

Martins v Memorial Sloan-Kettering Cancer Ctr.

2021 NY Slip Op 30905(U)

March 5, 2021

Supreme Court, New York County

Docket Number: 805316/2019

Judge: John J. Kelley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

-----X

BARBARA S. MARTINS,
Plaintiff,

- v -

MEMORIAL SLOAN-KETTERING CANCER CENTER, MEMORIAL
SLOAN-KETTERING HOSPITAL, DOCTOR CRAIG MOSKOWITZ,
DOCTOR PHILLIP CARON, and DOCTOR ALLISON
MOSKOWITZ,
Defendants.

INDEX NO. 805316/2019
MOTION DATE 01/11/2021
MOTION SEQ. NO. 001

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number 18, 19, 20, 21, 22, 23, 24, 25, 26,
27, 34, 40, 41, 43, and 46 (Motion 001)

were read on this motion to/for DISMISS COMPLAINT/CROSS MOTION FOR
UNSPECIFIED RELIEF

In this action to recover damages for conscious pain and suffering and wrongful death
arising from medical malpractice, the 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 and cross-moves for unspecified relief.
The motion is denied, as the defendants failed to establish that the plaintiff is not the sole
beneficiary of the decedent's estate or that the estate is indebted to any third parties. The cross
motion is denied, as it does not seek any affirmative relief.

The plaintiff is the surviving spouse of her deceased husband, Daniel V. Martins, who
died on July 7, 2017. On May 14, 2019, the Surrogate's Court, Westchester County, appointed
the plaintiff as administrator of her husband's estate, and issued her letters of administration.

The plaintiff, appearing pro se, commenced this action on October 1, 2019, and styled
the action as "Barbara S. Martins v Memorial Sloan-Kettering Cancer Center, et al." Although
the caption did not expressly indicate that the plaintiff was suing in her capacity as administrator

of the estate, in her complaint, the plaintiff alleged that she was in fact the administrator of her decedent's estate, and that the defendants all committed medical malpractice, causing her husband to sustain conscious pain and suffering and ultimately dying as a consequence of the alleged malpractice. The complaint asserted claims to recover for

“[d]ecedent's lost income and earning capacity, [b]urial and funeral expenses, [m]edical bills incurred prior to death, [t]he family's loss of lover, companionship, care and comfort, [t]he spouses' loss of enjoyment of sexual intimacy, [t]he spouses' loss of support of partnership in assisting with life's work and tasks, [t]he pain and suffering due to the loss of a beloved husband and father, [t]he decedent's pain and suffering prior to death, [p]unitive and exemplary damages, according to proof, [and] [s]uch other and further relief as the Court may deem just and proper.”

The defendants allege that the plaintiff lacks capacity to maintain this action because (a) all of the causes of action set forth in the complaint here must be asserted on behalf of the estate by the administrator of the estate, and (b) an administrator of an estate who is a non-attorney such as the plaintiff may not represent the estate in court. The defendants assert that only an attorney can represent a non-attorney administrator and prosecute an action in the name of the administrator on behalf of the estate. They thus contend that, inasmuch as the plaintiff is suing only in her individual, rather than her representative capacity, and she is not represented by an attorney, the complaint must be dismissed. The defendants further argue that, although a decedent's spouse is entitled to recover, in her individual capacity, for loss of the decedent's consortium for the period of time that the decedent remained alive after the injury, such a claim may not be asserted as a stand-alone claim, but may only be asserted in the context of a properly prosecuted action by the estate's representative which, in this case, must be prosecuted by an attorney.

In the first instance, the defendants are correct that any action to recover 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]). In connection with a survivor’s cause of action to recover for loss of consortium, 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, it may be inferred that the greater portion of the plaintiff’s claim to recover for loss of consortium---loss of a lover, companionship, care and comfort, enjoyment of sexual intimacy, support of partnership in assisting with life’s work and tasks---implicitly seeks recovery for the period prior to the

decedent's death, even if the aspect of the claim seeking recovery for pain and suffering due to the death itself does not constitute a cognizable basis for recovery.

As to the entirety of the complaint,

“[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]).

Thus, if the plaintiff is not the sole beneficiary of the estate, or there are nonparty creditors of the estate, the plaintiff would be required to be represented by counsel, and her failure to do so normally would mandate that 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]).

Here, however, the defendants submit no proof that there are any creditors of the estate. Moreover, the defendants only allege “on information and belief” that the decedent had children who are additional beneficiaries of his estate. Where an allegation is based only upon information and belief, “without the slightest reference to the source of the information or the grounds for the belief” (*Zelnik v Bidermann Indus. U.S.A.*, 242 AD2d 227, 228 [1st Dept 1997]), it is insufficient to constitute proof of facts necessary to support a dispositive motion (see *id*; see also *Henriquez v Purins*, 245 AD2d 337, 338 [2d Dept 1997]).

“The party asserting an affirmative defense generally bears the burden of proof on that issue” (*Manion v Pan Am. World Airways*, 55 NY2d 398, 405 [1982]; see generally *Phillips Constr. Co. v City of New York*, 61 NY2d 949, 953 [1984]; *Goncalves v Regent Intl. Hotels*, 58 NY2d 206, 217 [1983]). A claim that a plaintiff lacks capacity to maintain an action has always been characterized as an affirmative defense (see *Fausset v Turner Constr. Co.*, 177 AD3d

702, 702 [2d Dept 2019]; *Matter of Tomarken v State of New York*, 100 AD3d 1072, 1074 [3d Dept 2012]; *Guiffrida v Storico Dev., LLC*, 60 AD3d 1286, 1287 [4th Dept 2009]; *cf. Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991] [suggesting that the related concept of lack of standing is not necessarily an affirmative defense, but merely a defense as to which the plaintiff has the burden of proof once the issue is raised]; *Bank, N.A. v Weinman*, 123 AD3d 1108, 1109 [2d Dept 2014] [same]]. The defendants have failed to satisfy their burden of showing that the plaintiff lacks capacity to prosecute this action pro se, as they have failed to demonstrate that she is not the sole beneficiary of the estate or that there are creditors of the estate.

The court rejects the defendants' suggestion that the plaintiff's failure to style herself as administrator of the estate in the caption waives her right to assert the claims in the complaint that were clearly asserted in her capacity as administrator. This is a mere ministerial omission that may be corrected. The court notes that, in MOT SEQ 002, it is granting the plaintiff's motion to amend the caption.

Inasmuch as the plaintiff's cross motion here does not seek specified relief, but simply opposes the defendants' motion to dismiss the complaint, there is no relief that the court can grant in connection with the cross motion (*see Hirschmann v Hassapoyannes*, 11 Misc 3d 265, 276 [Sup Ct, N.Y. County 2005]).

The court further notes that the plaintiff's affidavit was executed and notarized in Connecticut, but does not include the certificate of conformity required by CPLR 2309, which is a written instrument pursuant to which a person qualified by the laws of the country or state in which an affidavit is executed and notarized, or by the laws of New York, certifies that the out-of-state affidavit has indeed been drafted, executed, and notarized in conformity with the laws of that country or state. This defect does not require the court to disregard the affidavit or reject the plaintiff's opposition, as the defect may be cured by the submission of the proper certificate

nunc pro tunc (see *Bank of New York v Singh*, 139 AD3d 486 [1st Dept 2016]; *Seiden v Sonstein*, 127 AD3d 1158 [2d Dept 2015]).

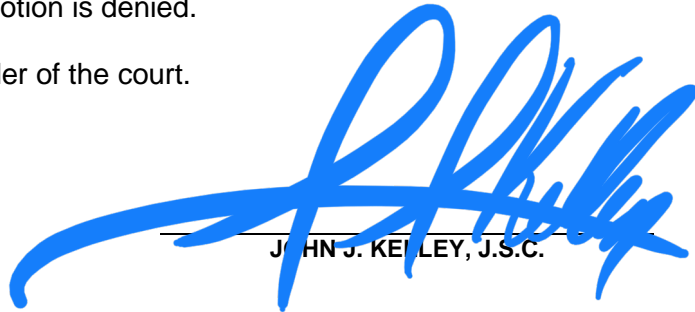
Accordingly, it is

ORDERED that the defendants' motion is denied; and it is further,

ORDERED that the plaintiff's cross motion is denied.

This constitutes the Decision and Order of the court.

3/5/2021
DATE



JOHN J. KENLEY, J.S.C.

MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	
CROSS MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE