

**Neesemann v Mt. Sinai W.**

2020 NY Slip Op 34250(U)

December 22, 2020

Supreme Court, New York County

Docket Number: 100271/2018

Judge: John J. Kelley

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

**PRESENT:** HON. JOHN J. KELLEY **PART** **IAS MOTION 56EFM**

*Justice*

-----X

CYNTHIA NEESEMANN, individually, and as the Executor of the Estate of Samuel Eagle Friedar,

Plaintiff,

- v -

MT. SINAI WEST, THE MT. SINAI HOSPITAL, SELECT SPECIALTY-NORTHEAST NEW JERSEY HOSPITAL, THE PAVILION AT QUEENS FOR REHABILITATION AND NURSING, NEW YORK-PRESBYTERIAN QUEENS, WOODMERE REHABILITATION AND HEALTH CARE CENTER, KINDRED HOSPITAL NEW JERSEY-WAYNE, SOUTH NASSAU COMMUNITIES HOSPITAL, JOHN DOES, and JOHN DOES 1-10,

Defendants.

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The following e-filed documents, listed by NYSCEF document number 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 52, 57, 58 (Motion 005)

were read on this motion to/for DISMISS COMPLAINT.

**DECISION AND ORDER**

In this action to recover damages for conscious pain and suffering and wrongful death arising from medical malpractice, the defendants Mt. Sinai West and The Mt. Sinai Hospital (together the Mt. Sinai defendants) move pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against them based on the pro se plaintiff's lack of capacity to maintain the action. The plaintiff opposes the motion. The motion is granted to the extent that (a) the third cause of action, which was asserted in the plaintiff's individual capacity, is dismissed and (b) the plaintiff shall, on or before February 23, 2021, retain an attorney to prosecute the first, second, and fourth causes of action, all of which were asserted in her capacity as executor of her decedent's estate.

The plaintiff is the surviving spouse of her deceased husband, Samuel Eagle Friedar, who died on November 22, 2015. On August 12, 2016, the Surrogate's Court, New York

County, appointed the plaintiff as executor of Friedar's estate, and issued her letters testamentary.

The plaintiff, appearing pro se, commenced this action on February 22, 2018, and styled the action as "*Cynthia Neesemann, individually, and as Executor of the Estate of Samuel Eagle Friedar v Mt. Sinai West, et al.*" In her complaint, the plaintiff alleged that the defendants all committed medical malpractice, causing Friedar to sustain conscious pain and suffering and ultimately resulting in Friedar's death. In her capacity as executor of the estate, the plaintiff thus asserted a claim to recover for wrongful death based on malpractice, pursuant to which she sought compensation on behalf of Friedar's estate for the pecuniary loss sustained by the estate as a consequence of his death (First Cause of Action). The plaintiff also alleged causes of action, in her capacity as executor, seeking to recover on behalf of the estate for that pecuniary loss from some or all defendants, based on a violation of civil rights, gross negligence, and personal injury (Second Cause of Action) and false imprisonment (Fourth Cause of Action). In the third cause of action, the plaintiff sought to recover, in her individual capacity, for loss of consortium. Specifically, she alleged, at paragraphs 42 through 44 that:

"Plaintiff was caused to incur pecuniary loss included but not limited to financial expenses and medical expenses by reason of the wrongful death of Friedar.

"As a result of Friedar's death, Plaintiff has been deprived of financial support, love, affection, guidance, and services, all to her damage.

"By reason of the foregoing, Plaintiff has been damaged in the sum of \$5 million."

The claim for loss of consortium must be dismissed, inasmuch as it was asserted in the plaintiff's individual capacity. Any action for personal injury that seeks recovery for conscious pain and suffering, sometimes referred to as a "survival" action, belongs to the estate and, therefore, must be asserted by the personal representative of the estate. As set forth in EPTL 11-3.2(b), "[n]o cause of action for injury to person or property is lost because of the death of the person in whose favor the cause of action existed. For any injury an action may be brought or continued by the personal representative of the decedent." Where a plaintiff seeks to assert a

cause of action as an individual beneficiary of a decedent's estate, he or she has no independent right to maintain an independent cause of action for the recovery of estate property, as such a right belongs to the personal representative of the decedent's estate (see *Stallsworth v Stallsworth*, 138 AD3d 1102, 1103 [2d Dept 2016]; *Gaentner v Benkovich*, 18 AD3d 424 [2d Dept 2005]; *Carrick v Central Genl. Hosp.*, 71 AD2d 226 [2d Dept 1979], *revd on other grounds* 51 NY2d 242 [1980]; see also *Goldberg v Camp Mikan-Recro*, 42 NY2d 1029 [1977]). Inasmuch as plaintiff sought to assert the third cause of action in her individual capacity, with herself listed in the caption "individually," her personal claims in this regard must be dismissed.

In any event, the Court of Appeals has unambiguously explained that it

"can[not] . . . be said [that] a spouse's cause of action for loss of consortium exists in the common law independent of the injured spouse's right to maintain an action for injuries sustained. (See *Millington v Southeastern Elevator Co.*, 22 NY2d 498, 507-508; *Green v Hudson Riv. R. Co.*, 28 Barb 9, *supra*; *Sorensen v Balaban*, 11 App Div 164, 165, *supra*.)"

(*Liff v Schildkrout*, 49 NY2d 622, 632 [1980]). The Court continued:

"In this regard, we adopt the reasoning set forth in *Osborn v Kelley* (61 AD2d 367, 370, *supra*) 'that insofar as plaintiff is attempting to recover for loss of consortium for the period prior to decedent's death, a cause of action is stated. (*Hentze v Curry Chevrolet Sales & Servs.*, 46 AD2d 800.) Such a cause of action, however, is a derivative one (*cf. Millington v Southeastern Elevator Co.*, 22 NY2d 498.) The wrongful death statute created a new cause of action based not upon damage to the estate of the deceased because of death, but rather for the pecuniary injury to the surviving spouse and next of kin of the decedent (*Greco v Kresge Co.*, 277 NY 26, 32). Since a decedent has no cause of action to recover damages for his death ( EPTL 11-3.3), plaintiff has no derivative cause of action to recover for loss of consortium due to decedent's death"

(*id.* [emphasis added]; see *Maidman v Stagg*, 82 AD2d 299, 301 [2d Dept 1981]; *Richardson v Lutheran Hosp. of Brooklyn*, 70 AD2d 933, 933-934 [2d Dept 1979]). Here, the plaintiff's third cause of action, by its terms, does not seek to recover for loss of consortium for the period prior to the decedent's death, but only for loss of consortium attributable to the death itself. Hence, it fails to state a cause of action even if it were asserted in the plaintiff's capacity as executor of the decedent's estate.

With respect to the first, second, and fourth causes of action, all of which are asserted in the plaintiff's capacity as the executor of the decedent's estate,

“[t]t is unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court of record in the State of New York (Judiciary Law § 478). An administrator of an estate, however, may appear pro se on behalf of *an estate with no creditors, providing he [or she] is the sole beneficiary of the estate*”

(*Tanami v LaSala*, 2012 NY Slip Op 33483[U], 2012 NY Misc. LEXIS 6444, \*10 [Sup Ct, Bronx County, Jun. 11, 2020] [emphasis added]; see *Guest v Hansen*, 603 F3d 15, 17 [2d Cir 2010]).

The Mt. Sinai defendants submitted documentary evidence establishing that Medicare is a creditor of the decedent's estate, and that the decedent had adopted children who were beneficiaries of his estate in addition to the plaintiff. Hence, the plaintiff cannot appear pro se in her capacity as executor of the decedent's estate but, rather, may only appear by counsel.

The failure of a plaintiff required to be represented by counsel to appear by counsel normally requires that his or her action be dismissed at the outset (see *Moran v Hurst*, 32 AD3d 909, 910 [2d Dept 2006]; *Cinderella Holding Corp. v Calvert Ins. Co.*, 265 AD2d 444, 444 [2d Dept 1999]; *Ernest & Maryanna Jeremias Family Partnership, L.P v Sadykov*, 48 Misc 3d 8, 13 [App Term, 2d Dept, 2d, 11th, and 13th Jud Dists 2015]). Under the unique circumstances of this action, however, in which the defendants were the parties who first came forward with evidence both that the decedent's estate had creditors and that the plaintiff is not the sole beneficiary of the estate, dismissal of the first, second, and fourth causes of action are not warranted at this juncture. Rather, the court exercises its discretion to permit the plaintiff, in her capacity as executor, to appear by counsel on or before February 23, 2021; if she does not do so by that date, and she seeks no extension of time to do so, the court shall dismiss those causes of action against the Mt. Sinai defendants.

Accordingly, it is

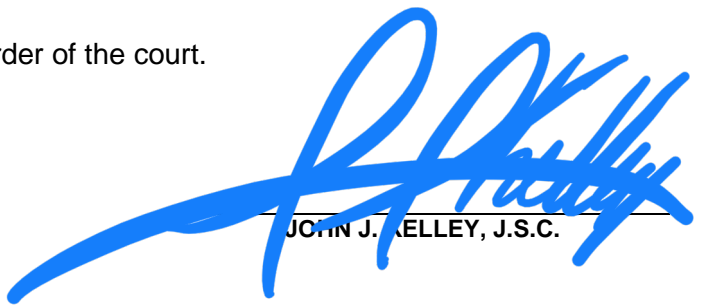
ORDERED that the motion of the defendants Mt. Sinai West and The Mt. Sinai Hospital to dismiss the complaint against them is granted to the extent that (a) the third cause of action,

pursuant to which the plaintiff seeks to recover for loss of consortium in her individual capacity, is dismissed as against those defendants, and (b) on or before February 23, 2021, the plaintiff shall retain counsel to appear on her behalf by filing a notice of appearance to prosecute the first, second, and fourth causes of action, pursuant to which the plaintiff seeks to recover in her capacity as executor of the estate of Samuel Eagle Friedar, and the motion is otherwise denied; and it is further,

ORDERED that if the plaintiff does not retain counsel on or before February 23, 2021 by causing counsel to file a notice of appearance on or before that date, the court shall dismiss the first, second, and fourth causes of action insofar as asserted against the defendants Mt. Sinai West and The Mt. Sinai Hospital, unless the court extends the deadline or otherwise stays the dismissal for good cause shown.

This constitutes the Decision and Order of the court.

12/22/2020  
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: