

**Murdock v Cold Spring Hills Ctr. for Nursing & Rehabilitation**

2020 NY Slip Op 35154(U)

May 8, 2020

Supreme Court, Nassau County

Docket Number: Index No. 602900/2019

Judge: Sharon M.J. Gianelli

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU - IAS/TRIAL PART 17  
Present: Hon. Sharon M.J. Gianelli

X

MICHELLE STERLING MURDOCK, as Proposed  
Executrix of the Goods, Chattels and Credits which  
were of IVANHOE STERLING, deceased,  
and PEARL STERLING,

*Plaintiffs,*

Index No: 602900/2019

-against -

Mot. Seq. Nos.: 001 & 002

COLD SPRING HILLS CENTER FOR NURSING  
AND REHABILITATION, EXCELSIOR CARE  
GROUP, LLC, FULTON COMMONS CARE  
CENTER, INC.,

Decision & Order

XXX

*Defendants.*

X

Papers submitted:

Seq. 001

Defendant Cold Spring Hills

Notice of Motion and Affirmation in Support \_\_\_\_\_ X

Defendant Cold Spring Hills

Affirmation in Reply \_\_\_\_\_ X

Seq. 002

Defendant Fulton Commons Notice of Cross-Motion  
and Affirmation in Support \_\_\_\_\_ X

Plaintiff Affirmation in Opposition to Defendants' Motion  
and to Defendants' Cross-Motion \_\_\_\_\_ X

Defendant Fulton Commons Affirmation in Reply \_\_\_\_\_ X

*Background*

This is an action in negligence against Defendants, which allegedly resulted in conscious pain and suffering and wrongful death of Plaintiff Ivanhoe Sterling.

This action was commenced by the filing of a Summons and Complaint on February 28, 2019. Defendant Cold Spring Hills Center for Nursing and Rehabilitation (hereinafter "Cold Spring") now moves for an Order dismissing the Complaint upon the

ground that Plaintiffs lack the legal capacity to commence this action and directing the Clerk to enter Judgment accordingly.

Defendant Fulton Commons Care Center, Inc. (hereinafter "Fulton Commons") cross-moves for an Order dismissing the action due to Plaintiffs' lack of capacity to bring the suit and directing the Clerk to enter Judgment accordingly.

### *History/Facts*

Decedent, Ivanhoe Sterling, was a resident of Defendant Cold Spring for approximately two (2) years prior to his death on April 27, 2017, and a resident of Defendant Fulton Commons Care, Inc., for approximately one (1) year prior to his death.

Plaintiffs allege that Decedent sustained injuries at the two facilities as a result of negligence, which resulted in, among other injuries, a hip fracture, bedsores, excessive weight loss, limb contractures, sepsis, and eventually death.

Decedent, Ivanhoe Sterling is survived by his wife, Pearl Sterling, their two (2) daughters, a son, and four (4) grandchildren.

Plaintiffs also allege a claim for loss of consortium on behalf of the surviving spouse, Plaintiff Pearl Sterling, which claim is derivative of the estate claims of Decedent's conscious pain and suffering, and is not based on a claim for wrongful death.

This action was commenced on February 28, 2019, in order to preserve the Statute of Limitations while the Petition for Letters Testamentary was prepared and submitted to the Surrogate's Court.

*Motion Seq. 001:*

Defendant Cold Spring now moves for an Order dismissing the Complaint on the ground that Plaintiffs lack the legal capacity to commence this action and directing the Clerk to enter Judgment accordingly.

Defendant Cold Spring moves for the dismissal of the action, pursuant to *CPLR § 3211(a)(3)*. Defendant Cold Spring argues that a plaintiff who fails to take the necessary step of securing appointment as estate representative prior to commencement of a lawsuit lacks the capacity to bring and maintain that lawsuit. Defendant Cold Spring asserts that Plaintiffs lack the legal capacity to bring this action based on the fact that there is no evidence that Plaintiff Michelle Sterling Murdock has been duly appointed as the estate representative of Decedent's estate by the Surrogate's Court, and that such a lack of capacity must result in the dismissal of the action pursuant to *CPLR § 3211(a)(3)*. Consequently, Defendant asserts that any action taken by Plaintiffs' counsel on behalf of the Goods, Chattels, and Credits of Ivanhoe Sterling is null and void inasmuch as Plaintiff Michelle Sterling Murdock lacks any legal authority to act.

In addition to reliance on *CPLR § 3211(a)(3)*, Defendant Cold Spring also argues that *EPTL § 5-4.1* sets forth a similar requirement, namely an appointment of a proper

estate representative prior to the commencement of an action on behalf of the decedent. As such, Defendant Cold Spring asserts that designation of a proper estate representative is a condition precedent to bringing a lawsuit on behalf of the decedent's estate.

Defendant Cold Spring maintains that New York law clearly establishes that the appointment of a legal representative prior to the commencement of an action on behalf of an estate is a mandatory condition precedent.

*Motion Seq. 002:*

Defendant Fulton Commons cross-moves for an Order dismissing the action due to Plaintiff's lack of capacity to bring the suit and directing the Clerk to enter Judgment accordingly.

Defendant Fulton Commons argues that the action should be dismissed as it was commenced by a party who lacks the capacity to prosecute the action.

Defendant Fulton Commons argues that Plaintiffs' pleading reflects that Michelle Sterling Murdock as a proposed executrix cannot maintain the instant action. Defendant Fulton Commons further argues that pursuant to *EPTL § 5-4.1* and *§ 1-2.13*, only a person who has obtained Letters of Administration or Letters Testamentary can be considered a duly appointed representative and thus be able to legally commence and prosecute a survival and wrongful death action on behalf of a deceased person. As such, an action for wrongful death and negligence must be dismissed if a proposed Administrator or Testator has not been appointed at the time of commencement of the

action. Defendant Fulton Commons further argues that the facially deficient pleading is fatal to the prosecution of this action regardless of whether Michele Sterling Murdock subsequently obtains Letters Testamentary.

Defendant Fulton Commons Care Center, Inc. additionally argues that the sixth cause of action for loss of consortium by Plaintiff Pearl Sterling cannot be maintained in a wrongful death action. Defendant Fulton Commons asserts that recovery for wrongful death by the members of a decedent's estate is limited to pecuniary loss and no action lies for loss of society, comfort or consortium. Moreover, Defendant Fulton Commons contends that while other states may permit recovery for loss of society, New York's death statute has steadfastly restricted recovery to "pecuniary injuries," or injuries measurable by money, and deny recovery for grief, loss of society, affection, conjugal fellowship and consortium.

Defendant Fulton Commons concludes that any independent cause of action Plaintiff Pearl Sterling may have possessed was extinguished upon the death of her husband Ivanhoe Sterling and subsumed into an action on behalf of his estate which for the foregoing reasons does not permit recovery for loss of consortium, society and comfort.

In opposition, Plaintiffs maintain that Plaintiff Michelle Sterling Murdock is a daughter of Decedent Ivanhoe Sterling, and has been making concerted efforts to obtain appointment to represent the estate. Plaintiffs describe the actions taken to obtain the appropriate Letters Testamentary, including a search for Decedent's Last Will and

Testament, and the preparation of a Petition for Letters Testamentary, which was rejected as deficient because the version of the will submitted appeared to be a copy and not the original.

Ultimately, a Petition for Letters of Administration was prepared and submitted to Plaintiff Michelle Sterling Murdock for signature. Plaintiffs allege that new waivers have been sent to all of the potential distributees, which are required for the submission of the new Petition for Letters of Administration.

Plaintiffs argue that any dismissal of the action must be without prejudice, thereby permitting Plaintiffs to re-commence the action pursuant to *CPLR § 205(a)* once Letters of Administration are obtained.

In Reply, Defendant Cold Spring maintains its previously stated position that Plaintiff Michelle Sterling Murdock lacked the legal capacity to commence this lawsuit, and to date, still lacks such capacity. Defendant Cold Spring further argues that the fact that a Petition for Letters of Administration has been sent to Plaintiff Michelle Sterling Murdock, but to date, has not been submitted to the Surrogate's Court is of no consequence and does not negate the fact that at the time Plaintiff commenced this action, Plaintiff lacked the legal capacity to do so. Consequently, Defendant argues that the Complaint must be dismissed as a matter of law.

In its Reply, Defendant Fulton Commons reiterates its position.

Furthermore, Defendant adds that that while Plaintiffs' papers reference some effort to take the necessary steps to have an administrator appointed, it is apparent that such an appointment is not imminent.

*Analysis*

A wrongful death action or a negligence-malpractice action based upon personal injury to a decedent must be brought by a person in a representative capacity, i.e. , an executor or administrator of the decedent' s estate. *Claim of Gerkin 106 Misc.2d 643*; and *EPTL § 11-3.2*.

Here, Plaintiff Michelle Sterling Murdock has yet to be appointed as Executrix of decedent' s estate. Therefore, she lacked and still lacks the capacity to bring the instant action.

Based upon the foregoing, Defendants' application seeking dismissal of Plaintiffs' Complaint is substantiated.

Accordingly,

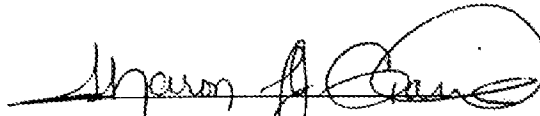
It is

ORDERED, that Defendant Cold Spring Hills Center for Nursing and Rehabilitation's motion for an Order dismissing the Complaint upon the grounds that Plaintiffs lack the legal capacity to commence this action, is Granted, without prejudice; and

It is

ORDERED, that Defendant Fulton Commons Care Center, Inc.'s cross-motion for an Order dismissing the action due to Plaintiffs' lack of capacity to bring the suit, is Granted, without prejudice.

DATED: Mineola, New York  
May 8, 2020



HON. SHARON M.J. GIANELLI,  
Justice of the Supreme Court

The conformed signature on this Order and copies thereof shall be deemed original.

**ENTERED**

**May 15 2020**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE