

Villaverde v 3464 E. Tremont Holdings LLC
2018 NY Slip Op 31296(U)
May 1, 2018
Supreme Court, Bronx County
Docket Number: 300839-17
Judge: Howard H. Sherman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

5/4/18

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 4 X
SERGIO VILLAVERDE ESQ, AS GUARDIAN
FOR JANET ROSE DIFRISCO

Plaintiff(s)

-against-

Index No. 300839-17

3464 EAST TREMONT HOLDINGS LLC et al.

Defendant(s)

X

In The Matter Of

JANET DIFRISCO

Index No. 91817-2015

An Incapacitated Person

X

HON. HOWARD H. SHERMAN:

This is a motion by defendants 3464 East Tremont Holdings LLC, JCL Funding LLC, JCL Funding LLC Series 2013B-Tremont Ave, T Squared Equities LLC, and T Squared Equities LLC Series 2013A-Tremont Ave. (collectively "the East Tremont Defendants") to dismiss the lawsuit commenced by the Guardian on behalf of the Incapacitated Person Janet DiFrisco under index number 300839-17 pursuant to CPLR §1021 for failure to make substitution for the late plaintiff Janet DiFrisco, and for vacatur of all stays granted in these consolidated [sic] actions and directing the cancellation of all notices of pendency, and granting judgment by default against non-party RBM's Family Place Inc., d/b/a/ Louis Seafood, and for other relief, is decided as follows:

After Sergio Villaverde Esq. was appointed Guardian of the Person and Property of Janet Di Frisco on January 9, 2017 under index number 91817-15, and qualified as such on January 27, 2017, he commenced this related action on April 12, 2017 under index number 300839-2017 ("the damages and rescission action"). This latter proceeding asserts fifteen causes of action seeking, amongst many other things, money damages for breach of fiduciary duty and rescission of deeds transferring real property based on the contention that Ms. Di Frisco lacked capacity when these financial transactions were entered into. It should be noted, not parenthetically, that these two proceedings cannot be deemed "consolidated" as one is a Guardianship proceeding, and the other is clearly not. They have been considered together for purposes of convenience, but they should not be formally consolidated or joined, particularly since the Guardianship proceeding will be shortly terminated upon the settlement of the Guardian's final account.

Janet Di Frisco is now deceased, having passed away on October 27, 2017. The powers of the Guardian cease upon the death of his ward, aside from the filing of a final account and fulfilment of his responsibility for the burial of the I.P., as well as certain other duties not relevant to these proceedings. However, the authority of Mr. Villaverde as Guardian to continue

the prosecution of the damages and rescission action under index number 300839-2017 clearly ceased upon Ms. DiFrisco's death. Accordingly, any further motions with respect to this damages and rescission action will be brought in that proceeding, and not under the Guardianship index number 91817-2015.¹

As this Court has previously noted, the death of a party to an action divests the Court of jurisdiction, automatically nullifies any orders that are made between the time of death and the substitution of a qualified personal representative, and stays all proceedings automatically. For reasons of jurisdiction, therefore, this Court cannot make any directives with respect to prior restraining orders and existing *lis pendens*.

Additionally, however, the East Tremont Defendants move for dismissal pursuant to CPLR §1021, a motion which is permitted notwithstanding the existence of an automatic stay caused by the death of a party prior to Judgment. Pursuant to this section, if a required substitution is not made within a "reasonable time" the action is subject to dismissal for this reason alone as to the party for whom substitution should have been made. The determination of reasonableness requires consideration of several factors including the diligence of the party seeking

¹This motion was calendared under index number 91817-2015.

substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has potential merit. *Reidel v. Kapoor*, 123 AD 3d 996 (2nd Dept 2014).

Although Courts have shown relative liberality regarding the time of delay because of the strong public policy favoring disposition of cases on the merits (*Peters v. City of NYH&H Corp*, 48 AD 3d 329 [1st Dept 2008]) the failure to demonstrate a reasonable excuse for the delay will warrant dismissal of the action. *Public Administration v. Levine*, 142 AD 2d 475 (1st Dept 2016).

In order to prevail on a CPLR §1021 motion to dismiss, a defendant must also show that the plaintiff's failure to secure substitution in a timely fashion resulted in undue prejudice. *Noriega v. Presbyterian Hosp. V. City of New York* 305 AD 2d 220 (1st Dept 2003).

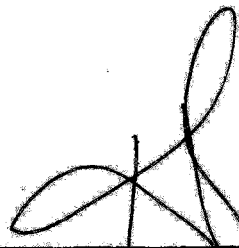
Ms. DiFrisco passed away approximately six months ago. No precedent has been cited which would support dismissal of this proceeding after such a short lapse of time, and this Court declines to direct summary dismissal at this time. It should be noted nonetheless that the sole opposition filed to this motion consists of the affirmation of the counsel for Ms. Di Frisco's daughter, which contains no substantive demonstration that any

effort has been made to date to make proper substitution for the deceased party plaintiff by any party with standing to do so. As the time to make substitution cannot be extended indefinitely, [Silvagnoli v. Consolidated Edison Employees Mutual Aid Society, 112 AD 2d 819 (1st Dept 1985)] the Court herewith directs that this proceeding will be dismissed pursuant to CPLR §1021 unless proper substitution is made for the deceased plaintiff within 60 days from the date of settlement of the order to be settled herein.

Beyond this, all motions are denied.

Settle order.

Dated: May 1, 2018



HOWARD H. SHERMAN J.S.C.