SJC-13173

CHARLES KINGARA vs. SECURE HOME HEALTH CARE INCORPORATED & others.[1]

Suffolk. January 10, 2022. - March 28, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Practice, Civil, Class action, Death of party, Substitution. Death. Rules of Civil Procedure. Attorney at Law, Class action. Notice.

Civil action commenced in the Superior Court Department on September 30, 2019.

A pretrial motion to authorize notice to putative members of a class and to extend tracking order deadlines was considered by Kenneth W. Salinger, J.

An application to prosecute an interlocutory appeal was allowed in the Appeals Court by Vickie L. Henry, J., and questions of law were reported by her to the Appeals Court. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Raven Moeslinger for the plaintiff.
Catherine M. Scott for the defendants.
Kevin W. Buono, for Massachusetts Defense Lawyers Association, amicus curiae, submitted a brief.

[1] Siddharth Parmar and Ankur Rustgi.

LOWY, J. A single justice of the Appeals Court reported two questions of law to a full panel of the Appeals Court pursuant to Mass. R. Civ. P. 64, as amended, 423 Mass. 1410 (1996), and Rule 1.0 of the Rules of the Appeals Court, as appearing in 97 Mass. App. Ct. 1001 (2020). Each question concerns the authority of counsel or the courts to protect the interests of putative class members when the named plaintiff has died, no party has been substituted for the named plaintiff, and no motion has been made to certify the putative class. We transferred these questions to this court on our own motion. We conclude that in these circumstances, counsel has no authority to act on behalf of the deceased plaintiff or the putative class, but the courts may act to protect the interests of the putative class members when, absent notice, those individuals would face significant prejudice.[2]

Background. Secure Home Health Care Incorporated (Secure Health) employs nurses and home health care aides who travel among clients providing in-home care. Charles Kingara worked for Secure Health as a licensed practical nurse for about three years. In September 2019, Kingara filed a five-count complaint in the Superior Court against Secure Health, its president

[2] We acknowledge the amicus brief submitted by the Massachusetts Defense Lawyers Association.

Siddharth Parmar, and its treasurer Ankur Rustgi, alleging both class and individual causes of action arising under the wage act, the minimum fair wage law, and the overtime law.

In October 2020, while the suit was pending, and before plaintiff's counsel had filed for class certification, defendants' counsel informed plaintiff's counsel that Kingara had died. Thereafter, plaintiff's counsel filed a motion to (1) order notice to putative class members pursuant to Mass. R. Civ. P. 23 (d), as amended, 471 Mass. 1491 (2015) (rule 23 [d]), informing them of Kingara's death and inviting them to join the action; (2) order the defendants to identify putative class members' names and addresses; and (3) extend tracking order deadlines to allow substitution of a new class representative and completion of discovery. The defendants opposed the motion, arguing that plaintiff's counsel had no authority to act on behalf of Kingara or any other member of the putative class. After the motion was granted, the defendants filed a petition for interlocutory relief pursuant to G. L. c. 231, § 118, which ultimately resulted in the questions of law before this court.

Discussion. 1. Standard of review. We consider questions of law de novo. CP 200 State, LLC v. CIEE, Inc., 488 Mass. 847, 848 (2022). The questions here concern class actions under Massachusetts law, which are governed by Mass. R. Civ. P. 23. "We have noted that rule 23 was written in the light of Fed. R.

Civ. P. 23, hence case law construing the Federal rule is analogous and extremely useful" (quotations, citations, and alterations omitted). Chambers v. RDI Logistics, Inc., 476 Mass. 95, 111 (2016).

2. Attorney authority. We first address "[w]hether a deceased plaintiff's attorney has the authority to act on the deceased plaintiff's behalf prior to class certification, and before any motion to certify a class had been filed, and without motion by the plaintiff's legal representative to substitute as a party to the putative class action." Our answer is no: in the specific circumstances posited, counsel lacks authority to act on behalf of the deceased plaintiff or on behalf of the putative class.

A client's death terminates an attorney's authority to act on behalf of that client.[3] Kelley v. Neilson, 433 Mass. 706, 710 n.8 (2001) (attorney's authority to act on behalf of client "expired on her death"). Thus, the deceased plaintiff's attorney may not act on behalf of the deceased, absent a motion

[3] The defendants are incorrect to rely on Mass. R. Civ. P. 25 (a), 365 Mass. 771 (1974), as the basis for this proposition; that rule merely provides a procedural mechanism by which the legal representative of the deceased (e.g., executor) may be substituted as a party. Rule 25 (a) (1), as relevant, states: "If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the representative of the deceased party . . . ."

by the deceased's legal representative. See Federal Ins. Co. v. Ronan, 407 Mass. 921, 923 n.6 (1990), quoting Turner v. Minasian, 358 Mass. 425, 427 (1970) ("On the death of the client there is no legal representative before the court and counsel's authority was automatically terminated by his death. . . . No effective action can be taken until a legal representative is made a party" [alterations omitted]).

Because "counsel for a class has a continuing obligation to each class member," Spence v. Reeder, 382 Mass. 398, 409 (1981), it is in keeping with the above proposition that the death of the named plaintiff does not necessarily terminate class counsel's authority to act on behalf of a certified class, see id.; Bartle v. Berry, 80 Mass. App. Ct. 372, 386 (2011), quoting Parker v. Anderson, 667 F.2d 1204, 1211 (5th Cir. 1982) ("duty owed by class counsel is to the entire class and is not dependent on the special desires of the named plaintiffs"). However, it is unclear whether a similar representative relationship exists between would-be class counsel and putative class members such that counsel would have an obligation and concomitant authority to act on behalf of those putative class members prior to certification. Cf. Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 75 (2013) ("a putative class acquires an independent legal status once it is certified under Rule 23"). We need not determine whether there might be circumstance that

would give rise to such a representative relationship because in the circumstances posited here, we conclude that any relationship between plaintiff's counsel and the putative class would be too attenuated to vest in counsel an obligation or authority to act on behalf of the class.

Indeed, the deceased plaintiff's attorney here is in no position to act on behalf of anyone whose interests are implicated in the putative class action. The attorney has not filed for class certification, has failed to locate the deceased plaintiff's personal representative, and has failed to identify any other potential members of the putative class who could serve as class representative. And while it is true that attorneys sometimes act not as agents of parties but as officers of the court, see, e.g., ABA Formal Op. 95-397 (Sep. 18, 1995) (duty of candor usually requires attorneys to inform court and opposing parties of death of client), to allow the deceased plaintiff's attorney to act in such a manner here would allow the attorney to utilize the courts as an instrument of client solicitation.

3. Judicial authority. Given our answer above, we next address "whether the Superior Court ha[s] the power to order, sua sponte, notice to the putative class members under Mass. R. Civ. P. 23 (d)." We answer this question in the affirmative: a trial judge has the power to order notice to putative class

members pursuant to rule 23 (d) if those putative class members would otherwise face significant prejudice.

First, the plain language of rule 23 (d) vests the court with the discretionary power to order notice during class actions.[4] Federal case law interpreting Fed. R. Civ. P. 23 (d) supports this reading. See, e.g., Navarro-Ayala v. Hernandez-Colon, 951 F.2d 1325, 1336 (1st Cir. 1991) (under rule 23 [d], "notice is not mandatory, but may be required" [emphasis in original]); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 878 n.86 (5th Cir. 1975) (rule 23 [d] notice "is not mandatory, but rather discretionary with the trial court"). Second, this discretion may be exercised sua sponte. While other Massachusetts Rules of Civil Procedure require that the court act upon the motion of a party, rule 23 (d) does not refer to any necessary request for relief. Cf. Mass. R. Civ. P. 15 (d), 365 Mass. 761 (1974) (court may permit supplemental pleadings "[u]pon motion of a party"). Finally, this discretion

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[4] Rule 23 (d) provides in relevant part:

> "The court at any stage of an action under this rule may require such security and impose such terms as shall fairly and adequately protect the interests of the class in whose behalf the action is brought or defended. It may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment, or of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire."

may be exercised prior to class certification, but only where there is a finding of significant prejudice, see infra.[5] Cf. Wolf v. Commissioner of Pub. Welfare, 367 Mass. 293, 298 (1975) (prior to certification, "the judge should have treated the suit as a class suit for the purposes of dismissal or compromise"); Mass. R. Civ. P. 23 (c) ("A class action shall not be dismissed or compromised without the approval of the court. The court may require notice of such proposed dismissal or compromise to be given in such manner as the court directs").

Indeed, it is the finding of significant prejudice, not the

[5] The defendants discuss a number of Federal cases interpreting the courts' authority to issue notice under Fed. R. Civ. P. 23 (d) prior to class certification. Federal courts have seemed to split on the issue, but many of these Federal cases, though not all, seem actually to hinge on whether putative class members will suffer prejudice, as opposed to whether a class has been certified. Compare, e.g., Marian Bank vs. Electronic Payment Servs., Inc., U.S. Dist. Ct., No. 95-614-SLR (D. Del. Mar. 12, 1999) (putative class members not entitled to notice due to duty "to keep apprised of the legal developments in plaintiff's case"), with Puffer v. Allstate Ins. Co., 614 F. Supp. 2d 905, 908-915 (N.D. Ill. 2009), quoting Culver v. Milwaukee, 277 F.3d 908, 914 (7th Cir. 2002) (court ordered notice to putative class members under Fed. R. Civ. P. 23 [d] in part because of risk of prejudice from "expiration of the statute of limitations on the class members' claims without their realizing it," in view of publicity concerning suit and potential reliance by class members on pendency of suit). Cf. Doe v. Lexington-Fayette Urban County Gov't, 407 F.3d 755, 761-764 (6th Cir. 2005), cert. denied, 546 U.S. 1094 (2006) (Federal District Court erred in not giving putative class members notice of settlement because of likelihood of prejudice); Crawford v. F. Hoffman-La Roche Ltd., 267 F.3d 760, 764-765 (8th Cir. 2001) (Fed. R. Civ. P. 23 [e] applies prior to certification, and court must consider possibility of prejudice "in deciding whether to allow dismissal or issue notice").

stage of litigation, that should be meaningful. Courts must exercise their discretion to issue notice pursuant to rule 23 (d) in keeping with the rule's stated purpose to "fairly and adequately protect the interests of the class in whose behalf the action is brought or defended." Accordingly, we conclude that while courts may, in limited circumstances, order notice under rule 23 (d) to putative class members prior to class certification, it is a clear abuse of discretion to do so without finding that putative class members would face significant prejudice absent such notice.[6]

Conclusion. The answer to the first reported question and the related question posed in the single justice's order is "no." The answer to the second reported question is "yes," though it is an abuse of discretion for the court to issue notice to putative class members without finding that those members face significant prejudice. We remand the case to the

[6] For example, putative class members may be prejudiced when they do not receive notice regarding dismissal, settlement, or other circumstances effectively terminating a class action, if those putative members relied on the prior pending action and therefore did not bring individual claims, because following dismissal, the statute of limitations -- which may be tolled during the pendency of the class action, see China Agritech, Inc. v. Resh, 138 S. Ct. 1800, 1806 (2018) -- begins to run again and may bar subsequent claims. Cf. Sikes v. American Tel. & Tel. Co., 841 F. Supp. 1572, 1579-1580 (S.D. Ga. 1993) (lack of publicity indicates that "class members are not likely to have developed a 'reliance interest' in the proposed class action," and notice was therefore likely unnecessary).

single justice of the Appeals Court for further proceedings consistent with this opinion.

So ordered.