

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D12423
Y/hu

_____AD3d_____

Submitted - September 18, 2006

DAVID S. RITTER, J.P.
GLORIA GOLDSTEIN
REINALDO E. RIVERA
ROBERT A. SPOLZINO, JJ.

2005-07601

DECISION & ORDER

Rosa Aronov, etc., appellant, v Regency Gardens
Apartments Corp., et al., respondents.

(Index No. 10829/02)

Mallilo & Grossman, Flushing, N.Y. (Francesco Pomara, Jr., of counsel), for
appellant.

Steven G. Fauth, New York, N.Y. (Arthur T. Wade of counsel), for respondents.

In an action to recover damages for wrongful death and conscious pain and suffering,
the plaintiff appeals from an order of the Supreme Court, Queens County (Grays, J.), dated June 29,
2005, which granted the defendant's motion pursuant to CPLR 3211(a)(5) to dismiss so much of the
plaintiff's cause of action as sought to recover damages for wrongful death.

ORDERED that the appeal is dismissed, with costs, as the plaintiff is not aggrieved
by the order appealed from (*see* CPLR 5511).

CPLR 3211(a) permits a party to move, on certain enumerated grounds, "for judgment
dismissing one or more causes of action asserted against him [or her]." The defendants here moved
to dismiss, as time barred, only so much of the plaintiff's single cause of action as sought to recover
damages for wrongful death. In disposing of the motion, the order appealed from articulated the
Supreme Court's determination in sufficient detail (*see* CPLR 2219), and thus made clear that so
much of the plaintiff's cause of action as sought to recover damages for her decedent's conscious pain
and suffering was not dismissed. Rather, upon dismissal, that portion of the cause of action which
sought to recover damages for wrongful death was effectively severed from that portion of the cause

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of action which sought to recover damages for conscious pain and suffering (*see Tow v Moore*, 24 AD2d 648, 649; *Forse v Turner*, 55 Misc 2d 810, 812; *cf. Zivian v McNulty*, 136 AD2d 547, 548; *see also Behren v Papworth*, 30 NY2d 532; *Sirling Plumbing Co. v Maple Hill Homes*, 20 NY2d 401, 402-403; *but cf. Burke v Crosson*, 85 NY2d 10, 16). Accordingly, so much of the cause of action as sought to recover damages for conscious pain and suffering remains viable, and the plaintiff is not barred from litigating it. In light of the foregoing, and because the plaintiff did not register opposition to the dismissal of so much of her cause of action as sought to recover damages for wrongful death, the plaintiff is not aggrieved by the order appealed from (*see CPLR 5511; Whiteman v Yesnivah & Mesivta Torah Temimah*, 255 AD2d 378, 379; *Ciaccio v Germin*, 138 AD2d 664, 665).

RITTER, J.P., GOLDSTEIN, RIVERA and SPOLZINO, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court