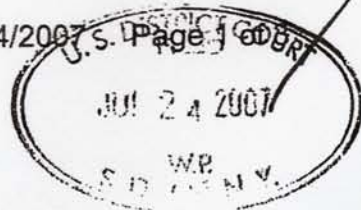


21-53



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
ERIC ILIFF,

Plaintiff,

06 Cv. 15453 (CLB)

- against -

*Memorandum and Order*

ST. VLADIMIR'S ORTHODOX THEOLOGICAL  
SEMINARY, INC. and THE ORTHODOX  
CHURCH IN AMERICA,

Defendants.  
-----X

Briant, J.

Plaintiff Eric Iliff in this diversity suit to recover tort damages, filed December 12, 2006, died on March 13, 2007, before the case could be reached for trial. A Suggestion of Death was filed the following day (Doc. 20).

Rule 25(a) F.R. Civ. P. is applicable. Death of Mr. Iliff did not extinguish his claim. No motion for substitution was filed by his personal representative within 90 days thereafter, and the identity of his heirs or executor is unknown to the Court.

By motions thereafter filed (Docs. 24 and 28), fully submitted for decision on July 20, 2007, Defendants seek to invoke that portion of Rule 25(a) which provides that upon failure to move timely for substitution, "the action shall be dismissed as to the deceased party."

No opposition was presented to the motion, but the attorney who represented the Plaintiff

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during his lifetime has suggested the “dismissal should be without prejudice because Mr. Iloff’s representative had not appeared and is not represented in the action.” (Letter dated July 6, 2007). Defendants seek dismissal with prejudice.

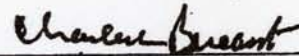
“A dismissal with prejudice generally signifies that the Court intended to dismiss the action ‘on the merits,’ that is, to bring the action to a final conclusion against the Plaintiff (citations omitted). We have used the words ‘with prejudice’ interchangeably with the phrase ‘on the merits’ to indicate the same preclusive effect. *Yonkers Contracting Co., Inc. v. Port Authority Trans-Hudson Corp.*, 93 N.Y. 2d 375, 380 (1999).

This Court sees no basis consistent with due process on which it can now rule on the merits of the claim when the present owners of the claim are not before the Court. Our Court of Appeals has held that “the 90 day period [of Rule 25(a)] was not intended to act as a bar to otherwise wise meritorious actions.” *Staggers v. Otto Gerdau Company*, 359 F.2d 292, 296 (2d Cir. 1966).

The action is dismissed without prejudice and without costs. The Clerk shall file a Judgment.

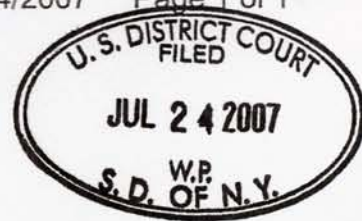
SO ORDERED.

Dated: White Plains, New York  
July 23, 2007



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Charles L. Brieant, U.S.D.J.



**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----X  
**ERIC ILIFF,**

**Plaintiff,**

**-against-**

**7:06 Civ 15453 (CLB)  
JUDGMENT**

**ST. VLADIMIR'S ORTHODOX THEOLOGICAL  
SEMINARY, INC. and THE ORTHODOX  
CHURCH IN AMERICA,**

**Defendants.**  
-----X

Whereas the above entitled action having been assigned to the Honorable Charles L. Briant, U.S.D.J., and the Court thereafter on July 23, 2007, having handed down a MEMORANDUM AND ORDER (docket #35), dismissing the action without prejudice and without costs, it is,

**ORDERED, ADJUDGED AND DECREED:** That the action is dismissed without prejudice and without costs, the case is hereby closed.

**DATED: White Plains, N.Y.  
July 24, 2007**

*J. Michael McMahon*  
**J. Michael McMahon  
Clerk Of Court**

**USDCCSD NY WP**

**JUL 24 2007**

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**DOCKETED AS  
A JUDGMENT  
ON**