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| Victoria v 36 Greene St. Corp. |
| 2026 NY Slip Op 31827(U) |
| April 28, 2026 |
| Supreme Court, New York County |
| Docket Number: Index No. 650569/2026 |
| Judge: Emily Morales-Minerva |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42M

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| THEODOSIUS W. VICTORIA, | INDEX NO. | <u>650569/2026</u> |
| Plaintiff, | MOTION DATE | <u>04/10/2026</u> |
| - v - | MOTION SEQ. NO. | <u>003</u> |
| 36 GREENE STREET CORP., DONATO SAVOIE | | |
| Defendants. | | |

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40, 42
were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE.

APPEARANCES:

Clark Smith Villazor LLP, New York, New York (Christopher J. Clark Esq., of counsel) for plaintiff.

HON. EMILY MORALES-MINERVA:

In this action, non-party Elizabeth Fensterstock, preliminary executor of the estate of plaintiff THEODOSIUS W. VICTORIA, moves, unopposed, by order to show cause (motion sequence number 03), pursuant to CPLR §§ 1015 (a)¹ and 1021,² to

¹ CPLR § 1015 (a) provides, "If a party dies and the claim for or against him is not thereby extinguished, the court shall order substitution of the proper parties."

² CPLR § 1021 provides, "A motion for substitution may be made by the successors or representatives of a party or by any party. If a person who should be substituted does not appear voluntarily he may be made a party defendant. If the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made, however, such dismissal shall not be on the merits unless the court shall so indicate. If the event requiring substitution occurs after final judgment, substitution may be made in either the court from or to which an appeal could be or is taken, or the court of original instance, and if substitution is not

be substituted as the party plaintiff due to THEODOSIUS W. VICTORIA's untimely passing.

BACKGROUND

On February 08, 2026, plaintiff THEODOSIUS W. VICTORIA passed away (see New York State Court Electronic Filing System [NYSCEF] Doc. No. 38, death certificate of plaintiff). On March 23, 2026, the Surrogate's Court of the State of New York, New York County, appointed Elizabeth Fensterstock as the preliminary executor of THEODOSIUS W. VICTORIA's estate (see NYSCEF Doc. No. 39, order directing the issuance of preliminary letters testamentary, issued March 23, 2026). Now, non-party Elizabeth Fensterstock moves, by order to show cause (seq. no. 003), pursuant to CPLR §§ 1015 (a) and 1021, to be substituted as the party plaintiff.

Defendants do not appear or submit opposition to the order to show cause.

made within four months after the event requiring substitution, the court to which the appeal is or could be taken may dismiss the appeal, impose conditions or prevent it from being taken. Whether or not it occurs before or after final judgment, if the event requiring substitution is the death of a party, and 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."

ANALYSIS

"A party's death divests a court of jurisdiction to conduct proceedings in an action until a proper substitution has been made pursuant to CPLR § 1015 (a)" (Noriega v Presbyterian Hosp. in City of New York, 305 AD2d 220, 221 [1st Dept 2003], citing Silvagnoli v Consol. Edison Emps. Mut. Aid Soc., 112 AD2d 819 [1st Dept 1985]). Generally, the only inquiry for purposes of a motion for substitution is whether the party sought to be substituted for a deceased party is duly appointed to handle the decedent's estate (see Tag 380, LLC v Estate of Ronson, 69 AD3d 471, 474 [1st Dept 2010]).

Further, "[w]henver a petition for probate of a will [] has been filed and process has issued thereon, an executor named in the will may file with the court a written request for the issuance to him of preliminary letters testamentary" (Surrogate's Court Procedure Act [SCPA] § 1412 [1]; see also Matter of Estate of Scamardella, 169 Misc2d 55 [Sur. Ct. 1996] [holding that it is in the best interest of the estate that the nominated executor under a will be given preliminary letters testamentary for the purpose of expediting the administration of the estate], affd 238 AD2d 513 [2d Dept 1997]). The basic purpose of issuing preliminary letters testamentary is to provide for immediate administration when there may be delay in

probate (see generally SCPA § 1412; see also Vincent C. Alexander, Prac Commentaries, McKinney's Cons Laws of NY, CPLR 1021 [note: online version] [discussing the Surrogate's Court's jurisdiction to entertain applications for appointment of a temporary executor]).

In consideration thereof, Elizabeth Fensterstock demonstrates that plaintiff THEODOSIUS W. VICTORIA passed away, and that she was duly appointed as the preliminary executor of his estate (see NYSCEF Doc. Nos. 38 and 39). Therefore, the order to show cause (mot. seq. no. 03) is granted, without opposition.

Accordingly, it is hereby

ORDERED that the motion (seq. no. 03) is granted entirely; it is further

ORDERED that Elizabeth Fensterstock is hereby substituted as party plaintiff in place and stead of THEODOSIUS W. VICTORIA, in the above captioned proceeding; it is further

ORDERED that Elizabeth Fensterstock shall file with the Court formal letters of appointment or denial of such appointment within ten days thereof; it is further

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

ELIZABETH FENSTERSTOCK, as Preliminary Executor of the Estate of THEODOSIUS W. VICTORIA, Deceased,

Plaintiff,

v

36 GREENE STREET CORP. and DONATO SAVOIE

Defendants;

it is further

ORDERED that Elizabeth Fensterstock shall serve a copy of this decision and order with notice of entry upon defendants; it is further

ORDERED that, within 15 days of the entry of this decision and order, Elizabeth Fensterstock shall serve a copy of this decision and order upon the County Clerk and the Clerk of the General Clerk's office, who are directed to, in accordance with this decision and order, amend the caption accordingly; it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website); it is further

ORDERED that the parties shall appear for a virtual conference on May 20, 2026, at 12:30 P.M. in Part 42M; and it is further

ORDERED that the Clerk of Court shall mark the file accordingly.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.


4/28/2026
DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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


 EMILY MORALES-MINERVA, J.S.C.