

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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MEMORANDUM

**DONALD ZARDA,**

Plaintiff,

10-cv-04334-JFB

-against-

**ALTITUDE EXPRESS, INC.,  
dba Skydive Long Island, and RAY MAYNARD,**

Defendants.

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Plaintiff makes the following brief statement in further support of his motion for substitution, et alia.

**1. THE MOTION TO SUBSTITUTE THE ESTATE AS PLAINTIFF IS TIMELY**

Defendant suggested plaintiff's death on October 6, 2014. Plaintiff's estate moved to be substituted within just over 30 days, well under the 90 permitted by Rule 25. As such, this tolls and renders nugatory the suggestion of death.

**2. THE CASE IS VIABLE, WAS READY FOR TRIAL, AND A TRIAL DATE SHOULD BE SCHEDULED**

There will have to be some clean up and rejiggering of how the case will be presented to this jury; but the Court has already held that it has jurisdiction and has already held that there is enough evidence for a jury to make a decision. There are few reported decisions on Rule 25, but in Republic Pension Services, Inc. v. Finger, 1988 U.S. Dist. LEXIS 1848 (E.D.N.Y.Feb. 11, 1988), the magistrate, citing older authorities, ruled that "Rule 25(a) is simply procedural. As such, it gives no guidance on whether the claim survives. Whether a claim survives is a matter of substantive law, and, in federal court, depends on whether jurisdiction is based on diversity of

citizenship or on a case or controversy arising under federal law.” Defendants have had their bites at both the substance of the claim and the Court's jurisdiction. They didn't like the results, but those issues are res judicata and/or the law of the case.

The case arises under state law, which would allow substitution. See Giles v. Campbell, 698 F.3d 153 (3d Cir.2012) (circuit looks to state law to see whether claim survives in diversity case). Under New York Law, CPLR § 1015(a), “If a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties.” The language (“shall”) is mandatory. All of the angles are covered by these statutes, so long as I have moved within 90 days of the suggestion of death - which I have, and as long as the Court has held there are questions of fact that the jury gets to decide, the estate is entitled to this relief.

### CONCLUSION

For these reasons the motion should be granted.

Dated:                      New York, New York  
November 11, 2014

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/s/  
GREGORY ANTOLLINO, ESQ