dept 2008]; *GMAC Mtge. Corp. v Tuck*, 299 AD2d 315, 315-316 [2d Dept 2002]).

The instant motion was not served upon Christine Dilandro, the administrator of the estate of the plaintiff. On February 12, 2024, the date Fergus Odaly III died, the instant action was automatically stayed by operation of law (*see Gonzalez v Ford Motor Co.*, 295 AD2d 474, 475 [2d Dept 2002]). The action will remain stayed until a proper substitution of the decedent by an administrator of his estate or until a further order of the Court.

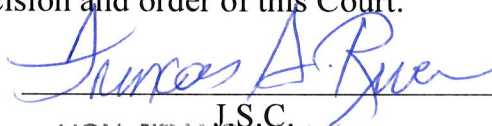
CONCLUSION

The branch of the instant motion filed by prior counsel to Fergus Odaly III for an order pursuant to CPLR 1021 substituting Christine Dilandro, as administrator of the estate, as plaintiff and amending the caption to reflect the substitution and amending all papers, pleadings, and proceedings accordingly is denied without prejudice.

If such an application is to be made in the future, the movant must proceed by an order to show cause.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.
HON. FRANCIS A. RIVERA

*Researched and drafted with the assistance of Shania Uppal, a student at John Jay College of Criminal Justice.