

Hosek v Giannakopoulos
2025 NY Slip Op 35508(U)
February 13, 2025
Supreme Court, Nassau County
Docket Number: Index No. 615232/2019
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Supreme Court Justice

JUDY HOSEK,

Plaintiff,

- against -

G. GIANNAKOPOULOS a/k/a
ANDRE GIANNAKOPOULOS,

Defendant.

TRIAL/IAS PART 27
NASSAU COUNTY

Index No.: 615232/2019
Motion Seq. No.: 01
Motion Date: 08/20/2024

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmations and Exhibits	<u>1</u>
Affirmation in Opposition and Exhibits	<u>2</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 1021, for an order dismissing plaintiff's Verified Complaint for failure to make a timely substitution in place of the deceased plaintiff. Counsel for plaintiff opposes the motion.

In support of the motion, counsel for defendant submits, in pertinent part, that, "[t]his action arises out of a motor vehicle accident which occurred on or about May 6, 2019. At that time, Plaintiff, JUDY HOSEK, allegedly sustained personal injuries. Plaintiff commenced this action on October 13, 2019 by the filing of a Summons and Complaint in Supreme Court, Nassau County.... Issue was joined by Defendant,

GEORGE GIANNAKOPOULOS s/h/a G. GIANNAKOPOULOS &

ANDRE GIANNAKOPOULOS, on December 13, 2019 by the filing of an Answer....

On June 3, 2021, Plaintiff filed a Note of Issue and the matter was placed on the trial calendar.

On November 10, 2022, a trial scheduling conference was held before

[the] Hon. R. Bruce Cozzens, Jr. At the conference, Plaintiff's counsel advised that,

Plaintiff, JUDY HOSEK, passed away 'four weeks ago' and he had to get the death certificate and have Plaintiff substituted. As such, the Court marked the case as stayed.

On January 15, 2024, your affirmant sent a letter to Plaintiff's counsel to follow up

if they have (*sic*) appointed an estate representative and intend to restore the case

to the calendar.... On May 3, 2024, your affirmant called Plaintiff's counsel to follow up

on the status of appointing an estate representative. I left a voicemail for attorney, Ron Ingber.

To date, Plaintiff's counsel has failed to respond to any of your affirmant's inquiries

and no administrator or estate representative of the deceased Plaintiff has been appointed....

The Second Department, in the context of analyzing the statute of limitations toll provision

for death of a party, recently re-affirmed the statutory rule that eighteen months

is a reasonable period of time in which to have an estate representative appointed.

[citation omitted]. In the instant case, more than a reasonable amount of time has elapsed

since Plaintiff's death in 2022, and no motion for substitution has been made

by Plaintiff's counsel to have an administrator, or executor or by any person interested in

the estate, appointed on behalf of the deceased Plaintiff." *See* Defendant's Affirmation

in Support Exhibits A-C.

In opposition to the motion, counsel for plaintiff asserts, in pertinent part, that, “[t]his motion must necessarily be denied because it failed to comply with C.P.L.R. § 1021’s directive that notice be given to those potentially interested in the deceased Plaintiff’s estate to show cause why the action should not be dismissed (so any Order dismissing this action would be a legal nullity). [citations omitted]. Moreover, it is well-settled that any determination of unreasonableness in how long it took or is taking to substitute a party inherently requires consideration of several factors, including but not limited to the diligence of the party seeking substitution, the existence of prejudice to other parties, and whether the party to be substituted can show that the action (or defense) has merit. [citations omitted]. At bar, the merits of the action have been established by Defendant’s concession of liability, as evidenced by the letter memorializing the same annexed hereto.... My office has diligently followed up with the deceased Plaintiff’s family (Plaintiff notably died without children), first attempting to work with nephew James Reilly. I thereafter contacted estate counsel Lawrence Cohen, Esq. to protect Plaintiff’s interests and put Mr. Reilly in touch with Mr. Cohen on February 17, 2023. Through my continuous follow-up attempts, I was advised on June 5, 2024 that nephew Steven Hosek became the best contact to finalize any estate and that he would put me in touch with his father, Steve Hosek, i.e., Plaintiff’s brother and closest living relative. Steve Hosek contacted our office July 24, 2024 in response to our inquiries, at which time he noted that he had obtained the original Death Certificate and the funeral bill pursuant to my office’s request. On July 25, 2024, I put him in touch with Mr. Cohen. On October 1, 2024, Steve Hosek advised Mr. Cohen that he had the paperwork and information anticipated to been (*sic*) needed to set up the estate. Mr. Cohen advised him the following day to forward

the same to his office so that the Petition could be drafted. Annexed hereto as Exhibit 'B' is Lawrence Cohen's Affirmation detailing his work on the subject Surrogate's file. Furthermore, Defendant has made no showing of prejudice (and has not even argued the same); a mere conclusory statement of prejudice would still be insufficient to demonstrate the existence of prejudice since the matter is otherwise trial-ready. [citation omitted]. The mere passage of time is similarly insufficient to establish prejudice against Defendant. [citation omitted]. Accordingly, Defendant is not entitled to dismissal of Plaintiff's complaint pursuant to C.P.L.R. § 1021. The instant motion failed to comply with C.P.L.R. § 1021's directive that notice be given to those potentially interested in the deceased Plaintiff's estate to show cause why the action should not be dismissed, there is no showing of lack of diligence in setting up the estate, there is no showing of prejudice to Defendant, and Plaintiff's action is meritorious." See Plaintiff's Affirmation in Opposition Exhibits A and B.

The death of a party divests the Court of jurisdiction. CPLR § 1021 grants jurisdiction to the Court to consider a motion for dismissal, essentially creating jurisdiction for that limited purpose, once the Court obtains jurisdiction over the "persons interested in the decedent's estate" by ordering them "to show cause why the action should not be dismissed." If the Court, considering an Order To Show Cause, directs service upon the persons interested in the estate, and service is made, the Court then has jurisdiction to consider whether or not the matter should be dismissed for failure to substitute a proper party.

In the instant matter, counsel for defendant served the Notice of Motion, not an Order to Show Cause, upon counsel for the deceased plaintiff and not upon "persons interested in the decedent's estate." Counsel for plaintiff's authority to act

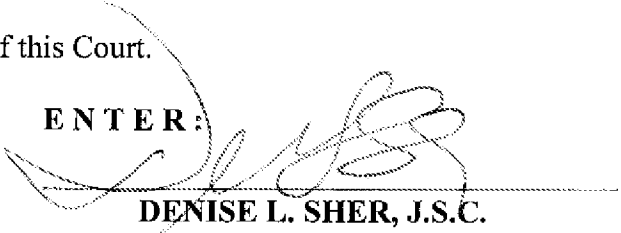
had technically expired with the death of plaintiff. Defendant's motion is, therefore, procedurally defective.

Nevertheless, the Court finds that, based upon the papers before it, defendant has failed to demonstrate that there has been an unreasonable delay in the proceeding. Counsel for plaintiff has submitted documentation to show that efforts have indeed been made to have an administrator appointed for plaintiff's estate. Furthermore, defendant has not shown how he has been prejudiced by the delay, especially given the fact that all discovery had been completed prior to the stay being issued in the matter.

Accordingly, defendant's motion, pursuant to CPLR § 1021, for an order dismissing plaintiff's Verified Complaint for failure to make a timely substitution in place of the deceased plaintiff, is hereby **DENIED**.

This constitutes the Decision and Order of this Court.

ENTER:


DENISE L. SHER, J.S.C.

ENTERED

Feb 20 2025

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
February 13, 2025