

**Meiyun Wu v Rios**

2016 NY Slip Op 32162(U)

October 24, 2016

Supreme Court, Queens County

Docket Number: 5306/2011

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT  
Justice

IAS Part 14

MEIYUN WU, et ano.,  
Plaintiff(s),

Index  
No. 5306 2011

- against -

Motion  
Date September 22, 2016

INDIRA RIOS, et al.,  
Defendant(s).

Motion  
Cal. No. 177

Motion  
Seq. No. 4

The following papers numbered 1 to 19 read on this renewed motion by plaintiffs for an order substituting administrator Jennifer Sheridan in the place of defendant Luis Fernando Quirama s/h/a Luis Quirama-Mineta, deceased (decedent); and on this cross motion by defendants Indira Rios and Dominga Mia Rios (defendants Rios) for an order, inter alia, vacating the note of issue.

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Answering Affirmation - Exhibits.....	11-13
Reply.....	14-19

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

By prior order dated September 11, 2015, plaintiffs’ motion for like relief was denied and with leave to renew after service of the motion upon Jennifer Sheridan with those formalities that Article 3 of the CPLR prescribes for service of process. Plaintiffs have since complied with that directive. Defendants Rios do not oppose such relief. As such, those branches of plaintiffs motion for an order granting them leave to renew their prior motion

and, upon such renewal, for an order amending the caption to reflect the proper substitution, are granted.

Plaintiffs also seek an order vacating a 90-day notice served upon their counsel pursuant to CPLR 3216. Counsel states, in support of the motion, that defendants Rios served said notice on March 10, 2016, despite the fact that a note of issue had already been filed on March 20, 2012, and despite the fact that there was an automatic stay in place due to decedent's death.<sup>1</sup> However, plaintiffs do not attach the 90-day notice to which they refer. As such, that branch of the motion is denied for failure to establish that such notice was mailed.

Defendants Rios cross-move for an order vacating the note of issue or, in the alternative, precluding plaintiffs from offering testimony as to liability or damages or compelling plaintiffs to appear for an examination before trial (EBT) and independent medical examination (IME). Counsel states, in support thereof, that there have been no EBTs nor have plaintiffs appeared for IMEs. Further, due to the death of decedent, the action has been stayed for over a four-year period. As such, they argue that vacatur is warranted.

It is noted that Michael G. Nashak, Esq., "attorney for the defendant, Luis Quirama-Mineta," submits an affirmation in support of the motion. However, inasmuch as his client's death has terminated his authority to act on his behalf (*see Aurora Bank FSB v Albright*, 137 AD3d 1177 [2016]; *Vapnersh v Tabak*, 131 AD3d 472 [2015]; *Hyman v Booth Memorial Hosp.*, 306 AD2d 438 [2003]), his affirmation cannot be considered by this court, absent some showing that he has authority to appear on behalf of the estate or, at this juncture, on behalf of Jennifer Sheridan as Administratrix of the estate.

In opposition to the cross motion, plaintiffs argue that the same is untimely, as it was made more than twenty days after the note of issue was filed (22 NYCRR 202.21 [e]). Plaintiffs contend that, though EBTs and IMEs remain outstanding, defendants Rios have not demonstrated why such disclosure cannot be completed while the action remains on the trial calendar.

In reply, defendants Rios argue, in effect, that plaintiffs cannot claim untimeliness while simultaneously acknowledging that decedent's death imposed a stay in this matter, the

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1. Though the parties indicate that the stay was imposed on August 8, 2012, the stay became automatic upon decedent's death on February 10, 2012 (*see e.g. Lambert v Estren*, 126 AD3d 942 [2015] ["the death of a party . . . automatically stays proceedings in the action pending the substitution of a personal representative for the decedent"]).

latter clearly providing special circumstances for having made the cross motion years after the filing of the note of issue.<sup>2</sup>

As plaintiffs' note of issue was filed after decedent's death, it was a nullity and, therefore, it must be stricken (*see Bluestein v City of New York*, 280 AD2d 506 [2001]; *Braynard v Morgan*, 50 AD2d 810 [1975]; *see also* n 1). In any event, it is agreed that all parties have yet to appear for EBTs and that plaintiffs have yet to appear for IMEs and that, as a result, such discovery should take place. Given this determination, the remaining branch of the cross motion seeking preclusion, which was pleaded in the alternative, need not be considered.

Accordingly, it is hereby

ORDERED that the branches of plaintiffs' motion for an order granting them leave to renew their prior motion for substitution and, upon such renewal, for an order substituting Jennifer Sheridan, as Administratrix of the Estate of Luis Quirama-Mineta, deceased, are granted, and it is further

ORDERED that "Jennifer Sheridan, as Administratrix of the Estate of Luis Quirama-Mineta, deceased," be substituted as party defendant in the above-entitled action in the place and stead of the deceased defendant, and it is further

ORDERED that the stay imposed herein is vacated and the case is restored to active status, and it is further

ORDERED that all papers, pleadings, and proceedings in the above-entitled action be amended by substituting the name of "Jennifer Sheridan, as Administratrix of the Estate of Luis Quirama-Mineta, deceased," as defendant in the place and stead of "Luis Quirama-Mineta," without prejudice to the proceedings heretofore had herein, and it is further

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2. To the extent defendants Rios argue that plaintiffs are guilty of a four-year delay in having an administrator appointed and substituted in place of decedent and, as such, plaintiffs' case should be dismissed pursuant to CPLR 1021, such contention is misplaced. "The last sentence of CPLR 1021 provides special protection for the estate of a deceased plaintiff (or an appellant) where the opponent seeks dismissal of the action (or appeal) based on the estate's failure to make timely substitution" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B CPLR1021:2). It does not call for dismissal of a plaintiff's action when the successors of a decedent's estate are "dragging their heels" in substituting themselves as parties-defendant (*id.*).

ORDERED that the branch of plaintiffs' motion for an order vacating the 90-day notice purportedly served upon plaintiffs' counsel is denied, and it is further

ORDERED that the branch of the cross motion by defendants Rios for an order vacating the note of issue and compelling discovery are hereby granted as set forth below, and it is further

ORDERED that the note of issue, filed on March 20, 2012, is hereby vacated, inasmuch as same was a nullity, and it is further

ORDERED that the remaining branches of the cross motion are denied as academic in light of the vacatur of the note of issue, and it is further

ORDERED that plaintiffs shall appear for deposition on January 12, 2017 – or as otherwise stipulated by the parties, but in no case later than said date provided above – at a time and place to be stipulated by the parties; and it is further

ORDERED that defendants shall appear for deposition on January 19, 2017 – or as otherwise stipulated by the parties, but in no case earlier than plaintiffs' respective depositions and no later than the January 19, 2017 date provided above – at a time and place to be stipulated by the parties, and it is further

ORDERED that post-deposition demands shall be served within 20 days after the respective depositions and shall be responded to within 20 days thereafter, and it is further

ORDERED that independent medical examinations shall be held within 45 days of plaintiffs' depositions, and reports shall be exchanged within 45 days of the examinations, and it is further

ORDERED that failure to comply with the above directives may result in, upon motion, the imposition of sanctions, which may include the striking of pleadings, and it is further

ORDERED that the remaining branch of the cross motion for an order of preclusion is denied, and it is further

ORDERED that plaintiffs shall serve a copy of this order together with notice of entry, within 30 days of the entry date of this order, upon all parties to this action, which include Jennifer Sheridan as Administratrix for decedent's estate, who appears to be pro se at this

juncture, unless prior counsel for decedent establishes his authority to continue to appear in this action.

Dated: October 24, 2016

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J.S.C.