At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of April, 2024.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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HEASHY ITZKOWITZ, as administrator for the ESTATE OF ABRAHAM STERN,

Plaintiff,

-against-

Index No.: 16215/2012

DECISION AND ORDER

SHANA STERN,

Defendant.

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The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Notice of Motion/Affirmation in Support/Exhibits.....	4 – 22
Notice of Cross-Motion/Affirmation in Opposition to Motion and in Support of Cross Motion/Exhibits.....	47 – 69
Affirmation in Opposition to Cross-Motion.....	72
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Non-party David Stern ("Stern") moves for an order (1) pursuant to CPLR 3216, restoring the instant action to active status;[1] (2) permitting Plaintiff to file a Note of Issue and Certificate of Readiness; and (3) amending the caption to substitute him in place of Heashy Itzkowitz ("Itkzowitz") (Mot. Seq. No. 6). Defendant Shana Stern ("Defendant") cross-moves for an order, pursuant to CPLR 3216, dismissing the complaint for failure to prosecute (Mot. Seq. No. 7).

In August 2012 this action was commenced by Itzkowitz, as administrator of the Estate of Abraham Stern, seeking a declaratory judgment determining ownership of real property

[1] Plaintiff Hearshy Itzkowitz's previous motion to restore the matter to active status (Mot. Seq. No. 5) was denied without prejudice by Justice Lawrence Knipel on February 16, 2021. In the order, Justice Knipel noted that Plaintiff had failed to provide what outstanding issues remained preventing the case from proceeding to trial and Plaintiff provided scarce details as to how and why the action went unattended to for five years.

located at 1789 East 17th Street in Brooklyn, New York (the "Property"). The Property was owned by the decedent Abraham Stern. Non-party Stern is the decedent's son and was previously married to Defendant. In the complaint, Itzkowitz alleged that Defendant made false representations to the Supreme Court in her divorce proceedings, which concluded in a Judgment of Divorce (a) deeming the Property as marital property, (b) giving Defendant exclusive use and occupancy until their youngest child reached the age of majority and (c) restraining Stern from selling the Property until such time. Itzkowitz alleged that the Property was never conveyed to Defendant or Stern and is part of the Estate of Abraham Stern. The matter was administratively marked off the calendar on or about September 25, 2015 when the parties failed to appear at a conference, prior to the filing of a note of issue.

The Court will first address the portion of the motion seeking to substitute the named administrator and amend the caption. Abraham Stern passed away on February 14, 2005, and Itzkowitz was appointed the administrator of his estate on or about March 15, 2012. After the prior motion to restore was denied in 2021, Stern contends that he frequently asked Itzkowitz to renew the application to restore the action. Stern claims that once it became clear that no such motion was forthcoming, he began the process to revoke Itkowitz's Letters of Administration. Itzkowitz's Letters of Administration were revoked on November 3, 2022 by the Honorable Carol Robinson-Edmead, and David Stern was appointed in his stead. Defendant argues that Stern has not made a formal motion pursuant to CPLR 1021. Defendant further argues that Stern has not been diligent in seeking substitution, Stern's attempt to substitute is highly prejudicial to her and the action is meritless.

As an initial matter, "there is no requirement that a movant identify a specific statute or rule in the notice of motion, only that the notice "specify ... the relief demanded and the grounds therefor" (*Matter of Blauman-Spindler v Blauman*, 68 AD3d 1105, 1106 [2d Dept 2009]). Instead, "a court may grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party" (*Frankel v Stavsky*, 40 AD3d 918, 918-19 [2d Dept 2007]). Though Defendant avers that the failure to formally move under CPLR 1021 deprived her of the opportunity to be heard in opposition, this is belied by the arguments contained in her cross-motion. Thus, the Court will proceed with the merits of Stern's motion to substitute.

Under CPLR 1021, "[i]f the event requiring substitution [of a party] 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'" (CPLR 1021). "The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has potential merit" (Al*ejandro v N. Tarrytown Realty Assoc.*, 129 AD3d 749, 749 [2d Dept 2015]).

Here, Stern was appointed as the substitute administrator on November 3, 2022 and filed the instant motion on or about February 7, 2023. In his affirmation, Stern asserts that after his pleas to have Itzkowitz file another motion to restore went unheard, it was apparent that Itzkowitz "would need to be removed so this matter could finally go forward." The order denying Plaintiff's initial motion to restore was entered on or about February 24, 2021 and Stern commenced the proceeding to revoke Itzkowitz's Letters of Administration in June 2022. Stern failed to explain why it took over a year from the denial of the motion to commence the proceeding in Surrogate's Court.[2] Though the delay in obtaining Letters of Administration shows a lack of diligence, "[e]ven if the plaintiff's explanation for the delay is not satisfactory, the court may still grant the motion for substitution if there is no showing of prejudice and there is potential merit to the action, in light of the strong public policy in favor of disposing of matters on the merit" (*Navas v NY Hosp. Med. Ctr. of Queens*, 180 AD3d 796, 797-798 [2d Dept 2020]).

In arguing prejudice, Defendant contends that the "lawyer who wrote the trust and the indenture professes to have no knowledge of the matter, and the transferor is dead." Defendant fails to establish how this amounts to prejudice, since the decedent had passed before the commencement of this action and the parties had an opportunity to depose the lawyer. This is not a situation where Plaintiff's delay had any bearing on Defendant's ability to obtain discovery (*see Linyard v Long Is. Coll. Hosp.*, 2023 NY Slip Op 30740[U] [Sup Ct, Kings County 2023] [finding prejudice where "witnesses are no longer employed at their respective facilities and, those still employed, may not remember the events that happened 14 years ago"]). Moreover, Plaintiff concedes that the case is ready to proceed to trial and Defendant has not argued that further discovery is necessary. Defendant also states that the underlying events occurred over 19

[2] Stern also failed to proffer an explanation as to why he only moved for Letters of Administration after the denial of the motion to restore but not during the four-year period between when the case was marked off and the first motion to restore was filed.

years ago; however, mere passage of time is insufficient to establish prejudice (*Hemmings v Rolling Frito-Lay Sales, LP*, 220 AD3d 754, 757 [2d Dept 2023]). Defendant further argues that she is prejudiced due to her assumption of debt to pay off a tax lien, believing that Stern had abandoned this lawsuit. Defendant's suggestion that she would not have assumed the debt if the case was still ongoing is unconvincing.[3]

Though Defendant deems the lawsuit as spurious, Defendant's prior motion to dismiss pursuant to CPLR 3211 was denied by Justice David I. Schmidt on June 6, 2013[4] (*see Largo-Chicaiza v Westchester Scaffold Equip. Corp.*, 90 AD3d 716, 717 [2d Dept 2011] [finding that action had merit when complaint was reinstated]). Defendant argues that this action is barred by the statute of limitations; however, she acknowledges that she did not raise the issue of the expiration of the statute of limitations as an affirmative defense and tries to explain this error by stating that she filed her answer pro se. Nonetheless, Defendant was represented by counsel at the time of the filing of her motion to dismiss in which a statute of limitations defense was not raised (*see Ross v Epstein*, 26 AD2d 658, 658-659 [2d Dept 1966] [one-motion rule barred attempt to invoke statute of limitations defense not raised in prior motion]; CPLR 3211 [e]).

While the Court finds that Plaintiff did not proffer sufficient explanation for the delay in moving to substitute himself in place of Itzkowitz, Defendant has not shown prejudice. Accordingly, Plaintiff's motion to amend the caption to reflect David Stern as the administrator is granted.

The Court will next address the portion of Plaintiff's motion seeking to restore the matter to active status and Defendant's cross-motion to dismiss for want of prosecution. Plaintiff argues that no order of dismissal was issued pursuant to 22 NYCRR 202.27 and no 90-day notice was served on Plaintiff requiring him to file the note of issue pursuant to CPLR 3216. Moreover, Plaintiff contends that even if a 90-day notice was served, the action should be restored per CPLR 3404 because Plaintiff has shown a justifiable excuse for the delay and the existence of a meritorious cause of action. In opposition, Defendant argues that the arguments offered by Stern are the same as those made in the prior motion to restore and despite Justice Knipel's order detailing deficiencies in the moving papers.

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[3] As an exhibit to his affidavit in reply, Stern attached a letter purportedly reflecting the existence of another lien on the Property.

[4] In her motion to dismiss, Defendant argued that the decedent had conveyed the property prior to his death, and that Itzkowitz lacked legal capacity because the property was not part of decedent's estate (NYSCEF Doc No. 77 at 61-72).

CPLR 3404 does not apply to actions, such as this one, in which a note of issue has not yet been filed (*U.S. Bank N.A. v Salem*, 191 AD3d 921 [2d Dept 2021]). "When a plaintiff has failed to file a note of issue by a court-ordered deadline, restoration of the action to the active calendar is automatic, unless either a 90–day notice has been served pursuant to CPLR 3216 or there has been an order directing dismissal of the complaint pursuant to 22 NYCRR 202.27" (*Rosario v Cummins*, 222 AD3d 897, 897 [2d Dept 2023]). CPLR 3216 requires that the court or a defendant serve a demand in writing requiring "the plaintiff [to] resume prosecution of the action and serve and file a note of issue within 90 days after receipt of the order or demand, and also stating that the failure to comply with the order or demand will serve as the basis for a motion to dismiss the action" (*Amos v Southampton Hosp.*, 131 AD3d 906, 907 [2d Dept 2015]; CPLR 3216 [b] [3]). If the demand is served by the court, it must "set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation" (CPLR 3216 [b] [3]; *see Designer Limousine, Inc. v Auth. Transportation, Inc.*, 218 AD3d 540, 541-42 [2d Dept 2023]).

It is undisputed that the Court did not issue an order pursuant to 22 NYCRR 202.27 and a 90-day notice was not served. Instead, Defendant contends that a court order setting deadlines for the filing of the Note of Issue is the equivalent of a 90-day notice. According to Defendant, the Note of Issue was extended four times, the last being "embodied in a September 11, 2015 order." The Defendant's argument is untenable. First, Defendant failed to attach said order as an exhibit to the moving papers. The referenced "Exhibit L" is a stipulation extending discovery deadlines to conduct depositions. Second, Defendant has not argued that the stipulation or the purported September 2015 order contains the requisite language under CPLR 3216.[5]

Even if the parties failed to comply with an order imposing a deadline to file the note of issue, "courts are prohibited from dismissing an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met" and a "90-day demand to file a note of issue is one of the statutory preconditions" (*Alli v Baijnath*, 101 AD3d 771, 771 [2d Dept 2012]

[5] Defendant quoted the following language from *Benitez v. Mut. of Am. Life Ins. Co.*, 24 AD3d 708 [2d Dept 2005]: "Contrary to the plaintiff's contentions, the compliance conference order had the same effect as a valid 90-day notice pursuant to CPLR 3216." Defendant's reliance on *Benitez* is unpersuasive. While Defendant omitted the internal citations to the quoted language, upon further review, the omitted cases involved orders that specifically warned that a failure to comply with the order may serve as a basis for dismissal pursuant to CPLR 3216 (*see Vinikour v Jamaica Hosp.*, 2 AD3d 518, 519 [2d Dept 2003]; *Aguilar v Knutson*, 296 AD2d 562 [2d Dept 2002]; *Werbin v Locicero*, 287 AD2d 617 [2d Dept 2001]). No documentation was provided to the Court reflecting such language in the compliance conference order.

[internal quotation marks and citations omitted]; *see also Waterfall Victoria Master Fund, Ltd. v Gurley*, 172 AD3d 783 [2d Dept 2019]). The "failure of [a defendant] or the court to afford [plaintiffs] adequate written notice constitutes a failure of a condition precedent to the dismissal" (*Matter of Airmont Homes, Inc. v Town of Ramapo*, 69 NY2d 901, 902 [1987]; *see also Amos*, 131 AD3d at 906-07). The Court need not consider whether a reasonable excuse for the delay in moving to restore was provided under these circumstances (*OneWest Bank, FSB v Segal*, 221 AD3d 1020, 1022-23 [2d Dept 2023]; *Fifth Third Mtge. Co. v Schiro*, 210 AD3d 953, 954 [2d Dept 2022]). Accordingly, Stern's motion to restore is granted and Defendant's cross-motion is denied.

Accordingly, it is hereby

ORDERED, that non-party David Stern's motion (Mot. Seq. No. 6) is granted in its entirety; and it is further

ORDERED, that the caption be amended to reflect David Stern, as administrator of the Estate of Abraham Stern; and it is further

ORDERED, that the parties shall file the Note of Issue within thirty days of Notice of Entry of this Order.

ORDERED, that Defendant Shana Stern's cross-motion to dismiss (Mot. Seq. No. 7) is denied.

All other issues not addressed herein are without merit or moot.

This constitutes the decision and order of the Court.

Hon. Ingrid Joseph, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice