

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D18917
X/prt

_____AD3d_____

Argued - March 25, 2008

DAVID S. RITTER, J.P.
JOSEPH COVELLO
DANIEL D. ANGIOLILLO
WILLIAM E. McCARTHY, JJ.

2007-04036

DECISION & ORDER

Freddy Rocha, appellant, v Antonio Figueiredo,
et al., respondents, et al., defendant.

(Index No. 11638/06)

Kim I. McHale & Associates, P.C., New York, N.Y. (John C. Naccarato of counsel),
for appellant.

Ras Associates, PLLC, White Plains, N.Y. (Luis F. Ras of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from a judgment of the Supreme Court, Westchester County (Carey, J.H.O.), dated March 28, 2007, which, upon an order of the same court dated March 5, 2007, made after a hearing on the issue of whether service was properly effected, granting the motion of the defendants Antonio Figueiredo, Estate of Antonio Figueiredo, and Maria B. Figueiredo, as executor of the Estate of Antonio Figueiredo, pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against them, is in favor of those defendants and against him, dismissing the complaint insofar as asserted against them.

ORDERED that the appeal from so much of the judgment as relates to the defendant Antonio Figueiredo is dismissed on the ground that the judgment is a nullity as to that defendant since he died before the commencement of this action, the provisions of the judgment and the order relating to the deceased defendant are vacated, and the complaint insofar as asserted against that defendant is dismissed; and it is further,

ORDERED that the judgment is reversed insofar as reviewed, on the law, without costs or disbursements, the provisions of the order relating to the defendants Estate of Antonio Figueiredo and Maria B. Figueiredo, as executor of the Estate of Antonio Figueiredo, are vacated,

April 15, 2008

Page 1.

ROCHA v FIGUEIREDO

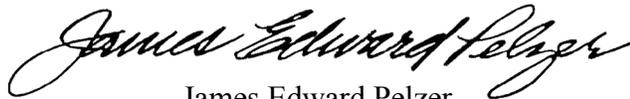
the complaint is reinstated against those defendants, and the matter is remitted to the Supreme Court, Westchester County, for further proceedings consistent herewith.

The defendant Antonio Figueiredo died prior to the commencement of this action. Accordingly, the provisions of the judgment and the order relating to that defendant must be vacated and the appeal therefrom must be dismissed (*see Jordan v City of New York*, 23 AD3d 436; *Zito v City of New York*, 293 AD2d 469; *Berlinger v City of New York*, 289 AD2d 188, 189).

The complaint should not have been dismissed insofar as asserted against the defendants Estate of Antonio Figueiredo and Maria B. Figueiredo, as executor of the Estate of Anthony Figueiredo. Under the particular circumstances of this case, including errors which occurred, a new hearing on the issue of whether service was properly effected against these defendants is required.

RITTER, J.P., COVELLO, ANGIOLILLO and McCARTHY, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court