

SCW

SHORT FORM ORDER

MG

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

GASPER GALLUZZO,

TRIAL/IAS PART 19

Plaintiff(s),

INDEX NO. 1314/98

- against -

MOTION SEQUENCE  
NO. 3

MARTIN LEHMAN, M.D., ROY SHANON, M.D.,  
and LONG ISLAND MEDICAL DIAGNOSTICS., P.C.,

MOTION SUBMISSION  
DATE: September 30, 2003

Defendant(s).

The following papers read on this motion:

Notice of Motion	X
Reply Affirmation	X
Affirmation in Opposition	X

Upon the foregoing papers, the motion by plaintiff, for an Order vacating stay and substituting Eileen Caruso as Executrix for the Estate of Gasper Galluzzo, and to amend the caption to reflect said substitution, pursuant to CPLR §1015(a) and §1021, is determined as hereinafter provided:

The plaintiff, Gasper Galluzzo, died on April 4, 2001. The death of the plaintiff stayed the action (see, **Hicks v Jeffrey**, 304 AD2d 618, 757 NYS2d 474 (Second Dept., 2003)). In examining this issue, the Court in **Hicks v Jeffrey**, supra, stated:

"It is well settled that the death of a party stays the action as to him or her pending the substitution of a legal representative, and any determination rendered without such a substitution is generally deemed a nullity (see, *CPLR 1015*; *Matter of Einstoss*, 26 NY2d 181, 187, 189, 309 NYS2d 184, 257 NE2d 637; *Gonzalez v Ford Motor Co.*, 295 AD2d 474, 475, 744 NYS2d 468; *Meehan v Washington*, 242 AD2d 286, 287, 660 NYS2d 737). Here, the Supreme Court's marking the case off the calendar, and its subsequent dismissal of the action because of the death of the defendant, Albert Jeffrey, were nullities, and the plaintiff was entitled to apply for the appointment of an administrator for that defendant. Upon said appointment, the plaintiff was entitled to substitution (see, *CPLR 1015[a],[b]*; *CPLR 1021*; *Meehan v*

*Washington, supra; see also 22 NYCRR 202.21[h])."*

**Hicks v Jeffrey, supra at 475**

Based upon the holding in **Hicks v Jeffrey**, supra, the "marking off" of the instant action and the subsequent dismissal pursuant to CPLR §3404 was a nullity. As such, the plaintiff's application for an Order vacating stay and substituting Eileen Caruso as Executrix for the Estate of Gasper Galluzzo, and to amend the caption to reflect said substitution, pursuant to CPLR §1015(a) and §1021, is granted.

SO ORDERED.

DATED:

*12/5/2003*

*Roy S. Mellon*  
.....  
J.S.C.

