

Ainsworth v Affirmed Home Care, Inc.

2026 NY Slip Op 31140(U)

March 19, 2026

Supreme Court, New York County

Docket Number: Index No. 805223/2025

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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SUSAN AINSWORTH, as proposed Administratrix of the
Estate of CECILE AINSWORTH,

Plaintiff,

INDEX NO. 805223/2025

MOTION DATE 12/22/2025

MOTION SEQ. NO. 001

- v -

AFFIRMED HOME CARE, INC., and ALAN BIENSTOCK,
M.D., UPPER EAST SIDE REHABILITATION AND
NURSING CENTER,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18,
19, 20, 21, 22, 23, 24

were read on this motion to/for DISMISSAL/X MOTION DISMISSAL.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice and for common-law negligence, and pursuant to Public Health Law § 2801-d for purported violations of statutes and regulations governing nursing homes, the defendant Alan Bienstock, M.D., moves pursuant to CPLR 3211(a)(3) to dismiss the amended complaint insofar as asserted against him based on the plaintiff's lack of capacity. In papers erroneously denominated as a cross motion, the defendant Affirmed Home Care, Inc. (Affirmed), separately moves for the same relief as to it. The plaintiff opposes the motions to the extent of contending that, if the court dismisses the amended complaint insofar as asserted against Bienstock and Affirmed, the dismissals should be without prejudice to commencement of new action against them in accordance with CPLR 205(a). The motions are granted, and the amended complaint is dismissed insofar as asserted against Bienstock and Affirmed, albeit without prejudice to commencement of a new action against them for the same relief under a new index number by a duly authorized representative of the estate of the plaintiff's decedent, provided that the new action is timely commenced in accordance with CPLR 205(a).

In the first instance, Affirmed's application was not a proper cross motion because it did not seek relief against a moving party; instead, its application was, in effect, a separate motion seeking relief against a nonmoving party (see CPLR 2215; *Asiedu v Lieberman*, 142 AD3d 858, 858 [1st Dept 2016]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]; *Guzetti v City of New York*, 32 AD3d 234 [1st Dept 2006]; *Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986 [2d Dept 2005]; *Sheehan v Marshall*, 9 AD3d 403, 404 [2d Dept 2004]; *Mango v Long Is. Jewish-Hillside Med. Ctr.*, 123 AD3d 843, 844 [2d Dept 1986]; *Lucheux v William Macklowe Co., LLC*, 2017 NY Slip Op 31044[U], 2017 NY Misc LEXIS 187 [Sup Ct, N.Y. County, May 11, 2017]). CPLR 2214(b) requires such a separate motion to be made on at least eight days' notice. The mislabeling of a motion as a cross motion, however, may be treated as a "technical" defect to be disregarded, particularly where the nonmoving party does not object and the consideration of the application results in no prejudice to the nonmoving party (see *Sheehan v Marshall*, 9 AD3d at 404), and where, as here, the party making the separate motion made its application more than eight days prior to the return date, thus giving the plaintiff ample opportunity to be heard on the merits (see *Daramboukas v Samlidis*, 84 AD3d 719, 721 [2d Dept 2011]; *Matter of Jordan v City of New York*, 38 AD3d 336, 338 [1st Dept 2007]; *Della-Mura v White Plains Hosp. Med. Ctr.*, 2022 NY Slip Op 31085[U], *3, 2022 NY Misc LEXIS 1697, *3-4 [Sup Ct, N.Y. County, Mar. 31, 2022] [Kelley, J.]). Thus, Affirmed's "cross motion" may be considered as a properly noticed separate motion (see *Matter of Jordan v City of New York*, 38 AD3d at 338).

As to the merits of the motions, the decedent, Cecile Ainsworth, died on April 29, 2023. On July 22, 2025, the plaintiff commenced the instant action, naming herself as a party plaintiff, and purported to prosecute this action on behalf of the decedent's estate as a "proposed administratrix" of the estate. There is no evidence that the plaintiff had been appointed as the representative of the decedent's estate as of the date that this action was commenced, or even

that she had petitioned an appropriate court of competent jurisdiction for appointment as the representative of the decedent's estate.

“A personal representative who has received letters of administration of a decedent's estate [or letters testamentary] is the only party who is authorized to commence a survival action to recover damages for personal injuries sustained by the decedent or a wrongful death action to recover damages sustained by the decedent's distributees on account of his or her death”

(*Shelley v South Shore Healthcare*, 123 AD3d 797, 797 [2d Dept 2014]; see *Gulledge v Jefferson County*, 172 AD3d 1666, 1667 [3d Dept 2019]; *Jordan v Metropolitan Jewish Hospice*, 122 AD3d 682, 683 [2d Dept 2014]; *Mingone v State of New York*, 100 AD2d 897, 899 [2d Dept 1984]; EPTL 1-2.13, 5-4.1 [1]; 11-3.2 [b]). Consequently, a “proposed administrator” or “proposed administratrix” lacks capacity to prosecute either a personal injury “survival” action or a wrongful death action on behalf of the estate of a decedent (see *Rodriguez v River Val. Care Ctr., Inc.*, 175 AD3d 432, 433 [1st Dept 2019]; *Richards v Lourdes Hosp.*, 58 AD3d 927, 927-928 [3d Dept 2009]; *Mendez v Kyung Yoo*, 23 AD3d 354, 355 [2d Dept 2005]; *Duran v Isabella Geriatric Ctr., Inc.*, 2023 NY Slip Op 30500[U], *9, 2023 NY Misc LEXIS 669, *12-13 [Sup Ct, N.Y. County, Feb. 15, 2023] [Kelley, J.]; *Castro v Fraser*, 2022 NY Slip Op 30903[U], *5, 2022 NY Misc LEXIS 1368, *7 [Sup Ct, N.Y. County, Mar. 15, 2022] [Kelley, J.]; *Stroble v Townhouse Operating Co.*, 2019 NY Misc LEXIS 18865 [Sup Ct, Nassau County, Dec. 16, 2019]; *Fleisher v Ballon Stoll Bader & Nadler, P.C.*, 2015 NY Slip Op 31855[U], *5, 2015 NY Misc LEXIS 3625, *6 [Sup Ct, N.Y. County, Oct. 5, 2015]).

The burden is on the defendants to establish that the plaintiff lacked capacity to commence this action (see *Bartel v Farrell Lines*, 215 AD3d 517, 526 [1st Dept 2023]). Bienstock and Affirmed have established that the plaintiff lacked capacity to commence the action on the date that she filed the summons and complaint, by noting that she had not been appointed as administrator or executor of the decedent's estate as of that date. Where a plaintiff lacks capacity to prosecute an action, and a defendant timely moves to dismiss the complaint on that ground, the complaint must be dismissed, and is not subject to an amendment

to substitute either a proper plaintiff or an existing plaintiff who secured appointment as a proper administrator or executor of a decedent's estate during the pendency of the action. This is so because it is a "fatal defect" for a person who lacks capacity to commence an action, and that defect constitutes a "failure to comply with a condition precedent" (*Morris Investors, Inc. v Commissioner of Finance*, 121 AD2d 221, 224 [1st Dept 1986]). Even if the plaintiff had secured letters of administration during the pendency of this motion, the amended complaint must still be dismissed insofar as asserted against the movants, since she may not make a belated motion further to amend the complaint herein to allege that he now has capacity to prosecute the subject claims (see *Mingone v State of New York*, 100 AD2d at 899; *Cianciotto v Hospice Care Network*, 32 Misc 3d 916, 919 [Dist Ct, Nassau County 2011]; cf. *Favourite, Ltd. v Cico*, 42 NY3d 250, 260 [2024] [where dismissal of complaint due to dissolution of corporate plaintiff was without prejudice, Supreme Court did not lack discretion to consider motion to amend the complaint under CPLR 3025[b] where corporation thereafter was revived and motion was made within six months of dismissal]).

Nonetheless, although the plaintiff lacked capacity to prosecute this action at the time that she commenced it, her lack of capacity did not technically render the action a "nullity," and, hence, while the action remains "subject to grounds for dismissal," it nonetheless is "within the ambit of CPLR 205(a)" (*Sokoloff v Schor*, 176 AD3d 120, 124, 135-136 [2d Dept 2019]). As relevant here, CPLR 205(a) provides that:

"[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period."

A "disposition based solely upon the absence of a duly appointed administrator does not preclude re prosecution of the underlying claim through the mechanism of CPLR 205 (subd [a])

once a qualified administrator has been appointed” (*Carrick v Central Gen. Hosp.*, 51 NY2d 242, 246, 252 [1980]; see *Rodriguez v River Val. Care Ctr., Inc.*, 175 AD3d at 433; *Snodgrass v Professional Radiology*, 50 AD3d 883, 884-885 [2d Dept 2008]; *Mendez v Kyung Yoo*, 23 AD3d at 355; *Bernardez v City of New York*, 100 AD2d 798, 799-800 [1st Dept 1984]). The dismissal here thus is without prejudice to the commencement of a new action against Bienstock and Affirmed for the same relief by a duly appointed representative of the decedent’s estate, under a new index number, in accordance with CPLR 205(a), provided that the new action is commenced within six months of the termination of this action.

Accordingly, it is,

ORDERED that the motion of the defendant Alan Bienstock, M.D., is granted, and the amended complaint is dismissed insofar as asserted against him, without prejudice to the commencement, in accordance with CPLR 205(a), of a new action against him under a different index number by the duly appointed administrator or executor of the decedent’s estate for the same relief; and it is further,

ORDERED that, on the court’s own motion, the action is severed against the defendant Alan Bienstock, M.D.; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the amended complaint insofar as asserted against the defendant Alan Bienstock, M.D.; and it is further,


ORDERED that the motion of the defendant Affirmed Home Care, Inc., erroneously denominated in its moving papers as a cross motion, is granted, and the amended complaint is dismissed insofar as asserted against it, without prejudice to the commencement, in accordance with CPLR 205(a), of a new action against it under a different index number by the duly appointed administrator or executor of the decedent’s estate for the same relief; and it is further,

ORDERED that, on the court’s own motion, the action is severed against the defendant Affirmed Home Care, Inc.; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the amended complaint insofar as asserted against the defendant Affirmed Home Care, Inc.

This constitutes the Decision and Order of the court.

3/19/2026
DATE



JOHN J. KELLEY, J.S.C.

MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
			<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CROSS MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
			<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE