

Raymond v JNJ Home Health Care, Inc.

2022 NY Slip Op 33161(U)

September 14, 2022

Supreme Court, Kings County

Docket Number: Index No. 514401/2019

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part DJMP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the day of 2022.

SEP 14 2022

P R E S E N T:

HON. RICHARD J. MONTELIONE,
Justice.

-----X

MARJORIE RAYMOND,
Plaintiff,

- against -

Index No. 514401/2019
MOT. SEQ. 1-3

JNJ HOME HEALTH CARE, INC. and "JANE
DOE" (said name being fictitious and intended to
represent the home health aide who cared for the
decedent on June 29, 2016 and prior thereto),
Defendants.

-----X

The following papers numbered 1 to 26 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

NYSCEF #:
4-5, 9; 15-16; 19-23
14; 24
25

Upon the foregoing papers, in this action alleging that defendant's improper care and supervision of plaintiff caused her to fall and sustain injuries, plaintiff moves, in motion (mot.) sequence (seq.) 1, for an order pursuant to CPLR 3215(a)(b), directing that a default judgment be entered against the defendant, JNJ Home Health Care, Inc. (JNJ); and this matter be set down for an inquest in favor of the plaintiff. Defendant JNJ cross-moves, in mot. seq. 2, for an order dismissing plaintiffs' complaint pursuant to CPLR

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3211 (a) (3). Plaintiff moves in mot. seq. 3 for an order pursuant to CPLR 1015, substituting Marjorie Raymond, as Administrator of the Estate of Emma Henry, deceased, as plaintiff in the above entitled action in place and stead of the plaintiff, Marjorie Raymond as proposed Administrator of the Estate of EMMA HENRY, deceased; amending all papers, pleadings and proceedings in the above entitled action accordingly; amending the caption to reflect the aforesaid; lifting the stay that resulted from decedent's death; conditionally granting plaintiff's motion for default; and denying defendant's cross-motion to dismiss for lack of capacity;

Contentions of the Parties

The above entitled action was commenced by the e-filing of a summons and verified complaint on June 28, 2019 setting forth Marjorie Raymond, as Proposed Administrator of the Estate of Emma Henry as the plaintiff (NYSCEF #1). Emma Henry died intestate on September 29, 2016, and no administrator was appointed in the subsequent three years. The Verified Complaint was served upon the Defendant via Secretary of State, on October 24, 2019 and an Affidavit of Service e-filed on October 29, 2019 (NYSCEF #2). No Answer was received, nor did defendant move to dismiss based upon the improper caption. On November 19, 2020, a motion seeking a default judgment against the defendant JNJ was made (NYSCEF # 4-9). In opposition to plaintiff's motion for a default, JNJ contends that as a "Proposed Administrator" is not a proper party, no action may be taken, nor relief sought (NYSCEF #14); and cross-moved for dismissal of plaintiff's complaint due to plaintiff's lack of capacity to bring an action

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prior to being appointed Administrator (NYSCEF # 15-16).

On July 27, 2021, Marjorie Raymond was appointed Administrator of the estate of Emma Henry (NYSCEF #21). Upon obtaining the Letters of Administration, plaintiff moved to substitute Marjorie Raymond as Administrator, and amend the caption accordingly. JNJ opposes the motion, contending that the underlying action was a nullity due to the proposed administrator's lack of capacity to bring the suit.

Discussion

Although the action was defective when commenced by service of the summons due to plaintiff's lack of capacity to sue as proposed administrator, and subject to dismissal due to that defect, defendant did not move to dismiss the action until after the time to answer had elapsed and plaintiff had moved for a default judgment. Plaintiff did not discontinue the action. Accordingly, the action was pending when the motion to dismiss was made and if the action were to be dismissed for plaintiff's lack of capacity to sue when the summons was served, the six-month extension provisions of CPLR 205(a) would be available to plaintiff if she sought to re-commence the action, notwithstanding the time bar of the Statute of Limitations. *Snay v. Cohoes Mem'l Hosp.*, 110 A.D.2d 1021 (1985).

The death of a party divests the court of jurisdiction to render a judgment until a proper substitution has been made, so that any step taken without it may be deemed void, including an appellate decision. N.Y. CPLR § 1015(a). *Dugger v. Conrad*, 189 A.D.3d 478, 138 N.Y.S.3d 7 (2020); *Matter of Einstoss*, 26 NY2d 181, 189-190 (1970);

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Thompson v. Raymond Kramer, Inc., 23 AD2d 746, 747 (1st Dept 1965).)

As such, defendant correctly contends that the plaintiff's motion for a default judgment must be denied. Moreover, defendant promptly responded to plaintiff's motion for default and moved to dismiss promptly. No prejudice from the short delay in responding ensued. However, contrary to defendant's contention, the action need not be dismissed due to the plaintiff's initial lack of capacity to sue, inasmuch as plaintiff promptly moved to substitute pursuant to CPLR 1015(a) once the Surrogates Court granted the Letters of Administration.

Under the circumstances of this case, where the decedent's plaintiff is her daughter, with a clear identity of interest, the commencement of the action before her appointment as an estate representative is a defect which may be remedied retroactively. Under these circumstances the decedent's unique interests are not jeopardized in the absence of a personal representative, nor are the defendant's rights prejudiced by validating the prior proceedings, particularly as defendant will have the opportunity to answer or move pursuant to CPLR 3211. Defendants were aware of the decedent's death at the inception of the lawsuit. As such, the substitution *nunc pro tunc* is a proper and valid exercise of the court's discretion. *Kucher v. Kucher*, 60 AD2d 644, 645 (2d Dept 1977; *Nieves on Behalf of Nieves v. 331 E. 109th St. Corp.*, 112 A.D.2d 59, 60, 491 N.Y.S.2d 350, amended sub nom. Angel L. Nieves, Individually & on Behalf of Cecilia Nieves, Deceased, Respondent, v. 331 E. 109th St. Corp. et al., Appellants., 112 A.D.2d 825 (N.Y. App. Div. 1985)

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CPLR 1015(a) provides that “[i]f a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties.” A motion for substitution should be granted in the absence of prejudice. *Carel Almo Serv. v. Weisskopf*, 58 A.D.2d 550, 551; *Rocha Toussier y Asociados, S.C. v. Rivero*, 184 A.D.2d 398, 398–99 (1992).

CONCLUSION

Here as there was no delay in seeking the substitution, nor prejudice to any party, the action is not dismissed. Defendant is deemed not in default and plaintiff is entitled to substitute in the appointed administrator in this action.

Accordingly, it is

ORDERED that plaintiff’s motion for a default judgment is DENIED; and it is further,

ORDERED that defendant’s cross-motion to dismiss is DENIED; and it is further,

ORDERED that plaintiff’s motion pursuant to CPLR 1015(a) to substitute Marjorie Raymond, as Administrator instead of the plaintiff Marjorie Raymond, as proposed Administrator, and amend the caption is granted without prejudice to any proceedings heretofore had herein and it is further,

ORDERED that the caption should read as follows:

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-----X
MARJORIE RAYMOND, as Administrator of the
Estate of EMMA HENRY, Deceased
Plaintiff,

- against -

Index No. 514401/2019

JNJ HOME HEALTH CARE, INC. and "JANE
DOE" (said name being fictitious and intended to
represent the home health aide who cared for the
decedent on June 29, 2016 and prior thereto),
Defendants.

-----X

And it is further,

ORDERED that Defendant's time to answer the complaint is extended to 30 days
from entry of this order.

This constitutes the decision and order of the court.

ENTER



Hon. Richard J. Montelione, J.S.C.

2022 SEP 19 AM 10:58
KINGS COUNTY CLERK
FILED