



TRUSTS AND ESTATES

Actions Against Deceased Parties

By Robert M. Harper

Many practitioners are familiar with the procedure for substituting a party's successor or personal representative into an action when that party dies while the action is pending. What they may not be aware of is the devastating effect that commencing an action against a previously deceased party can have on the plaintiff's claims. Although the New York Civil Practice Law and Rules ("CPLR") do not directly address that issue, New York courts have done so on several occasions. This article discusses recent decisions from the First and Second Departments and suggests how to avoid the procedural problems associated with commencing an action against a deceased party.

In *Marte v. Graber*, the plaintiff, "incarcerated and acting pro se, filed an unsigned, undated summons and complaint alleging malpractice" on the part of his former attorney, the decedent, in July 2005.¹

However, the plaintiff did so three months after the decedent died, in April 2005. The plaintiff then moved, by order to show cause, for a "stay" in order to identify and serve the personal representative of the decedent's estate. The Supreme Court, New York County, signed the plaintiff's order to show cause ex parte and "issued a second ex parte order extending [the plaintiff's] time for service . . ."

Nearly a year later, in June 2006, the plaintiff, then represented by counsel, moved to substitute the decedent's personal representative into the action as the defendant. The plaintiff also sought leave to amend the summons to reflect a claim for a breach of contract, rather than legal malpractice. The Supreme Court granted both of the plaintiff's motions.

On appeal, the First Department held that the plaintiff's action was a nullity from the very start, given the fact that the decedent died before the plaintiff commenced the action. Noting that the "dead cannot be sued[,] the Appellate Division also explained that the nullity could not be remedied by substituting the personal representative of the decedent's estate into the action. Accordingly, the First

Department reversed the Supreme Court's decisions and dismissed the plaintiff's action.

The decision to commence an action against a deceased person, rather than the personal representative of that person's estate, can have dire consequences for a plaintiff, as evidenced by the Second Department's decision in *Arbaelaez v. Chun Kuei Wu*.²

There, the plaintiff commenced an action against the defendant in January 2001, seeking to recover for injuries he suffered in an automobile accident with the defendant in December 1998. However, the plaintiff did so more than a year after the defendant's death.

In February 2004, the plaintiff moved, for the first time, to have a personal representative appointed for the decedent's estate for the purpose of defending the plaintiff's action. Although the defendant's insurance carrier initially appeared in the action and even filed an answer to the plaintiff's complaint on the defendant's behalf, the insurance carrier cross-moved for the dismissal of the plaintiff's action. There were two bases for the insurance carrier's cross-motion: the plaintiff's action was a nullity because the defendant died before the plaintiff commenced it; and the period within which to commence a personal injury action against the decedent's estate had expired, even with the addition of the 18 month tolling period after the defendant's death.

Upon consideration of the parties' contentions, the Supreme Court, Kings County, denied the plaintiff's motion, granted the insurance carrier's cross-motion, and dismissed the action against the defendant. The Second Department affirmed the Supreme Court's decision, noting that a "plaintiff [cannot] commence an action during the period between the death of a potential defendant and the appointment of a representative of the estate . . ." As a result, the Appellate Division held that the plaintiff's action against the defendant was a nullity, notwithstanding the insurance carrier's decision to appear and file an answer on behalf of the deceased defendant.

The passage of time between the date of the accident and the date on which the plain-

tiff sought to have a representative appointed for the defendant's estate was, however, more problematic for the plaintiff. During the five year period between the accident and the plaintiff's motion, both the statute of limitations for the plaintiff's claim and the tolling period following the decedent's death expired. Although the plaintiff argued that the insurance carrier should be estopped from relying on the statute of limitations since the insurance carrier appeared in the action and filed an answer on behalf of the defendant, the court explained that the plaintiff knew about the defendant's death approximately two years before the limitations period expired and therefore could not rely on an estoppel-based theory to avoid the statute of limitations. As a result, the plaintiff was barred from seeking to have a representative appointed for the defendant's estate and then commencing the personal injury action anew.

To avoid the procedural problems that the plaintiffs in *Marte* and *Arbaelaez* encountered, the prudent practitioner will recognize the need to commence an action to recover for a decedent's misconduct against the representative of the decedent's estate, rather than the decedent him or herself. If there is no personal representative of the estate at the time that the practitioner seeks to commence the action, the plaintiff should then petition for the appointment of an administrator pursuant to section 1002 of the Surrogate's Court Procedure Act.³

The failure to follow these principles, when combined with the commencement of an action against a previously deceased party, will render the action a nullity and may have drastic consequences for statute of limitations purposes.

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1. *Marte v. Graber*, N.Y.L.J., Nov. 19, 2008, at 26, col. 1 (1st Dep't).

2. *Arbaelaez v. Chun Kuei Wu*, 18 A.D.3d 583 (2d Dep't 2005).

3. S.C.P.A. § 1002.



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