

Brenner v Silver

2025 NY Slip Op 33650(U)

September 24, 2025

Supreme Court, New York County

Docket Number: Index No. 805143/2018

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

-----X

MARLA BRENNER,

Plaintiff,

- v -

PETER SILVER, IRA NEWMAN, and GRAMERCY DENTAL
STUDIO,

Defendants.

-----X

INDEX NO. 805143/2018

MOTION DATE 05/30/2025

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147

were read on this motion to/for DISMISSAL.

In this action to recover damages for dental malpractice, the defendant Ira Newman moves pursuant to CPLR 1021 to dismiss the complaint insofar as asserted against him for the plaintiff's failure to substitute a representative of the estate of the deceased defendant, Peter Silver, as a party defendant. The plaintiff opposes the motion. The motion is denied.

The plaintiff commenced this action on May 1, 2018. On September 20, 2021, Silver died, and, in an order dated October 7, 2021, this court memorialized the automatic stay of proceedings imposed by operation of law retroactive to the date of Silver's death. No party has yet moved to substitute a representative of Silver's estate in his place.

It is well settled that "the 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 *Perez v City of New York*, 95 AD3d 675, 677 [1st Dept 2012]; *Manto v Cerbone*, 71 AD3d 1099 [2d Dept 2010]; *Nieves v 331 E. 109th St. Corp.*, 112 AD2d 59, 60 [1st Dept 1985]). Any determination rendered or proceedings held without such a substitution is generally 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]; *Nieves v 331 E. 109th St. Corp.*, 112 AD2d at 60). Rather, the action is automatically stayed as of the date of the decedent's death (see *Perez v City of New York*, 95 AD3d at 677). Moreover, parties may not "by agreement confer subject matter jurisdiction upon [a] court where there is none" (*Cuomo v Long Island Lighting Co.*, 71 NY2d 349, 351 [1988]; see *Haverstraw Park, Inc. v Runcible Properties Corp.*, 33 NY2d 637 [1973]; *Stancu v Cheon Hyang Oh*, 74 AD3d at 1323) by stipulating to conducting further proceedings prior to the substitution of a personal representative for the deceased party. Indeed, any such stipulation is "legally inoperative" (*Morrison v Budget Rent A Car Syst., Inc.*, 230 AD2d at 261).

Nonetheless, "determinations . . . pursuant to CPLR 1021 are a necessary exception to the general rule, and the court does not lack jurisdiction to consider such a motion" (*Medlock v Dr. William O. Benenson Rehabilitation Pavilion*, 167 AD3d 994, 995 [2d Dept 2018]; see *Lee v Leeds, Morelli & Brown, P.C.*, 233 AD3d 1072, 1076 [2d Dept 2024]; *Barnabas v Boodoo*, 134 AD3d 970, 972 [2d Dept 2015]; *Vapnersh v Tabak*, 131 AD3d 472, 474 [2d Dept 2015]). CPLR 1021 requires that a motion to dismiss for failure to substitute a representative of a deceased party's estate may only be made where substitution was not made "within a reasonable time" after the decedent's death.

Although this court thus has jurisdiction to consider Newman's motion pursuant to CPLR 1021 to dismiss the complaint insofar as asserted against him, that statute "d[oes] not authorize dismissal of the complaint as against any of the other defendants" apart from Silver, the deceased defendant (*Vicari v Kleinwaks*, 157 AD3d 975, 977-978 [2d Dept 2018]). Even then, where a CPLR 1021 motion is made by the former attorney for a decedent, and is made purportedly on behalf of the decedent, the former attorney lacks the authority to act unless a representative of that decedent's estate has been duly appointed. Hence, under those circumstances, the Supreme Court would lack jurisdiction to consider such a motion to dismiss

(see *Vicari v Kleinwaks*, 157 AD3d at 977; *Vapnersh v Tabak*, 131 AD3d 472, 474 [2d Dept 2015]; *Lewis v Kessler*, 12 AD3d 421, 422 [2d Dept 2004]).

CPLR 1021 provides, in pertinent part, that “[i]f the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed *as to the party for whom substitution should have been made*, however, such dismissal shall not be on the merits unless the court shall so indicate” (emphasis added; see *Vicari v Kleinwaks*, 157 AD3d at 977; *Terpis v Regal Hgts. Rehabilitation & Health Care Ctr., Inc.*, 108 AD3d 618, 619 [2d Dept 2013]; *Borruso v New York Methodist Hosp.*, 84 AD3d 1293, 1294 [2d Dept 2011]). CPLR 1021 also provides, in pertinent part, that “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.” “The latter provision is intended to provide special protection for the estate of a deceased plaintiff where the opponent seeks dismissal of the action based on the estate’s failure to make timely substitution” (see *Vicari v Kleinwaks*, 157 AD3d at 977; see Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR C1021:2). It is not intended to provide non-deceased defendants with the opportunity to dismiss the complaint insofar as asserted them against, where there has been no substitution of a deceased co-defendant (see *Vicari v Kleinwaks*, 157 AD3d at 977-978). Hence, Newman’s motion must be denied.

The court thus directs the parties to take all necessary steps forthwith to substitute a representative of Silver’s estate. In this regard, however, the court notes that “[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 Durocher’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 *Biancono 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]). Moreover, where, as here, Silver's insurer is the real party in interest to the underlying dispute, it may be appropriate to appoint, as the temporary administrator, an attorney assigned by her insurer to defend her (see *Batan v Schmerler*, 155 Misc 2d at 47; see also *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.]; *Fahey v Zissis*, 2023 NY Slip Op 23152, 2023 NY Misc LEXIS 2367 [Sup Ct, Bronx County, May 16, 2023]; *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]; see generally *George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA*, 92 AD3d 104, 118 [1st Dept 2012] [explaining circumstances in which insurer becomes real party in interest]).

If the parties cannot secure the appointment of a representative of Silver's estate within a reasonable time, the court would be amenable to entertaining a motion to appoint Silver's former attorney as temporary administrator of his estate, with any recovery limited to the limits of his insurance policy.

In light of the foregoing, it is,

ORDERED that the motion is denied; and it is further,

ORDERED that the remaining parties shall forthwith take all reasonable steps to secure the appointment of a representative of the estate of Peter Silver and thereupon move to substitute that representative as a party defendant in this action.

This constitutes the Decision and Order of the court.

9/24/2025
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE