

<b>Almodovar v City of New York</b>
2021 NY Slip Op 32103(U)
October 25, 2021
Supreme Court, New York County
Docket Number: Index No. 151225/2019
Judge: J. Machelles Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. J. MACHELLE SWEETING PART IAS MOTION 62**

*Justice*

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**INDEX NO. 151225/2019**

GIOVANNA ALMODOVAR,

**MOTION DATE 01/15/2021**

Plaintiff,

**MOTION SEQ. NO. 002**

- v -

CITY OF NEW YORK, MMB THIRD AVENUE,  
LLC, AMERICAS BURGER AND WRAPS D/B/A AMERICAN  
CAFE AND GRILL

**DECISION + ORDER  
ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for DISCOVERY.

Pending before the court is a motion filed by defendant 68th GRILL INC. (d/b/a AMERICAN CAFÉ AND GRILL i/s/h/a AMERICAS BURGER AND WRAPS d/b/a AMERICAN CAFÉ and GRILL) seeking an order pursuant to CPLR §3124: (1) compelling plaintiff to provide responses to movant’s “Notices for Discovery and Inspection,” dated January 17, 2020 and June 29, 2020; and to April 9, 2020 and July 19, 2020 letters regarding outstanding authorizations; and (2) compelling defendant CITY OF NEW YORK to provide responses to movant’s “Combined Demands,” dated May 6, 2019, and “Notice for Discovery and Inspection,” dated January 17, 2020.

On February 5, 2021, plaintiff's counsel Linda T. Ziatz, Esq. sent a letter to the court (NYCEF #48) that provided, *inter alia*:

Please be advised that I have been informed that Plaintiff, Giovanna Almodovar passed away in July of 2020 due to Covid-19. Her family will provide a death certificate as soon as possible which I will provide to the Court.

I respectfully request that proceedings be stayed until an estate can be set up.

On February 17, 2021, the undersigned issued an order staying this action, *nunc pro tunc*, to August 5, 2021, by virtue of plaintiff's death. Plaintiff's counsel was ordered to provide the court with a written update as to whether an administrator had been appointed. Such update was to have been filed with the court and a courtesy copy emailed to [bbuliu@nycourts.gov](mailto:bbuliu@nycourts.gov) no later than August 5, 2021.

No such update was filed.

On August 6, 2021, the court sent a courtesy inquiry e-mail to plaintiff's counsel.

On August 10, 2021, plaintiff's counsel submitted a letter (NYSCEF Document #55) to the court that provided, *inter alia*:

I believe the family intends to appoint an administrator but cannot at this time attest to that fact [...]

[...]

However, on or about July 19, 2021, I noticed I had a missed call from a Paul Almodovar. He did not leave a message and the call came from an unidentified number. I do not know who Paul Almodovar is but he is obviously a family member of the deceased. He has called twice since that time but each time he has called it was at a time when the telephone was unattended and he did not leave a message [...]

The fact that Paul Almodovar called a few times leads me to believe the family wants to pursue the case.

In order to be fair to the family of the deceased, I ask the Court to allow me time to find Paul Almodovar or speak to Ms. Almodovar's daughter if possible. At the very least I would like the opportunity to write to the family, return receipt requested, in Spanish giving them specific deadlines in their own language[...]

I am hereby requesting that the Stay be extended for an additional two months.

On August 12, 2021, the undersigned issued an order that extended the stay until October 12, 2021 and ordered that on or before October 12, 2021, plaintiff's counsel must provide a comprehensive written status update.

On October 12, 2021, plaintiff's counsel submitted a written status update (NYSCEF Document # 58) that provided, in substantive part:

1. I have finally contacted Juan Burgos, the husband of the deceased Plaintiff GIOVANNA ALMODOVAR who passed away as a result of Covid-19.
2. Mr. Burgos informed me today via telephone that he wants to proceed with his wife's case.
3. I had made many attempts to contact Ms. Almodovar's husband but inexplicably did not have his name in the file. I was attempting to contact a Mr. Almodovar.
4. I wrote several letters (copies attached hereto) and left many messages at the phone number I had in my file for her daughter, Naomi Almodovar, to no avail.
5. On two occasions I went to Ms. Almodovar's apartment located at 124 East 176th Street, Apt. 7F, Bronx, New York and left notes, again with no response. I was informed by a neighbor, who would not give me her name, that Plaintiff's husband did still live there.
6. On or about September 28, 2021 I sent a certified letter, return receipt requested addressed to Sr. Almodovar. For the purposes of full disclosure. I sent the certified letter to protect myself because I realized I had no evidence of any attempts to reach Plaintiff's family. In place of a signature on the return receipt Covid-19 was written.
7. On Saturday, October 9, 2021, I made one last attempt to call Plaintiff's daughter and this time someone picked up and very angrily told me I had the wrong number. Due to the unwarranted anger in this woman's voice, I sent her a text stating ery generally the situation and asking if she was a relative of Giovanna Almodovar could she reach out to Plaintiff's husband and have him call me.
8. Today, October 12, miraculously, Ms. Almodovar's son telephoned me and informed that Plaintiff's husband's name was Juan Burgos and gave me his father's new telephone number.

9. I spoke with Mr. Burgos and he wants to proceed with Plaintiff's action. 10. I am not an estate attorney, but with the Court's permission, I would like to proceed with the case and do anything I can to aid the family in setting up an estate as quickly as possible.

Notably, the update from plaintiff's counsel did not include any application with respect to extending the stay or with respect to motion #002.

On October 13, 2021, the court the court sent a courtesy inquiry e-mail to plaintiff's counsel inquiring of the same. Plaintiff's counsel did not reply.

On October 18, 2021, the court the court sent a second courtesy inquiry e-mail to plaintiff's counsel, and plaintiff's counsel again did not reply.

Accordingly, it is hereby:


**ORDERED** that the stay of this action expired on October 12, 2021, and such stay was *not* renewed because there was no application requesting such; and it is further hereby

**ORDERED** that the pending motion shall be scheduled for a discovery conference with DCM Part 62, and the clerks of such part will reach out to parties regarding scheduling; and it is further hereby

**ORDERED** that all counsel, including plaintiff's counsel (Linda T. Ziatz, Esq.) must attend such conference as scheduled, and be prepared to move forward with discovery, including addressing the issues in Motion #002; and it is further hereby

**ORDERED** that if plaintiff's counsel fails to appear for such conference, **this case will be dismissed for failure to prosecute.**

This is the decision and order of the court.

10/25/2021		
DATE		J. MACHELE SWEETING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
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"/> REFERENCE