

<b>Naumova v West 62nd St. LLC</b>
2020 NY Slip Op 30414(U)
February 5, 2020
Supreme Court, New York County
Docket Number: 153300/2016
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE

PART IAS MOTION 62

Justice

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INDEX NO. 153300/2016

MARINA NAUMOVA,

Plaintiff,

MOTION DATE 06/05/2019, 06/10/2019, 08/13/2019

- v -

MOTION SEQ. NO. 001 002 003

WEST 62ND STREET LLC, GLENWOOD MANAGEMENT CORP.,

Defendant.

DECISION + ORDER ON MOTION

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WEST 62ND STREET LLC, GLENWOOD MANAGEMENT CORP.

Plaintiff,

Third-Party Index No. 595772/2016

-against-

THE CITY OF NEW YORK

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 24, 25, 28, 29, 30, 31

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 003) 26, 27, 32, 33, 34, 35

were read on this motion to/for RETENTION/RELEASE

Upon the foregoing documents,

Plaintiff Marina Naumova was allegedly caused to trip and fall at 160 West 62nd Street, New York, New York, on October 27, 2015 around 3:00 pm. Injuries included left knee tears of

the anterior and posterior cruciate ligaments, left knee tears of the medial and lateral menisci, and left knee tear of the lateral collateral ligament.

This action was commenced by the filing of a summons and complaint on April 19, 2016. Issue was joined by service of defendants' answer, West 62<sup>nd</sup> Street LLC and Glenwood Management Corp., on June 27, 2016. A third-party summons and complaint were served on defendant City of New York on or about October 17, 2016.

A preliminary conference was held on December 14, 2016, scheduling physical exams, medical report authorizations, and other disclosure. A case scheduling order dated April 6, 2017 sets a deposition date for plaintiff on June 13, 2017, and a compliance conference for July 20, 2017. A stipulation dated August 31, 2017 sets a deposition date of plaintiff for November 28, 2017.

On November 21, 2017 plaintiff passed away.

On June 28, 2018, a compliance conference was ordered adjourned to October 11, 2018 because of plaintiff's failure to appear.

On June 5, 2019 Glenwood Management Corp. and West 62 Street, LLC moved to dismiss, per CPLR 1021, because no motion has been made in a reasonable and timely manner to substitute a representative to represent the estate of plaintiff Marina Naumova. The City of New York, on June 5, 2019, also moved to dismiss the complaint, per CPLR 1021, due to the failure to reasonably and timely substitute a representative.

Plaintiff's counsel, moved by order to show cause to relieve the law firm of Miguel A. Ruiz, and for a temporary stay of the matter so the deceased plaintiff's parents, Valeriy Naumov and/or Tatyana Lopatina, may retain replacement counsel and appoint an administrator to the estate of Marina Naumova.

If a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties (see CPLR 1015[a]). Upon the death of one or more of the plaintiffs ... in an action in which the right sought to be enforced survives only to the surviving plaintiffs ..., the action does not abate. The death shall be noted on the record and the action shall proceed (see CPLR 1015[b]).

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 (see CPLR 1021).

The last sentence of CPLR 1021 provides special protection for the estate of a deceased plaintiff where the opponent seeks dismissal of the action based on the estate's failure to make a timely substitution. The statute 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 or appeal should not be dismissed. Such notice is a jurisdictional prerequisite to the court's consideration of the motion to dismiss (see *Gonzalez v. Ford Motor Co.*, 295 AD2d 474 [2d Dept 2003]).

Notice solely to the attorney previously representing the decedent is ineffective because the decedent's death revokes such attorney's authority to act (see *Rumola v. Maimonides Medical Center*, 37 AD3d 696 [2d Dept 2007]). Counsel for the party seeking dismissal must do sufficient research to identify and locate the decedent's heirs so that proper notice can be given (see *Peña v. Rucon Properties, LLC*, 19 Misc3d 655 [Sup Ct Bronx Co 2008]).

If proper notice is given to the persons interested in the decedent's estate, the court may then effectively proceed to decide the motion to dismiss (see *Thomas v. Benedictine Hosp*, 8 AD3d 781 [3d Dept, 2004]; *Hyman v. Booth Mem. Hosp*, 306 AD2d 438 [2d Dept 2003]). 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 (see CPLR 1021).

Defendants' motion to dismiss was not brought by order to show cause and is premature as a proper substitute has not been provided. Plaintiff's order to show cause to be relieved of counsel does not show service upon the proper parties interested in this litigation. In fact, the Court would have expected counsel to have begun the process of seeking estate representatives by this time so a proper substitution could occur.

ORDERED that the defendants' motions to dismiss the complaint for failure to timely substitute the administrator or an executor of plaintiff's estate is DENIED without prejudice.

ORDERED that plaintiff's order to show cause to be relieved of counsel is DENIED.

ORDERED this litigation is stayed until plaintiff has been properly substituted by a family member, an administrator, or a suitable representative.

2/5/2020  
DATE

LAURENCE L. LOVE, 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