

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANIMAL WELFARE INSTITUTE et al. :

Plaintiff, :

v. :

FELD ENTERTAINMENT, INC. :

Defendants. :

Case No. 03 - 2006 (EGS/JMF)

**FORMER COUNSEL TO DECEASED PARTY TOM RIDER’S *AMICUS CURIAE*
RESPONSE TO FELD’S MOTION FOR SUBSTITUTION**

Matthew Kaiser, former counsel for party Tom Rider, responds to Defendant Feld Entertainment’s Motion for Substitution, filed December 30, 2013, as follows:

1. Because of the unfortunate death of Mr. Rider, undersigned counsel no longer represents Mr. Rider and no longer has the authority to speak on his behalf in this litigation. *In re Haller’s Estate*, 56 Pa. Super. 48, 50 (1913).

2. Due to the relief requested in Feld’s motion and supporting memorandum against undersigned counsel, as well as the inaccurate allegations of unethical conduct leveled against undersigned counsel contained therein, former legal counsel to the deceased Mr. Rider files this response *amicus curiae*.

3. Feld’s motion requests the Court to issue an order “compelling Mr. Rider’s [former] counsel to identify Mr. Rider’s successor or representative; or, in the alternative, for an order substituting defendant and decedent Tom Rider with his purported heirs/distributees”. Motion for Substitution (hereinafter “Motion”), at 1. Neither request is justified.

4. While not the subject of Feld's motion, Feld's memorandum of law seeks an additional and broader order "requiring Mr. Rider's [former] counsel ... to provide a written description to the Court as to what actions, if any, they have taken with respect to the disposition of information that was in Mr. Rider's possession, custody or control at the time of his death that is subject to potential discovery in the instant matter." Feld's Memorandum in Support of Motion for Substitution (hereinafter "Memorandum"), at 1. This request should be rejected.

5. The Court should deny Feld's requests as there is no factual or legal basis for the Court to issue any of the orders sought by Feld.

6. There is no basis to compel counsel "to identify Mr. Rider's successor or representative" because, as counsel has advised Feld's counsel, undersigned counsel has no information about who Mr. Rider's successor or representative is. That remains true today. Further, despite Feld's claim to the contrary, former legal counsel are not in a better position than Feld to obtain this information. Memorandum at 7. Undersigned counsel has represented Mr. Rider for the purposes of this litigation only.

7. Indeed, Feld's memorandum makes clear that counsel for Feld already has more information on this issue than the deceased Mr. Rider's former counsel by conceding that Feld "has independent knowledge of the identity of Mr. Rider's potential heirs and/or distributees" which it then demonstrates by identifying three individuals whom Feld alleges are the daughters of Mr. Rider. Memorandum at 8-9.

8. Further, the cases cited by Feld do not support any of the relief it has requested. The D.C. Circuit, in *Rende v. Kay*, did not require the decedent's former counsel to take any action; to the contrary, it specifically acknowledged that it could "conceive of cases wherein even the lawyer retained to represent a defendant might know the defendant had died, yet not readily

know where his estate would be administered.” *Rende v. Kay*, 415 F.2d 983, 986 (D.C. Cir 1969). That is precisely the situation here. In addition, the *Daskalea* case involved a co-plaintiff whose claims, the Court ruled, would be dismissed if information were not provided relative to “whether there is any other appropriate successor or representative who might seek to be substituted” to pursue the deceased plaintiff’s claims on behalf of his estate. *Daskalea v. Washington Humane Society*, 275 F.R.D. 346, 370 (D.D.C. 2011). If undersigned counsel had the authority to stipulate to the dismissal of Feld’s claim against Mr. Rider, he would.

9. Under Rule 25 of the Federal Rules of Civil Procedure, this Court can only appoint a legal representative of the decedent’s estate, and that status is governed, in this instance, by the law of Mr. Rider’s residence upon his death—Pennsylvania. *In re Baycol Products Litigation*, 616 F.3d 778, 785 (8th Cir.2010) (state law governs who can represent estate, federal law governs procedures for substitution). While the D.C. Circuit has ruled that a distributee of a completely distributed estate may be a candidate for substitution, *McSurely v. McClellan*, 753 F.2d 88, 99 (D.C. Cir. 1985), that is not remotely the case here because the record contains no evidence of the creation of a Rider estate in Pennsylvania, much less its complete distribution. As undersigned counsel has previously informed Feld’s counsel, he does not have information about the creation or status of any such Rider estate.

11. Feld goes even further though, and also “seeks an order requiring Mr. Rider’s [former] counsel of record to provide a written description to the Court as to what actions, if any, they have taken with respect to the disposition of information that was in Mr. Rider’s possession, custody or control at the time of his death that is subject to potential discovery in the instant matter.” FEI Motion at 1.

15. Feld contends that it “cannot allow documents and information potentially relevant to this case to be spoliated or discarded while it awaits Mr. Rider’s successor or representative to be identified.” Memorandum at 5. Feld’s counsel cites and quotes the D.C. Rules of Professional Conduct to establish the proposition that counsel cannot spoliage or discard evidence “if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding.” D.C. Rule 3.4. No one disputes that rule, but the problem with Feld’s argument is that there is absolutely no factual predicate triggering application of the rule. In other words, Feld has not established - nor can it establish - that Rider’s former counsel has destroyed any such evidence.

16. In the absence of any factual support for its concern, Feld’s counsel asserts that “[i]t is a fair inference Mr. Kaiser’s correspondence that Mr. Rider’s death may have been seized upon as an excuse for allowing potentially discoverable information to be destroyed or to become otherwise unavailable to the prejudice of FEI.” Memorandum at 7. That is not a fair inference at all from the referenced correspondence, which the Court will read for itself. A much fairer (and correct) inference here is that the lawyer who represented Mr. Rider understands his obligations under the Rules of Professional Conduct and should be presumed to comply with them, in the absence of clear and convincing proof to the contrary. Here there is no proof whatsoever.

18. Rattling his saber even without proof, FEI’s counsel complains of the “deafening silence” from the undersigned, former counsel to the decedent, and argues that “the D.C. Rules of Professional Conduct . . . do not provide license to destroy a client’s files even after the termination of a representation.” FEI Memorandum at 6. “Silence” proves nothing, and FEI’s counsel’s baseless suggestion that Rider’s counsel may have “destroy[ed their] client’s files” is

wholly unwarranted. In this case previously, this Court once offered the following admonition to counsel:

Judge Sullivan and I have grown tired of telling the lawyers in this case to stop impugning each others' professional integrity. That direction has again fallen on deaf ears. Accusing one's opponent of unprofessional conduct in attempting to purposefully assist a witness's destruction of evidence is not legal argument.

ESA Action No. 326 at 5. It is not sound argument.¹

19. The reality of the situation is that the undersigned counsel has not destroyed any evidence in this matter and his silence, up to now, on this issue, reflects the fact that he is no longer authorized to speak for Mr. Rider. What Feld characterizes as a "straightforward" request for an "assurance" in this regard was in fact an unwarranted demand that Rider's former counsel take steps to obtain, preserve and eventually produce documents that were not the subject of discovery during their client's lifetime. Counsel requested that Feld's counsel provide case authority to support such an extraordinary request and none has been provided, either at that time or in conjunction with the filing of Feld's motion. *See* Motion, Exh. 5.

20. Rule 25 conveys a measure of discretion in this Court to order substitution or not, as it sees fit. *See* Fed.R.Civ. Pro. 25 ("the court may order . . ."). Nothing in the Advisory Committee Notes detailing the development and adoption of Rule 25, and nothing in the caselaw decided under Rule 25, identifies its purpose as being to facilitate discovery, which is the basis for FEI's motion. There are no letters rogatory to the dead. So there is no warrant for exercising the Court's discretion to order substitution on that ground.

21. Some of the Rule's history and jurisprudence identifies facilitating a source of recovery as a purpose of the rule. FEI has abandoned that rationale in the case of the penniless

¹ *See* D.C. Bar Voluntary Standards for Civility, General Principle No. 5 ("We will not bring the profession into disrepute by making unfounded accusations of impropriety or making ad hominem attacks on counsel, and, absent good cause, we will not attribute bad motives or improper conduct to other counsel.")

Tom Rider. See FEI Memo at 5 (“FEI is under no illusion that Mr. Rider’s estate will be plentiful or have adequate funds to contribute meaningfully to a money judgment in this case.”) So there is no warrant for exercising the Court’s discretion to order substitution on that ground either.

22. At the time of Rider’s death, FEI had no outstanding discovery requests to him. So there is also nothing left uncompleted as a result of Rider’s death, which might now require a substitution order to be completed. To the extent that FEI seeks discovery from Rider’s remaining property, of course, that discovery can be accomplished as efficiently through the use of third-party subpoena as through dragging a previously uninvolved third-party into this morass in Rider’s place.

23. Finally, Feld asks this Court to rule on the survivability of its claims against Mr. Rider on an *ex parte* basis—that is, before the deceased even has a proper representative, much less before Feld properly brings a suitable representative within the personal jurisdiction of this Court. This Court should not adjudicate the rights of a decedent, or his potential estate, *ex parte*, and Feld should not be asking this Court to do so.

24. Accordingly, undersigned counsel respectfully suggests that this Court lacks personal jurisdiction to consider the motion for substitution and, therefore, for this and all of the foregoing reasons, the motion for substitution and FEI’s other requests for relief should be denied.

Respectfully submitted,

/s/ _____
Matthew G. Kaiser
The Kaiser Law Firm PLLC
1400 I Street NW Suite 525
Washington, DC 20005
mkaiser@tklf.com

