

Oriente v KFG Operating Two, LLC

2025 NY Slip Op 32878(U)

July 24, 2025

Supreme Court, Kings County

Docket Number: Index No. 531569/2021

Judge: Ingrid Joseph

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At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 24th day of July 2025.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No: 531569/2021

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DONATO ORIENTALE, as Attorney-in-Fact for
JOSEPHINE ORIENTALE,

DECISION & ORDER

Mot. Seq. Nos. 2-3

Plaintiff,

-against-

KFG OPERATING TWO, LLC d/b/a BENSONHURST
CENTER FOR REHABILITATION AND HEALTHCARE,

Defendants.
-----X

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Motion Seq. No. 2

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Affirmation in Opposition/Exhibits Annexed.....	31 – 34

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In this matter, Donato Orientale, as attorney-in-fact for Josephine Orientale (“Plaintiff”) moves (Mot. Seq. 2) for an Order to (1) restore the instant action, dismissed pursuant to CPLR 3404, to the Court’s active calendar; (2) amend the caption to reflect the new administrator of the estate; and (3) set the matter down for a compliance conference. Defendant KFG Operating Two, LLC d/b/a Bensonhurst Center for Rehabilitation and Healthcare (“Defendant”) has opposed this motion. Additionally, Defendant moves by Order to Show Cause (Mot. Seq. 3), pursuant to CPLR 3126 (3), to dismiss the Plaintiff’s complaint due to Plaintiff’s failure to comply with several court orders, and to dismiss Plaintiff’s complaint with prejudice for failure to effect a timely substitution

in place of the plaintiff for purposes of proceeding with the litigation pursuant to CPLR 1015 (a) and 1021. Plaintiff has opposed the motion.

This action (Mot. Seq. 2) stems from instances of alleged medical malpractice that occurred on or about December 5, 2014, through December 11, 2019 while Josephine Orientale (“Plaintiff-Decedent”) was in the exclusive care of the Defendant. In support of his motion, Plaintiff states that the underlying action, brought on December 9, 2021, was marked abandoned, and therefore disposed, by the Hon. Leon Ruchelsman (“Ruchelsman, J.”) on November 14, 2023, after a failure to timely file a Note of Issue pursuant to the prior court order (*see* NYSCEF Doc. No. 32). Plaintiff claims it was at this time that notice was given to the Court that Plaintiff-Decedent, whom Plaintiff had brought the instant case on behalf of, had passed almost four years prior.¹ Thereafter, on January 30, 2024, Plaintiff was appointed as Administrator of the Estate of Plaintiff-Decedent. Plaintiff now requests that the Court issue an Order lifting the alleged stay and restoring this action to the active calendar, scheduling this matter for a compliance conference so that discovery can continue, and to amend the caption to reflect the appointment of the Estate’s Administrator.

In opposition to Plaintiff’s motion, Defendant argues that Plaintiff has failed to satisfy his burden necessary to vacate the prior dismissal of this action pursuant to CPLR 3404. Defendant asserts that Plaintiff has failed to establish or submit, any evidence of a reasonable excuse for failing to timely serve and file a Note of Issue or seek an extension of time for filing the Note of Issue. Furthermore, Defendant claims the Plaintiff has failed to confer in good faith to resolve the outstanding issues discussed herein.² Additionally, Defendant contends that Plaintiff has failed to provide any reasonable excuse why he failed to prosecute this case over the past 2 years since its dismissal. Finally, Defendant claims Plaintiff has still failed to provide outstanding discovery owed to Defendant.³ As a result, Defendant claims the delay will result in prejudice against it due to loss of memory of witnesses.

In support of its motion to dismiss (Mot. Seq. No. 3), pursuant to CPLR 3126 (3), Defendant reiterates that Plaintiff willfully and repeatedly failed to comply with court orders to provide discovery. Furthermore, Defendant claims Plaintiff willfully failed to serve the Bill of Particulars and failed to notify the Court and the Defendant of Plaintiff-Decedent’s death, over a

¹ Letters of Administration show Plaintiff-Decedent passed away on March 14, 2020 (*see* NYSCEF Doc. No. 29).

² Uniform Rules for Trial Cts (22 NYCRR § 202.7).

³ Defendant opposition to Mot. Seq. 2 was filed on March 19, 2025. Plaintiff has since claimed discovery has been provided as of May 4, 2025, in Bill of Particulars (*see* NYSCEF Doc No. 44).

year before the action was commenced, and that Plaintiff had Letters of Administration over a year before bringing this motion. Defendant claims Plaintiff has failed to address the delay in bringing this motion in his supporting papers. Defendant further argues that not only did the Court not have jurisdiction until the proper substitution was made for the Plaintiff-Decedent, but also that the Plaintiff's authority over Plaintiff-Decedent was terminated at her death. Since Plaintiff has had the past five years to make a proper substitution but has not, Defendant requests the Court to dismiss for lengthy delay and prejudice to the Defendant.

In opposition to the motion, Plaintiff's counsel argues that the September 14, 2023, dismissal for failure to file a Note of Issue is a nullity since no legal substitution had been made. Plaintiff's counsel states that his office lost contact with Plaintiff from mid- to late-2019 until late November or early December of 2023, and it was only at the point of reconnection that counsel learned of the passing of Plaintiff-Decedent.⁴ Upon learning of her passing, counsel claims he immediately filed the Petition for Letters of Administration and, therefore, the submission was timely given the situation. Counsel then argues that an Affirmation of Merit was given by a licensed physician who opines to a reasonable degree of certainty that Plaintiff-Decedent's injuries were caused due to Defendant's departure from the standard of care. Plaintiff further asserts that Defendant's claim of prejudice is conclusory and speculative, since there is no evidence presented showing that there has been actual prejudice against Defendant. Finally, in response to Defendant, Plaintiff's counsel cites to the attached Verified Bill of Particulars claiming that there is no outstanding discovery.⁵ Therefore, Plaintiff asks the Court to deny Defendant's Motion to Dismiss as moot.

Before looking at the requests for relief, the Court notes that to properly bring an action, both parties must have standing to do so. In the case before us, the Plaintiff commenced this action as an Attorney-in-Fact of Plaintiff-Decedent. It is well established that when an individual is made an Attorney-in-Fact, they are given the authority and responsibility to act as the principal's agent with respect to all matters during the principal's lifetime (*see Matter of Perosi v. LiGreci*, 98 AD3d

⁴ Many documents including Summons and Complaint, Affirmation in Support, Notice of Motion, Amended Summons, Amended Complaint, and Notice of Withdrawal, were filed by Plaintiff's counsel's own office during the time they claimed to have lost contact with Plaintiff (*see* NYSCEF Doc. Nos. 1, 2, 5-16, 19, 20, 22). Plaintiff's Affidavit of Merit, filed March 18, 2022, was signed by Plaintiff on March 11, 2022, two years after Plaintiff's counsel's office lost contact with Plaintiff (*see* NYSCEF Doc. No. 8).

⁵ Plaintiff's Verified Bill of Particulars being cited was filed after Mot. Seq. 3 and Defendant's Affirmation in Support had been filed (*see* NYSCEF Doc. No. 44).

230, 232 [2d Dept 2012]). It follows that someone, acting solely as Attorney-in-Fact for another individual at the time of their death, loses all authority over the decedent and has no authority based in law to commence an action on behalf of the decedent. While Defendant's opposition is silent as to Plaintiff's authority, the Court is presented with the issue as to whether the Plaintiff had standing at the time this lawsuit was commenced.

When a party does not address an argument within their papers "[a] court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" (*U.S. Bank, Natl. Assn. v Emmanuel*, 83 AD3d 1047, 1048 [2d Dept 2011]). Generally a "lack of standing is not an 'extraordinary circumstance' that warrants sua sponte dismissal" (*HSBC Bank USA, N.A. v Taher*, 104 AD3d 815, 817 [2d Dept 2013]). However, a party waives the defense of "lack of standing" if they fail to raise the defense in their answer or pre-answer motion to dismiss (*id.*). Here, the court finds that the lack of standing is not an extraordinary circumstance warranting sua sponte dismissal. Furthermore, since Defendant failed to raise this defense, the Court will not weigh in, sua sponte, on the lack of standing, and it will be deemed to have been waived by the Defendant.

To succeed on a motion to restore a case that has been dismissed pursuant to CPLR 3404, the Plaintiff must "demonstrate a meritorious cause of action, a reasonable excuse for the delay in prosecuting the action, a lack of intent to abandon the action, and a lack of prejudice to the defendant" (*see Krichmar v Queens Med. Imaging, P.C.*, 26 AD3d 417, 418 [2d Dept 2006]; *Matter of Transtechnology Corp. v Assessor*, 71 AD3d 1034, 1036 [2d Dept 2010]). Furthermore, it is well established that all of the components of this test must be met to vacate the dismissal for restoration (*see Ornstein v Kentucky Fried Chicken, Inc.*, 121 AD2d 610, 611 [2d Dept 1986]).

With respect to Plaintiff's motion to restore, the Court finds that Plaintiff has failed to satisfy his burden to warrant vacatur of the prior dismissal of this action. Plaintiff's supporting moving papers do not address a reasonable excuse for delay in failing to prosecute the action or timely serve and file a Note of Issue. Rather, Plaintiff first addresses the delay in opposition to Defendant's subsequent motion to dismiss for failure to comply (Mot. Seq. No. 3).

Assuming, arguendo, that the Court were to consider counsel's excuse for the delay raised in opposition to Defendant's motion, his motion to restore would still fail. Plaintiff's counsel claims their office lost contact with the Plaintiff in mid- to late-2019 and did not know about Plaintiff-Decedent's death until contact with the Plaintiff was reestablished in late November or

however, Plaintiff's counsel appears to have been in contact with the Plaintiff during the time they claimed not to be. Out of the 24 documents filed during the alleged time Plaintiff's counsel was not in contact with the Plaintiff, 19 are filed by Plaintiff's counsel (*see* NYSCEF Doc. Nos. 1-24). Additionally, NYSCEF Doc. No. 3, dated March 11, 2022, roughly two years after allegedly losing contact with the Plaintiff, and almost two years before allegedly reconnecting with the Plaintiff, is signed by the Plaintiff himself (*see* NYSCEF Doc. No. 3). Since this explanation does not meet the "reasonable excuse" burden required to restore a CPLR 3404 dismissal, and therefore not every element is met, the motion is denied.

As the motion to amend the caption and the motion for a compliance conference are contingent on the motion to restore being granted, they are both moot. Similarly, Mot. Seq. No. 3 is moot.

Accordingly, it is hereby,

ORDERED, that Plaintiff's motion (Mot. Seq. No. 2) is denied in its entirety, and it is further,

ORDERED, that Defendant's motion (Motion Seq. 3) is denied as moot.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.



Hon. Ingrid Joseph, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**