

<b>Estrella v New York Presbyt. Hosp.</b>
2019 NY Slip Op 31068(U)
April 12, 2019
Supreme Court, New York County
Docket Number: 805457/17
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*

RAMON ESTRELLA, as guardian of the Estate of  
MARISOL MARMOLEJOS, incapacitated, and RAMON  
ESTRELLA, Individually,

MOTION INDEX NO. 805457/17

Plaintiffs,

MOTION DATE  
MOTION SEQ. NO. 001

- v -

NEW YORK PRESBYTERIAN HOSPITAL,

Defendant.

**Cross-Motion:**  Yes  No

Plaintiffs RAMON ESTRELLA, as guardian of the Estate of MARISOL MARMOLEJOS (“Ms. Marmolejos”), incapacitated, and RAMON ESTRELLA (“Mr. Estrella”), Individually (collectively “plaintiffs”) move, pursuant to CPLR § 3025(b), for an order permitting plaintiffs to serve a supplemental summons and amended complaint to substitute AILEEN GUTIERREZ, ESQ. (“Ms. Gutierrez”) as plaintiff, and as guardian of the property of Ms. Marmolejos. Defendant NEW YORK PRESBYTERIAN HOSPITAL (“defendant”) cross-moves for an order, pursuant to CPLR § 3025, permitting defendant to amend its answer to add an affirmative defense of lack of capacity, and pursuant to CPLR § 3211(a)(3), to subsequently dismiss the complaint for lack of capacity to sue.

**BACKGROUND AND ARGUMENTS**

In this medical malpractice action, plaintiffs allege that on November 16, 2016, Ms. Marmolejos was under the medical care of defendant when she sustained a post-partum

intracerebral hemorrhage. On December 20, 2017, Mr. Estrella commenced this action with the filing of a summons and complaint as guardian of the estate of Ms. Marmolejos. Thereafter, issue was joined on or about February 15, 2018.

On March 9, 2018, the Hon. Kelly O'Neill Levy issued an order appointing Ms. Marmolejos' mother and Ms. Gutierrez as co-guardians of Ms. Marmolejos' person, and Ms. Gutierrez alone as guardian of Ms. Marmolejos' property. On November 28, 2018, plaintiffs' counsel attempted to substitute Ms. Gutierrez as guardian of the property of Ms. Marmolejos via stipulation, but was instead ordered to seek said relief by motion.

Plaintiffs' argument rests on caselaw that stands for the proposition that leave to amend pleadings should be freely given absent prejudice to the non-moving party. Plaintiffs also highlight that a delay does not bar one's ability to seek leave to amend the complaint since a mere lapse of time is not a sufficient ground for denial.

In its cross-motion, defendant argues that plaintiffs' request for leave to serve an amended complaint presupposes that the initial complaint was valid, however, here, there was never a valid lawsuit before the court. Defendant contends that although the lawsuit was commenced by Mr. Estrella, who was listed in the original complaint as Ms. Marmolejos' guardian, Mr. Estrella had never been appointed as Ms. Marmolejos' guardian, and had no right to commence this action. Specifically, defendant highlights that at a preliminary conference before the court on May 16, 2018, plaintiffs' counsel was unable to advise the court as to the type of guardianship Mr. Estrella had over Ms. Marmolejos, and whether he had guardianship of the person and/or the property of Ms. Marmolejos. The conference was subsequently adjourned for plaintiffs' counsel to consult with plaintiffs. At another conference on July 18, 2018, plaintiffs' counsel was still unable to advise whether Mr. Estrella was appointed as solely an Article 81 guardian, or whether he had

other guardianship rights. The case was adjourned, and plaintiffs' counsel was directed to show proof that Mr. Estrella had legal rights to act on behalf of Ms. Marmolejos. At a court appearance on September 29, 2018, plaintiffs' counsel advised that Mr. Ramon would not be the proposed guardian and plaintiff in this case, and that a new guardian would be proposed for Ms. Marmolejos.

Defendant contends that no one had been previously named as guardian for Ms. Marmolejos until the March 9, 2018 court order which appointed Ms. Marmolejos' mother and Ms. Gutierrez as co-guardians of Ms. Marmolejos' person, and Ms. Gutierrez as guardian of Ms. Marmolejos' property. Defendant argues that because there was no valid guardian in place at the time the lawsuit was commenced, there is no valid action before the court, and thus, nothing to amend. Defendant contends that one cannot "fix" a lawsuit through the type of amendment plaintiffs now seek when there was no authority to bring the lawsuit in the first place. As such, defendant requests leave to amend<sup>1</sup> its answer as there would be no surprise to plaintiffs since plaintiffs instituted this action in the name of someone who was not the purported guardian. Lastly, defendant argues that this matter must be dismissed for lack of capacity to sue.

In reply, plaintiffs assert that defendant's papers are procedurally defective under CPLR §2214(b). Plaintiffs contend that their notice of motion was served via e-file on December 19, 2018, and stated that answering affidavits must be served at least seven days prior to the return date of this motion, but defendant's opposition was served six days prior to the return date.

Plaintiffs also assert that Mr. Estrella is the father of two of Ms. Marmolejos' children, including the child whose birth led to the injuries that are the basis of this lawsuit, but due to a conflict within the family, Mr. Estrella was not appointed the guardian after a "lengthy and

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<sup>1</sup> Defendant's proposed amendment is an affirmative defense stating that, "The named plaintiff lacks capacity to sue."

protracted Surrogates matter.” Plaintiffs further advise that plaintiffs’ counsel attempted to amend the complaint at prior conferences via stipulation, but was rejected by opposing counsel.

Additionally, plaintiffs request that if defendant’s cross-motion is granted and the case is dismissed, that plaintiff be permitted to immediately recommence this action under CPLR § 205. To that end, plaintiffs assert that they have not voluntarily discontinued this action, personal jurisdiction was obtained over defendant, plaintiffs have continuously prosecuted this action, and dismissal based on a lack of capacity is not on the merits. Plaintiffs also contend that because this action was filed within the statute of limitations, dismissing it would unnecessarily burden the court since plaintiffs would have to commence an additional action, which would further delay plaintiffs relief.

Finally, plaintiffs argue that defendant’s cross-motion to amend its answer to add an affirmative defense of lack of capacity should be denied since this issue was rendered moot by the Surrogates order appointing Ms. Gutierrez as guardian of Ms. Marmolejos’ person.

### **DISCUSSION**

“Leave to amend pleadings should be freely granted in the absence of prejudice or surprise to the opposing party [or] unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Lucido v. Mancuso*, 49 A.D.3d 220, 226–27 [2d Dept. 2008]; CPLR 3025[b]). “Prejudice has been defined as a special right lost in the interim, a change in position, or significant trouble or expense that could have been avoided had the original pleading contained the proposed amendment” (*Ward v. City of Schenectady*, 204 A.D.2d 779, 781 [3d Dept. 1994]). “Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side” (*Edenwald Contracting Co. v. City of New York*, 60 N.Y.2d 957, 959 [1983]; *see also*

*Sheppard v. Blitman/Atlas Bldg. Corp.*, 288 A.D.2d 33, 34 [1st Dept. 2001] [“In the absence of prejudice, mere delay is insufficient to defeat the amendment.”]). “A motion for leave to amend is committed to the sound discretion of the trial court” (*Colon v. Citicorp Inv. Servs.*, 283 A.D.2d 193, 193 [1st Dept. 2001]).

Here, although Mr. Estrella improperly commenced this action without being appointed as Ms. Marmolejos’ guardian, in the interest of judicial economy, and due to the lack of prejudice to defendant, sufficient grounds have been established to support the granting of plaintiffs’ application to amend the complaint. While this action was initially commenced by Mr. Estrella on December 20, 2017, Judge Levy’s March 9, 2018 order shortly thereafter appointed Ms. Gutierrez as guardian of Ms. Marmolejos’ person and property. Dismissing the complaint at this juncture would only permit plaintiffs to seek leave to commence a new action within six months under CPLR § 205(a) since an appropriate guardian has been duly appointed by the court (*see, Brown v. Lutheran Med. Ctr.*, 35 Misc. 3d 553, 556 [Sup. Ct. Kings County 2012] [“CPLR 205(a) ‘permits a plaintiff to commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after termination of a prior action, provided that the prior action was timely commenced and was not terminated, *inter alia*, by a final judgment upon the merits.’ The fundamental purpose of [CPLR 205(a)] is served when the defendant is given timely notice of the cause of action when asserted by or on behalf of the injured party. Thus, an ‘error’ relating to the identity of the named plaintiff in the first action does not bar recommencement of the action pursuant to CPLR 205(a). This is true even where the plaintiff who commences a lawsuit under § 205(a) is a completely different entity than that who commenced the initial lawsuit which was dismissed for lack of legal capacity, as long as the real party in interest

is unchanged [citations omitted]). Thus, to avoid the waste of judicial resources and further delay of the prosecution of this case, plaintiffs' request for leave to amend the complaint is granted.

Moreover, plaintiffs' application to amend the complaint is not prejudicial to defendant. Indeed, defendant has failed to allege or demonstrate that the proposed amendment would be prejudicial or surprising (*Greco v. Grande*, 160 A.D.3d 1345 [4th Dept. 2018] [granting leave to amend where the record is devoid of any potential prejudice flowing from the proposed amendment"]; *Brunetti v. City of New York*, 286 A.D.2d 253, 253 [1st Dept. 2001] [motion to amend was properly granted absent a showing of prejudice]; *Powe v. City of Albany*, 130 A.D.2d 823, 823 [1st Dept. 1987] ["There being no prejudice or surprise occasioned directly by defendants' delay in amending their answer, the proposed amendment should have been granted."]). To be sure, defendant has been aware of the appointment of Ms. Gutierrez as guardian as early as March 9, 2018, less than three months after the complaint was filed (*see, Sheppard v. Blitman/Atlas Bldg. Corp.*, 288 A.D.2d 33, 34 [1st Dept. 2001] [granting leave to amend where opposing party did not demonstrated prejudice from the delay since it had notice of the claim]; *Edenwald Contracting Co.*, 60 N.Y.2d 957 at 959, *supra*; *Ward*, 204 A.D.2d 779 at 781, *supra*). Accordingly, plaintiffs' request to serve a supplemental summons and amended complaint substituting Ms. Gutierrez as plaintiff and as guardian of the property of Ms. Marmolejos is granted, and defendant's cross-motion to amend its answer, and subsequently dismiss the action must, *ipso facto*, be denied.

Furthermore, because defendant failed to raise capacity to sue as a defense in its answer or in a motion to dismiss made prior to answering, this defense is waived. "Although a defendant may move for dismissal on the ground that the plaintiff 'has not legal capacity to sue' (CPLR § 3211 [a][3]), an objection or defense based upon that ground is waived unless raised either by a

pre-answer motion or in the responsive pleading (*see* CPLR § 3211 [e])” (*Downey Sav. & Loan Ass’n, F.A. v. 162 Grand Newburgh LLC*, 27 Misc. 3d 674, 677 [Sup. Ct. 2010] (“Since defendants did not move for dismissal prior to service of their answer and the second affirmative defense [relates to the lack of capacity to maintain this action], . . .the defense pertaining to legal capacity to sue has been waived.”)).

As such, it is hereby

ORDERED that plaintiffs’ application to serve a supplemental summons and amended complaint to substitute AILEEN GUTIERREZ, ESQ. as plaintiff, and as guardian of the property of MARISOL MARMOLEJOS is GRANTED; and it is further

ORDERED that plaintiffs are directed to serve said supplemental summons and amended complaint within 30 days of this decision; and it is further

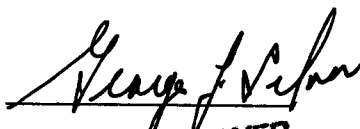
ORDERED that defendant’s cross-motion to amend its answer is DENIED; and it is further

ORDERED that defendant’s cross-motion to dismiss the complaint for lack of capacity to sue is DENIED; and it is further

ORDERED that the parties are directed to appear for a compliance conference on June 25, 2019 at 2:15 p.m. at 111 Centre Street (Part 10 Room 1227) New York, New York 10013 to ensure compliance with this court’s order.

This constitutes the decision and order of the court.

Dated: 4/12/19

  
GEORGE J. SILVER

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION