

|                                                                                                                                                                                                                                |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Urgiles v Heredia</b>                                                                                                                                                                                                       |
| 2023 NY Slip Op 35265(U)                                                                                                                                                                                                       |
| May 8, 2023                                                                                                                                                                                                                    |
| Supreme Court, Westchester County                                                                                                                                                                                              |
| Docket Number: Index No. 66313/2016                                                                                                                                                                                            |
| Judge: David S. Zuckerman                                                                                                                                                                                                      |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

DISPO Motion Seq 5 and Case

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
WILSON C. URGILES,

Plaintiff,

-against -

DECISION/ORDER

Index No.  
66313/2016

JUAN J. HEREDIA and KARLA HEREDIA,

Defendants.

-----X  
ZUCKERMAN, J.

The papers filed in NYSCEF as Documents 1 through 103 were read in connection with this motion by Plaintiff for an Order "[v]acating the prior Decision and Order of this court, duly entered on October 21, 2022, pursuant to CPLR 5015, and, [p]ursuant to CPLR 1015 (a) and CPLR 1021 [a]ppointing a Temporary Administrator to appear for each of the deceased Defendants" (Notice of Motion, p. 1). Defendants oppose the motion.

#### FACTS

On October 28, 2016, Plaintiff Wilson C. Urgiles commenced this action by filing a Summons and Complaint. The Complaint sets

forth a single cause of action sounding in negligence. On November 23, 2016, Defendants Juan J. Heredia and Karla Heredia filed a Verified Answer along with assorted discovery demands, releases, and notices. In the intervening years, the court held numerous discovery compliance conferences resulting in approximately eleven discovery orders.

On February 4, 2019, Defendant Juan J. Heredia passed away in Ecuador. On April 19, 2020, co-defendant Karla Heredia also passed. No one has ever been appointed to represent either Defendant's interests.

On August 19, 2022, Defendants moved, pursuant to CPLR 1021, to dismiss the Complaint<sup>1</sup>. Plaintiff did not respond. In an October 11, 2022 Decision and Order, the court granted Defendants' unopposed motion, pursuant to CPLR 1021, to dismiss the Complaint. The court found that during the over three and a half years since Plaintiff's counsel was informed of Defendant Juan Heredia's passing, it took no action to have an estate representative appointed to substitute for the deceased Defendant. On March 23, 2023, Plaintiff submitted the instant motion.

---

<sup>1</sup>Defendants also sought dismissal, pursuant to CPLR 3216, for Plaintiff's neglect of the action. That branch of Defendants' motion was denied due to their failure to serve Plaintiff with a ninety day notice (CPLR 3216 (b) (3)).

## CONTENTIONS OF THE PARTIES

Plaintiff contends that the October 11, 2022 Decision and Order must be vacated because

1. While the prior motion was pending, Defendant's counsel "utterly misled" the court by not informing it of co-Defendant Karla Heredia's passing (Affirmation in Support, p. 2),
2. "The inadvertent failure of plaintiff's counsel to submit opposition papers" (*id*),
3. Plaintiff's lack of wilfulness to abandon the action,
4. Defendants' counsel should have moved to appoint a representative for the deceased Defendants,
5. Defendants' counsel lacked to standing to file the prior motion,
6. Defendants' counsel failed to establish prejudice, and
7. The court misapplied the law in dismissing the entire action.

Counsel for Defendants first responds that the motion must be summarily denied because Plaintiff has not established a reasonable excuse for defaulting on the prior motion. It adds that, on the merits, over four years after Defendant Juan J. Heredia's death,

Plaintiff still has not caused an estate representative to be appointed. Counsel also avers that, at the time of the prior motion, it was unaware of co-Defendant Karla Heredia's death.

In Reply, counsel for Plaintiff mostly impugns the integrity of opposing counsel. Plaintiff's counsel also posits that the death of co-Defendant Karla Heredia "was the proximate cause of the purported undue delay."

#### DISCUSSION

"A party seeking to vacate an order entered upon his or her failure to oppose a motion is required to demonstrate both a reasonable excuse for the default and the existence of a potentially meritorious opposition to the motion. The determination of what constitutes a reasonable excuse lies within the Supreme Court's discretion, and the court has discretion to accept law office failure as a reasonable excuse (see CPLR 2005) where that claim is supported by a detailed and credible explanation of the default at issue" (*Giotis v Besser*, 207 AD3d 526, 527-528 [2d Dept 2022][internal citations and quotation marks omitted). In contrast, "a conclusory, undetailed, and uncorroborated claim of law office failure does not amount to a reasonable excuse" (*White v Daimler Chrysler Corp.*, 44 AD3d 651 843

[2d Dept 2007]]).

Here, Plaintiff's counsel concedes receiving timely notice of the prior motion via NYSCEF e-mail, reading it, and intending to seek an adjournment. Counsel adds that "our office staff was advised to seek said adjournment" and that counsel "was advised (incorrectly) by the same office staff that the matter was adjourned. . . ." (Affirmation in Support, p. 15). Plaintiff's counsel goes on to indicate that "it appears that the office had wrongly calendared the motion" (*id*). Glaringly absent from Plaintiff's submission is any documentation of this claim from "office staff" or anyone else in "the office," copies of any incorrect calendar entries or anything else to corroborate counsel's unsupported allegations. Consequently, Plaintiff has failed to provide a reasonable excuse for defaulting on the prior motion.

"Since the plaintiffs failed to establish a reasonable excuse for their default, it is not necessary to consider whether they demonstrated a potentially meritorious opposition to the motion" (*Giotis v Besser, supra* at 528). Therefore, Plaintiff's motion to vacate the court's October 11, 2022 Decision and Order must be denied. The branch of Plaintiff's motion seeking an Order appointing a representative for the deceased Defendants is denied

as moot.

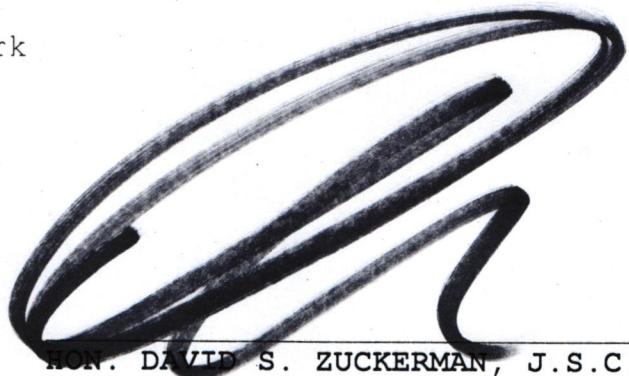
The remaining contentions do not compel a different result. Any additional relief requested by any party and not expressly considered herein is denied.

Accordingly, upon the foregoing papers, it is hereby

**ORDERED**, that Plaintiff's motion is in all respects denied.

The foregoing constitutes the Opinion, Decision & Order of the Court.

Dated: White Plains, New York  
May 8, 2023



HON. DAVID S. ZUCKERMAN, J.S.C.

TO: All parties via NYSCEF