

**Barahona v Marcus**

2014 NY Slip Op 32190(U)

August 7, 2014

Sup Ct, NY County

Docket Number: 805268/13

Judge: Alice Schlesinger

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This opinion is uncorrected and not selected for official publication.

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

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DEBORA BARAHONA, as Proposed Administrator of  
the Estate of DAMIAN FORTUNE, Deceased, in her  
capacity as Guardian of DAYMIA ELIZABETH  
FORTUNE,

Plaintiff,

Index No. 805268/13  
Motion Seq. No.002

-against-

SERGIU MARCUS, M.D., SERGIU MARCUS, M.D.,  
P.C., LONG ISLAND AMBULATORY SURGERY  
CENTER, L.L.C., LONG ISLAND EYE SURGICAL  
CARE, P.C., LINDENHURST EYE PHYSICIANS AND  
SURGEONS, P.C., MICHELLE LEE ADAMS, P.A.,  
ANTHONY T. PACIA, M.D., BROOKHAVEN  
ANESTHESIA ASSOCIATES, L.L.P., VATSAL  
DOSHI, M.D., SCOTT HORN, M.D., SCOTT HORN,  
M.D., P.C., and THE NEW YORK EYE AND EAR  
INFIRMARY,

Defendants.

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SCHLESINGER, J.:

Damian Fortune died on July 30, 2011. He was thirty-four years old. His death followed by one day a procedure to repair his left retina. The various named defendants include doctors and institutions that were involved in this surgery. Mr. Fortune left two children, a son Christian and a daughter Daymia Elizabeth.

On July 25, 2013, five days before the two-year Statute of Limitations for wrongful death was to expire, an action was commenced on behalf of Daymia, with her mother Debora Barahona acting as guardian. The child was twenty-six months old at the time of her father's death. Since her parents were not married, it was necessary to ascertain Daymia's paternity. This was accomplished on July 19, 2013 when a DNA test, performed with a blood sample obtained from the decedent's autopsy, confirmed paternity.

Ms. Barahona then obtained a guardianship decree, issued on August 1, 2013. Soon thereafter she made an application for Letters of Administration. As noted above, the complaint of July 25, 2013 was timely filed and was then served upon each of the defendants within 120 days. All answered except for Dr. Vatsal Doshi, who instead moved to dismiss the complaint pursuant to §3211(a)(3) of the CPLR, on the ground that the plaintiff at the time the complaint was brought had no standing to bring the action. She had filed for Letters of Administration but permanent ones had not yet been granted.

I heard this motion on February 19, 2014. By that time only temporary Letters of Administration had been granted to Ms. Barahona.<sup>1</sup> However, her counsel informed me that the application had been granted in Suffolk County, but an Order to that effect had not yet come down. I denied the motion, but on the condition that the permanent Letters be issued by March 31.<sup>2</sup>

The parties next appeared for a conference on April 23, 2014. On that day, a discussion between counsel and the Court established that defendant Dr. Doshi had moved to reargue this Court's prior decision, and the remaining defendants had either moved, or were in the process of moving, to dismiss for lack of standing by the plaintiff. However, more than that, most wanted the Court to dismiss the action with prejudice and not allow the plaintiff to avail herself of the saving provision of §205(a) of the CPLR.

The rationale for that argument was that since the plaintiff lacked standing when the complaint was filed on July 25, 2013, any subsequent filing of a new complaint

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<sup>1</sup>The caption named the plaintiff as "Proposed Administrator of the Estate".

<sup>2</sup>Permanent Letters were issued on March 24, 2014.

would be untimely as greater than two years after Mr. Fortune's death on July 30, 2011. Of course, the plaintiff Ms. Barahona was the nominal plaintiff. The actual party in interest was the child, Daymia Elizabeth. A schedule for all papers was established on April 23. I told counsel that I wished both issues to be addressed in the motions; that is, the dismissal of the action and the availability of CPLR §205(a) relief to the plaintiff.

I have received all papers and read the cases relied on by the parties. It should be noted that plaintiff at this stage does not oppose the motions for dismissal, acknowledging that by commencing the action before obtaining permanent Letters of Administration, Ms. Barahona lacked standing. It should also be noted that no defendants here have argued that they were not served timely or that personal jurisdiction over them had not been obtained.

My decision is as follows. In the first instance, I am granting reargument to Dr. Doshi and granting all the defendants' motions to dismiss for lack of standing. However, that dismissal is without prejudice pursuant to CPLR §205(a). I find support for this decision in two Court of Appeals' decisions, *George v. Mt. Sinai Hosp.*, 47 NY2d 170 (1979) and *Carrick v. Central General Hospital*, 51 NY2d 242 (1980), as well as the decision from the Appellate Division, First Department, in *Bernardez v. City of New York*, 100 AD2d 798 (1984).

In all three cases, the plaintiff was allowed to refile the complaint based on §205(a). All three cases involved deaths allegedly caused by malpractice. In *George*, a timely complaint was filed in the name of Katherine David and served. However, Ms. David, unbeknownst to her attorney, died before the filing. An amended summons was

served and filed in the name of the administratrix of Ms. David's estate, as the new named plaintiff. The malpractice allegedly occurred in August 1972, but the amended summons was not filed until 1976. Thus, it was beyond the then three-year Statute of Limitations.

The defendants argued that since Ms. David had died before the complaint was originally filed, the action was a nullity and there was lacking the prior action that was necessary for the application of §205(a). The Court of Appeals disagreed. Citing to CPLR §205(a), it emphasized that the law applies to all instances where an action has been timely commenced and is not terminated for any of three stated reasons, which are "a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits." 47 NY2d at 180. Assuming that one of these conditions has been met, a new action upon the same transaction or occurrence may be commenced within six months of the dismissal of the first complaint. This rule pertains even if the second action is commenced beyond the Statute of Limitations, as long as the defendants have been given timely notice of the claim by proper service of the first complaint.

In *Carrick*, the facts were very close to the case now before me, in that the wrongful death action had been dismissed because a duly appointed administrator had not been appointed at the time the complaint was filed. Similar to the facts here, the plaintiff was designated a "proposed administratrix"; she was the wife of the decedent. Citing to *George*, the estate was allowed to rely on §205(a) to commence a second action, although the new complaint was filed beyond the applicable Statute of Limitations.

*Bernardez*, citing to *Carrick*, also allowed for a new "untimely" action to be commenced pursuant to §205(a). There also, the first complaint was jurisdictionally defective as the plaintiff did not have proper standing to commence the action when filing the first complaint.

The authority here is clear. CPLR § 205(a) does apply in these circumstances. Therefore, the action is dismissed, but without prejudice to plaintiff's right to commence a new action within six months of this dismissal.

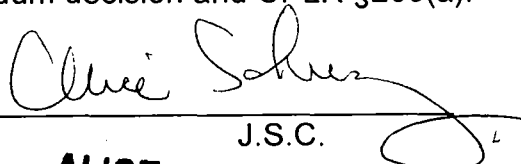
Accordingly, it is hereby

ORDERED that the motion by defendant Vatsal Doshi, M.D., to reargue this Court's prior decision dated March 13, 2014, which incorporated the decision on the record on February 19, 2014, is granted, and upon reargument, the motion to dismiss is granted without prejudice in accordance with this memorandum decision and CPLR §205(a); and it is further

ORDERED that the motions and cross-motions to dismiss by the other defendants are all granted to the extent provided herein and the action is dismissed without prejudice in accordance with this memorandum decision and CPLR §205(a).

Dated: August 7, 2014

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J.S.C.  
**ALICE SCHLESINGER**