

**Ulmer v Blaha**

2015 NY Slip Op 31212(U)

July 15, 2015

Supreme Court, Schuyler County

Docket Number: 2007-0128

Judge: Eugene D. Faughnan

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This opinion is uncorrected and not selected for official publication.

At a Submitted Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Schuyler County Courthouse, Watkins Glen, New York, on the 5<sup>th</sup> day of June, 2015.

PRESENT: HON. EUGENE D. FAUGHINAN  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT : SCHUYLER COUNTY

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RUSSELL ULMER,

Plaintiff,

-vs-

WILLIAM J. BLAHA

Defendant.

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DECISION AND ORDER

Index No. 2007-0128  
RJI No. 2015-0034-M

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**EUGENE D. FAUGHNAN, J.S.C.**

This matter comes before the Court on a Motion to Dismiss the Complaint, or in the alternative, make a substitution for the Defendant. The Motion is made by the Estate of William J. Blaha, who was the initial named Defendant in the case. In support of the Motion, the following documents were submitted: an affirmation of Robert L. Halpin, Esq., attorney for the Estate, dated March 25, 2015; and an affidavit of Richard Blaha, the Executor of the Estate, sworn to on March 30, 2015, with attached Exhibits. Plaintiff filed papers in opposition on June 5, 2015, and a Notice of Cross-Motion, with an affirmation of Richard Urda dated June 2, 2015 with attached Exhibits. The Motion was returnable on June 5, 2015, which was a submitted term of the Court.

Russell Ulmer (hereinafter "Plaintiff"), commenced the instant action on May 7, 2007. The complaint alleged that Plaintiff and William J. Blaha ("Defendant") had entered into an oral agreement whereby certain property owned by Defendant could be possessed and purchased over time by Plaintiff. Based upon that, Plaintiff purportedly undertook to make improvements upon the premises, in order to operate a dairy farm. When Defendant failed to convey the property, Plaintiff filed a Mechanic's Lien on May 9, 2005. Plaintiff filed an Extension of Mechanic's Lien on May 8, 2006. Just prior to the one year expiration of the second Mechanic's Lien, Plaintiff commenced this action seeking recovery based upon the materials and labor involved in the improvements. In June, 2007, Defendant, proceeding *pro se*, served a Verified Answer to the Complaint, with Counter-Claims.

Defendant passed away on June 10, 2012. Preliminary Letters Testamentary were issued to Richard Blaha on September 7, 2012. Subsequently, Letters Testamentary were issued and Richard Blaha was named Executor of the Estate.

On or about January 14, 2013, Plaintiff filed a Notice of Claim against the Estate of William Blaha in Schuyler County Surrogates Court. The claim in the Surrogates Court proceeding was based upon the same facts described herein, and in regard to the Mechanic's Lien that had been filed. On January 8, 2014, the Surrogate Court issued a Decree and Order Disallowing the Claim of Plaintiff. The Decree noted that there was an action pending in Supreme Court, and that would be the most appropriate forum to hear this dispute. The Decree

further went on to direct Plaintiff to proceed to have the Estate substituted as the Defendant in the Supreme Court action.

Another 14 months passed, without any application being made to the Supreme Court to substitute the Estate in the action. The Estate then filed this motion on April 1, 2015 seeking dismissal of the Complaint, or in the alternative, to substitute the Estate as the Defendant, and to allow the Answer to be amended to include the Statute of Frauds. The Estate argues that there has been prejudice due to the delay in substituting the Estate because 1) the property has been sold; 2) defending the claim is compromised due to the passage of time, and 3) the Estate proceeding is ready to be concluded, but cannot because of this outstanding claim. The motion was made returnable for June 5, 2015. Plaintiff served a Cross Motion on June 2, 2015, seeking to deny Dismissal of the Complaint, and further seeking to have the Estate substituted as the Defendant.

CPI.R § 1021 provides that “[a] motion for substitution may be made by the successors or representatives of a party or by any party... If 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.... Whether or not it occurs before or after final judgment, 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.”

A motion for substitution under CPLR §1021 must be made within a reasonable time. *Borruso v. New York Methodist Hosp.* 84 AD3d 1293 (2<sup>nd</sup> Dept. 2011); *Reed v. Grossi*, 59 AD3d 509 (2<sup>nd</sup> Dept. 2009). “The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or defense has potential merit.” *Terpis v. Regal Heights Rehab & Health Care Ctr. Inc.* 108 AD3d 618, 619 (citations omitted). This particular case involves a deceased defendant. “Inasmuch as plaintiff wants a judgment in this action to bind [defendant’s] estate, it must ‘assure that a proper substitution is

made for the decedent.” *Walfred Corp. V. Alb-Inn, Inc.* 178 AD2d 811 (3<sup>rd</sup> Dept. 1991) *citing Siegel, NY Prac §184 at 277* [2d Ed], *Butts v. Marx*, 148 Misc2d 405, 406 (Sup. Ct. Kings County 1990). As observed by the trial court in *Butts*,

Plaintiffs' attorneys are under the mistaken impression that it is the sole burden of the defendant's attorneys to make the motion to effectuate a substitution of the defendant. The statute clearly states that the motion may be made by "any party". When the defendant is the party who dies, and no representative seeks to be substituted for him, the plaintiff may seek the appointment of a representative and move that he be substituted as a party defendant. ( *Castrovinci v Edwards*, 59 Misc 2d 696.) Since the defendant in a personal injury action may ultimately be liable to the plaintiff for money damages, it is logical to assume that a representative of decedent's estate would not jump at the chance to be substituted in the action. Likewise, in addition to the fact that they no longer have a client to represent, defendant's attorneys would not have any logical reason to promote plaintiff's lawsuit by making the motion for substitution. The obligation falls upon the plaintiff.

*Butts* at 406.

In *Walfred*, there were two named defendants who had passed away. One of the defendant's estates had been administered and wound up, and the other remained open due to insolvency. Many years had gone by before any action was taken to pursue the case. Supreme Court dismissed the complaint against the defendants which was affirmed by the Third Department. Given the passage of time as well as the fact that the Supreme Court had not been apprised as to the merits of the claim, the Third Department held that the lower court providently exercised its discretion in dismissing the complaint.

In the present case, the action was commenced in May of 2007, more than 8 years ago, concerning an alleged oral agreement from August, 2004, almost 11 years ago. Decedent passed away in June of 2012, and Plaintiff filed a notice of claim in Surrogates Court in January, 2013 which was ultimately disallowed on January 8, 2014, with that court specifically stating it “elected to direct [Plaintiff] to proceed to have the estate of Decedent substituted in the Supreme Court Action and to continue to pursue his rights and any remedy in that court...” Despite that direction, Plaintiff took no steps to have the Estate substituted, until the Cross-Motion in June, 2015. This was 3 years after Defendant passed away, and 17 months after the Surrogates Court's decision. Under these circumstances, the Court determines that there has been an inordinate



delay in seeking substitution.

The Court further concludes that the Plaintiff has failed to demonstrate merit, a reasonable excuse and lack of prejudice. As noted in the moving papers, the Complaint essentially contends there was an oral contract for the sale of property, which would be barred by the Statute of Frauds. Plaintiff's Cross-Motion papers do not address the merits of the complaint at all. Plaintiff's papers also fail to provide a reasonable excuse for the delay. Although Plaintiff contends that the Decedent's Estate could have moved for the substitution, the Court finds that unavailing in light of the rationale expressed in the *Walfred* and *Butts* cases discussed above. The Court is also persuaded that Plaintiff's delay has prejudiced the Estate's ability to defend the action, and has hindered the closing of the Estate. The property has been sold. The passage of time would also make it difficult for the Estate to defend against this claim. It has been 11 years since the alleged oral contract. The Estate is prepared to be closed, but for this claim which has been pending for some 8 years. For these reasons, the Court concludes that the request for substitution has not been made within a reasonable time under CPLR §1021, and that the complaint should be dismissed.

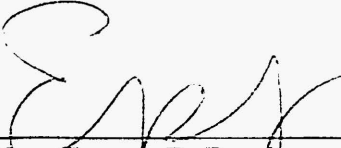
Accordingly, it is hereby

**ORDERED**, that the Motion by the Executor of the Estate of William Blaha for dismissal of the Complaint is **GRANTED**, and the Complaint is hereby **DISMISSED**, and it is further

**ORDERED**, that Plaintiff's Cross-Motion substituting the Estate as the Defendant is **DENIED**.

**This constitutes the Decision and Order of this Court.**

Dated: July 15, 2015  
Watkins Glen, New York

  
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Hon. Eugene D. Faughnan  
Supreme Court Justice