

It is clear that a lease for term of years which has not yet expired is not automatically terminated by the death of the lessee. *Rasch, NY Landlord and Tenant* 2d ed. Section 1016; \*778 *Remford Corp. v. Rosenfeld*, 274 A.D. 769, 79 N.Y.S.2d 756 (1st Dep't). Upon the death of the tenant, the unexpired leasehold interest of the decedent becomes personal property of the estate, and does not automatically revert to the lessor. EPTL 13-1.1; *Schnee v. Jonas Equities*, 109 Misc.2d 221, 442 N.Y.S.2d 342 (App.T.2d Dep't). Accordingly, the law provides that the estate, not the landlord, is the sole party entitled to possession of the premises for the balance of the lease<sup>1</sup>, until a will is probated or the administrator distributes the property. *Park Avenue Manhattan Associates v. Carnegie*, N.Y.L.J. March 23, 1990, p. 21, col. 2 (App.T.Dep't), citing *Joint Property Owners, Inc. v. Deri*, 113 A.D.2d 691, 693-694, 497 N.Y.S.2d 658 (1st Dep't).

The statutory scheme in New York is clearly structured to protect the interests of the estate, its personal representatives and potential distributees. Any action against the estate must name the executor or administrator in his/her representative capacity as defendant. EPTL Section 11-3.1; *100 West 72nd Street v. Murphy*, 144 Misc.2d 1036, 545 N.Y.S.2d 901 (Civ.Ct., N.Y.Co.1989). Thus, an owner's first task is to attempt to ascertain if there are any survivors, in occupancy or not, and whether or not there is a personal representative of the estate.

The statutory requirements that petitioner institute the proper proceedings against an estate representative and, if necessary, first commence a proceeding to appoint an estate representative, are not ritualistic hypertechnicalities. An estate is not considered a person under the law<sup>4</sup> and therefore would not be entitled to constitutional due process protection under the Fourteenth Amendment. U.S. Const., Amend. XIV; N.Y. Const. Art. I, Sec. 6. However, those persons having rights in or against the estate, i.e. distributees, creditors and persons having legal claims, would \*\*754 be adversely affected by petitioner's attempt to bypass the clear, reasonable and orderly statutory scheme. Those persons, the real parties in interest, are entitled to due process of law. In the context of this proceeding, due process requires that the estate, through its legal representative, be named a party and served with the notice of petition and petition, as the law requires.

In a summary holdover proceeding against the current occupant of a rent-stabilized apartment, the landlord's failure to name or serve the estate of the deceased tenant of record, who had an unexpired leasehold interest in the apartment at the time of his death, required a dismissal of the petition for failure to join a necessary party, since there was no evidence of a surrender or abandonment of the unexpired leasehold, and any judgment entered in the proceeding would necessarily affect the property rights of the deceased tenant's estate. *1515 Macombs Rd. Corp. v. Austin*, 149 Misc.2d 473, 567 N.Y.S.2d 199 (N.Y. City Civ. Ct. 1990).

It is well-settled that the death of a party divests the court of jurisdiction to render a judgment until a proper substitution has been made, so that any step taken without it may be deemed void, including an appellate decision. *Matter of Einstoss*, 26 N.Y.2d 181, 189–90, 309 N.Y.S.2d 184, 257 N.E.2d 637 (1970); *Thompson v. Kramer, Inc.*, 23 A.D.2d 746, 747, 258 N.Y.S.2d 671 (1st Dept., 1965). However, under the circumstances of this case, where the decedent's co-plaintiff is the surviving \*\*352 spouse, with a clear identity of interest, we find the lack of a personal representative to be an omission which may be remedied retroactively. Under these circumstances the decedent's unique interests are not jeopardized in the absence of a personal representative. Compare *Wisdom v. Wisdom*, App.Div., 488 N.Y.S.2d 682 (1st Dept., 1985). The identity of interest in the litigation assures that the co-plaintiff surviving spouse will vigorously protect the decedent's claim until formal substitution is made.

The death of a party, for example, is covered by CPLR 1015(a), which mandates that the decedent's personal representative be substituted by court order.

Even if a cause of action survives the death of a party as a matter of substantive law (see Commentary C1015:2, above), such death divests the court of jurisdiction--subject to the motion practice authorized by CPLR 1021--until a duly appointed personal representative is substituted for the deceased party. *Griffin v. Manning*, 2007, 36 A.D.3d 530, 828 N.Y.S.2d 372 (1st Dep't). Hence the command of CPLR 1015(a) that the court "shall"

order the substitution of a proper party for the decedent. According to CPLR 1021, an order of substitution may be sought by motion of any party or the successors or representatives of the decedent. In light of the mandatory language of CPLR 1015(a), the court may also order substitution sua sponte. See *Paul v. Ascher*, 1984, 106 A.D.2d 619, 621, 483 N.Y.S.2d 422, 424 (2d Dep't).

Several procedural consequences flow from the rule that the court's jurisdiction is divested, at least temporarily, by a party's death. All proceedings in the action are automatically stayed by the death. *Gonzalez v. Ford Motor Co.*, 2002, 295 A.D.2d 474, 744 N.Y.S.2d 468 (2d Dep't). See also CPLR 1022 (if time for taking procedural step in the action has not expired before occurrence of event requiring substitution, time limit is extended until 15 days after substitution is made).

#### McKinney's CPLR § 1015

##### § 1015. Substitution upon death

(a) Generally. If a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties.

(b) Devolution of rights or liabilities on other parties. Upon the death of one or more of the plaintiffs or defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or against the surviving defendants, the action does not abate. The death shall be noted on the record and the action shall proceed.