

**Ortiz v Jacobs**

2020 NY Slip Op 33712(U)

November 4, 2020

Supreme Court, New York County

Docket Number: 805138/2019

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM**

*Justice*

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**INDEX NO. 805138/2019**

SANDRA ORTIZ and MARCO A. CRIOLLO,  
Plaintiffs,

**MOTION DATE 10/05/2020**

- v -

**MOTION SEQ. NO. 001**

JORDAN M.S. JACOBS, M.D., and MOUNT SINAI BETH ISRAEL,  
Defendants.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 (Motion 001)

APPOINT REPRESENTATIVE OF DECEDENT'S  
ESTATE/SUBSTITUTE REPRESENTATIVE OF  
DECEDENT'S ESTATE/AMEND  
CAPTION/DISSOLVE STAY

were read on this motion to/for

In this action to recover damages for medical malpractice, Sandra Ortiz, the wife of the deceased plaintiff Marco A. Criollo, moves pursuant to CPLR 1015(a), 1021, and 3025(b) to be appointed as temporary administrator of Criollo's estate, to substitute herself as the plaintiff in place and stead of her decedent, to amend the caption accordingly, to vacate the automatic stay imposed upon the decedent's death, and voluntarily to discontinue Criollo's derivative causes of action. The defendants do not oppose the motion. The motion is granted.

The plaintiffs commenced this action on April 30, 2019, alleging that Ortiz was injured as a proximate result of the defendants' malpractice. Criollo asserted a derivative cause of action to recover for loss of his wife's services and consortium. Criollo died on November 4, 2019. Consequently, this action was automatically stayed (*see Perez v City of New York*, 95 AD3d 675, 677 [1st Dept 2012]).

Ortiz now moves for leave to be appointed as temporary administrator of Criollo's estate, and substitute herself in place and stead of Criollo for the sole purpose of discontinuing his derivative cause of action.

CPLR 1015(a) provides that "[i]f a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties." The law does not prohibit the

"plaintiff seeking the appointment of a temporary administrator for [Criollo] in the Supreme Court, as opposed to Surrogate's Court. In so moving for the appointment . . . as temporary administrator, and for substitution, the plaintiff [is] following the procedures outlined in CPLR 1015(a) and 1021. These statutory provisions do not require the plaintiff to proceed in Surrogate's Court, and, indeed, the attendant delays incidental thereto would militate against that procedure. The Supreme Court is a court of general jurisdiction with the power to appoint [a surviving spouse] to serve as temporary administrator, and [this] court also has broad discretion to act in matters involving substitution. Indeed, in order to avoid delay and prejudice in this action which has been pending for some time . . . there is no special need to proceed in Surrogate's Court"

(*Harding v Noble Taxi Corp.*, 155 AD2d 265, 266 [1st Dept 1989]). Hence, the court grants Ortiz's request for to be appointed as a temporary administrator, and for substitution, thereby permitting the case to proceed expeditiously (*see id.*).

In addition,

"CPLR 3217(b) authorizes a court to grant a motion for voluntary discontinuance 'upon terms and conditions, as the court deems proper.' While the determination upon such an application is generally within the sound discretion of the court (*see Tucker v Tucker*, 55 NY2d 378, 383 [1982]), a party ordinarily cannot be compelled to litigate and, absent special circumstances, such as prejudice to adverse parties, a discontinuance should be granted"

(*Bank of Am., N.A. v. Douglas*, 110 AD3d 452, 452 [1st Dept 2013]; *see Burnham Serv. Corp. v National Council on Compensation Ins.*, 288 AD2d 31 [1st Dept 2001]). Inasmuch as no party has opposed Ortiz's motion, the court concludes that Ortiz, as temporary administrator, upon her substitution as party plaintiff in place and stead of Criollo, should be permitted to discontinue his derivative cause of action.

In light of the foregoing, it is,

ORDERED that the motion is granted, without opposition, and Sandra Ortiz be, and hereby is, appointed as temporary administrator of the estate of Marco A. Criollo for the limited purpose of substitution and voluntary discontinuance of Marco A. Criollo's derivative cause of action; and it is further,

ORDERED that Sandra Ortiz, as temporary administrator of the estate of Marco A. Criollo, is substituted as the plaintiff in place and instead of Marco A. Criollo, now deceased; and it is further,

ORDERED that Sanda Ortiz, as temporary administrator of the estate of Marco A. Criollo, is granted leave voluntarily to discontinue the third cause of action, which had been asserted on behalf of Marco A. Criollo, and that cause of action is dismissed, with prejudice; and it is further,

ORDERED that the caption of the action is amended to read as follows:

SANDA ORTIZ

Plaintiff,

v

JORDAN M.S. JACOBS, M.D., and MOUNT  
SINAI BETH ISRAEL

Defendants,

and it is further,

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon the defendants; and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon the Trial Support Office, and shall file the notice required by CPLR 8019(c) and a completed Form EF-22 with the County Clerk, and the Trial Support Office shall thereupon amend the court records accordingly; and it is further,

ORDERED that the automatic stay imposed on November 4, 2019 be and hereby is vacated and dissolved; and it is further,

ORDERED that the parties shall resume discovery in accordance with the preliminary conference order dated September 3, 2019, to the extent practicable; and it is further,

ORDERED that the parties shall appear remotely, via the Microsoft Teams for a compliance conference on December 15, 2020, at 3:30 p.m., and the court shall email the attorneys for the parties an invitation to link to that conference.

This constitutes the Decision and Order of the court.

11/4/2020  
DATE



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JOHN J. KELLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE