

Attorney's Death Is Not Excuse For Allowing Statute of Limitations to Expire

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[*Cabrera v. Collazo*, 979 N.Y.S.2d 326 \(2014\)](#)

Brief Summary

The trial court denied the defendants' motion to dismiss, which was based on the argument that the attorney handling the plaintiff's underlying wrongful death claim passed away shortly before the statute of limitations expired. The attorney died 11 days before the statute of limitations expired on his client's wrongful death case. Under the bizarre facts, the court found that at the time of the attorney's death, the expiration of the statute of limitations was a foregone conclusion. Intervention by substitute counsel was not possible. However, the attorney's death was foreseeable and steps should have been taken to ensure the underlying wrongful death claim was timely filed. The appellate court thus affirmed the denial of the motion to dismiss.

Complete Summary

This case involved the issue of whether a legal malpractice case can proceed against an attorney's estate when the attorney died shortly before the underlying claim became time-barred. The New York Appellate Court found that the legal malpractice case could proceed.

On October 26, 2008, Raquel Gutierrez died as a result her doctor's negligent care. The next month, her estate retained one of the defendants, "Defendant 1," to commence a wrongful death action. It appears that nothing was done to pursue the case for over a year. In March 2010, the plaintiff's administrator entered into a retainer agreement with the other defendant, "Defendant 2." The retainer agreement provided that Defendant 1 would be the contact between the client and Defendant 2, but that Defendant 1 would not be involved in the litigation.

The following month, Defendant 1 was convicted of immigration and visa fraud. In September 2010, Defendant 2 filed a certificate of lateness with the Surrogate's Court. He followed that with a letter dated September 30, 2010,

that stated letters of administration needed to be issued as soon as possible because the statute of limitations on the wrongful death case would be expiring shortly. The letters were issued on October 6, 2010.

Defendant 1 was sentenced to 24 months in prison on October 14, 2010. On October 24, 2010, Defendant 2 died of cancer. On November 4, 2010, the statute of limitations expired on the wrongful death claim, and no complaint had been filed.

In August 2011, Defendant 2's office sent the administrator the case file. It was only at this point that the administrator discovered that Defendant 2 was dead and that the statute of limitations had expired.

The estate filed a legal malpractice action against Defendant 1, Defendant 2's estate and Defendant 2's office. The estate and office of Defendant 2 filed a motion to dismiss and argued that Defendant 2's death terminated the attorney-client relationship. They argued that because Defendant 2's death was prior to the expiration of the statute of limitation, there was no cause of action. The court disagreed and found the legal malpractice cause of action accrued only upon the running on the statute of limitations, but this fact "does not require the conclusion that an attorney is absolved of responsibility for any and all consequence of his neglect of the matter simply because it occurred *prior* to accrual of an action claim."

The court found two facts important: the September 30, 2010 letter from Defendant 2 expressed concern that the limitations period was about to expire and the fact he appeared to die from cancer. Because his death appeared to be from cancer, his death may have been foreseeable. Defendant 2 could not rely on Defendant 1 since he had been convicted and sentenced to prison. However, Defendant 2 did not engage any of three attorneys associated with his firm as of counsel to timely file a complaint. Accordingly, upon Defendant 2's death, "the running of the statute of limitations against his client was a foregone conclusion because intervention by substitute counsel was not possible."

The court did leave open the possibility for the Defendant 2's estate and office to prevail on summary judgment if facts could demonstrate that "[He] was suddenly struck by a fatal and totally incapacitating episode of cancer rendering him unable to engage the services of another attorney to file a timely complaint on behalf of plaintiff or to communicate the necessity to do so."

Significance of Opinion

Here, the foreseeability of death from cancer was the key factor. If an attorney has a disease that makes death foreseeable, that attorney should have a plan in place to ensure that the attorney's cases are taken over by counsel who will be able preserve the client's rights.

For more information, please contact [Terrence P. McAvoy](#), Adam R. Vaught.

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Terrence P. McAvoy

Of Counsel

📞 312-704-3281