

Hernandez v George

2021 NY Slip Op 33798(U)

May 4, 2021

Supreme Court, Nassau County

Docket Number: Index No. 605410/2020

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MARNIE L. HERNANDEZ, as PROPOSED
ADMINISTRATOR of the estate of JASON C.
HERNANDEZ and MARNIE L. HERNANDEZ,
individually,

Plaintiffs,

-against-

USHA GEORGE, M.D., USHA GEORGE, M.D., P.C.,
NORTHWELL HEALTH INC and NORTHWELL
HEALTHCARE INC,

Defendants.

TRIAL/IAS PART 30
NASSAU COUNTY

Index No.: 605410/2020
Motion Seq. Nos.: 01, 02
Motion Dates: 11/19/2020
11/19/2020

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The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation and Exhibit	1
Notice of Motion (Seq. No. 02), Affirmation and Exhibit	2
Affirmation in Opposition to Motions (Seq. Nos. 01 and 02) and Exhibit	3

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendants Usha George, M.D. and Usha George, M.D., P.C. (hereinafter collectively "Dr. George") move (Seq. No. 01), pursuant to CPLR § 3211(a)(3), for an order dismissing plaintiffs' Verified Complaint on the grounds that plaintiff Marnie L. Hernandez lacks the capacity to bring or maintain the action. Plaintiffs oppose the motion.

Defendants Northwell Health, Inc. and Northwell Healthcare, Inc. (hereinafter collectively "Northwell") move (Seq. No. 02), pursuant to CPLR § 3211(a)(3), for an order

dismissing plaintiffs' Verified Complaint on the grounds that plaintiff Marnie L. Hernandez lacks the capacity to bring or maintain the action. Plaintiffs oppose the motion.

In support of defendants Dr. George's motion (Seq. No. 01), their counsel submits, in pertinent part, that, "[p]laintiff Marnie L. Hernandez commenced this action with the filing of a Summons and Complaint with the Nassau County Clerk on June 5, 2020.... The first four causes of action sound in medical malpractice and are asserted against the four defendants, respectively. The fifth cause of action alleges that all defendants are jointly, severely (*sic*) and vicariously liable for each other and the sixth cause of action sounds in lack of informed consent. The seventh cause of action asserted in the Complaint alleges wrongful death and the eight cause of action is a derivative claim on behalf of Marnie L. Hernandez indicating that as the spouse of the deceased Jason C. Hernandez she was entitled to his services, society, companionship and support.... The first seven causes of action are interposed on behalf of Jason C. Hernandez by the 'PROPOSED ADMINISTRATOR OF THE ESTATE OF JASON C. HERNANDEZ' and, as noted within the Complaint itself, as of the date of the Complaint, June 5, 2020, Marnie L. Hernandez was in the process of applying for Letters of Administration seeking her appointment as the Administrator/Administratrix of the estate of her deceased husband, Jason C. Hernandez. The fact that Letters of Administration have not been issued to Marnie L. Hernandez appointing her as Administrator or Administratrix of the Estate of Jason C. Hernandez renders the Complaint defective as Mrs. Hernandez does not have standing to bring an action on behalf of her husband's estate without being duly appointed by the Surrogate's Court. The Estate Powers and Trust Law of New York State at Section 5-4.1 requires that the action be brought by a duly appointed personal representative. This is defined as a person who has received letters to administer the estate of the decedent.... Statute 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 and the plaintiff who fails to secure an appointment as the estate

representative prior to the commencement of the lawsuit lacks capacity to bring and maintain the action under the EPTL and, as a result, such action must be dismissed pursuant to CPLR § 3211(a)(3). [citation omitted]. As it is clear from the wording of the Complaint alone that there have not been Letters of Administration issued to Marnie L. Hernandez, Mrs. Hernandez lacked the capacity to commence the causes of action asserted on behalf of her deceased husband.... The eight cause of action asserted in the Complaint is pled on behalf of Marnie L. Hernandez, individually, and alleges that Mrs. Hernandez was the lawful spouse of the deceased Jason C. Hernandez and as a result of his deaths (*sic*) she had been deprived of his services, society, companionship and consortium. The eight cause of action is a derivative claim and must also be dismissed as such cause of action is unsustainable as by its very nature a derivative claim has no existence separate and apart from a claim of the insured (*sic*) plaintiff upon which it is based. Accordingly, the derivative claim for lack of services must fail a (*sic*) the primary claims of negligence fail. [citations omitted].” See Defendants Dr. George’s Affirmation in Support Exhibit A.

In support of defendant Northwell’s motion (Seq. No. 02), their counsel submits, in pertinent part, that, “[p]laintiff Marnie L. Hernandez (‘Ms. Hernandez’) commenced this medical malpractice and wrongful death action with the electronic filing of the Summons & Complaint on June 5, 2020.... Plaintiff brings this lawsuit as the ‘Proposed Administrator’ of the Estate of Jason C. Hernandez (‘Mr. Hernandez’), and on her own behalf as his alleged spouse.... The Complaint contains eight causes of action.... The first four causes of action sound in medical malpractice. The fifth cause of action alleges that all defendants are jointly, severally and vicariously liable for each other; the sixth cause of action sounds in lack of informed consent; the seventh cause of action alleges wrongful death; and the eight cause of action is a derivative claim on behalf of Ms. Hernandez for loss of services and consortium.... Briefly, this case involves alleged negligent treatment rendered to deceased-plaintiff Mr. Hernandez, between April 6, 2018

through April 13, 2018, and his alleged wrongful death on April 15, 2018.... As a Proposed Administrator, Ms. Hernandez has no legal capacity to bring this action, because she has not been duly appointed by the Surrogate's Court. Accordingly, the first seven causes of action cannot be prosecuted by Ms. Hernandez. Further, Ms. Hernandez's eight cause of action (derivative claim) must be dismissed, because it cannot survive without the underlying claims. For these reasons, the Complaint must be dismissed in its entirety.... The Estate Powers and Trust Law (EPTL) of New York State at Section 5-4.1 requires that personal injury and wrongful death actions concerning a deceased-plaintiff are brought by a duly appointed personal representative. This is defined as a person who has received letters to administer the estate of the decedent.... In the present case, it is undisputed that plaintiff was not in possession of Letters of Administration for the decedent's estate at the time the action was commenced. Thus, she lacked the capacity to bring the action, and she lacks the capacity to maintain this action, warranting dismissal pursuant to CPLR § 3211(a)(3), the EPTL and relevant case law. [citation omitted].... The eight cause of action asserted in the Complaint is pled on behalf of Ms. Hernandez, individually.... She alleges that Mr. Hernandez is her husband, and as a result of his death, she has been deprived of his services, society, companionship and consortium.... Since all direct claims on behalf of deceased-plaintiff Mr. Hernandez must be dismissed, the derivative claims by Ms. Hernandez must also be dismissed. [citations omitted]." See Defendants Northwell's Affirmation in Support Exhibit A.

In opposition to the motions (Seq. Nos. 01 and 02), counsel for plaintiffs asserts, in pertinent part, that, "[t]his wrongful death action by **MARNIE HERNANDEZ** the proposed administrator (*sic*) and I am advised by the law firm of Mahon, Mahon, Kerins and O'Brien that the requisite petition has been filed with the Surrogate Court and it is anticipated that Limited Letters of Administration will issue shortly.... Should this court dismiss this matter, plaintiff

intends to refile within six months under the saving statute C.P.L.R. 205(c) [should be 205(a)].”
See Plaintiffs’ Affirmation in Opposition Exhibit A.

CPLR § 3211(a)(3) states that, “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:… 3. the party asserting the cause of action has not (*sic*) legal capacity to sue.”

In the instant matter, it is evident that plaintiff Marnie L. Hernandez commenced the matter prior to being appointed as administrator of the Estate of Jason C. Hernandez. Consequently, plaintiff Marnie L. Hernandez as “Proposed Administrator” lacked the capacity to sue.

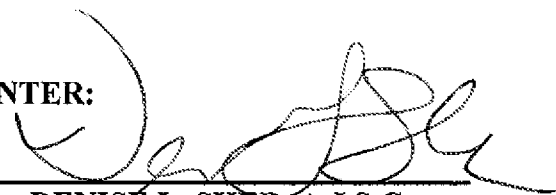
However, CPLR § 205(a), states, in pertinent part, “[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.”

Therefore, defendants Dr. George’s motion (Seq. No. 01), pursuant to CPLR § 3211(a)(3), for an order dismissing plaintiffs’ Verified Complaint on the grounds that plaintiff Marnie L. Hernandez lacks the capacity to bring or maintain the action, is hereby **GRANTED without prejudice** allowing plaintiffs to re-file this action pursuant to CPLR § 205(a).

Defendants Northwell's motion (Seq. No. 02), pursuant to CPLR § 3211(a)(3), for an order dismissing plaintiffs' Verified Complaint on the grounds that plaintiff Marnie L. Hernandez lacks the capacity to bring or maintain the action, is also hereby **GRANTED without prejudice** allowing plaintiffs to re-file this action pursuant to CPLR § 205(a).

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
May 4, 2021

ENTERED

May 12 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE