

**Santos v Williams**

2020 NY Slip Op 33542(U)

September 11, 2020

Supreme Court, Bronx County

Docket Number: 21955/2017E

Judge: Ruben Franco

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX - IAS PART 26

FRANCISCO SANTOS,

Plaintiff,

-against-

VARGAS WILLIAMS,

Defendant.

Index No. 21955/2017E

**MEMORANDUM  
DECISION/ORDER**

**Rubén Franco, J.**

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on February 2, 2015, as a result of a slip and fall in his apartment, caused by rainwater that leaked into the apartment. The Summons and Complaint were filed on March 10, 2017, and plaintiff died on April 29, 2018. Plaintiff's attorney moves to renew this court's January 7, 2020 Order which denied movant's application to have the Administrator of plaintiff's estate, Lidia Ferrer, substituted in this action in place of deceased plaintiff (CPLR 1021), and to vacate this court's September 28, 2018 and December 10, 2018 Orders.

In this court's Decision and Order of January 7, 2020, the procedural history of this action was set forth as follows:

Plaintiff previously moved for a default judgment and an inquest, and defendant cross-moved pursuant to CPLR §§ 305 (a), 317, 3025, 3211 (4), (7) and (8), to dismiss the action on the ground that there is an identical action pending under Index No. 303852/2015; or in the alternative, pursuant to CPLR §§ 2004, 3012 (d) and 5015, extending defendant's time to interpose an Answer, claiming that he has a reasonable excuse for failing to timely submit an Answer, and that he has a meritorious defense.

Pursuant to this court's Decision and Order dated June 21, 2018, plaintiff's motion for a default judgment and defendant's cross-motion for dismissal were held in abeyance, pending the completion of a traverse hearing on the issue of service of the Summons and Verified Complaint. A traverse hearing was scheduled and adjourned based upon the claim of plaintiff's attorney that the plaintiff had passed away. On the adjourned date of the traverse hearing, plaintiff's attorney failed to

produce written proof of plaintiff's demise, or the process server, and plaintiff's Complaint was dismissed pursuant to Decision and Order dated September 24, 2018.

Plaintiff subsequently moved to renew and reargue the court's Decision and Order, to restore the action to active status, and for an Order granting the relief previously sought. The attorney submitted a photocopy of plaintiff's death certificate. The motion was denied in its entirety on December 10, 2018, inasmuch as a personal representative for the deceased plaintiff had not been appointed and no application was made to substitute a personal representative for the deceased in this action.

Following Lidia Ferrer's appointment as Administrator, on November 6, 2019, plaintiff's counsel moved for leave to have her substituted as plaintiff in this action and to vacate the September 28, 2018 and December 10, 2018 Orders. On January 7, 2020, the motion was denied without prejudice and the court explained its findings as follows:

The court finds that there is a lack of proof as to the authority upon which counsel makes this motion, absent a facially valid Letters of Administration and some indication from the purported administrator, or any other interested party, of the intent to prosecute this action.

In this motion, plaintiff's attorney submits a "Certificate of Appointment of Administrator" with a raised seal.

CPLR 1015 provides that when a party dies, and the cause of action survives the death, a proper party, such as an executor or administrator, must be substituted. EPTL 11-3.2 (b) provides in part: "No cause of action for injury to person or property is lost because of the death of the person in whose favor the cause of action existed. For any injury, an action may be brought or continued by the personal representative of the decedent...." In seeking substitution, the movant must provide the court with sufficient evidence of the death and appointment of the administrator (CPLR 1021).

Rather than renewal (CPLR 2221 [e]), as requested in this motion, the proper application is to have the action restored to the active calendar (*see Bonoff v Troy*, 244 AD2d 260, 261 [1<sup>st</sup> Dept 1997]). When an action is disposed of through no fault of the plaintiff, the usual prerequisites

for restoration are not applicable (*see Evans v New York City Hous. Auth.*, 262 AD2d 123, 124 [1<sup>st</sup> Dept 1999]). Restoring the action would comport with “New York's strong public policy in favor of litigating matters on the merits (*Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 419 [1<sup>st</sup> Dept 2016]).” (*Hertz Vehs., LLC v Mollo*, 171 AD3d 651 [1<sup>st</sup> Dept 2019].)

In *Barnabas v Boodoo* (134 AD3d 970, 972 [2<sup>nd</sup> Dept 2015]), the Court explained:

“The death of a party divests the court of jurisdiction and stays the proceedings until a proper substitution has been made pursuant to CPLR 1015 (a)” (*Vapnersh v Tabak*, 131 AD3d 472, 473 [(2<sup>nd</sup> Dept) 2015] [internal quotation marks omitted]; *see Giroux v Dunlop Tire Corp.*, 16 AD3d 1068 [(4<sup>th</sup> Dept) 2005]). However, CPLR 1021 is an exception to that principle (*see Hyman v Booth Mem. Hosp.*, 306 AD2d 438 [(2<sup>nd</sup> Dept) 2003]). CPLR 1021 provides, in pertinent part, that a motion for substitution may be made by the successors or representatives of a party or by any other party within a reasonable time after the party's death. If “timely substitution has not been made, the court, before proceeding further, shall, on such notice as it may in its discretion direct, order the persons interested in the decedent's estate to show cause why the action or appeal should not be dismissed” (CPLR 1021).

In *Silvagnoli v Consolidated Edison Empls. Mut. Aid Socy.* (112 AD2d 819, 820 [1<sup>st</sup> Dept 1985]), the Court stated: “The death of a party divests a court of jurisdiction to conduct proceedings in an action until a proper substitution has been made pursuant to CPLR 1015 (a). (*Matter of Einstoss*, 26 NY2d 181, 189-190 [1970]; *Wisdom v. Wisdom*, 111 AD2d 13 [1<sup>st</sup> Dept 1985].)” Upon proper substitution it would be appropriate to vacate the September 28, 2018 and December 10, 2018 Orders, restore the action, and proceed with the traverse hearing (*see Faraone v National Academy of Tel. Arts & Sciences*, 296 AD2d 349 [1<sup>st</sup> Dept 2002]).

Guided by the decision in *Robinson v Thomas* (123 App Div 411, 412 [1<sup>st</sup> Dept 1908]), the affidavit in support of a motion for substitution after the death of a party should contain facts showing the nature of the cause of action, so that it can be determined whether it survived; the condition of the action; the title of the person to be substituted; and if the affidavit is made by the attorney for the party to be substituted, the attorney must show that the party authorized him or her

to make the motion. Upon a plaintiff's death his/her attorneys' authority to act on his/her behalf terminates (*see Snipes v Schmidt*, 166 AD3d 483, [1<sup>st</sup> Dept 2018]; *Hemphill v Rock*, 87 AD2d 836, 836 [2<sup>nd</sup> Dept 1982]). It is insufficient merely to state that he/she is the attorney for the Administrator.

In his affirmation in support, Brian J. Isaac states:

I am a member of Pollack , Pollack, Isaac & Decicco , LLP , special and appellate counsel to Krentsel & Guzman , LLP , attorney of record for plaintiff, Francisco Santos ("plaintiff") , in the above captioned matter . I make this affirmation based upon my review of the file maintained by my office....

The Surrogates Court issued letters of administration on June 7, 2019 and informed Lidia Ferrer that she had been appointed plaintiff's Administrator (hereinafter "Administrator") on September 10, 2019.

By notice of motion dated November 6, 2019, Lidia Ferrer moved for leave to be substituted into this action, and upon granting the motion for substitution (*sic*), vacating the orders of this Court dated September 28, 2018 and December 10, 2018.

Similar to the current motion, the notice of motion dated November 6, 2019, was supported by an affirmation by Brian J. Isaac, who stated that he was the attorney of record for plaintiff. Here, as in the previous motion there is no affidavit from Lidia Ferrer, the party to be substituted, nor a representation in the attorney's affirmation that Lidia Ferrer authorized him to make the motion. There is no statement that the moving attorney is the attorney for Lidia Ferrer, which, without further substantiation, would be insufficient.

The court finds that there is a lack of proof regarding the authority upon which counsel makes this motion, nor is there any indication from the appointed Administrator of the intent to prosecute this action.

It has been more than two years since plaintiff's death. Counsel has made several missteps in his attempt to obtain an Order granting the substitution of the Administrator of plaintiff's estate for the deceased plaintiff, resulting in denial of each of his motions.

Accordingly, the motion is denied without prejudice. However, unless counsel files a

proper motion for the substitution of the Administrator of plaintiff's estate, for the plaintiff, within thirty (30) days of the date of entry of this Order, the court will entertain a motion to dismiss by defendant, pursuant to CPLR 1021.

This constitutes the Decision and Order of the court.

Dated: September 11, 2020



Rubén Franco, J.S.C.

**HON. RUBÉN FRANCO**