

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

	<u>x</u>	Index	
JOANNA (a/k/a NANA) LOISELLE, etc., et al.		Number <u>2778</u>	2006
- against -		Motion	
		Date <u>October 11,</u>	2006
ARISTOTELIS (a/k/a TELLY) VAGIANDERIS		Motion	
	<u>x</u>	Cal. Numbers <u>47 & 48</u>	

The following papers numbered 1 to 15 read on this motion by Ioannis Vagianderis as executor of the Estate of Aristotelis, a/k/a Telly Vagianderis pursuant to CPLR 1015 to be substituted as the party defendant.

The following papers numbered 1 to 15 read on this motion by plaintiffs pursuant to CPLR 602 to consolidate the instant action with the action and special proceeding entitled Vagianderis v Kalamaki Taverna, Inc., Supreme Court, Queens County, Index No. 307/06 (the Vagianderis proceeding), and for injunctive relief.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-5
Order to Show Cause - Affidavits - Exhibits - Memorandum of Law	7-12
Reply Affidavits	13-15

Upon the foregoing papers it is ordered that the motions are denied.

Plaintiffs commenced the instant action pursuant to Business Corporation Law (BCL) § 706(d), § 716(c) and § 720 seeking the removal of defendant as a director and officer of Kalamaki Taverna, Inc. (the Corporation), d/b/a Telly's Taverna (the Restaurant). Pursuant to the Shareholder's Agreement dated February 19, 2001, plaintiff Joanna (a/k/a Nana) Loiselles and defendant each own 50% of the Corporation and each are salaried employees responsible for the daily operation of the Restaurant.

Plaintiffs allege that defendant voluntarily withdrew from the Corporation and stopped working at the Restaurant over 10 years ago due to a permanent illness and disability. However, plaintiffs allege defendant still conducts himself as if he is a 50% owner of the Corporation and an employee of the Restaurant. Plaintiffs commenced this action seeking, inter alia, a declaration that defendant is permanently removed as a director and officer of the Corporation and is not an employee of the Restaurant.

Aristotelis, a/k/a Telly, Vagianderis maintains that he is still an officer and director of the Corporation, and commenced the Vagianderis proceeding seeking a judicial dissolution of the Corporation. After commencement of the actions, petitioner-plaintiff Aristotelis Vagianderis died. Preliminary letters testamentary have been issued appointing Ioannis "John" Vagianderis as fiduciary of the estate. Ioannis "John" Vagianderis now seeks to be substituted as the defendant in place of his brother, Aristotelis Vagianderis.

CPLR § 1015(a) states that "if a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties." Moreover, if a cause of action survives the death of a party as a matter of substantive law, such death divests the court of jurisdiction until a duly appointed personal representative is substituted for the deceased party (Homemakers Inc. of Long Is. v Williams, 131 AD2d 636 [1987]; Silvagnoli v Consolidated Edison Employees Mut. Aid Soc., 112 AD2d 819 [1985]).

Preliminary letters testamentary were issued on June 14, 2006, with the provision that they would expire 180 days after being issued unless further extended by the court. In December 2006, an application was submitted to the Surrogate for an extension. The applicant was thereafter notified by the Surrogate that the preliminary letters testamentary would be extended upon the posting of a bond in the amount of \$1,000,000.00. To date, the bond has not been posted. Therefore, by its own terms, the June 14, 2006 order granting Ioannis Vagianderis the preliminary letters testamentary expired on December 14, 2006 (see Matter of Estate of Horton, 255 AD2d 642 [1998]). Consequently, Ioannis Vagianderis is no longer a fiduciary; thus, the motion for substitution must be denied (see Estate of Bertha Seher, NYLJ, January 17, 1996, at 35, col 1). A fortiori, the motion by plaintiffs must be denied until a proper substitution is made (see Homemakers Inc. of Long Is. v Williams, supra; Silvagnoli v Consolidated Edison Employees Mut. Aid Soc., supra).

It is noted that the parties are scheduled to appear before

the Surrogate on January 25, 2007. At that time, the parties will have an opportunity to discuss the issue of letters testamentary.

Dated: January 22, 2007

J.S.C.