



Caution

As of: Feb 17, 2012

JOAN PASTORELLO, Plaintiff -against- CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITAL CORPORATION, KATHLEEN HUNZICKER, M.D., SHEPARD GREENE, M.D., JANET LANIGAN, DOROTHEA SCHUETZ-MUELLER, LUCY MUELLER, M.D., CAROLYN GRIFFITHS, R.N., JOHN DOE # 1 (SECURITY GUARD), JOHN DOE # 2 (SECURITY GUARD), JOHN DOE # 3 (SECURITY GUARD), Defendants.

95 Civ. 470 (CSH)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2000 U.S. Dist. LEXIS 15137

October 17, 2000, Decided

October 18, 2000, Filed

DISPOSITION: [*1] Plaintiff's motion for substitution granted.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff sued under 42 U.S.C.S. § 1983 to recover against defendant city, hospital, and individuals for alleged violations of her constitutional rights. Plaintiff moved for substitution of parties pursuant to *Fed. R. Civ. P. 25(a)*, as an individual defendant was deceased.

OVERVIEW: Plaintiff sued defendant city, hospital, and individuals, under 42 U.S.C.S. § 1983, alleging defendants assaulted her, administered medicine to her without authorization, forcibly restrained her, deprived her of necessities, and libeled, slandered, and defamed her person. As an individual defendant had died, plaintiff

moved under *Fed. R. Civ. P. 25(a)* to substitute the representative of the decedent's estate as a defendant. Granting the motion, the court found the motion was timely. The suggestion of death was sufficient, even though not identifying decedent's representative. Under *Fed. R. Civ. P. 6(e)*, the 90 day period in which to bring the motion for substitution began running after the third day after mailed to plaintiff's counsel. On the last day of this 93 day period, plaintiff moved to request a 60 day enlargement within which to move for substitution, which the court granted.

OUTCOME: Plaintiff's motion for substitution was granted. Motion to enlarge period in which plaintiff could move to substitute decedent's representative as party was timely. Period in which to move for substitution began running after third day after suggestion of death was mailed to plaintiff's counsel.

LexisNexis(R) Headnotes***Civil Procedure > Parties > Substitutions > Death of Party***

[HN1] See *Fed. R. Civ. P. 25(a)*.

Civil Procedure > Parties > Substitutions > Death of Party***Civil Procedure > Parties > Substitutions > Motions for Substitution***

[HN2] Courts liberally permit motions to substitute parties even years after death of a party.

Civil Procedure > Parties > Substitutions > Death of Party***Civil Procedure > Parties > Substitutions > Motions for Substitution***

[HN3] Under *Fed. R. Civ. P. 25(a)*, the running of the 90 days in which to make a motion for substitution of parties begins with the proper suggestion of death.

Civil Procedure > Parties > Substitutions > General Overview

[HN4] The United States Court of Appeals for the Second Circuit has held that *Fed. R. Civ. P. 25(a)* does not require that the statement identify the successor or legal representative; it merely requires that the statement of death be served on the involved parties. This holding unequivocally announces the de minimis standard to which suggesting parties are held.

Civil Procedure > Pleading & Practice > Service of Process > General Overview

[HN5] *Fed. R. Civ. P. 6(e)* provides that whenever service is made by mail, three days shall be added to the prescribed period for the required responsive action.

Civil Procedure > Pleading & Practice > Service of Process > General Overview

[HN6] See *Fed. R. Civ. P. 6(a)*.

COUNSEL: JOAN PASTORELLO, plaintiff, Pro se, Bronx, NY.

For JOAN PASTORELLO, plaintiff: Randall David

Bartlett, Louise J. Gilmore, Bartlett, Bartlett & Ziegler, P.C., New York, NY.

For CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITAL CORPORATION, JANET LANNIGAN, CAROLYN CAROLYN GRIFFITHS, defendants: Amu K. Adelman, Corp. Counsel of the City of New York, NY, NY.

For DOROTHEA SCHUTEZ-MUELLER, KATHLEEN HUNZICKER, MD, DOCTOR GREENE, defendants: Amy K. Adelman, Paul A Crotty, Corporation Counsel of the City of N.Y., New York, NY.

JUDGES: CHARLES S. HAIGHT, JR., UNITED STATES SENIOR DISTRICT JUDGE.

OPINION BY: CHARLES S. HAIGHT, JR.

OPINION**MEMORANDUM OPINION AND ORDER**

HAIGHT, Senior District Judge:

Plaintiff brings this action pursuant to 42 U.S.C. § 1983 to recover against defendants for alleged violations of her constitutional rights. Plaintiff commenced the action on November 15, 1994 by filing a *pro se* complaint against the City of New York, the New York City Health and Hospitals Corporation ("HHC"), and various other then unknown defendants employed by the Bronx Municipal Hospital Center, an HHC facility. [*2] An amended complaint claims, *inter alia*, that the above named defendants variously assaulted the plaintiff, administered medicine to her without authorization, forcibly restrained her, deprived her of necessities, and libeled, slandered, and defamed her person. These events allegedly transpired from February 26, 1993 to March 2, 1993 at the Bronx Municipal Hospital Center ("Hospital").

Defendant Janet Lanigan (sued herein as "Janet Lannigan"), now deceased, worked as a hospital administrator on duty at the Hospital during the time in controversy, and is alleged to have been involved in the plaintiff's confinement and other mistreatment. Plaintiff alleges that Janet Lanigan specifically assisted in an assault by holding down the plaintiff's legs.

The case is presently before the Court upon plaintiff's motion for substitution which requests that the Court, pursuant to *Rule 25(a)*, *Fed. R. Civ. P.*, substitute Eugene D. Lanigan, representative of the estate of Janet Lanigan, in the place of defendant Janet Lanigan. Plaintiff further seeks, correspondingly, amendment of the caption, as well as fees and costs incurred in the course of locating the executor of Janet Lanigan's estate. [*3] Defendants oppose the motion. For reasons described herein, plaintiff's motion to substitute is granted, and the caption will be amended accordingly. Plaintiff's request for payment of costs is denied.

Under *Rule 25(a)*, a party may move for substitution where any party in the case has died. In relevant part, [HN1] *Rule 25(a)* reads as follows:

If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties.... Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

This rule in part reflects changes from a 1963 amendment aimed at abolishing the rigid two-year rule which required that such a motion be presented within two years of death of the party regardless of reasons for delay. See *Anderson v. Yungkau*, 329 U.S. 482, 91 L. Ed. 436, 67 S. Ct. 428 (1947) (establishing a two year limit on motions for substitution after death of a party); Advisory Committee Notes to *Rule 25*. The defendants rely in error upon *Yungkau* when they [*4] argue that the motion for substitution is untimely because, first, some years have passed since the death of the plaintiff, and second, the estate is likely penniless. While *Yungkau* established a restrictive test for substitution, [HN2] courts now liberally permit substitution motions even years after death of a party. See *Al-Jundi v. Estate of Rockefeller*, 757 F. Supp. 206, 208 (W.D.N.Y. 1990) (noting that since the 1963 amendments the courts have systematically undone the previously inflexible interpretations of the Rule). As for the question of whether any assets remain to dispose of from the estate, that is not a relevant consideration with respect to an application for substitution under *Rule 25(a)*.

[HN3] Under *Rule 25(a)* the running of the 90 days begins with the proper suggestion of death. Here, the defendants filed a Suggestion of Death Upon the Record on January 25, 2000. ¹ Plaintiff's counsel states without contradiction that defendants served the suggestion upon him "by first class mail on January 25, 2000," Reply Declaration of Randall D. Bartlett, Esq., verified September 22, 2000, at P 3.

1 The docket sheet shows that the suggestion of death was not entered on the docket until January 26, 2000. I will assume, without deciding, that the filing date of January 25 triggers the running of the 90 day period under *Rule 25(a)*.

[*5] The plaintiff disputes the sufficiency of the suggestion of death, which provided no information as to any substituting party, and argues that, because of such deficiency, the suggestion was not capable of triggering the 90 day time period. There is no substance to the argument. For some time courts in this jurisdiction held that to constitute a valid suggestion of death under *Rule 25(a)*, thereby allowing the suggesting party to invoke the 90 day time limit against their adversary, the suggesting party must provide the identity of the substituting representative or successor. See *Young v. Patrice*, 832 F. Supp. 721, 725 (S.D.N.Y.1993) ("the statement must be filed and served according to *Rule 25*, which most courts, including this one, have interpreted to require at least the naming of the executors of the decedent's estate"); *Kaldawy v. Gold Service Movers, Inc.*, 129 F.R.D. 475 (S.D.N.Y.1990); *Gronowicz v. Leonard*, 109 F.R.D. 624, 627 (S.D.N.Y.1986) ("the [suggestion of death] must identify the representative or successor...no valid suggestion of death has been made and the 90 day period did not commence"). Recently, however, in [*6] *Unicorn Tales, Inc. v. Banerjee*, 138 F.3d 467, 469 (2d Cir. 1998), [HN4] the Second Circuit held that *Rule 25(a)* "does not require that the statement identify the successor or legal representative; it merely requires that the statement of death be served on the involved parties." This holding of the Second Circuit unequivocally announces the *de minimis* standard to which suggesting parties are held, and the standard by which this Court is governed.

Judged by the Unicorn standard, the Defendant's suggestion of death was proper and sufficient, thereby triggering the 90 day time limit of *Rule 25* to commence on January 26, 2000.

On April 27, 2000 the plaintiff moved this Court,

pursuant to *Fed. R. Civ. P. 6(b)*, requesting a 60 day enlargement within which to move for substitution of parties. The motion was granted by an Order signed April 28, 2000. The defendants argue that the Order was ineffective, as it was requested more than 90 days from the suggestion of death, in contravention of the prohibitions of *Rule 25(a)*.² But defendants fail to account for the fact that they served a copy of the suggestion of death upon plaintiff's counsel by mail. [HN5] *Rule 6(e)* provides [*7] that whenever service is made by mail, "3 days shall be added to the prescribed period" for the required responsive action. Accordingly *Rule 25(a)*'s 90-day period for plaintiff's substitution motion became a 93-day period. [HN6] *Rule 6(a)* provides that January 25, 2000, the date defendants filed the suggestion of death, is excluded from the calculation. ("In computing any period of time prescribed or allowed by these rules, . . . the day of the act . . . from which the designated period of time begins to run shall not be included."). Therefore the 93-day period expired on April 27, 2000. Plaintiff's request for an extension made on that date was timely.

2 For the reasons stated in text, I need not consider the propriety of such an enlargement when requested outside the temporal parameters of *Rule 25(a)*. There is some suggestion in the case law that a *Rule 6(b)* motion to enlarge the time within which to move for substitution under *Rule 25(a)*, even one brought delinquent, may be entertained by a court within its discretion where the moving party has reasonable grounds for delay. See *Al-Jundi*, 757 F. Supp. at 209 ("one can gain relief from the 90-day restriction via a motion for enlargement made even after the expiration of the allotted time if one satisfies the

court that the delay was the result of excusable neglect and the opponent fails to demonstrate that such relief would work undue prejudice"). *Rule 6(b)* itself provides that "upon motion made after the expiration of the specified period the district court may permit the act to be done where the failure to act was the result of excusable neglect," with the exception of certain enumerated time limits not here pertinent. *Rule 6(b)(2)*. Given the efforts of plaintiff's counsel to locate Janet Lanigan's executor, see Declaration of Randall D. Bartlett, Esq., verified June 26, 2000 at PP 9-13, I would be inclined to exercise that discretion in plaintiff's favor if it were necessary to do so.

[*8] As the plaintiff's motion for substitution was timely, it shall be granted, and the caption amended accordingly. As it is not the burden of the defendant to provide the location of the executor under *Rule 25*, plaintiffs' costs for such endeavor will not be ordered reimbursed. Cf. *Unicorn Tales, Inc.*, 138 F.3d at 467.

The Clerk of the Court is directed to substitute Eugene D. Lanigan, representative of the Estate of Janet Lanigan, in place of Janet Lanigan as a defendant in the case and to amend the caption accordingly.

It is SO ORDERED.

Dated: New York, New York

October 17, 2000

CHARLES S. HAIGHT, JR.

UNITED STATES SENIOR DISTRICT JUDGE