

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION**

Nedra Ward,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 20 L 1484
	)	
Donna M. Wilkinson,	)	
	)	
Defendant.	)	

**MEMORANDUM OPINION AND ORDER**

The Code of Civil Procedure authorizes under limited circumstances an action against a deceased person whose death was unknown to the plaintiff before the statute of limitations expired. In this case, those circumstances are unmet because the plaintiff failed to proceed with reasonable diligence to file an amended complaint and never named a personal representative for the decedent. For those reasons, the defendant's motion to dismiss must be granted with prejudice.

**Facts**

William and Donna Wilkinson, husband and wife, owned in joint tenancy their home at 2255 West 105th Place in Chicago. On July 27, 2008, William died. On February 6, 2018, Nedra Ward was on the front steps of the home when she stepped on plastic covered with snow, fell, and sustained injuries.

On February 4, 2020, Ward filed a single-count premises liability complaint naming William as the only defendant. On February 27, 2020, the Cook County Sheriff's Office returned the summons and complaint as unserved because of a lack of contact. On April 28, and May 1, 2020, another judge entered orders appointing a special process server to serve the summons and

complaint. On May 15, 2020, the process server returned the summons and complaint as unserved. The server's affidavit indicated the then-occupant, Linda Meziere, stated the defendant had moved more than one year earlier and had heard the defendant had passed away.

On December 17, 2020, Ward filed a petition to name Gianna Carabez as the special representative of William's estate. The petition stated Ward had learned of William's death. The petition also stated Ward was spreading William's death of record. Ward failed, however, to attach a death certificate to the petition. Further, Ward failed to provide a draft order, so this court never granted the petition either spreading William's death of record or naming Carabez as the special representative of William's estate.

On January 25, 2021, Ward filed a motion for leave to file an amended complaint. The motion stated that Ward filed her complaint against William not knowing of his death. The motion also stated that Ward's investigation indicated Donna jointly owned the property. On February 2, 2021, this court granted the motion to file the amended complaint, which Ward then filed on February 8, 2021. An alias summons issued on February 11, 2021, and Ward achieved service on Donna the next day. On March 12, 2021, Donna filed her appearance. Also on March 12, 2021, Donna filed a motion to dismiss the first amended complaint. Ward filed a response brief, and Donna filed a reply.

### Analysis

Donna brings her motion to dismiss pursuant to Code of Civil Procedure section 2-619(a)(5). 735 ILCS 5/2-619(a)(5). A section 2-619 motion to dismiss authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Solaia Technology, LLC v. Specialty Publ'g Co.*, 221 Ill. 2d 558, 579 (2006); *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). The running of the statute of limitations is one such defense serving to bar a cause of action. 735 ILCS 5/2-619(a)(5) (complaint subject to dismissal if it "was not commenced

within the time limited by law”); *Moore v. People for the Ethical Treatment of Animals, Inc.*, 402 Ill. App. 3d 62, 73 (1st Dist. 2010).

A court considering a section 2-619 motion must construe the pleadings and supporting documents in a light most favorable to the nonmoving party. See *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. See *Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324 (1995). As has been stated: “The purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation.” *Czarobski*, 227 Ill. 2d at 369.

Donna’s argument follows several steps. First, she argues the original complaint naming William exclusively was void since he predeceased Ward’s filing. Second, since the original complaint against William was void, the amended complaint against her cannot relate back. Third, Donna argues that Ward failed to follow the statutory requirements for substitution of a deceased defendant.

Donna’s first and second arguments are correct. As the Illinois Supreme Court has written: “If a person is already dead when an action is asserted against him or her, the proceedings will not invoke the trial court’s jurisdiction, and any judgment entered in the case will be a nullity.” *Relf v. Shatayeva*, 2013 IL 114925, ¶ 22; *Danforth v. Danforth*, 111 Ill. 236, 240 (1884). This court’s lack of jurisdiction in the original complaint naming William effectively converts Ward’s first amended complaint naming Donna into the original and only complaint in this case. In short, there is no previous complaint to which the current complaint can relate back.

Donna’s third argument is statutorily based and is also correct. She argues that Ward fails to meet any of the requirements to name a defendant whose death was unknown when the plaintiff filed the lawsuit. As the Code of Civil Procedure explicitly provides:

If a party commences an action against a deceased person whose death is unknown to the party before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred, the action may be commenced against the deceased person's personal representative if all of the following terms and conditions are met:

- (1) After learning of the death, the party proceeds with reasonable diligence to move the court for leave to file an amended complaint, substituting the personal representative as defendant.
- (2) The party proceeds with reasonable diligence to serve process upon the personal representative.
- (3) If process is served more than 6 months after the issuance of letters of office, liability of the estate is limited as to recovery to the extent the estate is protected by liability insurance.
- (4) In no event can a party commence an action under this subsection (c) unless a personal representative is appointed and an amended complaint is filed within 2 years of the time limited for the commencement of the original action.

735 ILCS 5/13-209(c).

As to subparagraph (1), it is plain Ward did not know of William's death at the time she filed her original complaint. Yet Ward's response brief failed to indicate when she did learn of his death. It is impossible to conclude that Ward proceeded with reasonable diligence without knowing that predicate fact. Subparagraph (2) is unfulfilled because Ward did not proceed with reasonable diligence in serving William's personal representative since Ward never had one appointed. Subparagraph (3) is unmet because no court ever issued letters of office. Finally, subparagraph (4) is insurmountable since, once again, Ward never had this or any other court name a personal representative for William's estate.

In the face of these enormous statutory hurdles, Ward argues her suit against Donna is permitted as an amended to the original complaint against William under relation-back doctrine provided in Code of Civil Procedure section 2-616(d). That section provides:

A cause of action against a person not originally named a defendant is not barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if all the following terms and conditions are met: (1) the time prescribed or limited had not expired when the original action was commenced; (2) the person, within the time that the action might have been brought or the right asserted against him or her plus the time for service permitted under Supreme Court Rule 103(b), received such notice of the commencement of the action that the person will not be prejudiced in maintaining a defense on the merits and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him or her; and (3) it appears from the original and amended pleadings that the cause of action asserted in the amended pleading grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery when the condition precedent has in fact been performed, and even though the person was not named originally as a defendant. For the purpose of preserving the cause of action under those conditions, an amendment adding the person as a defendant relates back to the date of the filing of the original pleading so amended.

735 ILCS 5/2-616(d). While there exists a liberal policy of allowing amendments to enable parties to present their alleged causes of action, there exists no absolute right to amend a complaint. *Grove v. Carle Found. Hosp.*, 364 Ill. App. 3d 412, 417 (4th Dist. 2006). At the same time, it is plain section 2-616 does not address amendments based on the situation here—the plaintiff's death prior to the original complaint's filing. Regardless, to determine whether Ward's amendment would further the ends of justice, this court must consider the three requirements explained in 2-616(d). *Morton v. Madison Cnty. Nursing Home Auxiliary*, 198 Ill. 2d 183, 188-89 (2001) (applying five elements in 2000 statutory version). See *Patino v. Velcani*, 2019 IL App (1st) 180384-U (most recent Illinois case applying 2002 statutory version).

As to the first factor, the time for filing suit against Donna had expired. Donna was not served until three years and two days after Ward's injury. Such a delay is plainly beyond the two-year statute of limitations for personal injury actions. 735 ILCS 5/13-202. The original complaint filed against William cannot be considered a valid complaint for purposes of the relation-back doctrine since, as previously noted, this court never had jurisdiction over the pre-deceased William. To that extent, Ward is not seeking to amend a complaint, but impermissibly seeking to file a new cause of action. See *Jones v. O'Brien Tire & Battery Serv. Ctr., Inc.*, 374 Ill. App. 3d 918, 927 (5th Dist. 2007) (distinguishing between adding a cause of action and curing a defective pleading).

As to the second factor, prejudice to the defendant exists "where delay before seeking an amendment leaves a party unprepared to respond to a new theory at trial." *Miller v. Pinnacle Door Co.*, 301 Ill. App. 3d 257, 261 (4th Dist. 1998). Here, the record establishes Donna did not know of the suit against William since she never received service until the alias summons issued for the first amended complaint. Since that service occurred well past the expiration of the two-year statute of

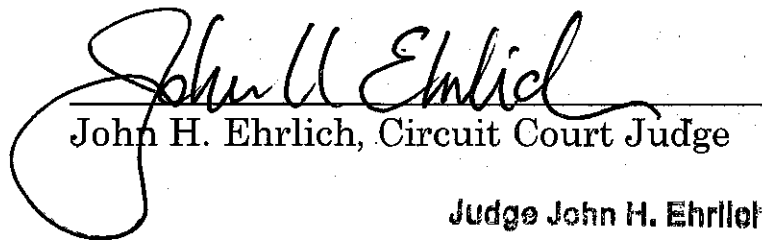
limitations, Donna would unquestionably be prejudiced if she had to proceed any further in this case.

As to the third factor, it is plain that Ward's allegations concern the same transaction or occurrence in the original complaint. That fact is, however, not enough. Rather, it must also be shown the original pleading "failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery when the condition precedent has in fact been performed, and even though the person was not named originally as a defendant." 735 ILCS 5/2-616(d). In this instance, Ward did not fail to allege the performance of an act or the existence of some fact providing a necessary condition precedent to the right to recovery. Rather, Ward's original complaint failed to provide this court with any jurisdiction to hear the matter since the suit against William was void. It is plain the third factor also cannot be met.

### Conclusion

For the reasons presented above, it is ordered that:

1. The motion to dismiss the first amended complaint is granted; and
2. This case is dismissed with prejudice.

  
John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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Circuit Court 2075