Raiola v South Nassau Community Hosp.
2016 NY Slip Op 33191(U)
March 4, 2016
Supreme Court, Nassau County
Docket Number: Index No. 603252/15
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 37
NASSAU COUNTY

MICHAEL RAIOLA and MICHELLE PICIULLO, as Co-Administrators of the Estate of JOHN LOUIS RAIOLA, Deceased,

Plaintiffs,

Index No.: 603252/15
Motion Seq. Nos.: 01, 02
Motion Dates: 02/08/16
02/08/16
XXX

- against -

SOUTH NASSAU COMMUNITY HOSPITAL, JEFFREY KURTA, M.D., JONATHAN ALTUS, M.D., VICTOR DLUGASH, M.D., RICHARD B. RUBIN, M.D., KENNETH BECKER, M.D. and DAVID ABRAHAMS, M.D.,

Defendants.

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation and Exhibits	1
Notice of Motion (Seq. No. 02), Affirmation and Exhibits	2
Affirmation in Opposition to Motions Seq. Nos. 01 and 02 and Exhibits	3
Reply Affirmation to Motion (Seq. No. 01)	4
Reply Affirmation to Motion (Seq. No. 02) and Exhibit	5

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant David Abrahams, M.D. ("Dr. Abrahams") moves (Seq. No. 01), pursuant to CPLR § 3212 and § 3211(a)(3) and (7), for an order dismissing plaintiffs' Verified Complaint as against him on the grounds that plaintiffs lack the legal capacity to prosecute this action; and moves for a order severing the action and directing the Clerk of the Court to enter judgment.

Defendants Jeffrey Kurta, M.D. ("Dr. Kurta"), Jonathan Altus, M.D. ("Dr. Altus"), Victor Dlugash, M.D. ("Dr. Dlugash"), Richard B. Rubin, M.D. ("Dr. Rubin") and Kenneth Becker, M.D. ("Dr. Becker") move (Seq. No. 02), pursuant to § 3211(a)(3) and (7), for an order dismissing plaintiffs' Verified Complaint as against them on the grounds that plaintiffs lack the legal capacity to prosecute this action.

Plaintiffs oppose the motions (Seq. Nos. 01 and 02).

Plaintiffs commenced the instant action with the filing of a Summons With Notice on or about May 21, 2015. *See* Defendant Dr. Abrahams's Affirmation in Support Exhibit A. Defendants Dr. Kurta, Dr. Altus, Dr. Dlugash, Dr. Rubin and Dr. Becker served a Notice of Appearance and Demand for a Complaint on or about September 15, 2015 and September 22, 2015. *See* Defendants Dr. Kurta, Dr. Altus, Dr. Dlugash, Dr. Rubin and Dr. Becker's Affirmation in Support Exhibit B. Defendant Dr. Abrahams served a Notice of Appearance and Demand for a Complaint on or about September 29, 2015. *See* Defendant Dr. Abrahams's Affirmation in Support Exhibit B. Plaintiffs served a Verified Complaint on or about December 17, 2015. *See* Defendant Dr. Abrahams's Affirmation in Support Exhibit C. Issue was joined by defendant Dr. Abrahams on or about December 18, 2015. *See* Defendant Dr. Abrahams's Affirmation in Support Exhibit D. Issue was joined by defendants Dr. Kurta, Dr. Altus, Dr. Dlugash, Dr. Rubin and Dr. Becker on or about December 29, 2015. *See* Defendants Dr. Kurta, Dr. Altus, Dr. Dlugash, Dr. Rubin and Dr. Becker's Affirmation in Support Exhibit D.

Counsel for defendant Dr. Abrahams submits that "[p]laintiffs commenced this action without first having been duly appointed by the Surrogate's Court as the legal representative of the decedent's estate and thus the action must be dismissed as plaintiffs do not have the legal

capacity to bring these claims. Clearly, a cause of action to recover damages for wrongful death was unknown at common law, and exists in New York State solely by reason of statute. [citations omitted]. Accordingly, the Courts have held that the statute, being contrary to the common law, is to be ***strictly construed***. (Emphasis added). [citations omitted]. The principal statutory provision, EPTL 5-4.1 reads, in pertinent part: The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death, against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within two years after the decedent's death. Notably, the foregoing statute contains two significant elements. First, it requires that the action be brought by a 'duly appointed personal representative,' who is defined in EPTL 1-2.13 as being: 'A person who has received letters to administer the estate of the decedent. The term does not include an assignee for the benefit of creditors, or a committee, conservator, curator, custodian, guardian trustee or donee of a power during minority.' It is so obvious that the term does not include a proposed administrator, that the definition does not even mention it."

Counsel for defendant Dr. Abrahams adds that, "[s]econd, the statute prescribes a two-year period of limitation for the commencement of a wrongful death action, which runs from the date of the decedent's death, and not from the date of the appointment of the personal representative. [citation omitted]. As such, it is respectfully asserted 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. [citations omitted]. Accordingly, it is respectfully

submitted that the named plaintiffs, MICHAEL RAIOLA and MICHELLE PICIULLO, as *proposed* co-administrators of the Estate of JOHN LOUIS RAIOLA, having not been granted the required Letters of Administration from the Surrogate's Court, clearly lack the statutorily required legal authority to initiate any litigation on behalf of the decedent's estate."

Counsel for defendant Dr. Abrahams asserts that "the Court of Appeals has decided that when a proposed administrator is named and the proposed administrator files a summons and complaint for medical malpractice and wrongful death, the complaint is a nullity and must be dismissed. The nullity cannot be cured by obtaining Letters of Administration. [citation omitted]. In the instant case, the summons withe notice has set forth MICHAEL RAIOLA and MICHELLE PICIULLO, as Proposed Co-Administrators of the Estate of JOHN LOUIS RAIOLA. As evidenced by plaintiff's (*sic*) caption and the words 'proposed co-administrators' indicate that the letters were not yet issued at the time of the filing of the summons with notice and presumes the letters will be issued. This is the proverbial placing the cart before the horse, therefore making the plaintiff's summons and complaint defective on its face." *See* Defendant Dr. Abrahams's Affirmation in Support Exhibit A.

In support of Motion Seq. No. 02, counsel for defendants Dr. Kurta, Dr. Altus, Dr. Dlugash, Dr. Rubin and Dr. Becker submits the same arguments asserted by counsel for defendant Dr. Abrahams as detailed above.

In opposition to the motions, counsel for plaintiffs first argues that defendants Dr. Kurta, Dr. Altus, Dr. Dlugash, Dr. Rubin and Dr. Becker failed to raise lack of capacity as an affirmative defense in their Verified Answers and, thus, have waived their right to file their motion (Seq. No. 02) on that legal ground. *See* Plaintiffs' Affirmation in Opposition Exhibit B.

Counsel for plaintiffs further argues that "[t]he action was commenced prior to the appointment of Michael Raiola and Michelle Piciullo as Administrators to protect the statute of limitations. Michael Raiola and Michelle Piciullo received Limited Letters of Administration on December 1, 2015.... It is not unusual for an action to be commenced by proposed Administrators due to the difficulties in meeting the two year wrongful death statute of limitations deadline. If the action is not commenced within the statute of limitations period, the action can be lost while waiting for Letters of Administration. While it is true that wrongful death and negligence actions may only be commenced by a duly appointed representative of the Estate and are subject to dismissal if the representative has not been duly appointed, CPLR § 205 (a) allows this action to be salvaged, as explained below."

Counsel for plaintiffs contends that, pursuant to CPLR § 205(a), "a party whose action is dismissed for technical reasons may recommence the suit within six months after dismissal, provided that the new action would have been timely commenced at the time of the terminated action and concerns the same transactions and/or occurrences. The statute has been described as a 'saving statute' or a 'tolling statute,' which attests to its remedial nature in preventing the extinguishment of claims following technical dismissals. [citation omitted]."

Counsel for plaintiffs submits that, "[i]n this case, the initial actions was timely commenced, and although it is technically defective because it was not filed by appointed administrators, these plaintiffs have now been appointed and can recommence a new action within the six month tolling period."

In reply to plaintiffs' opposition, counsel for defendants Dr. Kurta, Dr. Altus, Dr. Dlugash, Dr. Rubin and Dr. Becker submits that, "[t]he courts have generally held that 'defenses waived under CPLR 3211(e) can nevertheless be interposed in an Answer amended by leave of

Court pursuant to CPLR 3025(b) so long as the amendment does not cause the other party prejudice or surprise resulting directly from the delay'. [citations omitted]. While the moving defendants did not raise the affirmative defense of lack of capacity to sue in their initial Answer, the Courts liberally grant leave to amend pleadings absent a showing of prejudice resulting from the delay and provided that the proposed amendments are not plainly lacking in merit. [citation omitted]. In addition, mere lateness in amending an Answer, in the absence of any prejudice or surprise, is no barrier to an amendment of an Answer. [citation omitted]. In this instance, plaintiff's counsel commenced this action with the filing of a Summons with Notice listing MICHAEL RAIOLA and MICHELLE PICIULLO, as proposed Co-Administrators of the Estate of JOHN LOUIS RAIOLA. As such, the plaintiff (*sic*) cannot claim any prejudice or surprise for the moving defendants' underlying application. The moving defendants' proposed amendment is not defective and is clearly appropriate given the circumstances. Attached hereto as **Exhibit A** is the moving defendants' proposed Amended Verified Answers adding the affirmative defense of lack of capacity to sue." *See* Defendants Dr. Kurta, Dr. Altus, Dr. Dlugash, Dr. Rubin and Dr. Becker's Reply Affirmation Exhibit A.

CPLR § 3211(a)(3) states that, "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:... 3. the party asserting the cause of action has not (*sic*) legal capacity to sue."

In the instant matter, it is evident that plaintiffs commenced the matter prior to being appointed as administrators of the Estate of John Louis Raiola. Consequently, plaintiffs as "Proposed Co-Administrators" lacked the capacity to sue.

However, CPLR § 205(a), states, in pertinent part, "[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain

personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period."

Therefore, defendant Dr. Abrahams's motion (Seq. No. 01), pursuant to CPLR § 3211(a)(3), for an order dismissing plaintiffs' Verified Complaint as against him on the grounds that plaintiffs lack the legal capacity to prosecute this action is hereby **GRANTED without prejudice** allowing plaintiffs to re-file this action pursuant to CPLR § 205(a).

Defendant Dr. Abrahams's motion papers (Seq. No. 01) indicated that he was also moving pursuant to CPLR § 3212 and § 3211(a)(7), however no arguments were made with respect to said statutes and the Court is not entertaining the motion with respect to same.

As to defendants Dr. Kurta, Dr. Altus, Dr. Dlugash, Dr. Rubin and Dr. Becker's motion (Seq. No. 02), said defendants did not raise the affirmative defense of lack of capacity to sue in their initial Verified Answers and, therefore, pursuant to CPLR § 3211(e), said defense is waived.

While defendants Dr. Kurta, Dr. Altus, Dr. Dlugash, Dr. Rubin and Dr. Becker seek, in the Reply Affirmation, to amend their Verified Answers, there is no cross-motion before the Court requesting said affirmative relief (*e.g.*, CPLR § 2215; *Khaolaead v. Leisure Video*, 18 A.D.3d 820, 796 N.Y.S.2d 637 (2d Dept. 2005); *Thomas v. Drifters*, 219 A.D.2d 639, 631 N.Y.S.2d 419 (2d Dept. 1995). Therefore, the Court cannot entertain defendants Dr. Kurta, Dr.

Altus, Dr. Dlugash, Dr. Rubin and Dr. Becker's request to amend their Verified Answers.

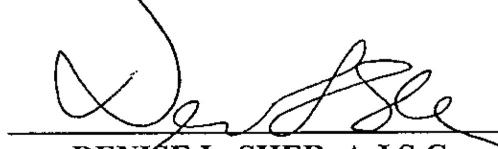
However, for the purpose of judicial economy and for continuity in the instant matter, since the Verified Complaint has been dismissed against defendant Dr. Abrahams and plaintiffs have been provided the opportunity to re-file this action pursuant to CPLR § 205(a), the Court finds that it would be best suited if the same relief is granted with respect to defendants Dr. Kurta, Dr. Altus, Dr. Dlugash, Dr. Rubin and Dr. Becker's motion (Seq. No. 02).

Accordingly, defendants Dr. Kurta, Dr. Altus, Dr. Dlugash, Dr. Rubin and Dr. Becker's motion (Seq. No. 02), pursuant to § 3211(a)(3), for an order dismissing plaintiffs' Verified Complaint as against them on the grounds that plaintiffs lack the legal capacity to prosecute this action is hereby **GRANTED without prejudice**, allowing plaintiffs to re-file this action pursuant to CPLR § 205(a).

Defendants Dr. Kurta, Dr. Altus, Dr. Dlugash, Dr. Rubin and Dr. Becker's motion papers indicated that they were also moving pursuant to CPLR § 3211(a)(7), however no arguments were made with respect to said statute and the Court is not entertaining the motion with respect to same.

This constitutes the Decision and Order of this Court.

E N T E R :



DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
March 4, 2016

ENTERED

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