

Pepe v Southside Hosp.
2019 NY Slip Op 34715(U)
September 17, 2019
Supreme Court, Nassau County
Docket Number: Index No. 612701/2018
Judge: Steven M. Jaeger
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 35**

Present: **HON. STEVEN M. JAEGER**

_____X
CARMELA PEPE, as Proposed Administrator of the
Estate of Jack Pepe, deceased,

Plaintiffs,

Index No.: 612701/2018
Motion Seq. Nos.: 001,002,003
Motion Date: 08/7/19
Decision & Order

-against-

XXXX

SOUTHSIDE HOSPITAL, NORTH SHORE-LONG ISLAND
JEWISH HEALTH SYSTEM, INC., BELAIR CARE CENTER,
INC., BELAIR NURSING AND REHABILITATION CENTER,
BELAIR CARE CENTER INC., d/b/a BELAIR NURSING
AND REHABILITATION CENTER, ERIK J. ALTMAN, M.D.,
NORTHSHORE UNIVERSITY HOSPITAL, NORTHWELL
HEALTH INC., and NYU WINTHROP HOSPITAL,

Defendants.

_____X

Papers submitted:

- Notice of Motion.....x
- Notice of Cross Motionx
- Notice of Cross Motionx
- Affirmation in Oppositionx
- Reply Affirmation.....x
- Reply Affirmation.....x

Upon the foregoing papers, the Defendants SOUTSIDE HOSPITAL, NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, INC., ERIK J. ALTMAN, M.D., NORTH SHORE UNIVERSITY HOSPITAL, NORTHWELL HEALTH, INC., (Motion Sequence #1), NYU WINTHROP HOSPITAL (Motion Sequence #2), BELAIR CARE CENTER, INC., BELAIR NURSING AND REHABILITATION CENTER, BELAIR

CARE CENTER, INC., d/b/a BELAIR NURSING AND REHABILITATION CENTER (Motion Sequence # 3) motions to dismiss the Summons and Verified Complaint, pursuant to CPLR § 3211 (a) 3, on the basis that the Plaintiff lacks the legal capacity to sue, on the ground that no Letters Testamentary or Letters of Administration were ever issued to CARMELA PEPE, is decided as provided herein.

The Summons and Verified Complaint was served upon each Defendant and issue was joined with the service of an Answer by each Defendant.

On a motion to dismiss for lack of standing, pursuant to CPLR § 3211 (a) (3), the burden is on the moving defendant to establish, prima facie the plaintiff's lack of standing as a matter of law. *New York Community Bank v. McClendon*, 138 A.D.3d 805 (2d Dept. 2016), "To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing" (*MLB Sub I, LLC v. Bains*, 148 A.D.3d 881, 882, (2d Dept. 2017) citing *Deutsche Bank Trust Co. Ams v. Vitellas*, 131 A.D.3d 52, 60.

The Defendants herein contend that the Plaintiff, as the "Proposed" Administrator of the Estate of Jack Pepe, does not have the capacity to sue pursuant to CPLR § 3211 (a) 3, as the Complaint alleges that Plaintiff was in the process of obtaining Letters of Administration.

Defendants argue that EPTL §5-4.1 requires the existence of a qualified administrator to maintain a wrongful death action and the statutory right to recover for wrongful death does not arise until an administrator has been named through the issuance

of Letters of Administration. Defendants contend that the action must be dismissed as Plaintiff was not a qualified administrator at the time of commencement.

Plaintiff's counsel opposes Defendants' motions to dismiss, arguing that Plaintiff is the wife and sole heir of the estate of Jack Pepe. Additionally, counsel argues that Plaintiff is united in interest for the purpose of continuing the litigation without letters of administration. In further support of his opposition, Plaintiff's counsel argues that dismissal of the Complaint would be futile as the proceeding could be recommenced as Plaintiff would have six (6) months to file a new complaint if the statute of limitations expired.

In support of his opposition, Plaintiff's counsel cites *Nieves v. East 109th Street Corp.*, 112 A.D.2d 59 (1st Dept., 1985) arguing that standing issues need not be strictly enforced as the Court held that "where the decedent's surviving spouse was united in a clear identity of interest, the lack of the personal representative is an infirmity that can and should be remedied and done so retroactively." (See Plaintiff's opposition ¶¶16-19)

In their Reply Affirmations, Defendants argue that dismissal is warranted as the action was improperly commenced by a party lacking the necessary capacity to do so in violation of EPTL §5-4.1. Defendants argue that Plaintiff's reliance on the *Nieves* case is misplaced as the case is distinguishable from the current matter.

EPTL §5-4.1 (1) in pertinent part states:

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,

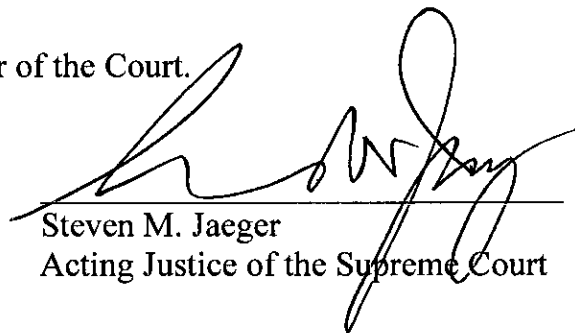
neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within two years after the decedent's death; provided,[w]hen the distributees do not participate in the administration of the decedent's estate under a will appointing an executor who refuses to bring such action, the distributees are entitled to have an administrator appointed to prosecute the action for their benefit.

The Court finds that Defendants have established that Plaintiff does not have the capacity to maintain the instant action. It is undisputed that at the time of commencement, Plaintiff was not duly appointed as the administrator of the estate of Jack Pepe and as such this matter must be dismissed. *Mingone v. State of New York*, 100 A.D.2d 897 (2d Dept. 1984)

Accordingly, it is hereby

ORDERED, that the Defendants' motions (sequences 001, 002 and 003) seeking dismissal of Plaintiff's Complaint pursuant to CPLR §3211 (a) (3) for lack of capacity are **GRANTED**.

This constitutes the decision and Order of the Court.



Steven M. Jaeger
Acting Justice of the Supreme Court

Dated: September 17, 2019
Mineola, NY

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NASSAU COUNTY
COUNTY CLERK'S OFFICE