Garrido v City of New York
2014 NY Slip Op 32370(U)
August 14, 2014
Supreme Court, Bronx County
Docket Number: 304009/10
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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NORRIS GARRIDO AS TEMPORARY ADMINITRATRIX OF THE ESTATE OF JOSEPH VEGA,

Plaintiff(s),

DECISION AND ORDER

Index No: 304009/10

- against -

THE CITY OF NEW YORK AND TC AMBULANCE CORPORATION,

Defendant(s).

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In this action for wrongful death caused by alleged negligence in the dispatching of an ambulance, defendant TC AMBULANCE CORPORATION (TC) moves for an order granting it summary judgment with respect to plaintiff's claim of medical malpractice on grounds that TC committed no malpractice and is, thus, not liable to plaintiff for the death of decedent JOSEPH VEGA (Vega). TC also moves to dismiss this action pursuant to CPLR § 3211(a)(3), on grounds that insofar as plaintiff never obtained non-temporary letters of administration, she has no capacity to maintain this action. Defendant CITY OF NEW YORK (the City) cross-moves for an order, allowing it to amend its answer to interpose the affirmative defense of legal incapacity and, thereafter, grant the City dismissal on the very same grounds asserted by TC. The City also moves for an order dismissing this action pursuant to CPLR § 3211(a)(7) on grounds that its liability can only flow from the establishment of a special duty to Vega, which duty plaintiff has

failed to adequately plead. Thus, the City asserts that the complaint fails to state a cause of action against it. Plaintiff opposes the instant motion and cross-motion solely on grounds that the dearth of discovery in this action precludes summary judgment.

For the reasons that follow hereinafter, TC's motion for dismissal of this action for lack of capacity to maintain the same is granted and, therefore, TC's motion for summary judgment is denied as moot. The City's cross-motion to amend its answer to interpose the affirmative defense of legal incapacity is granted, as is its cross-motion for dismissal on grounds of legal incapacity. The City's cross-motion for dismissal on grounds that the complaint fails to state a cause of action is denied as moot.

This is an action for alleged wrongful death caused by the defendant's negligence in dispatching an ambulance to aid Vega. Specifically, the complaint alleges that on February 16, 2009, at approximately 7:08PM, Vega was shot and wounded while inside premises located at 171 West Burnside Avenue, Bronx, NY. An ambulance was called, reported to the scene, and transported Vega to the hospital, where he subsequently died. Plaintiff alleges that the defendants were negligent in the dispatch of the ambulance to the scene. More specifically, that the defendants failed to relay the relevant information to the ambulance in a timely and proper manner. Such negligence, plaintiff alleges, delayed the

ambulance's arrival at the scene, delayed treatment to Vega and contributed to his death. Plaintiff alleges that defendants also violated a special duty owed to Vega. The complaint, which was filed on May 17, 2014, also alleges that plaintiff was issued temporary letters of administration on May 14, 2010 and brings this action in her capacity as temporary administratrix.

TC's Motion to Dismiss for Lack of Capacity

TC's motion to dismiss pursuant to CPLR § 3211(a)(3) is granted insofar as the complaint establishes that plaintiff was only issued temporary letters of administration and the documentary evidence, namely the letter itself, evinces that it expired on or about August 14, 2010, four years ago. Thus, TC establishes that plaintiff has no legal capacity to maintain this action.

On a motion to dismiss a complaint pursuant to CPLR 3211, all allegations in the complaint are deemed to be true (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). In opposition to such a motion a plaintiff may submit affidavits to remedy defects in the complaint (*Cron* at 366), and if submitted, such affidavit shall be given its most favorable intendment, and the facts therein deemed to be true (*id.*).

Capacity to sue "concerns a litigant's power to appear and

bring its grievance before the court" *(Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155 [1994]). Thus, for example, capacity, or the lack thereof, usually hinges upon a litigant's status, which could disqualify that individual from seeking relief in court, *i.e.*, a natural person's status as an infant, an adjudicated incompetent or, formerly, a felony prisoner (*id.* at 155; *Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006]). CPLR §3211(a)(3), authorizes dismissal of an action when "the party asserting the cause of action has no legal capacity to sue."

Under EPTL § 5-4.1(1), a cause of action for wrongful death may be initiated by "[t]he personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees." Moreover, pursuant to EPTL § 11-3.2(b), "[n]o cause of action for injury to person or property is lost because of the death of the person in whose favor the cause of action existed. . . [and] [f]or any injury an action may be brought or continued by the personal representative of the decedent."

Accordingly, it is well settled that a wrongful death action commenced absent duly issued letters of administration must be dismissed on grounds that it was commenced absent legal capacity to sue !(*George v Mt. Sinai Hospital*, 47 NY2d 170, 176-177 [1979]; *Boffee v Consolidated Telegraph & Electrical Subway Co.*, 171 AD

392, 394 [1916]). Additionally, in the absence of valid letters of administration, an otherwise properly commenced wrongful death action cannot be maintained because, again, legal capacity to maintain the action does not exist (*George* at 176-177; *Boffee* at 394). As the Court noted in *Boffee*

> the nonappointment of the administrators before bringing the action is not merely a lack of capacity to sue, for that presupposes an existing cause of action, which the plaintiff is incapacitated to maintain. But the due appointment and qualification of the administrators is a necessary element to the existence of the cause of action

(*id.*).

Here, the complaint itself - whose allegations must be deemed to be true - establishes that rather than permanent letters of administration, on May 14, 2010, plaintiff was only issued temporary letters of administration. Thus, it is clear that the complaint itself evinces that plaintiff's authority would expire. Further the letter of administration submitted by plaintiff in opposition to the instant motion and cross-motion evinces that it was only "in full force and effect for a period of 90 days from the date granted and issued by the court." Accordingly, on or about August 14, 2010, 90 days from the date the letters of temporary administration were issued, the same expired and by operation of law, divested plaintiff of the legal capacity to maintain this

action (*George* at 176-177; *Boffee* at 394). Accordingly, this action must be dismissed inasmuch as plaintiff has no legal capacity to maintain it.

Based on the foregoing, TC's motion for summary judgment is denied as moot.

The City's Cross-Motion to Amend its Answer to Plead an Additional Affirmative Defense and Dismissal of this Action for Lack of Legal Capacity

The City's cross-motion seeking leave to amend its answer to assert the affirmative defense of legal incapacity is granted since although the City waived such defense by failing to assert in its answer, it demonstrates that such defense has merit and plaintiff fails to establish any prejudice in allowing the City to interpose such an affirmative defense.

Generally, leave to amend a pleading shall be freely granted absent prejudice or surprise resulting directly from the delay in seeking the proposed amendment (*McMcaskey, Davies and Associates, Inc. v New York City Health & Hosps. Corp*, 59 NY2d 755, 757 [1983]; *Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]). Delay, however, in seeking leave to amend a pleading is not in it of itself a barrier to judicial leave to amend, instead, "[i]t must be lateness coupled with significant prejudice to the other side, the

very elements of the laches doctrine" (*Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 958 [1983]. A failure to adequately explain the delay in seeking to amend the pleadings, if coupled with prejudice, will generally warrant denial of a motion to amend a pleading.

Even if there is no prejudice resulting from the proposed amendment, however, before leave is granted, it must be demonstrated that the proposed amendment has merit (*Thomas Crimmins Contracting Co., Inc. v City of New York*, 74 NY2d 166, 170 [1989]["Where a proposed defense plainly lacks merit, however, amendment of a pleading would serve no purpose but needlessly to complicate discovery and trial, and the motion to amend is therefore, properly denied."]; *Herrick v Second Cuthouse, Ltd.*, 64 NY2d 692, 693 [1984][Court concluded that defendant could amend its answer when the amendment would not prejudice plaintiff and where the amendment was found to have merit]; *Mansell v City of New York*, 304 AD2d 381, 381-382 [1st Dept 2003]).

Here, the City, by not raising legal incapacity in its answer as an affirmative defense, waived it. However, defenses waived under CPLR 3211(e) can nevertheless be interposed in an answer when amended by leave of court, and provided the amendment does not cause the other party prejudice or surprise resulting directly from the delay and is not palpably insufficient or patently devoid of

merit (*Deutsche Bank Trust Co. Americas v Cox*, 110 AD3d 760, 760 [2d Dept 2013]). A review of plaintiff's complaint establishes that she never obtained permanent letters of administration. Further, a review of the actual letter of administration evinces that it expired on or about August 14, 2010, more than four years ago. Thus, given the prevailing case law, which requires valid letters of administration to maintain a wrongful death action such as this one, it is clear that plaintiff has no such letters, that she has no legal capacity to maintain this action, and that, thus, the amendment sought by the City - an affirmative defense of legal incapacity - has merit. Insofar as plaintiff fails to assert any prejudice by the grant of this portion of the City's cross-motion, the City's application for leave to amend its answer is hereby granted and its answer is hereby deemed amended to include the affirmative defense of legal incapacity.

Having granted the City leave to amend its answer to assert the affirmative defense of legal incapacity, its cross-motion for dismissal of this action pursuant to CPLR § 3211(a)(3), for lack of legal capacity, is granted for the very same reasons discussed above, namely that in the absence of valid letters of administration, plaintiff lacks the legal capacity to maintain this action (*George* at 176-177; *Boffee* at 394).

Based on the foregoing, the City's cross-motion seeking an

order dismissing this action on grounds that plaintiff fails to plead sufficient facts to establish the existence of a special duty owed to Vega is denied as moot. It is hereby

ORDERED that plaintiff's complaint be dismissed, without prejudice. It is further

ORDERED that TC serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

Dated : August 6, 2014
Bronx, New York

Mitchell J. Danziger, ASCJ