

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

D31353  
O/kmb

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - May 2, 2011

DANIEL D. ANGIOLILLO, J.P.  
THOMAS A. DICKERSON  
ARIEL E. BELEN  
SANDRA L. SGROI, JJ.

---

2010-00123

DECISION & ORDER

Michael Egan, etc., appellant, v Reza Neghavi,  
et al., respondents.

(Index No. 22758/07)

---

O'Connor, O'Connor, Hintz & Deveney, LLP, Melville, N.Y. (Eileen M. Baumgartner of counsel), for appellant.

Santangelo, Benvenuto & Slattery (James W. Tuffin, Roslyn, N.Y. [Gabriel Mignella], of counsel), for respondents Reza Neghavi and Hildy Saperstein.

Helwig, Henderson, Ryan & Spinola, Carle Place, N.Y. (Jeffrey A. Learn of counsel), for respondents Leslie King and Obstetrics and Gynecological Services of Rockville Centre, P.C.

In an action to recover damages for medical malpractice and wrongful death, the plaintiff appeals from a judgment of the Supreme Court, Nassau County (Martin, J.), dated November 10, 2009, which, upon an order of the same court entered January 21, 2009, granting the separate motions of the defendants Reza Naghavi and Hildy Saperstein, the defendants Leslie King and Obstetrics and Gynecological Services of Rockville Centre, P.C., and the defendant South Nassau Communities Hospital Oceanside New York, to dismiss the complaint insofar as asserted against each of them based upon lack of capacity to sue, is in favor of the defendants and against him dismissing the complaint without prejudice.

ORDERED that the judgment is affirmed, with one bill of costs payable to the defendants appearing separately and filing separate briefs.

May 17, 2011

EGAN v NEGHAVI

Page 1.

The plaintiff commenced this action to recover damages for medical malpractice and wrongful death on behalf of the decedent, his wife, prior to obtaining letters of administration. The defendants moved to dismiss the complaint with prejudice on the ground that he lacked legal capacity to sue. The Supreme Court dismissed the action without prejudice to the commencement of a new action pursuant to CPLR 205(a). On appeal, the plaintiff contends that, since he ultimately obtained limited letters of administration, the Supreme Court should have granted him leave to amend the caption and complaint instead of dismissing the action. However, the plaintiff did not cross-move or even request such relief in his opposing papers and submitted only expired letters of administration. Under the circumstances, the Supreme Court properly dismissed the complaint without prejudice (*see Carrick v Central Gen. Hosp.*, 51 NY2d 242; *George v Mt. Sinai Hosp.*, 47 NY2d 170; *Mendez v Kyung Yoo*, 23 AD3d 354; *Krainski v Sullivan*, 208 AD2d 904; *Ballav v Deepdale Gen. Hosp.*, 196 AD2d 520).

ANGIOLILLO, J.P., DICKERSON, BELEN and SGROI, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court