

**SUPREME COURT - STATE OF NEW YORK
IAS TERM, PART 28 NASSAU COUNTY**

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

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Motion R/D: 10-6-00

Submission Date: 10-6-00

Motion Sequence No.: 002,003/MOT D

STELLA SPEROS,

Plaintiff,

PLAINTIFF'S ATTORNEY

Arthur B. Trakas, Esq.

34-19 Broadway

Long Island City, New York 11106

- against -

DEFENDANT'S ATTORNEY

(for Carnell Engineering, Inc.)

Anthony J. DiFiore, Esq.

70 West Red Oak Lane

White Plains, New York 10604

**ANNETTE ROSENTIEL, J.V.P. TERMITE
and PEST CONTROL, INC., CARNELL
ENGINEERING INC., DONALD GERBER
BUILDING INSPECTION SERVICES,
Defendants.**

(for J.V.P. Termite and Pest Control, Inc.)

Stern & Altimari, Esqs.

128 Front Street

Mineola, New York 11501

Upon the following papers read on Defendant's motion seeking dismissal of the complaint:

- Defendant's Notice of Motion;
- Affirmation of Anthony J. DiFiore, Esq. and supporting papers;
- Defendant's Notice of Cross-motion;
- Affirmation of Anthony F. Altimari, Esq.;
- and no papers in Opposition.

Motions by Defendants J.V.P. Termite and Pest Control. Inc., and Carnell Engineering, Inc., for an order pursuant to CPLR 1021 dismissing the complaint of

Stella Speros for want of prosecution, abandonment and failure to substitute a representative for the deceased Plaintiff are **granted** without opposition.

In November, 1999, an action was commenced against the moving Defendants and others arising out of termite infestation and damage to the premises known as 4 Old Mill Road in Manhasset, New York which was purchased by Plaintiff from another Defendant in 1997. According to the complaint, treatment and repairs believed at the time to cost under \$10,000 in the end cost approximately \$63,000.

At the time the action was commenced in November, 1999, the complaint was verified by Helen Andreakis who was referred to in the verification as the Executrix of Stella Speros. The body of the complaint, which begins "Plaintiff, Stella Speros, by her executrix, Helen Andreakis complaining of the Defendants hereby states:", is, however, captioned only as "Stella Speros, Plaintiff." Apparently the parties engaged in numerous discussions over the course of nearly a year concerning the substitution of the executrix in the place of the named but deceased Plaintiff pursuant to CPLR 1015 (a) and CPLR 1021. A preliminary conference was adjourned for this purpose from an earlier date to June 23, 2000 and then to July 27th, August 25th and then, with a final marking, to September 8, 2000. To date, no substitution has been made despite the fact that when the preliminary conference was adjourned from August 25th to September 8th the parties were advised that it was the final adjournment for that purpose.

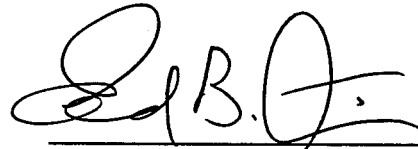
SPEROS v. ROSENTIEL, et al.,
Index No. 12042-99

Pursuant to CPLR 1021 where no motion is made within a reasonable period of time to substitute a proper party in the place of a deceased Plaintiff the appropriate remedy is a dismissal of the action. See, Gutwein v. Ungar Management Inc., 44 A.D. 2d 800, 360 N.Y.S. 2d 254 (1st Dept. 1974); and Price v. Booth, 21 A.D. 2d 680, 249 N.Y.S. 2d 1007 (2nd Dept. 1964). Until a representative of the deceased is substituted the court is without jurisdiction to do anything else. See, Wisdom v. Wisdom, 111 A.D. 2d 13, 488 N.Y.S. 2d 682 (1st Dept. 1985). The executrix has failed to move for the appropriate substitution. There has been no explanation for such failure or even to respond to the instant motion. Under these circumstances, and without any showing of merit, the court must dismiss the action. See, Ruderman v. Feffer, 10 A.D. 2d 704, 198 N.Y.S. 2d 130 (1st Dept. 1960). Accordingly, it is,

ORDERED, that the motion to dismiss this action is **granted** without costs.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
December 11, 2000



Hon. LEONARD B. AUSTIN, J.S.C.

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