

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WILLIAM VILLA; VILLA REALTY, INC. d.b.a., ACCION MORTGAGE; PATRICIA VILLA; and ACCLAIM FINANCIAL SERVICES, INC.,)	Civil No. 10cv1885 AJB (WMC)
)	ORDER GRANTING PLAINTIFF’S
)	MOTION TO SUBSTITUTE
)	DEFENDANT MICHAEL LUSBY
Plaintiff,)	
v.)	(Doc. No. 105)
)	
GRETCHEN HELLER; WILILAM HELLAR; DIANE HELLAR; HELLAR CHARITABLE REMAINDER TRUST; STEPHANIE RUIZ; MICHAEL LUSBY; COLLIN COOK; AMERICAN CONTRACTORS INDEMNITY COMPANY; AND DOES 1-7,)	
)	
Defendants.)	

Presently before the Court is Plaintiff William Heller’s (“Plaintiff”) motion to substitute Michael Lusby, son of deceased Defendant Michael Lusby, as the sole remaining Defendant in this case. (Doc. No. 105.) The Court issued a scheduling order instructing Defendants to file an opposition to the motion no later than November 19, 2012. (Doc. No. 107.) As of the date of this order, Defendants have failed to file an opposition. Accordingly, pursuant to Civil Local Rule 7.1.d.1, the Court finds this motion suitable for determination on the papers and without oral argument. For the reasons set forth below, the Court **GRANTS** Plaintiff’s motion to substitute Defendant Michael Lusby, for his son, Michael Lusby. (Doc. No. 105.) The Clerk of Court is instructed to make the above noted changes to the Docket.

1 **BACKGROUND**

2 **I. Factual Background¹**

3 This action was originally filed on September 9, 2010, by Plaintiffs William Villa; Villa Realty,
4 Inc., dba Accion Mortgage; Patricia Villa; and Acclaim Financial Services, Inc. (“AFSP”) (collectively,
5 “Plaintiffs”), against Defendants Gretchen Heller; William Hellar; Diane Heller, Hellar Charitable
6 Remainder Trust; Stephanie Ruiz; Michael Lusby; Collin Cook; American Contractors Indemnity
7 Company (“ACIC”); and Does 1 through 7 (collectively, “Defendants”). (Doc. No. 1) Does 1 through 7
8 were identified as Defendants Lanak & Hanna, P.C.; Peter Carman; Adam Pessin; Randy Rinicella;
9 William Whamond; Jeannie Kim; and Rajat Bhasin. (Compl. ¶¶ 11, 13.) On June 7, 2011, the Court
10 granted Defendants Cook, ACIC, Peter Carman, Adam Pessin, Randy Rinicella, William Whamond,
11 Jeannie Kim, Rajat Bhasin, and Lanak & Hanna’s motion to dismiss; *sua sponte* dismissed certain
12 claims against Defendants Michael Lusby, Gretchen Heller, William Hellar; and Diane Heller Hellar
13 Charitable Remainder Trust; and denied moving Defendants’ motion for sanctions. (Doc. No. 52.) On
14 August 7, 2012, the Court granted Defendant William Hellar’s motion for summary judgment as to the
15 remaining RICO claim, (Doc. No. 95), and on August 24, 2012, the Court granted the parties joint
16 motion for voluntary dismissal with prejudice as to Defendants Gretchen Heller, Diana Heller, Hellar
17 Charitable Remainder Trust and Stephanie Ruiz. (Doc. No. 98.)

18 The sole remaining defendant in this case is Defendant Michael Lusby (“Lusby”). Lusby was
19 served with the summons and complaint but did not answer. Clerk’s Entry of Default was entered
20 against Lusby on November 2, 2010, (Doc. No. 24). However Plaintiff William Villa did not file a
21 motion for default judgment against Lusby until October 16, 2011, over a year later.² (Doc. No. 68.)
22 On December 2, 2011, the Court denied Plaintiff Villa’s motion for default judgment, without prejudice,
23 finding the motion better suited until after the claims against the remaining defendants had been

24 _____
25 ¹ Although the factual and procedural background of this case has been discussed by the Court in
26 previous orders, the Court reiterates pertinent background information here for the sake of clarity and
completeness.

27 ² Local Civ. R. 55.1 requires that the plaintiff move for default judgment within 30 days of the
28 entry of default. Here, Plaintiff did not file a motion for default judgment until almost a year later.
However, the Clerk of Court also failed to issue an order to show cause why the complaint against the
defaulted party should not be dismissed after 30 days of the entry of default. See Local Civ. R. 55.1.
Accordingly, the Court allowed Plaintiff to proceed with his motion for default judgment.

1 adjudicated,³ and to provide Plaintiff Villa additional time to substitute in the proper party.⁴ (Doc. No.
2 74.) The Court has since adjudicated the claims of the remaining defendants—dismissing the RICO
3 charges pursuant to Rule 56—and ordered Plaintiffs to file either a motion for default judgment as to
4 Lusby—after the proper party has been substituted—or file a voluntary dismissal of Lusby. (Doc. No.
5 99.) Plaintiffs have elected to pursue their claims against Lusby.

6 On October 2, 2012, Plaintiff Villa filed a motion for an extension of time and concurrently filed
7 a Statement Noting the Death of Defendant Michael Lusby. (Doc. No. 100-2.) On October 3, 2012, the
8 Court granted Plaintiffs’ request for an extension and Plaintiff Villa’s motion for substitution of
9 Defendant Lusby is currently before the Court.⁵ (Doc. No. 103.)

10 DISCUSSION

11 Federal Rule of Civil Procedure 25 governs a motion for substitution and a notice of death. The
12 Rule provides:

13 (a) Death

14 (1) Substitution if the Claim is Not Extinguished. If a party dies and the
15 claim is not extinguished, the court may order substitution of the proper
16 party. A motion for substitution may be made by any party or by the dece-
17 dent’s successor or representative. If the motion is not made within 90 days
18 after service of a statement noting the death, the action by or against the
19 decedent must be dismissed.

...

17 (3) Service. A motion to substitute, together with a notice of hearing, must
18 be served on the parties as provided in Rule 5 and on nonparties as provided
19 in Rule 4. A statement noting death must be served in the same manner.
Service may be made in any judicial district.

20 Fed.R.Civ.P. 25(a).

21 The rule requires two affirmative steps in order to trigger the running of the 90–day period.
22 *Barlow v. Ground*, 39 F.3d 231, 233 (9th Cir. 1994). “First, a party must formally suggest the death of
23 the party upon the record.” *Id.* (citing *Anderson v. Aurotek*, 774 F.2d 927, 931 (9th Cir.1985);

24 ³ The Ninth Circuit has held that where defendants are similarly situated, it would be improper
25 for judgment to be entered against the defaulting defendant until the matter has been adjudicated in
26 regard to all of the defendants. *See In re First T.D. & Inc., Inc.*, 253 F.3d 520, 532 (9th Cir. 2001).

27 ⁴ Plaintiff Villa’s motion for default judgment indicated that Lusby was deceased but did not
28 provide any documents to show that Lusby had passed away, when he passed away, or that his personal
representative had been substituted in as a party. Based on a public records searched performed by
Plaintiffs’ current counsel, Lusby passed away on March 26, 2011. (Doc. No. 105-2 ¶ 10.)

⁵ Plaintiff Villa must substitute Defendant Lusby who another party before properly proceeding
with a motion for default judgment.

1 *Grandbouche v. Lovell*, 913 F.2d 835 (10th Cir. 1990)). “Second, the suggesting party must serve other
2 parties and nonparty successors or representatives of the deceased with a suggestion of death in the same
3 manner as required for service of the motion to substitute.” *Barlow*, 39 F.3d at 233; Fed.R.Civ.P. 25(a).


4 Here, Plaintiff filed the notice of suggestion of death on October 1, 2012. (Doc. No. 101.)
5 Although the notice did not identify the successor or representative who may be substituted for the
6 decedent, many courts in the Ninth Circuit do not require such identification. *See Jackson v. Rowlett*,
7 No. CIV S-04-0741 DFL DAD P, 2007 WL 397114, at *1, 2007 U.S. Dist. LEXIS 11300, at *2 (E.D.
8 Cal. Jan. 31, 2007) (“Rule 25’s sole requirement concerning the content of a suggestion of death on the
9 record is that it must contain ‘a statement of the fact of the death.’ ”). Moreover, Plaintiffs served copies
10 of the motion to substitute party Defendant Michel Lusby, the memorandum of points and authorities in
11 support of the motion, the documents supporting the motion, and the statement noting and suggesting
12 the death of Defendant Michael Lusby on Defendant Lusby’s successor, Michael Lusby, at 2427
13 Catalina Cir, Unit 568, Oceanside, California 92056. Service was personally executed on November 2,
14 2012.⁶ (Doc. No. 106.)

15 **CONCLUSION**

16 Accordingly, the Court finds Plaintiffs have complied with the requirements of Rule 25 and
17 Michael Lusby, son of deceased Defendant Michael Lusby should be substituted as a party Defendant in
18 this case. The Clerk of Court is instructed to update the docket accordingly.

19 **IT IS SO ORDERED.**

20
21 DATED: November 27, 2012

22 
23 Hon. Anthony J. Battaglia
24 U.S. District Judge

25
26
27 ⁶ *See Sequoia Prop. & Equip. Ltd. P'ship v. United States*, No. CV-F-97-5044, 2002 U.S. Dist.
28 LEXIS 15872, 2002 WL 32388132 at *2 (E.D. Cal. June 3 2002) (finding courts regularly substitute
executors, administrators, or distributees of distributed estates as proper parties for substitution of a
deceased party under Rule 25(a)).