

Massaro v Personal Touch Home Care of Westchester, Inc.
2014 NY Slip Op 33979(U)
November 25, 2014
Supreme Court, Westchester County
Docket Number: 51103/20 l4
Judge: Charles D. Wood
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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
JOHN MASSARO as the Proposed Executor
of the Estate of ANNE MASSARO,

Plaintiffs,

- against -

PERSONAL TOUCH HOME CARE OF
WESTCHESTER, INC., VISITING NURSE
ASSOCIATION OF HUDSON VALLEY, INC., DANIEL
J. BONOMO, M.D., individually and doing business as
MOBILE WOUND CARE PHYSICIAN, and ROY
HILLMAN, M.D., individually and doing business as
MOBILE WOUND CARE PHYSICIAN,

Defendants.

-----X
WOOD, J.

**FILED
AND
ENTERED**
ON 11-25 2014
**WESTCHESTER
COUNTY CLERK**

DECISION AND ORDER

Index No. 51103/2014
Seq nos. 1,2,3,4,5

The following papers numbered 1-28 were read in connection with defendant Roy Hillman, M.D. ("Hillman") (Seq 1) motion to dismiss, and the cross-motions to dismiss from defendants Daniel J. Bonomo, M.D. ("Bonomo") (Seq 2), Personal Touch Home Care of Westchester, Inc. ("Personal Touch") (Seq 3), Visiting Nurse Association of Hudson valley ("Visiting Nurse") (Seq 4), and cross-motion from plaintiff for leave to file and serve a supplemental summons and an amended complaint (Seq 5):

Hillman Notice of Motion, Counsel's Affirmation, Exhibits.	1-5
Bonomo Notice of Cross-Motion , Counsel's affirmation, Exhibits.	6-9
Personal Touch Notice of Cross-Motion, Counsel's Affirmation, Exhibits.	10-13
Visiting Nurse Notice of Cross-Motion, Counsel's Affirmation, Exhibits.	14-17
Plaintiff's Notice of Cross-Motion, Counsel's Affirmation, Exhibits.	18-26
Hillmans' Counsel's Reply Affirmation, Exhibit.	27-28

Defendant Hillman moves this court to dismiss the complaint of the plaintiff pursuant to CPLR 3211 (a)(3), and (a)(8), on the grounds plaintiff lacks the legal capacity to sue; or in the alternative, there is a lack of personal jurisdiction over defendant Hillman. The other moving defendants cross-move and joins in Hillman's application to dismiss, on the grounds that plaintiff lacks standing to bring this action, inasmuch as plaintiff has not yet received letters of administration. Plaintiff cross-moves for an order granting plaintiff leave to file and serve a supplemental summons and an amended complaint.

NOW, based upon the foregoing papers, the motions are decided as follows:

By way of background on January 24, 2014, plaintiff through counsel, filed the summons and complaint as against all of the named defendants. However, as of that filing date, plaintiff had not yet obtained letters testamentary. Plaintiff claims that in order to bring the action within the applicable statute of limitations, it was brought notwithstanding that fact that plaintiff was not yet the Administrator of the Estate. Defendants each joined issue with the service of their answers. This matter involves plaintiff's claims of medical malpractice, lack of informed consent and wrongful death of the 90 year old decedent, Anne Massaro.

Often referred to as the savings provision, CPLR 205(a) reads that when an action is dismissed on grounds other than voluntary discontinuance, lack of personal jurisdiction, neglect to prosecute, or a final judgment on the merits, the plaintiff may bring a new action within six

months of the dismissal, even though the action would otherwise be barred by the statute of limitations month period (CPLR 205[a]). CPLR 205(a) is a tolling provision, which ‘serves the salutary purpose of preventing a Statute of Limitations from barring recovery where the action, at first timely commenced, had been dismissed due to a technical defect which can be remedied in a new action’ ” (Marrero v Crystal Nails, 114 AD3d 101 [2d Dept 2013]). Further, CPLR 205(a) is a remedial statute, designed to “ameliorate the potentially harsh effect of the Statute of Limitations in certain cases in which at least one of the fundamental purposes of the Statute of Limitations has in fact been served, and the defendant has been given timely notice of the claim being asserted by or on behalf of the injured party” (Krainski v Sullivan, 208 AD2d 904, 904 [2d Dept 1994]).

Plaintiff represents that on August 22, 2014, while the instant motion and cross-motions were pending, plaintiff was granted Letters of Testamentary. Now, therefore, based upon the totality of the circumstances and the equities involved herein, the court grants the motion of defendant Hillman and the cross-motions of the moving defendants, to the extent to dismiss this action without prejudice and strike plaintiff’s Verified complaint. Where as here, defendants were given timely notice of the nature of the claim by service of a summons and complaint, and have interposed answers in the original action, it will not bar plaintiff’s recommencement of the action pursuant to CPLR 205(a) whose wrongful death action has been dismissed solely for want of a duly appointed administrator (Krainski v Sullivan, 208 AD2d 904, 904 [2d Dept 1994]); Carrick v Cent. Gen. Hosp., 51 NY2d 242, 246 [1980].

Further the parties are encouraged to address the proposed Stipulation of Discontinuance with Prejudice as to defendant Hillman.

Based upon the stated reasons, it is:

ORDERED, that the motion and cross-motions for an Order pursuant to CPLR 3211(a)(3) dismissing plaintiff's complaint as plaintiff lacked capacity to bring suit is/granted without prejudice for plaintiff to recommence suit under CPLR 205(a); and it is further

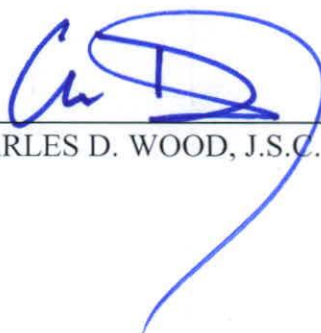
ORDERED that defendant Hillman shall serve a copy of this order with notice of entry upon the clerk and the parties within ten (10) days of entry, and file proof of service on NYSCEF within five (5) days of service; and it is further

ORDERED, that the clerk shall mark his records accordingly.

All other relief requested and not specifically mentioned herein is denied.

This constitutes the Order of this Court.

Dated: White Plains, New York
November 25, 2014



CHARLES D. WOOD, J.S.C.