

<b>Upton-Sims v Grand Manor Nursing &amp; Rehabilitation Ctr.</b>
2019 NY Slip Op 34878(U)
July 11, 2019
Supreme Court, Bronx County
Docket Number: Index No. 34522/2018E
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK — BRONX COUNTY  
PRESENT: Hon. GEORGE J. SILVER PART 19A

Justice

TONYA UPTON-SIMS, as Proposed  
Administratrix of the Estate of ALONZO  
UPTON, deceased, and ALONZO UPTON,  
individually,

INDEX NO. 34522/2018E

Plaintiff,

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

v.

MOTION SEQ. NO. 001

GRAND MANOR NURSING &  
REHABILITATION CENTER, GOLD  
CREST CARE CENTER, ANNA  
MEYENDORFF, M.D., and  
MONTEFIORE MEDICAL CENTER,

MOTION CAL. NO. \_\_\_\_\_

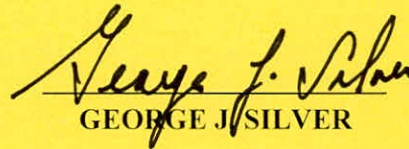
Defendants.

The following papers numbered 1 to 5 were read on this motion for (Seq. No. 001)  
to DISMISS COMPLAINT (See CPLR §2219 [a]):

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). <u>1, 2, 3, 5</u>
Answering Affidavit and Exhibits	No(s). <u>4</u>
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the  
annexed decision and order of the court.

Dated: July 11, 2019

  
GEORGE J. SILVER

GEORGE J. SILVER

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

1. Check one: .....  Case Disposed  Non-Final Disposition
2. Check as Appropriate: ... Motion is:  Granted  Denied  Granted in Part  Other

**SUPREME COURT OF THE STATE OF NEW YORK —BRONX COUNTY**

**PRESENT: GEORGE J. SILVER**

*Justice*

**TONYA UPTON-SIMS, as Proposed Administratrix  
of the Estate of ALONZO UPTON, deceased, and  
ALONZO UPTON, individually,**

Index No. 34522/2018E  
Motion Seq. No. 001

**Plaintiff,**

**DECISION & ORDER**

- v -

**GRAND MANOR NURSING & REHABILITATION  
CENTER, GOLD CREST CARE CENTER,  
ANNA MEYENDORFF, M.D., and MONTEFIORE  
MEDICAL CENTER,**

**Defendants.**

**Cross-Motion:**  Yes  No

Defendant GRAND MANOR NURSING & REHABILITATION CENTER (“Grand Manor”) moves for an order, pursuant to CPLR § 3211(a)(3), dismissing the complaint on the ground that plaintiff lacks the legal capacity to commence this action. Defendants MONTEFIORE MEDICAL CENTER (“Montefiore”) and GOLD CREST CARE CENTER (“Gold Crest” collectively “defendants”) cross-move separately for an order seeking the same relief.

Plaintiff TONYA UPTON-SIMS (“plaintiff”), as proposed administratrix of the estate of ALONZO UPTON (“decedent”), deceased, and ALONZO UPTON, individually, oppose Grand Manor and Montefiore’s motions, and cross-moves for an order, pursuant to CPLR § 3025(b), granting leave to amend the caption to add the executor, Maurice Samuel (“Mr. Samuel”), as a plaintiff for decedent’s estate. For the reasons discussed below, the court grants defendants’ motions, and denies plaintiff’s cross-motion.

### BACKGROUND

Plaintiff commenced this action by filing a summons and complaint on or about December 24, 2018. Plaintiff asserts causes of action under Public Health Law §§2801-d for medical malpractice, negligence, and wrongful death. Plaintiff's complaint alleges that plaintiff "is the daughter and one of three distributives of decedent . . . and the proposed Administratrix of the Estate of Alonzo Upton, with the petition for limited letters of administration pending in Surrogates' [sic] Court Bronx County."

In the instant motion, Grand Manor asserts that plaintiff commenced this action as the proposed administratrix of decedent's estate, however, the petition for limited letters of administration is pending in Surrogate's Court. According to Grand Manor, plaintiff is not a proper party to bring the instant action since plaintiff commenced this action without being designated as the legal representative of decedent's estate. Grand Manor contends that because no estate has been set up, and no letters of administration or letters testamentary have been issued in this case, any action that plaintiff took on behalf of decedent's estate is null and void since plaintiff does not have authority to act.

Grand Manor also argues that plaintiff's wrongful death action must be dismissed with prejudice since a wrongful death action may only be maintained by a personal representative who is duly appointed to administer decedent's estate. Moreover, Grand Manor contends that while plaintiff may argue that she will have another six months to refile this action if this case were dismissed, plaintiff's argument fails with respect to her wrongful death claim. In Grand Manor's view, the law prohibits plaintiff from filing an action as the "proposed administrator" in an attempt to toll the statute of limitations for her wrongful death claim, which expired on December 24, 2018.

Lastly, Grand Manor posits that this case will be delayed as plaintiff has not been properly appointed as the estate representative. Consequently, Grand Manor avers that the parties will not be able to engage in discovery.

Montefiore joins in Grand Manor's motion to dismiss. Montefiore contends that plaintiff is the "proposed administratrix" of decedent's estate, and that plaintiff concedes that letters of administration have not yet been issued appointing her as the administratrix of decedent's estate. Accordingly, Montefiore submits that because plaintiff had not obtained letters of administration at the time this case was commenced, and is only a "proposed administratrix," she lacks capacity to commence this action. As such, Montefiore argues that this action should be dismissed.

Plaintiff opposes both motions, and cross-moves for an order amending the caption of this case to include Mr. Samuel, decedent's cousin, as the executor of decedent's estate. Plaintiff advises that there is a probate proceeding *sub judice* in Surrogate's Court, Bronx County, in which there was a will filed and probated appointing Mr. Samuel as the executor and trustee of decedent's estate. That proceeding is contested by decedent's daughters.

Plaintiff argues that amending the complaint to substitute the executor/trustee as plaintiff would cure the defective petition.<sup>1</sup> Plaintiff contends that the proposed amendment is not palpably insufficient or devoid of merit, and that there has been no showing of prejudice or surprise resulting from plaintiff's delay in seeking leave to amend the complaint. Specifically, plaintiff highlights that preliminary letters testamentary were issued prior to the commencement of this action, which remained in effect until April 22, 2019. Plaintiff also points out that she sought an amendment

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<sup>1</sup> Plaintiff's sentence ineligibly continues, "twoulf crea"petition for limited letters of adn-initration [is] pending in Surrogates' Court Bronx County." The court further notes that certain sentences throughout plaintiff's cross-motion is ineligible, and hard to follow as there are numerous typos and incoherently-drafted sentences.

about 30 days after filing the complaint and before defendants served their answers. Plaintiff further notes that there been no discovery in this case thus far, and that the amendment is merely to comply with the fact that Mr. Samuel was appointed to represent decedent's estate at the time the action was commenced.

Additionally, plaintiff argues that under CPLR § 205(a), she may commence a new action within six months of the dismissal of this action although this action would otherwise be time-barred under the statute of limitations. According to plaintiff, she may commence a new action since the dismissal of this action would be for reasons other than a failure to prosecute, or a fatal defect involving the merits of the underlying claim.

Finally, plaintiff argues that contrary to Grand Manor's assertion, this action will not be delayed since Grand Manor has its own records, and could process the authorizations since there has been an executor and trustee appointed. Plaintiff also notes that the pending petition to appoint decedent's daughter in addition to the executrix and trustee of decedent's estate may not be necessary.

In reply, and opposition to plaintiff's cross-motion, Grand Manor asserts that plaintiff does not dispute that when she filed the complaint on December 24, 2018, she was only a "proposed administratrix," and therefore lacked capacity to bring this action. Rather, Grand Manor highlights that plaintiff only proposes that the caption be amended to include Mr. Samuel as the executor of decedent's estate. Grand Manor contends that while plaintiff argues that this case was timely filed with a proper representative as Mr. Samuel was issued preliminary letters testamentary on October 22, 2018, which were extended through April 22, 2019, plaintiff does not demonstrate why Mr. Samuel was not the originally named-plaintiff, nor provide a reasonable excuse for violating the statute of limitations. Grand Manor further reiterates that because the statute of limitations for

plaintiff's wrongful death action has expired, plaintiff's wrongful death action must be dismissed with prejudice since plaintiff cannot re-file the same complaint.

In addition, Grand Manor emphasizes that permitting plaintiff to maintain this action would be prejudicial since the parties' time to complete discovery has been delayed. As such, Grand Manor avers that the court should dismiss plaintiff's complaint, but permit plaintiff to refile the action within six months, with the exception of plaintiff's wrongful death claim.

Gold Crest also cross-moves for an order dismissing the complaint. Gold Crest argues that plaintiff has not been appointed as the personal representative of decedent's estate, and therefore lacks capacity to bring this action. According to Gold Crest, plaintiff is a proposed administratrix, who had not been granted letters of administration at the time the action was commenced. Additionally, Gold Crest avers that allowing plaintiff to amend the caption would bypass the statutory requirement of appointing a legal representative prior to the commencement of an action on behalf of an estate. In that regard, Gold Crest highlights that decedent's Surrogate's Court file shows that plaintiff has not been issued any letters testamentary, and that plaintiff has failed to provide any evidence to show that she has initiated a Surrogate's Court proceeding.

Gold Crest also argues that plaintiff's attempt to amend the caption to add Mr. Samuel as an executor is untimely as plaintiff's cross-motion was filed on January 23, 2019 and January 25, 2019, approximately one month after the statute of limitations expired. Gold Crest also advises that Stephen B. Kaufman, Ronald J. Stewart, and Mr. Samuel were granted preliminary letters testamentary on January 13, 2017, which were valid through May 18, 2018, and were again issued preliminary letters testamentary on October 22, 2018. Accordingly, Gold Crest argues that there is no excuse why Mr. Samuel was not named as the executor of decedent's estate when the lawsuit was commenced, and that adding Mr. Samuel as an executor after the expiration of statute of

limitations does not make this action timely. Moreover, Gold Crest submits that it is unclear as to whether the letters testamentary issued to Mr. Samuel would permit him to be included in the caption as an executor of decedent's estate since the letters were issued for the limited purpose of collecting \$40,000.

Lastly, Gold Crest asserts that plaintiff's wrongful death action should be dismissed with prejudice since the statute of limitations for a wrongful death cause of action expired on December 24, 2018, two years after the date of decedent's death.<sup>2</sup>

## DISCUSSION

### **I. Defendants' Motion to Dismiss the Complaint**

CPLR § 3211(a)(3) provides in pertinent part that a party may move to dismiss an action on the ground that "the party asserting the cause of action has not legal capacity to sue." "Statutory and case law make clear that the pre-existence of a qualified estate representative is essential to the commencement of a personal injury action or a wrongful death action" (*Karras v. Margaret Tietz Ctr. for Nursing Care, Inc.*, 61 Misc. 3d 1222(A) [Sup. Ct. Queens County 2018]). As such, "a personal representative who has received letters of administration of a decedent's estate is the only party who is authorized to commence a survival action to recover damages for personal injuries sustained by the decedent or a wrongful death action to recover damages sustained by the decedent's distributees on account of his or her death" (*Shelley v. S. Shore Healthcare*, 123 A.D.3d 797, 797 [2d Dept. 2014]). Therefore, "A plaintiff who fails to secure an appointment as the estate representative prior to the commencement of a lawsuit lacks the capacity to bring and maintain

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<sup>2</sup> Although plaintiff does not oppose Gold Crest's motion, the court will consider plaintiff's opposition as a global opposition to all defendants' respective motions in the interest of deciding the motions on their merits, and upon taking into account that defendants virtually argued the same position. In making this determination, the court has reviewed and considered the parties' letters dated May 15, 2019.

that lawsuit under the EPTL, and, as a result, such action must be dismissed pursuant to CPLR § 3211(a)(3)” (*Karras*, 61 Misc. 3d 1222(A), *supra*).

Here, plaintiff’s complaint must be dismissed as plaintiff lacked capacity to sue at the time the action was commenced. At the commencement of the action on December 24, 2018, no administrator had been appointed as the personal representative of decedent’s estate. Indeed, plaintiff had not received letters of administration or letters testamentary appointing her to represent decedent’s estate in any capacity<sup>3</sup> (*see, Shelley*, 123 A.D.3d at 797, *supra*; *Muriel v. New York City Health and Hospital Corp.*, 52 A.D.3d 792, 861 [2d Dept. 2008] [dismissing complaint where “the action may be brought only by a qualified personal representative of the decedent and the ‘proposed administratrix’ lacked capacity to proceed in this action”]; *Deutsch v. LoPresti*, 272 A.D.2d 506, 506 [2d Dept. 2000] [dismissing plaintiff’s claims for conscious pain and suffering and wrongful death on the ground that plaintiffs did not have the capacity to sue as plaintiffs had not obtained letters of administration at the time the action was commenced]; *Mingone v. State of New York*, 100 A.D.2d 897, 899 [2d Dept. 1984] [dismissing personal injury and wrongful death action where no administrator had been duly appointed to serve as the personal representative of decedent’s estate at the time the summons was served]). Therefore, because plaintiff lacked capacity to sue at the time she commenced the action, this action must be dismissed.

Moreover, plaintiff cannot correct this defect by simply amending the caption to substitute Mr. Samuel as the executor of decedent’s estate. Although Mr. Samuel was issued preliminary letters testamentary, he was not a named-plaintiff in this action, and did not commence this action (*see, Carrick v. Cent. Gen. Hosp.*, 51 N.Y.2d 242, 250 [1980] [“[T]he statutory requirement of a

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<sup>3</sup> EPTL § 1-2.13 defines a duly appointed representative as one “who has received letters to administer the estate of a decedent.”

duly appointed administrator [for wrongful death actions] is in the nature of a condition precedent to the right to bring the suit and, as such, is an essential element of the claim.”]; *Karras*, 61 Misc.3d 1222(A), *supra* [“Statutory and case law make clear that the pre-existence of a qualified estate representative is essential to the commencement of a personal injury action or a wrongful death action. A plaintiff who fails to secure an appointment as the estate representative *prior* to the commencement of a lawsuit lacks the capacity to bring and maintain that lawsuit under the EPTL, and, as a result, such action must be dismissed pursuant to CPLR § 3211(a)(3).” [emphasis added]]; EPTL § 5-4.1(1)). Furthermore, as Gold Crest correctly highlights, Mr. Samuel’s letters testamentary were issued for the limited purpose of collecting \$40,000, without any mention as to whether Mr. Samuel was appointed as a representative in a broader capacity, or whether Mr. Samuel was granted authority to bring suit on behalf of decedent’s estate beyond the collection of the \$40,000. Accordingly, plaintiff’s complaint must be dismissed.

However, notwithstanding the dismissal, plaintiff may commence a new action pursuant to CPLR § 205(a). “When an action is dismissed for reasons other than a failure to prosecute or a fatal defect involving the merits of the underlying claim, CPLR § 205[a] permits the plaintiff to commence a new action within six months of the dismissal even though the action would otherwise be time-barred under the applicable period of limitations” (*Carrick*, 51 N.Y.2d at 245–46, *supra*).

Here, since the court has dismissed plaintiff’s complaint due to plaintiff’s failure to appoint an administrator of decedent’s estate prior to commencing the action, plaintiff is permitted to commence a new action within six months of the dismissal. “Like any condition precedent, the requirement of a qualified administrator in a wrongful death action, while essential to the maintenance of the suit, is in no way related to the merits of the underlying claim” (*Carrick*, 51 N.Y.2d at 252, *supra*; *Mingone*, 100 A.D.2d at 899, *supra* [“The dismissal on the ground that the

action was brought by an improper party does not relate to the timeliness of the original action or want of prosecution and is, thus, without prejudice to allowing plaintiffs to commence a new action based upon the same causes of action pursuant to CPLR § 205 (subd [a]).” Therefore, because the dismissal here was not based on the merits of plaintiff’s underlying claim or plaintiff’s failure to prosecute, plaintiff may commence a new action within six months of the service of a copy of the order, with notice of entry pursuant to CPLR § 205(a).

Furthermore, contrary to defendants’ assertion, CPLR § 205(a) permits plaintiff to commence a new wrongful death action although the statute of limitations has expired on her wrongful death claim (*Carrick*, 51 N.Y.2d at 252, *supra* [granting plaintiff a six-month extension to commence wrongful death action under CPLR § 205(a) where plaintiff’s action was dismissed for the failure to appoint a personal representative. The court observed held that, “[A] disposition based solely upon the absence of a duly appointed administrator does not preclude re prosecution of the underlying claim through the mechanism of CPLR § 205[a] once a qualified administrator has been appointed.”]; *Rodriguez v. River Valley Care Ctr. Inc.*, 57 Misc. 3d 357, 360 [N.Y. Sup. Ct. Bronx County 2017] [While plaintiff’s wrongful death action was dismissed for the lack of a duly appointed administrator, and the statute of limitations had already expired, the savings provision of CPLR § 205(a) provided plaintiff with a six-month extension as “CPLR § 205 can be used to resuscitate actions that were previously dismissed due to some error not pertaining to the merits of the underlying claim.”] [denied on other grounds]; *Mingone*, 100 A.D.2d at 898, *supra* [plaintiff may invoke CPLR § 205(a) to commence a new personal injury and wrongful death action within six months where no administrator had been appointed to serve as a personal representative of decedent’s estate at the time the summons was served]).

Therefore, although the two-year statute of limitations expired for plaintiff's wrongful death claim on December 24, 2018, plaintiff has until six months after the entry of this decision to obtain the appropriate letters of administration and commence a new action. Indeed, the court acknowledges that plaintiff had timely commenced the original action,<sup>4</sup> and that defendants have had sufficient notice of the claims underlying plaintiff's wrongful death action by virtue of plaintiff's original, but technically defective, complaint.

## II. Plaintiff's Cross-Motion to Amend the Caption

Plaintiff's cross-motion to amend the caption to include Mr. Samuel as the executor of decedent's estate is insufficient to remedy plaintiff's defective complaint. While there is a probate proceeding *sub judice* in Surrogate's Court, Bronx County, Mr. Samuel has not been issued letters testamentary or letters of administration appointing Mr. Samuel as the executor of decedent's estate. Similarly, while plaintiff has informed the court that there has been a final request for an extension of Mr. Samuel's preliminary letters testamentary in Bronx Surrogate's Court, it currently stands that the last preliminary letters testamentary issued to Mr. Samuel expired on April 22, 2019, and therefore, Mr. Samuel is without legal authority to represent decedent's estate. Accordingly, plaintiff's request to amend the caption to include Mr. Samuel as the executor of decedent's estate is denied. Notwithstanding the same, plaintiff may commence a new action within six months upon obtaining proper letters of administration as indicated above.

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<sup>4</sup> *Cf.*, *Franks v. Kings Harbor Multicare Center*, No. 0305063/2010, 2011 WL 11084358, at \*2 [N.Y. Sup. Ct. Apr. 21, 2011] [plaintiff cannot amend caption in wrongful death action where she lacked standing to sue at the time of the filing, and because the action was commenced *after* the expiration of the statute of limitations; *Ortiz v. Hertz Corp.*, 212 A.D.2d 374, 375 [1st Dept. 1995] [dismissing complaint in the underlying wrongful death action which was commenced more than three and one-half years *after* decedent's death; *Hammie v. City of New York*, 143 A.D.2d 805, 806 [2d Dept. 1988] [statute of limitations is not tolled where plaintiff's complaint was untimely since it was not commenced within one year and 90 days].

Consequently, it is hereby

ORDERED that GRAND MANOR NURSING & REHABILITATION CENTER's application to dismiss the complaint is GRANTED; and it is further

ORDERED that MONTEFIORE MEDICAL CENTER's application to dismiss the complaint is GRANTED; and it is further

ORDERED that GOLD CREST CARE CENTER's application to dismiss the complaint is GRANTED; and it is further

ORDERED that plaintiff's cross-motion to amend the caption to add Maurice Samuel as the executor for the Estate of Alonzo Upton is DENIED.

This constitutes the decision and order of the court.

Dated: July 11, 2019

*George J. Silver*  
HON. GEORGE J. SILVER  
GEORGE J. SILVER

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION