

Goeller v Nyack Manor Nursing Home
2015 NY Slip Op 32614(U)
September 18, 2015
Supreme Court, Rockland County
Docket Number: 033161/2014
Judge: Margaret Garvey
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
BRENDA GOELLER, as the Proposed Executrix of
the Estate of GLORIA MARIE COLARELLI,

Plaintiff,

-against-

NYACK MANOR NURSING HOME, SYLVESTER
ALMIRON, M.D., and NYACK HOSPITAL,

Defendants.
-----X

Margaret Garvey, J.S.C.

DECISION AND ORDER

Index No. 033161/2014

(Motion # 1, 2 and 3)

The following papers, numbered 1 to 7, were considered in connection with the motions filed by three separate defendants all seeking the same relief - dismissal of the complaint pursuant to Civil Practice Law and Rules § 3211(a)(3) on the grounds that Plaintiff has no legal capacity to sue:

PAPERS

NUMBERED

<u>MOTION # 1 - DEFENDANT NYACK HOSPITAL</u> NOTICE OF MOTION/AFFIRMATION OF LILI C. OZAROWSKI, ESQ. DATED MAY 27, 2015 IN SUPPORT/EXHIBITS (A-D)	1
<u>MOTION # 2 - DEFENDANT SYLVESTER ALMIRON, M.D.</u> NOTICE OF MOTION/AFFIRMATION OF ROLAND T. KOKE, ESQ. DATED MAY 28, 2015 IN SUPPORT/EXHIBITS (A-D)	2
<u>MOTION # 3 - DEFENDANT NYACK MANOR NURSING HOME</u> NOTICE OF MOTION/AFFIRMATION OF JOHN B. SAVILLE, ESQ. DATED MAY 29, 2015 IN SUPPORT/EXHIBITS (A-D)	3
AFFIRMATION OF VALERIE J. CROWN, ESQ. DATED JULY 17, 2015 IN OPPOSITION/EXHIBITS (A-G)	4
REPLY AFFIRMATION OF ROLAND T. KOKE, ESQ. DATED JULY 20, 2015	5
REPLY AFFIRMATION OF JOHN B. SAVILLE, ESQ. DATED JULY 23, 2015	6
REPLY AFFIRMATION OF LILI C. OZAROWSKI, ESQ. DATED JULY 23, 2015	7

Upon the foregoing papers, the Court now rules as follows:

This action sounding in wrongful death, medical malpractice, and negligence was commenced by BRENDA GOELLER, as the Proposed Executrix of the Estate of Decedent Gloria Maria Colarelli (died July 22, 2012) with the filing of the Summons and Verified Complaint through the NYSCEF system on July 14, 2014. One of the allegations of the Verified Complaint is that a "petition is being submitted to the Surrogate Court of the County of Rockland, for Letters Testamentary, in order to appoint BRENDA GOELLER Executrix of the Estate of GLORIA MARIE COLARELLI." (Para. 4 of Verified Complaint).

Defendants move for dismissal of the complaint, pursuant to Civil Practice Law and Rules § 3211(a)(3) (lack of capacity to sue), on the grounds that BRENDA GOELLER has not been issued appropriate Letters and is not a proper representative of the Estate of the decedent. Defendants note that the petition for Letters before Surrogates Court was not even filed until November 19, 2014, 120 days after the statute of limitations expired on the wrongful death claims and 128 days after the complaint was filed.

Plaintiff's counsel filed opposition papers offering reasons for the delays in obtaining Letters before Surrogates Court, and also requesting that if the matter is dismissed, that it be dismissed without prejudice to Plaintiff's right to recommence within six months under Civil Practice Law and Rules § 205(a).

In her opposition papers, Plaintiff's counsel repeatedly references the Carrick case, but Defendants' counsel correctly note in their reply affirmations that the Carrick matter was dealing the a dismissal of the subsequent matter brought pursuant to Civil Practice Law and Rules § 205(a) after the proper dismissal of the initial matter for lack of capacity. [Carrick v.

Central Gen. Hosp., 51 N.Y.2d 242 (1980)].

In her opposition papers, Plaintiff's counsel also states that once Letters are obtained, she intends to request that counsel for the three defendants stipulate to amend the caption so this lawsuit can proceed, instead of her having to recommence a new lawsuit under Civil Practice Law and Rules § 205(a). However, on July 23, 2015,¹ at 5:22 p.m., Plaintiff's counsel e-filed a letter and attachments containing a July 22, 2015 Decree Granting Limited Administration and Letters of Limited Administration appointing Brenda Goeller as a representative of the Estate of Gloria Marie Colarelli. To date, the Court has heard nothing from Plaintiff's counsel regarding any resolution between counsel on the issues raised in the motions in light of the fact that Limited Letters were issued July 22, 2015. Therefore, in light of the fact that Brenda Goeller was not the proper representative at the time the action was commenced, or time the motion was filed, or even the time the opposition papers were filed, the Court is constrained to grant the motions to dismiss the matter without prejudice to Plaintiff's right to recommence under Civil Practice Law and Rules § 205(a).

Accordingly, it is hereby

ORDERED that Notice of Motion filed by Defendant NYACK HOSPITAL (#1) is granted and the matter is dismissed as against said defendant; and it is further

ORDERED that the Notice of Motion filed by Defendant SYLVESTER ALMIRON, M.D. (#2) is granted and the matter is dismissed as against said defendant; and it is further

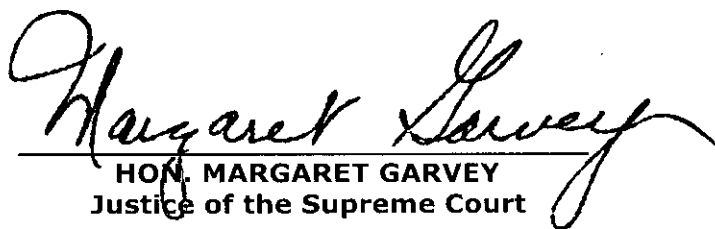
¹ The three dismissal motions were all returnable Friday, July 24, 2015, so opposition papers by Plaintiff were due on or before July 17, 2015. Plaintiff's affirmation in opposition and attached exhibits were timely filed by July 17, 2015, but the letter containing the Letters from Surrogates Court were not e-filed until after 5:00 p.m. on July 23, 2015.

ORDERED that the Notice of Motion filed by Defendant NYACK MANOR NURSING HOME (#3) is granted and the matter is dismissed as against said defendant; and it is further

ORDERED that this matter is marked disposed and all future dates are vacated.

The foregoing constitutes the Decision and Order of this Court on Motion #'s 1, 2 and 3.

Dated: New City, New York
September 18, 2015


HON. MARGARET GARVEY
Justice of the Supreme Court

TO:

VALERIE CROWN, ESQ.
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(e-filed)

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