

**Matter of Rosa**

2022 NY Slip Op 32494(U)

July 21, 2022

Surrogate's Court, New York County

Docket Number: File No. 2020-3344

Judge: Nora S. Anderson

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SURROGATE'S COURT : NEW YORK COUNTY

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Administration Proceeding,  
Estate of

File No. 2020-3344

KEARA ANGELICA ROSA,

Deceased.  
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A N D E R S O N , S .

Keara Rosa died at age 27 on August 5, 2020, as a result of a traffic accident. Her mother, Alma Rosa ("Rosa"), claiming to be her sole distributee, petitioned for limited letters of administration in order to bring a personal injury/wrongful death suit (SCPA § 1001[1][d]). Akiem Junior Baker ("Baker") has cross-petitioned for limited letters of administration, claiming to have priority as decedent's surviving spouse (SCPA § 1001[1][a]). Rosa now seeks summary dismissal of Baker's cross-petition on the ground that the marriage between decedent and Baker was effectively ended before decedent's death and he was not a surviving spouse (CPLR 3212).

Summary judgment is appropriate where a movant makes a prima facie showing of entitlement to judgment as a matter of law and there is insufficient evidence from the adversary to demonstrate the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant meets her burden by tendering sufficient proof in admissible form to establish entitlement to judgment, the party opposing summary judgment must come forward with evidence raising at least one material factual

issue requiring a trial (see *Friends of Animals, Inc. v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]). Where no genuine issues of fact are raised, summary judgment is appropriate (*Matter of Ryan*, 34 AD3d 212 [1<sup>st</sup> Dept 2006]; *Matter of Tully*, 227 AD2d 288 [1st Dept 1996]; *Matter of Coniglio*, 242 AD 2d 901 [4<sup>th</sup> Dept 1997]).

To make her prima facie case for summary judgment, Rosa relies upon the depositions of the parties; certified copies of the record of the divorce action *Baker v Rosa*, # 67535/2019, Sup Ct, Westchester County, filed October 21, 2019; and the January 24, 2002, affirmation of Special Referee James Garfein (“Special Referee Garfein”), the judicial officer to whom the divorce action was assigned.

From this record, the following facts are not in dispute. Baker, a citizen of Jamaica, came to the United States in October 2017 on a visitor’s visa. He and decedent met on a dating app, first communicating by text. In January 2018 they met in person and became engaged the same month. On February 18, 2018, they were married. No friends or family attended the wedding. The couple lived together until late 2019, when decedent left the marital home after an argument over whether Baker would give her \$250 to have her hair done. Baker did not recall the precise

date of the argument, but thought it was in early October 2019.

On October 21, 2019, Baker's attorney initiated an action for an uncontested "no-fault" divorce in Westchester Supreme Court (*Baker v Rosa*, # 67535/2019, Sup Ct, Westchester County, filed October 21, 2019, Garfein, Special Ref.). Pursuant to DRL §170(7), Baker swore under oath in the complaint and in an accompanying affidavit, both signed on October 16, 2019, 1) that the marital relationship had been irretrievably broken for at least six months, 2) that there were no children of the marriage, and 3) that there were no unresolved economic issues between the parties, thus fulfilling the requirements for the granting of a "no-fault" divorce.<sup>1</sup> An affidavit of service establishes personal service of the summons and verified complaint on decedent on January 27, 2020. Thereafter, decedent did not enter an appearance or file any opposition. Eventually, the case was assigned to Special Referee Garfein, who was designated and authorized by The Chief Administrative Judge to dispose of uncontested matrimonial matters, including proceedings on default such as this one.

*Baker v Rosa* was scheduled to appear on Special Referee Garfein's calendar on July 28, 2020. The matter was not

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<sup>1</sup>These requirements are set out on the court system's public information website Court Help for unrepresented litigants seeking uncontested divorces in Westchester County, at [www.nycourts.gov/LegacyPDFS/divorce/pdfs/Divorce-Packet-Instructions.pdf](http://www.nycourts.gov/LegacyPDFS/divorce/pdfs/Divorce-Packet-Instructions.pdf)).

considered on that day only because, due to the COVID pandemic, an administrative stay was in effect in the Westchester Supreme Court which prohibited the entry of default judgments. Decedent died shortly thereafter, on August 5, 2020.<sup>2</sup>

In his affirmation, Special Referee Garfein states that because of the administrative stay in effect at the time the matrimonial action appeared on his calendar, he did not have the opportunity to review the case file at that time. When he did later, at the request of Rosa's counsel, he found the papers to be "in order in all respects," and "legally sufficient." He further avers that "there would have been no impediment to me signing the proposed Findings of Fact/Conclusions of Law and Judgment of Divorce and I would have signed it."

Baker argues that Special Referee Garfein's affirmation does not definitively establish that he would have granted Baker a divorce on the papers he submitted. He argues that there is equivocation in the Special Referee's statements and that the Special Referee might not have granted the divorce had he been ruling on the case at the time rather than looking at the case file in retrospect. In addition to being wholly speculative, this argument wilfully overlooks Special Referee Garfein's

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<sup>2</sup>The matter was adjourned two more times after decedent's death, but was not considered because the stay on default judgments remained in effect. On October 2, 2020, Baker filed a notice of voluntary discontinuance. He does not argue that this filing has any effect on the issue before the court.

completely unreserved statement in his affirmation that but for the COVID-related stay, he would have signed both the Findings of Fact/Conclusions of Law and the Judgment of Divorce.

Baker is correct in his argument that divorce actions, which are considered personal in nature, generally abate on the death of one of the parties (see e.g. *Acito v Acito*, 72 AD3d 493 [1<sup>st</sup> Dept 2010]). There is, however, a well-established exception to abatement, which applies when all issues in the divorce action have been resolved and all that remains is for the court to complete the "ministerial act" of signing and entering the divorce judgment (*id.* at 493, quoting *Cornell v Cornell*, 7 NY2 164, 170 [1959]). Where the ministerial act exception applies, the rights of the parties are determined as if a divorce judgment had been entered before the death of one of them (see *Lewis v Green*, 295 AD2d 250 [1<sup>st</sup> Dept 2002]; *Zuckerman v Zuckerman*, 34 AD 3d 403 [1<sup>st</sup> Dept 2006]).

Baker argues that the ministerial act exception does not apply to the facts in this case because, in addition to not signing and entering a divorce judgment, the Special Referee did not sign the separate Findings of Fact/Conclusions of Law before decedent's death. He implies that the signing of this document required some exercise of judicial discretion which constituted more than a mere ministerial act. However, he cites no authority for this proposition in an uncontested divorce action being

granted on default. In fact, the ministerial act exception has been applied repeatedly in cases where all issues between the parties had been resolved by stipulation, but the findings of fact/conclusions of law as well as the divorce judgment had not been signed (see e.g. *Zuckerman v Zuckerman*, 34 AD 3d 403 [1<sup>st</sup> Dept 2006] [where parties had settled all substantive issues but plaintiff died prior to the entry of findings of fact and settlement of the judgment of divorce, the judgment was properly entered nunc pro tunc]; *McKibben v Jenkin*, 41 AD3 795 [2d Dept 2007] [same]).

Numerous Surrogate's Court cases support this conclusion. For example, in *Matter of Mirizzi*, 187 Misc 2d 481 (Sur Ct, Richmond County 2001, affd on other grds, 737 NYS2 542 [2d Dept 2002]), the spouses had stipulated in open court to the terms of their divorce settlement, and all papers needed to effectuate an uncontested divorce were filed with the court before the husband's death. However, as here, the requisite findings of fact and conclusions of law had not been signed before the husband's death. The court invalidated a bequest to the wife in decedent's will on the ground that the parties were divorced, noting that "[t]he failure of the Court in not signing the unopposed judgment of divorce in a timely fashion can be attributed only to the failure of the system as established in the matrimonial part of the Supreme Court ...". Other cases are

in accord (see e.g. *Matter of Jon David E.*, 48 Misc 3d 1223(A), 26 NYS3d 213 [Sur Ct, Dutchess County 2015]; *Matter of Savino*, NYLJ, January 25, 2010 at 30, col 3 [Sur Ct, Suffolk County]).

The ministerial act exception applies to this case. Baker filed the paperwork necessary to secure a judgment of divorce on default. There were no issues requiring determination or matters that required further court attention or the exercise of the court's discretion. Only an administrative stay on the signing of default judgments caused by the COVID pandemic prevented a timely final resolution of the matter before decedent's death. The judicial officer to whom the matter was assigned has stated that there was nothing left to be done other than his signing of the Findings of Fact/Conclusions of Law and the Judgment of Divorce, and that, had he not been constrained by the administrative stay, he would have signed them. Accordingly, as a matter of law, the divorce action did not abate. Based on the foregoing, the motion for summary judgement is granted and the cross-petition is dismissed.

A decree has been signed granting Alma Rosa's petition for Limited Letters of Administration upon her duly qualifying according to law.

Dated: July 21, 2022

  
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