

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

v.

**PLATINUM MANAGEMENT (NY) LLC;
PLATINUM CREDIT MANAGEMENT, L.P. ;
MARK NORDLICHT;
DAVID LEVY;
DANIEL SMALL;
URI LANDESMAN;
JOSEPH MANN;
JOSEPH SANFILIPPO; and
JEFFREY SHULSE,**

Defendants.

Civil Case No. 16-6848 (BMC)

ECF CASE

**SECURITIES AND EXCHANGE COMMISSION’S OBJECTION TO MOTION BY THE
ESTATE OF URI LANDESMAN FOR ORDER DISMISSING THIS ACTION AGAINST
DEFENDANT URI LANDESMAN UNDER FEDERAL RULE OF CIVIL PROCEDURE
25(a)(1)**

Plaintiff Securities and Exchange Commission (the “SEC”), objects to the April 2, 2019 motion by the estate of Uri Landesman (“Landesman Estate”) to dismiss this action against defendant Uri Landesman under Federal Rule of Civil Procedure 25(a)(1) (the “Dismissal Motion”; Dkt.#458). As set forth below, all non-receivership related proceedings in this case have been completely stayed since July 7, 2017. Accordingly, Rule 25(a)(1)’s requirement that a motion to substitute a party within 90 days after the service of a statement noting death has been stayed and the Dismissal Motion should be denied.

RELEVANT BACKGROUND

On December 19, 2016, the SEC commenced this civil enforcement action naming, among other defendants, Uri Landesman. On July 7, 2017, Chief Judge Irizarry, in response to a motion to stay proceedings filed by the United States Attorney for the Eastern District of New York, entered an order implementing “a complete stay of the civil action” except with respect to matters “affecting the responsibilities and actions of the Receiver in disposing of the receivership assets.” (Memorandum & Order, Dkt.#217 at 13) On October 4, 2018, former counsel for Mr. Landesman filed a notice under Fed. R. Civ. P. 25(a)(1) on the docket advising of Mr. Landesman’s death on September 14, 2018, but without moving to lift the stay. (Dkt.#390) On April 2, 2019, the Landesman Estate, again without first seeking to lift the stay in this action, filed this Dismissal Motion.

ARGUMENT

Rule 25(a)(1) provides as follows:

If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

Fed. R. Civ. P. 25(a)(1).

The Landesman Estate acknowledges in footnote 1 to the Dismissal Motion that this case was stayed, but contends nonetheless “that the time limits imposed by Rule 25 still apply.” (Dismissal Motion at 2) For this proposition, the Landesman Estate cites to three district court cases, none of which involved a stay of proceedings, that dismissed claims by or against a decedent when the 90-day period set forth in the Rule had lapsed. (Dismissal Motion at 2 & 3).

However, cases that have addressed the exact issue here, whether a stay of proceedings tolls the 90-day period set forth in Rule 25(a)(1), have held that it does. In *Lizarazo v. Miami-Dade Corr. & Rehab. Dep't*, 878 F.3d 1008 (11th Cir. 2017), the Eleventh Circuit reviewed a district court order that dismissed the claims brought by a decedent notwithstanding the fact that the district court had entered a 90-day stay of proceedings that “closed the case for administrative purposes and said it would be reopened ‘if a proper motion is made within 90 days hereof.’” *Id.* at 1009. Shortly before the 90-day stay was to expire, the plaintiff filed a motion to extend the stay for another seven days to be able to substitute the estate representative, and the defendants opposed the motion, arguing that the 90-day period set forth in Rule 25(a)(1) ran from the date of the service of the notice of death. The district court held that the 90-day period in the Rule was mandatory and dismissed the action. *Id.* at 1010.

The Eleventh Circuit reversed. First, the Court held that the 90-day period set forth in Rule 25(a)(1) was not mandatory, and that Rule 6(b) permitted the extension of that time.¹ *Id.* at 1011-1012. The Court then stated that “[h]ere, the District Court went straight to the ‘excusable neglect’ analysis [in Rule 6(b)(1)(B)] without considering whether its December 29 stay effectively extended the Rule 25 period.” *Id.* at 1012.

¹ Fed. R. Civ. P. 6(b) provides that:

(1) When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

Accordingly, the Court remanded the matter to the district court to “consider whether its December 29 order allowing the case to be reopened ‘if a proper motion is made within 90 days hereof’ had the effect of extending the Rule 25 deadline.” *Id.*

On remand, the district court, in an unpublished order, held that its stay order “effectively extended the Rule 25 period for filing a motion to substitute parties in accordance with Rule 6(b).” (Ex. A at 6)

Other courts addressing whether a stay of proceedings tolled the Rule 25(a)(1) period have held that it does. *See Hightower v. Birdsong*, 2017 U.S. Dist. LEXIS 141275 at *15-16 (N.D. Cal., Aug. 31, 2017) (after defendant died, Court entered order staying the proceedings and held, among other things, that “[i]f defense counsel wishes to trigger the 90-day period in Rule 25(a), she should move to lift the stay and reopen the action at the same time she files and properly serves a suggestion of death.”); *Serrano v. Henry*, 2015 U.S. Dist. LEXIS 31323 at *4 (S.D. FL, March 13, 2015) (“Regardless of Rule 25(a)’s mechanical requirements, the Court would grant Mr. Serrano an extension of the 90-day substitution requirement because he justifiably relied on the Court’s order staying the case and placing it in civil suspense due to Mr. Henry’s failing health. During that time, the Court stayed all activity (and pertinent deadlines) until the case was restored.”); *Blachy v. Butcher*, 190 F.R.D. 428, 431-32 (W.D. Mich. 1999) (Court entered order staying proceedings and tolling 90-day period set forth in Rule 25(a)(1)). *See also Progressive N. Ins. Co. v. Alivio Chiropractic Clinic, Inc.*, 2006 U.S. Dist. LEXIS 31880 at *5 (D. Minn., May 16, 2006) (Court denied motion to substitute a party under Rule

25(a)(1), holding that “[t]he Court stayed this case with two narrow exceptions, neither of which contemplated a motion under Rule 25.”²

CONCLUSION

Here, the blanket stay of proceedings has been in place since July 2017, well before Mr. Landesman’s death. The Landesman Estate never moved to lift the stay. Accordingly, the Court should deny the Dismissal Motion and grant such other and further relief as is just.

Dated: New York, New York
April 7, 2019

Respectfully submitted,

By: /s/Neal Jacobson
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² Although we contend that the Court need not reach this point, if the Court were to conclude that the existence of the stay is not dispositive, we submit that it was nevertheless reasonable for the SEC to rely upon the stay as a reason not to move to substitute an executor, and that its failure to do so should be excused under the doctrine of “excusable neglect.” *See Lizarazo*, 878 F.3d at 1012 (part of excusable neglect analysis for the district court on remand is the language in the district court’s order stating that the case would be reopened if a proper motion to substitute is filed within the 90-day court imposed stay of proceedings). Moreover, because an executor was only recently appointed, there is no prejudice to the Landesman estate.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EXHIBIT A

Case No. 1:16-cv-20558-UU

GUSTAVO LIZARAZO,

Plaintiff,

v.

MIAMI-DADE COUNTY, *et al.*,

Defendants.

ORDER

THIS CAUSE is before the Court upon remand from the Eleventh Circuit Court of Appeals (D.E. 95).

THE COURT is fully advised in the premises.

On December 29, 2017,¹ the Eleventh Circuit Court of Appeals reversed this Court's Order Denying Plaintiff's Motion for Extension of Stay of Proceedings (D.E. 83) and Order Denying Plaintiff's Motion to Reopen Case and Substitute Plaintiff (D.E. 90). The Eleventh Circuit remanded both Orders for the Court to consider whether its December 29, 2016 Order Granting Joint Motion for Stay of Proceedings (D.E. 78) "had the effect of extending the Rule 25 deadline to March 29[, 2018]."² D.E. 95 at *9. For the reasons outlined below, the Court finds that its December 29th Order (D.E. 78) did extend such deadline.

¹ The mandate was issued on February 14, 2018.

² In the event the Court "determines that the December 29 order did not extend the Rule 25 period," the Eleventh Circuit further instructed the Court to "turn to the question of whether [Plaintiff's] delay was the result of 'excusable neglect.'" D.E. 95 at *9.

BACKGROUND

On January 14, 2016, Plaintiff filed a Complaint against Defendants³ in the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. D.E. 1-2. On February 16, 2016, Defendants removed the case to the Southern District of Florida. D.E. 1. On November 17, 2016—in the midst of the discovery process—Plaintiff passed away. The next day, his attorney filed a Joint Motion for Stay of Proceedings Due to Death of Plaintiff (the “Joint Motion for Stay”) (D.E. 66). The Joint Motion for Stay noted that because Plaintiff had “passed away less than twenty-four hours [before], counsel [did] not yet have information as to the appropriate substitute party.” D.E. 66 ¶ 3. The parties therefore requested a ninety-day stay pursuant to Federal Rule of Civil Procedure 25(a)(1) to substitute a personal representative of Plaintiff’s estate.

Federal Rule of Civil Procedure 25 allows for substitution in the event that a party dies. The rule further states that: “[i]f the motion [for substitution] is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.” Fed. R. Civ. P. 25(a)(1). Thus, to start Rule 25’s ninety-day clock, a suggestion of death must be filed with the court and served on a personal representative of the deceased party. On November 22, 2016, Defendants filed a Suggestion on Record of Plaintiff’s Death (“Suggestion of Death”) (D.E. 68). On November 29, 2016, Defendants served the Suggestion of Death on Plaintiff’s father. D.E. 95 at *5. If the Rule 25 ninety-day period began to run when Plaintiff’s father was served, it would have expired on February 27, 2017.

However, on December 29, 2016, the Court entered an Order Granting the Joint Motion for Stay (D.E. 78). The Order administratively closed the case and stated that the case would be

³ The Court dismissed with prejudice all of Plaintiff’s claims against Defendants Miami-Dade County and the director of the Miami-Dade Corrections and Rehabilitation Department. D.E. 37.

reopened if “a proper motion is made within 90 days hereof.” D.E. 78 at *1. The Order also required Plaintiff’s attorney to file reports every thirty days on the status of the probate proceedings, and to notify the court within five days of the appointment of a personal representative. Given that the Order was filed on December 29, 2016, the stay expired on March 29, 2017.

Thereafter, Plaintiff’s attorney filed monthly status reports, as required by the Order. In his January 27, 2017 Status Report (D.E. 79), Plaintiff’s counsel stated that the family had made a “prompt request for a death certificate” and would be meeting with probate counsel on January 30, 2016 “to finalize the filing of appropriate probate proceedings, pending receipt of the death certificate.” *Id.* at *2. Counsel further stated that he was “cautiously optimistic that an Estate Personal Representative...w[ould] be appointed, and a motion to substitute plaintiff filed...before the next 30-day report [wa]s due with the Court.” *Id.* However, in his February 24, 2017 Status Report (D.E. 80), Plaintiff’s attorney stated that the family had “only recently obtained a final death certificate for Plaintiff”, and that probate counsel had obtained a hearing date of March 30, 2017, at which time an administrator of the estate would be appointed.” *Id.* at *1. Plaintiff’s attorney further stated that “[c]ounsel in California ha[d] been advised of this Court’s Order staying the matter and the deadlines therein, and [wa]s working to obtain an earlier court date on an expedited basis. Counsel [intended to] make further report and filings as appropriate and in accordance with this Court’s Order.” *Id.* at *2.

On March 13, 2017, Plaintiff’s attorney filed a Motion for Extension of Stay of Proceedings (D.E. 81) (“Motion for Extension of Stay”) stating that probate counsel had been unable to get an earlier hearing date. *Id.* ¶ 4. Given that the March 30, 2017 hearing to appoint a representative would take place just after the Court’s ninety-day stay expired, Plaintiff’s attorney

requested a seven-day extension in order to file his motion to substitute parties. *Id.* ¶ 6. Defendants opposed the extension, arguing that the text of Rule 25(a)(1) required the Court to dismiss an action if a motion for substitution had not been made within ninety days of service of the Suggestion of Death on a nonparty successor. D.E. 82. Given that Defendants served Plaintiff's father with the Suggestion of Death on November 29, 2016, Defendants argued that the ninety-day period had expired.

On March 28, 2017, Plaintiff's attorney filed a Motion to Reopen Case and to Substitute Plaintiff (the "Motion to Reopen and Substitute Plaintiff") (D.E. 86). In the Motion, Plaintiff's counsel informed the Court that probate proceedings had been initiated in California, and it was "anticipated that Movant, Gustavo Antonio Lizarazo, w[ould] be appointed as Personal Representative" of Plaintiff's estate.⁴ D.E. 86 ¶ 2. Counsel further stated that he was filing the Motion to Reopen "in an abundance of caution before the expiration of the stay imposed by the Court's December 29, 2016 Order (D.E. 78)". *Id.* ¶ 4. Plaintiff's lawyer asserted that his Motion to Reopen and Substitute Plaintiff was timely "due to the Court's *de facto* extension pursuant to the December 29, 2016 Order (DE 78)."⁵ D.E. 86 at *3.

On April 14, 2017, the Court issued an Order Denying the Motion to Reopen and Substitute Plaintiff, and consequently, denying as moot the Motion for Extension of Stay (D.E.

90). According to the Court:

Rule 25(a)(1) explicitly states that if the motion is not made within ninety (90) days after service of a statement noting the death, the action must be dismissed. Such language is mandatory, not discretionary. Plaintiff's father was served with the Suggestion of Death

⁴ Plaintiff's father was appointed administrator of his son's estate on April 3, 2017, and Plaintiff filed the Letters of Administration on April 5, 2017. D.E. 88.

⁵ Plaintiff also argued that his Motion to Reopen and Substitute Party was not untimely because of "Defendants' failure to serve the Suggestion of Death on decedent's mother, who was one of two successors of decedent at a time when a personal representative had not been appointed and it was uncertain who would be appointed". D.E. 86 at *3. Finally, Plaintiff argued that if the Court found that his motion was untimely, the motion should be granted on the grounds of excusable neglect. *Id.*

on November 29, 2016, and therefore, under the Rule, he was required to move to substitute the parties no later than February 29, 2017.⁶

Id. at *3-4 (emphasis in original). The Court further found that Plaintiff's untimely filing was not justified by excusable neglect.⁷ *Id.* at *4.

ANALYSIS

After conducting an analysis of Rule 25 and the Court's Order Denying the Motion to Reopen and Substitute Plaintiff, the Eleventh Circuit concluded that the Court "based [such] order on an incorrect interpretation" of the Rule. In its Order Denying Motion to Reopen and Substitute Plaintiff, the Court stated that: "if the motion [to substitute parties] is not made within ninety (90) days after service of a statement noting the death, the action must be dismissed. Such language is mandatory, not discretionary." D.E. 78 at *3-4 (emphasis in original). "The District Court's ruling was therefore based on its mistaken understanding that it could not extend Rule 25's ninety-day period. But to the contrary, Rule 6(b) [and the advisory committee's note to the 1963 amendment of Rule 25] permit the court to extend the Rule 25 ninety-day period for good cause with or without motion. And after the Rule 25 period expired, the District Court retained the discretion to extend time if [Plaintiff] showed 'excusable neglect.'" D.E. 95 (*citing* Fed. R. Civ. P. 6(b)(1)(A) & (B)). Accordingly, the Eleventh Circuit concluded that before undergoing an "excusable neglect" analysis, the Court should have first considered whether the December

⁶ The Court noted that though Plaintiff moved to reopen the case and substitute the parties on March 28, 2017, Plaintiff's father was not appointed as the administrator of Plaintiff's estate until April 3, 2017. However, while the Court's December 29, 2016 Order stated that "Plaintiff SHALL notify the Court within five (5) days after the appointment of the Estate's Personal Representative", the Court did not require that such notice be filed before the filing of a motion to reopen. D.E. 78.

⁷ The Court stated that it was not persuaded by Plaintiff's excusable neglect argument because "Plaintiff's counsel did not even think to initiate the probate proceedings in another state until the end of February when Plaintiff passed away three months earlier in November...It is hard for this Court to believe that 'despite his efforts,' Plaintiff was not able to secure a court hearing prior to March 2017." D.E. 90 at *4.

29, 2016 Order (D.E. 78) granting a ninety-day stay pursuant to Rule 25 effectively extended the Rule 25 period. *Id.*

In the Order Granting the Joint Motion to Stay Proceedings, the Court stated that “[p]rovided a proper motion is made within 90 days hereof, the Court will re-open the case to proceed and issue a revised Scheduling Order.” D.E. 78. In light of the Eleventh Circuit’s analysis of Rule 25, the Court’s Order effectively extended the Rule 25 period for filing a motion to substitute parties in accordance with Rule 6(b) and the advisory committee’s note to the 1963 amendment of Rule 25. Accordingly, Plaintiff had until March 29, 2017 to timely file a motion to substitute parties and to re-open this case. Plaintiff’s March 28, 2017 Motion to Reopen and Substitute Plaintiff was, therefore, timely filed.

Accordingly, it is hereby

ORDERED AND ADJUDGED that Plaintiff’s Motion to Reopen Case and Substitute Plaintiff, D.E. 86, is GRANTED as follows:

- I. The Clerk of the Court is directed to REOPEN this case; and
- II. Gustavo Antonio Lizarazo, as Personal Representative of the Estate of Gustavo Adolfo Lizarazo, is SUBSTITUTED AS THE PLAINTIFF in this matter.

It is further

ORDERED AND ADJUDGED that Plaintiff’s Motion for Extension of Time, D.E. 81, is DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this __16th__ day of February, 2018.



URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided to:
Counsel of record via CM/ECF