

<b>Yu Liao v Bellevue Hosp. Ctr.</b>
2018 NY Slip Op 32893(U)
November 9, 2018
Supreme Court, New York County
Docket Number: 805084/2018
Judge: George J. Silver
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: GEORGE J. SILVER PART 10**

*Justice*

**VIVIAN YU LIAO, as Proposed Administrator  
of the Estate of Hong Huang, Deceased,**

MOTION INDEX NO. 805084/2018

**Plaintiff,**

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 001

**BELLEVUE HOSPITAL CENTER and NEW YORK  
CITY HEALTH AND HOSPITALS CORPORATION,**

**Defendants.**

**Cross-Motion:  Yes  No**

Upon the foregoing papers, the motion by order to show cause permitting the firm of Silver & Kelmachter, LLP to withdraw as counsel of record for plaintiff Vivian Yu Liao (“plaintiff”), is granted.

This medical malpractice action concerns an alleged wrongful death in connection with care and treatment rendered to Hong Huang (“decedent”) at Bellevue Hospital Center between January of 2016 and July 1, 2017. In its moving papers, the firm of Silver & Kelmachter, LLP, alleges that it cannot proceed further in this matter, but cannot specify the reasons for its application without revealing confidential information that is protected by the attorney-client privilege.

Defendants partially oppose plaintiff’s motion to withdraw as counsel, and cross-move for an order, pursuant to CPLR §3211(a)(3), dismissing the complaint based on Ms. Liao’s lack of capacity to sue on behalf of decedent’s estate, and, pursuant to CPLR §3211(a)(7), dismissing the complaint for plaintiff’s failure to state a cause of action. Specifically, defendants do not oppose the firm of Silver & Kelmachter, LLP’s request to be relieved as counsel for plaintiff. However, defendants oppose plaintiff’s request for a 60-day stay of all proceedings while plaintiff seeks to retain new counsel since plaintiff’s failure to appoint an administrator of decedent’s estate warrants immediate dismissal of the action. Defendants contend that Ms. Liao is only the “Proposed Administrator,” not the personal representative of decedent’s estate since she has not received letters of administration

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

appointing her as such. Defendants also posit that because decedent had two adult children who would have been more appropriate administrators of his estate, Ms. Liao lacks the capacity to sue on behalf of decedent's estate. Defendants further seek dismissal pursuant to CPLR § 3211(a)(7) for plaintiff's failure to state a cause of action, "as the appointment of a duly appointed administrator is an essential element of a plaintiff's cause of action and the failure to do so is fatal to the case."

In opposition to defendants' cross-motion, plaintiff asserts that Ms. Liao is the mother and natural guardian of two of decedent's minor children, and as the guardian of the property of these two children, Ms. Liao is eligible to receive letters of administration for decedent's estate. Plaintiff also asserts that Ms. Liao does not have a relationship with decedent's children from his prior relationships, and that decedent's two adult sons from his prior relationships have not responded to plaintiff's counsel's repeated phone calls or correspondence. Finally, plaintiff argues that should the court dismiss the action, that it be dismissed without prejudice in order for plaintiff to commence a new action pursuant to CPLR § 205(a).

The court first addresses defendants' cross-motion to dismiss the action. CPLR § 3211(a)(3) allows a party to dismiss the complaint where "the party asserting the cause of action has not legal capacity to sue." "Only a duly appointed personal representative may bring suit on behalf of a decedent" (*Palladino v. Metro. Life Ins. Co.*, 188 A.D.2d 708, 708 [3d Dept. 1992] *citing* EPTL 11-3.1, 1-2.13). "On a defendant's motion pursuant to CPLR [§] 3211(a)(3) to dismiss the complaint based upon the plaintiff's alleged lack of standing, 'the burden is on the moving defendant to establish, *prima facie*, the plaintiff's lack of standing as a matter of law'" (*U.S. Bank Nat'l Ass'n v. Clement*, 163 A.D.3d 742, 743 [2d Dept. 2018]). Here, because Ms. Liao is only the proposed administrator of decedent's estate, and has not received letters of administration appointing her as the personal representative of decedent's estate, Ms. Liao lacks standing to sue (*Sam Kyung Cho v. Yongshin Cho*, 45 A.D.3d 388, 389 [1st Dept. 2007] ["Plaintiff lacked standing to commence this action because only a duly appointed representative may maintain an action on behalf of an estate."]; *Palladino*, 188 A.D.2d at 708, *supra* ["Inasmuch as letters of administration have not been issued to plaintiff, he has no standing to sue."]). Accordingly, the branch of defendants' cross-motion to dismiss the action based on plaintiff's lack of standing to sue is granted.

Similarly, defendants' application to dismiss the complaint for failure to state a cause of action pursuant to CPLR § 3211(a)(7) is granted. "A cause of action for wrongful death is a property right belonging to the distributees of a decedent" (*Matter of Estate of Baby Girl Lauanders*, 218 A.D.2d 501, 504 [1st Dept. 1995] *citing* EPTL 5-4.1 and 5-4.4). "The due appointment and qualification of the administrators are necessary elements to the existence of the cause of action" (*id. citing George v. Mt. Sinai Hosp.*, 47 N.Y.2d 170, 177 [1979]; *see also Boffee v. Consol. Tel. & Elec. Subway Co.*, 171 A.D. 392, 394 [1st Dept. 1916] ["It cannot be said that a cause of action exists, unless there be also a person in existence capable of suing."]) [citations omitted]. Because Ms. Liao has not been duly appointed as the administrator of decedent's estate, she cannot satisfy the requirements necessary to sustain a cause of action for wrongful death. Accordingly, the complaint must be dismissed.

However, CPLR § 205(a) allows a plaintiff or his or her administrator in a timely commenced action that 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 "to 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." Accordingly, this action is dismissed without prejudice to Ms. Liao exercising her right to recommence the action as administrator of decedent's estate (*see Caracciolo v. Solar*, 16 Misc. 3d 1127(A) [Sup. Ct. 2007]; *Carrick v. Central General Hospital*, 1980, 51 N.Y.2d 242, 253 [1980] [timely wrongful death action commenced by "proposed administratrix" rather than duly appointed estate fiduciary could be recommenced within time limit of CPLR 205(a) by administratrix after receipt of appropriate letters]).

The court now turns to the firm of Silver & Kelmachter, LLP's application to be relieved as counsel for plaintiff. The court grants the application; however, plaintiff's request for a 60-day stay of all proceedings is denied since the complaint has been dismissed as previously indicated.

Accordingly, it is hereby

ORDERED that plaintiff's motion to withdraw is granted and the firm of Silver &

**Kelmachter, LLP , is relieved as counsel for plaintiff, upon service of a copy of this decision and order, upon defendants by November 20, 2018 with proof of service electronically filed, and service upon all appearing parties; and it is further**

**ORDERED that defendants' application that the action be dismissed based on Ms. Liao's lack of capacity to sue on behalf of decedent's estate is granted to the extent that the complaint is dismissed without prejudice; and it is further**

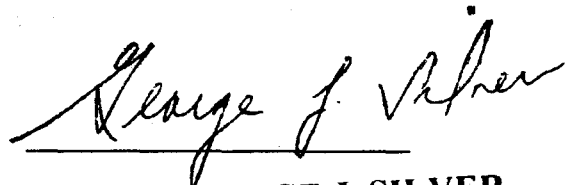
**ORDERED that defendants' application to dismiss the complaint for failure to state a cause of action is granted to the extent that the complaint is dismissed without prejudice; and it is further**

**ORDERED that defendants' application to dismiss the case with prejudice should plaintiff fail to appear at the next court conference is denied as moot; and it is further**

**ORDERED that the clerk is directed to enter judgment accordingly.**

**This constitutes the decision and order of the court.**

**Dated: November 9, 2018**



**HON. GEORGE J. SILVER**

**Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION**

**Check if appropriate:  DO NOT POST  REFERENCE**