

A.K. Hilton, Jr. v Resorts World Casino, Inc.

2013 NY Slip Op 32882(U)

October 15, 2013

Sup Ct, Queens County

Docket Number: 10800/2013

Judge: Robert J. McDonald

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escalator, struck her head on the escalator stairs several times, and sustained injuries that caused her death. The decedent was transported to Jamaica Hospital by ambulance where she was pronounced dead on arrival due to "traumatic cardiac arrest." The complaint alleges that the escalators at the casino did not have adequate safety features, were not properly inspected or maintained, and were not properly monitored and supervised. The complaint further alleges that plaintiff's wife's death was a direct and proximate result of the defendant's negligent maintenance, operation, monitoring and supervision of the escalators at the casino. In addition, the plaintiff alleges an individual cause of action for loss of care, comfort, consortium, assistance and financial support.

In lieu of filing an answer, defendant's attorney, Jessica Zemsky, Esq., moves to dismiss the complaint on the ground that the plaintiff does not have legal capacity to sue pursuant to CPLR 3211(a)(3). Counsel contends that under the EPTL the only person authorized to bring a wrongful death claim on behalf of a decedent is the duly appointed personal representative of the decedent's estate (see EPTL § 5-4.1). Thus, counsel argues that statutory right to recover for wrongful death does not even arise until an administrator has been named through the issuance of letters of administration (citing Bojanovich v Woitach, 2013 N.Y. Misc. LEXIS 2366 (Sup Ct. N.Y. Co. 2013]). Counsel states that on information and belief the plaintiff has not opened an estate in Kings County, the decedent's domicile, and as such he has not brought this action as the duly appointed representative of decedent's estate. Counsel argues, therefore, that plaintiff lacks the capacity to sue on behalf of the decedent individually, or her estate. In addition, counsel argues that the plaintiff's individual claims must also be dismissed as they are derivative of the claim for wrongful death.

Further, defendant argues that the complaint fails to properly plead a cause of action for wrongful death as the courts have stated that one of the elements of a wrongful death cause of action is the appointment of a personal representative (see Chong v New York City Transit Authority, 83 AD2d 546 [2d Dept. 1981][the elements of a cause of action to recover damages for wrongful death are (1) the death of a human being, (2) the wrongful act, neglect or default of the defendant by which the decedent's death was caused, (3) the survival of distributees who suffered pecuniary loss by reason of the death of decedent, and (4) the appointment of a personal representative of the decedent]; James v Middletown Community Health Ctr., Inc., 278 AD2d 280 [2d Dept. 2000]); Meroni v Holy Spirit Asso. for

Unification of the World Christ, 119AD2d 200 [2d Dept. 1986][a wrongful death action in New York must be brought by the appointed personal representative on behalf of all of the distributees, not just a single distributee who comes forward and elects to commence an action on his own behalf]). Therefore, counsel argues that the cause of action for wrongful death is incomplete as it does not state that the plaintiff as been appointed the decedent's personal representative on behalf of all distributees.

In opposition, the plaintiff, Mr. Hilton, submits a copy of letters testamentary which he obtained from the Kings County Surrogates Court on August 2, 2013 which state that plaintiff A.K. Hilton, Jr., is the Administrator of the Estate of Mamy L. Hilton a/k/a Mamy Hilton. Plaintiff also submits a copy of an amended complaint dated August 23, 2013 which states that he now brings the action on his own behalf and on behalf of the estate of the decedent. He states in his affidavit that a copy of the amended complaint has been served on the defendant.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see Nonnon v City of New York, 9 NY3d 825 [2007]; Leon v Martinez, 84 NY2d 83 [1994]).

Accepting the allegations in the complaint as true, according the plaintiff the benefit of every favorable inference, and determining only whether the allegations fit within any cognizable legal theory, (see DeSandolo v United Airlines Inc., 71 AD3d 1073 {2d Dept.2010}; AG Capital Funding Partners, L.P. v State St. Bank & Trust Co., 5 N.Y.3d 58 [2005]), the Court finds that on the date this action was commenced the complaint failed to state a proper cause of action for wrongful death and in addition, the plaintiff lacked the capacity to sue.

The Court of Appeals held in Carrick v Central General Hosp., 51 NY2d 242 [1980]that pursuant to EPTL § 5-4.1 "it is well established that the existence of a qualified administrator is essential to the maintenance of the [wrongful death] action and that the statutory right to recover for wrongful death does not even arise until an administrator has been named through the issuance of letters of administration" (also see Jakubowski v Huntington Hosp., 2012 NY Slip Op 30365(U) [Sup. Ct. Suffolk Co. 2012] citing Estate of Sir. J. Edward Tinsley v Walsh Manning Corp., 2009 NY Slip Op 31458[U] [Sup. Ct., N.Y. Co. 2009][the

existence of a duly appointed executor or administrator is essential to the commencement and prosecution of an action on behalf of an estate]). A "personal representative" is "a person who has received letters to administer the estate of a decedent" (see EPTL § 1-2.1; Butler v Kings County Hosp. Ctr., 30 Misc. 3d 1229[A]). Here, the plaintiff brought the action for damages for wrongful death in June 2013 but did not obtain letters testamentary until August 2013 after the action was commenced. Therefore, it is clear that he did not have capacity to sue for wrongful death at the time this action was commenced (see Rivera v Viva Bar & Lounge, 2010 NY Slip Op 30595(U) [Sup Ct N.Y. Co. 2010]). Further, the fact that the plaintiff received Letters of Administration for his wife's estate subsequent to commencing the wrongful death action does not cure the defect as he did not have capacity to sue at the time the action was commenced (see Butler v Kings County Hosp. Ctr., 30 Misc. 3d 1229(A) [Sup. Ct. Kings Co. 2011]; Jakubowski v Huntington Hosp., 2012 NY Slip Op 30365(U) [Sup. Ct. N.Y. Co. 2012]). Moreover, the proposed amended summons and complaint annexed to the affirmation in opposition is not in proper form as the caption does not reflect that plaintiff is the personal representative of the decedent's estate.

Lastly, the appointment of an administrator is a necessary element to the existence of the cause of action for wrongful death. As the courts have held, "the elements of a wrongful death claim include the survival of distributees who suffered pecuniary loss by reason of the decedent's death, and the appointment of a personal representative of the decedent (see James v. Middletown Community Health Ctr., Inc., 278 AD2d 280 [2d Dept. 2000]; Meroni v Holy Spirit Assn. for Unification of World Christianity, 119 AD2d 200; Chong v New York City Tr. Auth., 83 AD2d 546). Here, in addition to the fact that the plaintiff does not have capacity to sue, the complaint fails to state a cause of action because the plaintiff's complaint does not allege that a personal representative of the decedent has been appointed to recover damages for wrongful death (see Poplarski v Winthrop Univ. Hosp., 36 Misc. 3d 1219(A) [Sup. Ct. Nassau Co. 2012]).

Accordingly for all of the above stated reasons, it is hereby

ORDERED that the defendant's motion to dismiss the plaintiff's complaint for failure to state a cause of action and for lack of capacity to sue pursuant to CPLR 3211 (a) (3) and (a) (7) is granted without prejudice to the commencement of a new action by a duly appointed personal representative of the estate of Mamyia Hilton.

Dated: Long Island City, N.Y.
October 15, 2013

ROBERT J. MCDONALD, J.S.C.