

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES
Justice

PART 17

-----X
MARIO MORENO,

Plaintiff,

-against-

Index No. 19332/99
Motion Date: 12/10/08
Motion Cal. No. 44

YVES ETIENNE, MED EXPRESS, INC.,
Defendants.

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The following papers numbered 1 to 14 read on this motion by defendants for an order vacating the settlement of January 22, 2003 and dismissing the action as abandoned; and cross-motion by plaintiff for an order appointing Dominick Lavelle, Esq., as Administrator of the Estate of Mario Moreno, with Limited Letters of Administration for the purposes of this litigation only; Substituting Lavelle, as administrator of the Estate of Mario Moreno, in place of the plaintiff in this action and changing the caption accordingly; granting Lavelle, as administrator of the Estate of Mario Moreno, leave to execute a general release on behalf of the Estate of Mario Moreno; an order pursuant to CPLR 2601(a), directing that the settlement proceeds distributable to the Estate of Mario Moreno (after costs and the 1/3 attorney fee is apportioned pursuant to the retainer agreement executed by the plaintiff) then be deposited into the Court in full settlement of plaintiff Mario Moreno's action herein, thereby releasing defendants; and for an order staying the action, pursuant to CPLR 2201, by reason of the plaintiff's death, so that an estate and substitution may be arranged.

	<u>PAPERS</u>
	<u>NUMBERED</u>
Notice of Motion-Affirmation-Exhibits.....	1- 4
Affirmation in Opposition.....	5-6
Notice of Cross-Motion-Affirmation-Exhibits.....	7-10
Affirmation in Opposition.....	11-12
Reply Affirmation.....	13-14

Upon the foregoing papers, it is ordered that the motion is granted and the cross-motion is denied, for the following reasons:

This action arises out of an alleged motor vehicle accident which occurred on June 14, 1998 at or near the intersection of Parsons Boulevard and Hillside Avenue, in the County of Queens, City and State of New York. At the time of the alleged occurrence, the defendants, Yves Etienne and Med Express, Inc., were insured by Capital Mutual Insurance Company (hereinafter, "CMIC".) On October 2, 2000, by Order of the Hon. Edward H. Lehner of the Supreme Court, New York County, CMIC was placed into liquidation; as a result, the New York Liquidation Bureau (hereinafter, "NYLB") took control of the defendants' insurer. On or about January 22, 2003, the parties entered into a settlement in the amount of \$2,500.00. As a result of the settlement, the NYLB forwarded to plaintiff's counsel the necessary closing papers (i.e., a stipulation of discontinuance, lien letter, general release, plaintiffs' current mailing addresses,

and counsel's tax identification number and address) to be signed and returned to NYLB. Plaintiff failed to provide the needed documents and NYLB sent three follow up letters to plaintiffs' counsel requesting that the necessary closing papers be executed and sent back to NYLB. Since January 22, 2003, neither the general release, nor any of the other closing papers have ever been returned signed by plaintiff, Mario Moreno. Defendants claim these documents are necessary to effectuate the settlement of the instant claim and without them, the NYLB cannot receive payment from the guaranty funds created under Article 76 of the Insurance Law and subsequently disburse those funds to the plaintiff without the Liquidator's Release.

Defendants now move to set aside the instant stipulation of settlement and dismiss the complaint. They claim that since plaintiff has failed to sign the release, after more than four years, the settlement never took effect and no sum of money is payable to the plaintiffs. Defendants also argue that the action should be dismissed pursuant to CPLR 3216 for want of prosecution since one year has passed since the joinder of issue and they served plaintiff with a "90 day demand" and there has been no response.

Plaintiff opposes this motion by claiming that since the 2003 settlement was made, plaintiff's attorney has not been able to locate plaintiff. However, plaintiff requests that the settlement be honored and the relief requested in the cross-motion be granted. That relief is as follows: appointing Dominick Lavelle, Esq., as Administrator of the Estate of Mario Moreno, with Limited Letters of Administration for the purposes of this litigation only; Substituting Lavelle, as administrator of the Estate of Mario Moreno, in place of the plaintiff in this action and changing the caption accordingly; granting Lavelle, as administrator of the Estate of Mario Moreno, leave to execute a general release on behalf of the Estate of Mario Moreno; an order pursuant to CPLR 2601(a), directing that the settlement proceeds distributable to the Estate of Mario Moreno (after costs and the 1/3 attorney fee is apportioned pursuant to the retainer agreement executed by the plaintiff) then be deposited into the Court in full settlement of plaintiff Mario Moreno's action herein, thereby releasing defendants; and for an order staying the action, pursuant to CPLR 2201, by reason of the plaintiff's death, so that an estate and substitution may be arranged.

Initially, the Court notes that stipulations are favored by the courts and are not lightly cast aside. *See, Susan McCoy, Appellant, v. Kenneth I. Feinman* 99 N.Y.2d 295 (2002); *Hallock v State of New York*, 64 NY2d 224 (1984.) *see also, American Bridge Co. v. Acceptance Ins. Co.*, 51 A.D.3d 607 (2d Dept 2007.) Here, plaintiff claims that plaintiff Moreno is deceased. It is well established that the death of a party divests the court of jurisdiction and stays the proceedings until a proper substitution has been made. *Singer v. Riskin*, 32 A.D.3d 839 (2d Dept. 2006.) However, plaintiff's attorney has not submitted any admissible proof to support the allegation that plaintiff died. The only evidence of Moreno's death is a computer search printout from an unidentified website, which is not admissible evidence. See, Public Health Law § 4103 which states that a certified copy of a death certificate is admissible in this

State as prima facie evidence of the facts therein stated. Accordingly, there is insufficient evidence to establish an excuse for plaintiff's failure to sign the general release and the settlement is set aside and the complaint is dismissed. Smith v. Ford, 210 A.D.2d 469 (2d Dept. 1994)

In addition, according to plaintiff's attorney, based on the computer search, Mario Moreno died on December 1, 2002. However, this case was not settled until January 22, 2003. Even assuming, *arguendo*, that plaintiff Mario Moreno died on December 1, 2002, it is well established that the death of a plaintiff terminates his or her attorney's authority to act and stays the client's personal injury action pending the substitution of a legal representative. McDonnell v. Draizin, 24 A.D.3d 628 (2d Dept. 2005) Therefore, in the instant case, plaintiff's attorney had no authority to settle the case. Consequently, if this Court were to accept plaintiff's evidence of Moreno's death, such would invalidate the settlement. Without a settlement, this Court would need to evaluate the branch of the motion seeking dismissal of the action pursuant to CPLR 3216 for want of prosecution. It has been over one year since the joinder of issue and defendants served plaintiff with a "90 day demand". To date there has been no response and as the following discussion indicates, there was no excuse for plaintiff's lack of action in this matter. In fact this Court finds that plaintiff's inaction was wilful and contumacious and completely inappropriate neglect to proceed in this action. Moreover, plaintiff never sought an extension of time to file a note of issue after receiving the demand pursuant to CPLR 3216. Additionally, plaintiff has not set forth any proof of the merit of this action. As such, the complaint should be dismissed for want of prosecution. Blackwell v Long Island College Hospital, 303 AD2d 615 (2d Dept 2003.)

Regarding the cross-motion, plaintiff's evidence shows that plaintiff died almost six years ago and there has not been any motion to substitute a representative for plaintiff in this matter prior to the instant cross-motion, which was filed on October 15, 2008. It is well established that counsel is required to 'timely' ask for a substitution pursuant to CPLR 1021. CPLR 1021 requires that a substitution be made within a reasonable time after death. Plaintiff has not indicated that any actions have been taken in Surrogates Court to have a representative appointed for plaintiff. Moreover, plaintiff has not indicated what actions, if any, have been taken to discover if plaintiff has any living relatives to be appointed as an administrator for plaintiff's estate. The plaintiff's attorney has not made a diligent effort to locate relatives of the plaintiff or to obtain a death certificate for the plaintiff. The only step plaintiff's counsel had taken to locate plaintiff's relatives was to address three letters to relatives of the plaintiff at what appears to be plaintiff's known addresses. Nor has plaintiff submitted an affidavit of merit. As such, the branches of the cross-motion regarding substituting Lavelle as Administrator of Moreno's estate are denied. McDonnell v. Draizin, 24 A.D.3d 628 (2d Dept. 2005) Suciu v City of New York, 239 AD2d 338 (2d Dept 1997.)

The branch of the cross-motion seeking an order staying the action is denied. Plaintiff's attorney seeks this stay to enable the attorney to contact a family member, in order to ascertain

estate information, to obtain a death certificate, or otherwise. As stated above, this Court has found the efforts made to do such during the last six years were not diligent and there is no basis to believe additional efforts will produce positive results. Moreover, plaintiff has not presented any reasonable excuse of this lack of diligent effort. Accordingly, there is no basis to stay this action.

Based on the above, defendants' motion is granted and the complaint is dismissed and the cross-motion is denied.

Dated: December 15, 2008

ORIN R. KITZES, J.S.C.