Hermita v New York City Transit
2020 NY Slip Op 33563(U)
September 22, 2020
Supreme Court, New York County
Docket Number: 162365/2015
Judge: Lisa A. Sokoloff

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

----------x

EMILIA HUERTA HERMITA and ESTELLA BALDERAS, Administrators of the Estate of TEODORICO DOMINGUEZ ESTEBAN and Guardians of the Property of Decedent's Surviving Infant Children

Index No. 162365/2015

Mot. Seq. 1

DECISION AND ORDER

Plaintiffs,

-against-

THE NEW YORK CITY TRANSIT,

Defendant.

----------x

The following e-filed documents, listed by NYSCEF document number 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53 were read on this motion.

LISA A. SOKOLOFF: A.J.S.C.:

This wrongful death action arises from the death of Teodorico Dominguez (Teodorico), at 9:35 pm on July 3, 2009, when he was struck by an incoming subway train while lying in a state of alleged intoxication on the southbound platform of the C and E subway lines at the Avenue of the Americas and Spring Street subway station in Manhattan.

Defendant New York City Transit Authority (NYCTA or Transit Authority) (improperly sued herein as The New York City Transit) moves, pursuant to CPLR 3211 and 3212, for summary judgment dismissing the complaint for failure to state a cause of action and on the grounds that this action is untimely, measured both from the date of death and from the filing of a notice of claim.

In order to be awarded summary judgment, a movant

> must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]).

Plaintiffs Emilia Huerta Hermita (Emilia) and Estella Balderas (Estella) are each co-guardians of Emilia's three minor children (the Minor Distributees): Harry Dominguez-Huerta (DOB: January 26, 2005), Alejandro Dominguez-Huerta (DOB July 17, 2008), and Oscar Dominguez-Huerta (DOB: February 1, 2010). Emilia identifies Teodorico as the father of the Minor Distributees. NYCTA notes that the children's birth certificates identify their fathers as an individual named Oscar Dominguez, not Teodorico, and has two different birthdates for Oscar. While the NYCTA disputes the sufficiency of some of the documentation of paternity, the questions it raises about paternity do not support dismissal on summary judgment.

Emilia and Teodorico were never citizens or legal residents of the United States nor were they married. Estella, however, is a legal resident. Emilia and Estella are co-administrators of Teodorico's estate, the only asset of which is the wrongful death cause of action.

On September 17, 2009, Emilia, as the proposed administrator, filed a timely notice of claim against the Transit Authority, signed by her current counsel. On August 6, 2015, the Surrogate appointed Emilia and Estella as co-guardians of the property only of the Three Minor Distributees (Feinstein aff, exhibit C), authorizing the co-guardians to commence this action. According to counsel for the Transit Authority, the delay in petitioning for letters was caused by

> the reluctance of [Emilia] to serve as Administrator because she is undocumented and is not married to the decedent, although she is the mother of the three minor children

(Feinstein aff, paragraph 17).

By decree dated October 15, 2015, Kings County Surrogate Margarita L. Torres, after finding that jurisdiction had been obtained over all interested parties, granted limited letters of administration (the Letters) to Emilia and Estella, as co-administrators, expressly restraining the co-administrators from collecting more than $10,000 in estate assets, or collecting any assets from this wrongful death action without a "further court order pursuant to EPTL 5-4.6" from the Surrogate's Court (*id.*).

Tolling of the Statute of Limitations

Plaintiffs commenced this action on December 2, 2015, significantly outside the applicable one-year and ninety day limitations period contained in Public Authorities Law § 1212 (2) for wrongful death actions, as measured from the date of death, however, this action is timely if measured from the date of the appointment of the co-guardians.

Plaintiffs contend that the statute of limitations should be tolled because of the infancy of the Minor Distributees, under the rule of *Hernandez v New York City Health & Hosps. Corp.* (78 NY2d 687 [1991]), in which the infancy toll was applied to a sole, infant distributee.

The Court of Appeals framed the issue in Hernandez as follows:

> Under the CPLR, where the person entitled to commence an action is under a disability because of infancy at the time the cause of action accrues the Statute of Limitations is tolled (CPLR 208). The problem arises in the application of this toll to the wrongful death cause of action. The person entitled to commence a wrongful death action is not the decedent's distributee—who is the beneficiary of the claim—but the decedent's personal representative (see, EPTL 5–4.1). Is the infancy of the sole distributee a disability attributable to the person entitled to commence an action in the unusual situation where no personal representative can be appointed to bring a wrongful death action until the infant obtains a guardian?

(*id.* at 690-691 [internal quotation marks omitted]).

Hernandez held that because the administrator "is a mere nominal party, acting in the capacity of trustee or agent for the beneficiaries," and it is the child "who will bear the full burden of dismissal of the claim," that the child should have the full benefit of the toll (*id.* at 693-694 [internal quotation marks omitted]). The Hernandez case emphasized that the statute of limitations is tolled only until the appointment of a guardian:

> We underscore that the Statute of Limitations is tolled only until appointment of a guardian or the majority of the sole distributee, whichever is earlier, when letters of administration may issue and a personal representative may assume the role of plaintiff. That is the first time there exists a potential personal representative entitled to commence an action

(*Hernandez*, 78 NY2d at 694 [citations and internal quotation marks omitted]).

The Transit Authority has failed to establish that the toll of *Hernandez* does not apply to this action. It would be timely if measured from the appointment of a guardian. The only distinguishing fact between this action and *Hernandez* is that here there are three infant distributees instead of one. Accordingly, the *Hernandez* holding is the controlling precedent.

The Transit Authority also argues that this action is untimely because it was not filed within one year and ninety days of the filing of the notice of claim. The Court of Appeals has rejected this exact argument, stating:

> Infant plaintiffs should not be penalized by a parent's compliance with General Municipal Law § 50-e in an effort to protect a right to recovery. Infancy itself, the state of being a person [under] the age of eighteen (CPLR 105[j]), is the disability that determines the toll. An interpretation of the infancy toll which measures the time period of infancy based on the conduct of the infant's parent or guardian cuts against the strong public policy of protecting those who are disabled because of their age

(*Henry v City of New York*, 94 NY2d 275, 283 [1999] [internal quotation marks and citations omitted]).

The Validity of the Letters of Administration

The Transit Authority also argues that the toll of infancy would not be applicable in this matter had the petition for letters of administration been brought with full disclosure of Teodorico's family in Mexico.

The NYCTA alleges that Teodorico has a surviving spouse, Clara DeJesus (Clara), and four grown children (the Mexican Distributees) living in Mexico, whose names are Adrian, Arturo, Mayra and Jorge (the Four Children). It is undisputed that the existence of Clara and the Four Children was not disclosed to the Surrogate in the petition for letters of administration by the plaintiffs (Feinstein affirmation, exhibit A), despite the fact that family members living in New York knew of their existence. Plaintiff's counsel represents to the court that he had no knowledge of the existence of Clara and the Mexican Distributees at the time of the petition, and first learned of their existence during discovery in this action.

Counsel for plaintiff represented to this court at oral argument that he made diligent efforts to locate Clara and the Mexican Distributees by inquiring of family members, but has been unable to locate them. Neither counsel for either party acted on this court's direction to contact the American consulate in Mexico City.

The evidence before this court is conflicting whether Teodorico was married to Clara. At her statutory hearing, Emilia testified that Teodorico was not married to Clara (Feinstein affirmation, exhibit I, p 36) presumably based on what Teodorico told her. Andres Dominguez (Andres), Teodorico's brother, testified at his deposition that Teodorico had a wife in Mexico but he wasn't sure that they were actually legally married (*id.*, exhibit Q at 10-11), but he answered

that they never got divorced. Andres testified that they lived in Tlaneplanta, Mexico, near Mexico City. Teodorico's brother Martin testified at his deposition that Teodorico and Clara were married and had lived in Mexico City (*id.*, exhibit P at 10-11).

The Transit Authority argues that the infancy toll would not be available, and dismissal of this action would be mandated as untimely, if Clara or one of the Mexican Distributees had been properly disclosed and then appointed administrator, because there would have been no need for a guardian, and hence no tolling. While likely true, this argument is nothing more than wishful thinking as none of these benchmarks has occurred.

The Transit Authority's proposition would require the court to find as a matter of law that Clara and Teodorico had actually been married and never divorced, thus giving her statutory priority; that, as a non-resident alien, she would have been appointed as administrator by the Surrogate with a resident co-administrator, in the exercise of her discretion; that Clara and the Mexican Distributees would have been located, found eligible by the Surrogate and that they would not have renounced. All of these contentions are speculative and thus not capable of being proven by evidence in admissible form establishing these requirements as a matter of law.

Given the lack of any contact for a number of years between Teodorico and the Mexican Distributees, and the absence of any evidence of economic loss, even if Clara could be found and appointed administrator there is no reasonable expectation of Clara or her children participating in any settlement, especially since it appears that Teodorico was killed instantly and there would be no pain and suffering damages in his estate. Without an expectation of recovery, the hope that the Mexican Distributees would be willing to serve is likely unfounded.

NYCTA argues that the Surrogate improperly issued the Letters because it failed to consider "whether another eligible person would be available and willing to serve as administrator" and that

> [h]ad the [Surrogate] performed said task, it would have (or should have) discovered the existence of Clara DeJesus, Adrian Dominguez, Eduardo Dominguez, Mayra Dominguez and Jorge Dominguez … all of whom are distributees … eligible to serve as administrator of the decedent's estate, as a matter of law

(Feinstein aff paragraph 73).

The Transit Authority argues that the Surrogate's finding that jurisdiction over all interested parties had been obtained was based on incomplete, and possibly misrepresented facts as the existence of Clara and her children should have been disclosed on the petition for letters of administration. The Surrogate, however, could have, in the exercise of discretion, dispensed with service on Clara and the Mexican Distributees pursuant to SCPA § 1003, captioned "Persons who must be served with process; waiver of process; dispensation with service of process," which provides in subdivision (2), as pertinent:

> Every eligible person who has a right to administration prior or equal to that of the petitioner and who has not renounced must be served with process upon an application for letters of administration. … The court may dispense with the issuance and service of process upon non-domiciliaries

(id.).

Subdivision (4) provides:

> The court may dispense with service of process upon a person who has a right to administration prior or equal to that of the petitioner where it appears that the name or whereabouts of such person is unknown and cannot be ascertained after diligent inquiry, subject to the requirement that the decree granting the letters shall contain a provision directing that in the proceeding for the judicial settlement of the account of the administrator process shall issue and be served upon such person

(*id.*).

In accordance with subdivision (4), if there is a recovery in this action, the Mexican Distributees will have to be served, as required by the Surrogate, prior to allocation of the proceeds. In accordance with subdivision (3), Surrogate Torres was authorized to dispense with service upon Clara and the Mexican Distributees in the proceeding for limited letters of administration, in her discretion, if she knew about them.

The Letters are valid on their face and limited in their authority essentially to prosecuting this action. This court will not speculate on how the Surrogate might have exercised her discretion in appointing an administrator had plaintiff properly made full disclosure of potential distributees. Nor will this court review the validity of her actions.

If the Transit Authority has a remedy for what it alleges is the improper appointment of co-administrators, that remedy lies in the Surrogate's Court. When a party seeks to renew an order or decision of a court based upon new facts, it must return to the court that originally issued the decision. The original court that issued the letters was the Surrogate's court and that is where the NYCTA should have raised this issue. While the Supreme Court has concurrent jurisdiction with the Surrogate's Court, "the Supreme Court ordinarily refrains from exercising the concurrent jurisdiction where all the relief requested may be obtained in the Surrogate's Court and where the Surrogate's Court has already acted" (*Dunham v Dunham*, 40 AD2d 912, 913 [3d Dept 1972]). The issues raised about the issuance of letters of administration are for the Surrogate's Court (*McCoy v Bankers Fed. Sav. & Loan Assn.*, 131 AD2d 646, 648 [2d Dept 1987]).

This court advised both parties to return to the Surrogate based upon the information unearthed during discovery in this action. If they did not do so, their failure to act was at their own peril.

While the Transit Authority is deprived of a potentially successful defense it could have asserted if Clara actually is a surviving spouse of majority, and had been appointed as administrator, it has not carried its burden of proving untimeliness or failure to state a cause of action. Accordingly, NYCTA's motion to dismiss this action as untimely is denied based upon the application of the toll of infancy.

Accordingly, it is

ORDERED that the motion of defendant Transit Authority for summary judgment dismissing the complaint is DENIED.

Dated: September 22, 2020

ENTER

Hon. Lisa A. Sokoloff, A. J. S. C.