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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DOUGLAS C. DUIN,	)	
	)	2:10-cv-02150-GEB-EFB
Plaintiff,	)	
	)	
v.	)	<u>ORDER</u>
	)	
DALE ELAINE McCORMICK; ESTATE OF	)	
ROBERT A. McCORMICK, Deceased;	)	
JOHN G. STEFFES,	)	
	)	
Defendants.	)	
_____	)	

Defendant Estate of Robert A. McCormick, Deceased (the "Estate"), moves under Federal Rule of Civil Procedure ("Rule") 12(b)(6) for an order dismissing it as a defendant from Plaintiff's First Amended Complaint ("FAC"). Plaintiff alleges a negligence claim against the Estate based on personal injuries Plaintiff suffered in August of 2008 on real property then-owned by Robert A. McCormick. Plaintiff alleges that Robert A. McCormick "is deceased, having died October 10, 2008[.]" (FAC ¶ 4.)

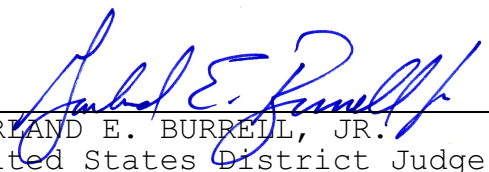
The Estate's dismissal motion was scheduled to be heard on May 16, 2011, but was submitted without oral argument on May 11, 2011, since Plaintiff had not filed an opposition or statement of non-opposition as required by Local Rule 230(c). However, Plaintiff filed an opposition to the motion after the motion was submitted, which included an affidavit from an assistant for Plaintiff's counsel. The assistant avers in the affidavit that Plaintiff's counsel was not aware of the Estate's

1 dismissal motion, since the Court's email notification stating the  
2 Estate's dismissal motion was filed "was not downloaded to [the  
3 assistant's work] email in-box." (Affidavit of Joan T. Nuefeld ¶ 11.)  
4 The assistant further avers that Plaintiff's counsel first learned of  
5 the Estate's motion after the assistant received the Court's email  
6 notification stating the Estate's dismissal motion was taken under  
7 submission. Id. ¶ 12. The Estate objects to the untimely filed  
8 opposition, and also filed a reply brief. Plaintiff's reason for filing  
9 a late opposition, is unpersuasive; however, all filed briefs have been  
10 considered.

11 The Estate argues its dismissal motion should be granted since  
12 "there is no legal entity known as 'the Estate of Robert A. McCormick,  
13 [D]eceased.'" (Estate's Mot. 9:18.) Plaintiff rejoins that the Estate  
14 should not be dismissed since California Probate Code section 550 et  
15 seq. permits Plaintiff to name the Estate as a defendant.

16 "Under [California] Probate Code § 550 [et seq.], 'an action  
17 to establish the decedent's liability for which the decedent was  
18 protected by insurance may be commenced or continued against the  
19 decedent's estate . . . .'" Pelayo v. City of Downey, 570 F. Supp. 2d  
20 1183, 1192 (C.D. Cal. 2008) (quoting Cal. Prob. Code § 550(a)). The  
21 Estate has failed to demonstrate that it may not be named as a defendant  
22 under California Probate Code section 550 et seq.; therefore, the  
23 Estate's motion is denied.

24 Dated: September 1, 2011

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27 GARLAND E. BURRELL, JR.  
United States District Judge