

**McEwen v JP Morgan Chase & Co.**

2019 NY Slip Op 33099(U)

October 17, 2019

Supreme Court, New York County

Docket Number: 161802/2015

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 161802/2015

CECIL MCEWEN,

Plaintiff,

MOTION SEQ. NO. 003 and 004

- v -

JP MORGAN CHASE & CO.,

Defendant.

DECISION + ORDER ON MOTION

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JP MORGAN CHASE & CO.,

Plaintiff,

Third-Party
Index No. 595484/2017

-against-

JONES LANG LASALLE AMERICAS, INC.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 94, 95, 98, 100

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 004) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 96, 97, 99, 101, 102

were read on this motion to/for DISMISSAL

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

In this personal injury action, third-party defendant Jones Lang LaSalle Americas, Inc. and defendant JP Morgan Chase & Co. move, pursuant to CPLR 1021 (motion sequence numbers 003 and 004, respectively), to dismiss the complaint against them. After a review of the motion papers, as well as a review of the relevant statutes and case law, the motions, which are unopposed, are decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND:**

Plaintiff Cecil McEwen commenced this trip and fall action against defendant JP Morgan Chase & Co. (JP Morgan) by filing a summons and verified complaint on November 16, 2015. Doc. 1. JP Morgan joined issue by its answer filed February 23, 2016. Doc. 3. On June 15, 2017, JP Morgan commenced a third-party action against Jones Lang LaSalle Americas, Inc. (JLL). Doc. 23. JLL joined issue by service of its answer to the third-party complaint filed September 1, 2017. Doc. 38.

Plaintiff passed away on July 28, 2018. Doc. 66 at par. 1.

By correspondence dated October 1, 2018, JLL's attorney wrote to this Court to request a stay of the action after he was advised by plaintiff's counsel that plaintiff had passed away and that none of plaintiff's next of kin intended to file an estate. Doc. 63. On November 20, 2018, plaintiff's counsel wrote to this Court confirming that plaintiff had passed away and representing that "[t]here [was] no intention to even raise an [e]state." Doc. 64.

On June 5, 2019, JLL moved (motion sequence 003) to dismiss the complaint, with prejudice, pursuant to CPLR 1021 based on plaintiff's failure to timely substitute a proper party as plaintiff. Doc. 66. The motion was served *on the deceased plaintiff* by regular and certified mail at his last known address. Doc. 79. JLL subsequently filed an amended notice of motion for the same relief, *also served on the deceased plaintiff*, by regular and certified mail at his last known address. Doc. 95. The motion was not served on JP Morgan.

On June 10, 2019, JP Morgan moved (motion sequence 004), pursuant to CPLR 1021, to dismiss the complaint, with prejudice, for failing to timely substitute a proper party for the deceased plaintiff. Doc. 80. The motion was served *on the deceased plaintiff* by regular and certified mail at his last known address and was served by email on counsel for plaintiff and

counsel for JLL. Doc. 93. JP Morgan filed an amended notice of motion on June 19, 2019 which was served *on the deceased plaintiff* by regular and certified mail at his last known address and served by email on counsel for the deceased plaintiff and JLL. Doc. 97.

On or about August 15, 2019, the defendants were directed by this Court to "make efforts to locate a family member or next of kin in order to provide them with a copy of the pending motions to dismiss." Doc. 101 at par. 4. After a search by counsel revealed that the deceased plaintiff's next of kin were his wife, Janince McEwen, and his adult son, Ruskin McEwen, JP Morgan's motion was amended to be served, by regular and certified mail, on those individuals. Doc. 101 at pars. 4-6. On August 28, 2019, JLL served its amended notice of motion on Ruskin McEwen and Janince McEwen by regular and certified mail at their last known address. Docs. 98, 100. On August 29, 2019, JP Morgan served its amended notice of motion on Ruskin McEwen and Janince McEwen by regular and certified mail at their last known address. Doc. 98.

On or about October 16, 2019, counsel for JP Morgan filed an affirmation in further support of JP Morgan's motion to dismiss. Doc. 101. In the affirmation, counsel for JP Morgan argues that, since Janince McEwen and Ruskin McEwen never responded to the motion to dismiss, the complaint must be dismissed as against said defendant. Doc. 101 at pars. 7-9.

#### LEGAL CONCLUSIONS:

"It is well settled that the death of a party divests a court of jurisdiction to conduct proceedings in an action until a proper substitution has been made pursuant to CPLR 1015(a), and any order rendered after the death of a party and before the substitution of a legal representative is void." *Griffin v Manning*, 36 AD3d 530, 532 (1st Dept. 2007). Additionally, CPLR 1015(a)

provides that "if a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties."

CPLR 1021 provides, in pertinent part, that:

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.

In deciding a motion to dismiss a claim for failure to timely substitute a proper party for a deceased plaintiff under CPLR 1021 and 1015(a), a court "may not order dismissal for such failure without first ordering the persons interested in the decedent's estate to show cause why the action should not be dismissed." *Petty v Meadowbrook Distributing Corp* 266 AD2d 88 (1st Dept 1999). CPLR 1021 thus "requires a motion by order to show cause, with court-directed notice to the 'persons interested in the decedent's estate,' as to why the action . . . should not be dismissed. Such notice is a jurisdictional prerequisite to the court's consideration of a motion to dismiss. *Gonzalez v Ford Motor Co.*, 295 AD2d 474 (2d Dept 2002)." Alexander and Girese, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C1021:2. Although this Court acknowledges that JLL and JP Morgan attempted to provide notice of their respective motions to the deceased plaintiff's next of kin, this Court is without jurisdiction to consider their applications since they were not brought by order to show cause.

Therefore, in light of the foregoing, it is hereby:


ORDERED that the motion by third-party defendant Jones Lang LaSalle Americas, Inc. (motion sequence 003) seeking to dismiss the complaint pursuant to CPLR 1021 is denied without prejudice to said defendant proceeding by order to show cause on notice as required by that statute; and it is further

ORDERED that the motion by defendant JP Morgan Chase & Co. (motion sequence 004) seeking to dismiss the complaint pursuant to CPLR 1021 is denied without prejudice to said defendant proceeding by order to show cause on notice as required by that statute; and it is further

ORDERED that this constitutes the decision and order of the court.

10/17/2019

DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE