

Castro v Fraser

2022 NY Slip Op 30903(U)

March 15, 2022

Supreme Court, New York County

Docket Number: Index No. 805144/2021

Judge: John J. Kelley

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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 56M

Justice

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LAUDALINA CASTRO, as Proposed Administrator of the
Estate of TIFFANY RIVERA, deceased,

Plaintiff,

INDEX NO. 805144/2021

MOTION DATE 01/25/2022

MOTION SEQ. NO. 001

- v -

CANDICE NIKISHA FRASER, M.D., MELISSA CHU LAM,
M.D., SERIN SECKIN, M.D., NIKITA SHAH M.D., CLAUDIA
HOLLAND, M.D., JACQUELINE ROZOV, M.D., RAYZE
SIMONSON, M.D., BRYAN MAHONEY, M.D., DIMITRI
KASSAPIDIS, D.O., MARIBEL SUMERGIDO, R.N., EMILY
NICOLE ANTHONISEN, N.P., CHRISTOPHER BEYER,
M.D., BARBARA ORLANDO, M.D., CHELSEA KNIGHTEN,
M.D., RAYMONDE JEAN, M.D., JAMES SALONIA, M.D.,
TRINITY MEDICAL CARE NY, PLLC, THE MOUNT SINAI
WEST HOSPITAL, MOUNT SINAI HOSPITALS GROUP,
INC., and MOUNT SINAI HEALTH SYSTEM, INC.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31,
32, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

were read on this motion to/for DISMISS

In this action to recover damages for medical malpractice and wrongful death, the
defendants Melissa Chu Lam, M.D., Jacqueline Rozov, M.D., Bryan Mahoney, M.D., Dimitri
Kassapidis, D.O., Maribel Sumergido, R.N., Emily Nicole Anthonisen, N.P., Christopher Beyer,
M.D., James Salonia, M.D., The Mount Sinai West Hospital, Mount Sinai Hospitals Group, Inc.,
the The Mount Sinai Health System, Inc. (collectively the Mount Sinai defendants), move, and
the defendants Candice Nikisha Fraser, M.D., and Trinity Medical Care NY, PLLC (together the
Trinity defendants) separately move, in papers incorrectly denominated as a cross motion,
pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against each of them
based on the plaintiff's lack of capacity to prosecute the action. The plaintiff opposes the
motion, and cross-moves, pursuant to CPLR 2004, for an extension of time within which to

oppose the motion or obtain letters of administration. The motion is granted, and the complaint is dismissed insofar as asserted against the Mount Sinai defendants and the Trinity defendants, without prejudice. The cross motion is denied as academic, in light of the fact that almost 60 days have lapsed since the plaintiff submitted its opposition papers, a period of time sufficient to initiate the process of obtaining proper letters of administration.

The plaintiff's decedent died on May 13, 2019. The Surrogate's Court, New York County, issued letters of voluntary administration to the plaintiff on July 15, 2019. The plaintiff commenced this action on May 12, 2021. As of that date, the plaintiff had not been issued letters of administration by the Surrogate's Court pursuant to SCPA article 10.

On September 20, 2021 Lam, Rozov, Mahoney, Kassapidis, Sumergido, Anthonisen, Beyer, Salonia, and The Mount Sinai West Hospital answered the complaint, asserting as an affirmative defense that the plaintiff lacked capacity to prosecute the action. On September 24, 2021, Mount Sinai Hospitals Group, Inc., and Mount Sinai Health System, Inc., answered the complaint, asserting the same affirmative defense. On October 6, 2021, Fraser answered the complaint, also asserting the affirmative defense of lack of capacity. On October 22, 2021, Trinity Medical Care NY, PLLC, answered the complaint, asserting the affirmative defense of lack of capacity as well.

In the first instance, all of the movants are seeking relief pursuant to CPLR 3211(a)(3). Reliance on that statute, however, is improper. CPLR 3211(e) provides that

"At any time *before service of the responsive pleading* is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading"

(emphasis added). Thus,

"[a] motion to dismiss the complaint based on a ground listed in CPLR 3211(a) . . . must be made before answering (see CPLR 3211[e]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:21). A motion for summary judgment, on the other hand, does not lie until after service of the responsive pleading (*id.*). Summary judgment is, therefore, a post answer

device (*id.*). Any of the grounds on which a CPLR 3211 motion could have been made here . . . can be used as a basis for a motion for summary judgment afterwards as long as the particular objection, although not taken by a CPLR 3211 motion before service of the answer, has been included as a defense in the answer and thereby preserved (CPLR 3211[e]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3212:20). Having preserved the affirmative defense in their answer, defendants were not also entitled to serve a pre-answer motion to dismiss, which is a procedural irregularity. Defendants [are] required to move for summary judgment on the [CPLR 3211(a)] issue inasmuch as they had served their answer”

(*Lusitano Enters., Inc. v Horton Bros., Inc.*, 2018 NY Slip Op 32011[U], *3-4, 2018 NY Misc LEXIS 3587, *5-6, [Sup Ct, Suffolk County, Aug. 14, 2018]; see *Higgins v Goyer*, 2018 NY Slip Op 33520[U], *2, 2018 NY Misc LEXIS 9607, *3 [Sup Ct, Rensselaer County, Nov. 1, 2018]; see also *McLearn v Cowen & Co.*, 60 NY2d 686, 689 [1983]; *Rich v Lefkovits*, 56 NY2d 276, 282 [1982] [“we answer in the affirmative the question . . . concerning whether defendant may move after answer for summary judgment on his jurisdictional defense”]).

Consequently, to the extent that the movants seek relief pursuant to CPLR 3211(a)(3), the relief that they seek at this juncture is available only via a motion for summary judgment pursuant to CPLR 3212. Nonetheless, in this case, there are no disputed issues of fact with respect to the plaintiff's status as a voluntary administrator, leaving only a pure issue of law for the court to consider, and the parties clearly have charted a summary judgment course. Hence, the court deems the motions to be motions for summary judgment dismissing the complaint on the ground of lack of capacity, without the need for providing additional notice to the parties pursuant to CPLR 3211(c) (see *Seasons Hotels v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]; see also *Mic Prop. & Cas. Ins. Corp. v Custom Craftsman of Brooklyn, Inc.*, 269 AD2d 333, 334 [1st Dept 2000]).

In addition, the Trinity defendants' motion was not a proper cross motion because it did not seek relief against a moving party; instead, their motion was, in effect, a separate motion (see CPLR 2215; *Asiedu v Lieberman*, 142 AD3d 858, 858 [1st Dept 2016]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]; *Guzetti v City of New York*, 32 AD3d 234

[1st Dept 2006]; *Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986 [2d Dept 2005]; *Sheehan v Marshall*, 9 AD3d 403 [2d Dept 2004]; *Lucheux v William Macklowe Co., LLC*, 2017 NY Slip Op 31044[U], 2017 NY Misc LEXIS 187 [Sup Ct, N.Y. County, May 11, 2017]). CPLR 2214(b) requires such a separate motion to be made on at least eight days' notice. The mislabeling of a motion as a cross motion, however, may be treated as a "technical" defect to be disregarded, particularly where the nonmoving party does not object and the consideration of the application results in no prejudice to the nonmoving party (*see Sheehan v Marshall*, 9 AD3d at 404). In any event, although the Trinity defendants uploaded their notice of cross motion to the NYSCEF electronic filing system on October 27, 2021, and thus fewer than eight days prior to the November 1, 2021 return date (*see CPLR 2214(b)*), the motions were adjourned until January 25, 2022, thus providing the plaintiff with sufficient time within which to oppose the Trinity defendants' application. Therefore, the Trinity defendants' motion can be heard as a properly noticed motion.

In her summons and complaint, the plaintiff characterized herself as the "proposed administrator" of the decedent's estate. In fact, as of the date that she commenced the action, she had been appointed by the Surrogate's Court as a "voluntary administrator" of the decedent's estate. The SCPA allows for the appointment of a voluntary administrator of a small estate, defined as an estate "having a gross value of \$50,000 or less exclusive of property required to be set off under EPTL 5-3.1(a)" (SCPA 1301[1]). "A voluntary administrator is a person who qualifies and undertakes to settle the estate of the decedent without the formality of court administration as hereinafter provided" (SCPA 1301[2]). Crucially, "[t]he voluntary administrator shall have no power to enforce a claim for the wrongful death of or a claim for personal injuries to the decedent" (SCPA 1306[3]). Rather,

"[a] personal representative who has received letters of administration of a decedent's estate [or letters testamentary] 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 South Shore Healthcare*, 123 AD3d 797, 797 [2d Dept 2014]; see *Gulledge v Jefferson County*, 172 AD3d 1666, 1667 [3d Dept 2019]; *Jordan v Metropolitan Jewish Hospice*, 122 AD3d 682, 683 [2d Dept 2014]; *Mingone v State of New York*, 100 AD2d 897, 899 [2d Dept 1984]; EPTL 1-2.13, 5-4.1 [1]; 11-3.2 [b]). Consequently, neither a "proposed administrator" nor a "voluntary administrator" has capacity to prosecute a personal injury "survival" action or a wrongful death action on behalf of the estate of a decedent (see *Carrick v Central Gen. Hosp.*, 51 NY2d 242, 246 [1980]; *Rodriguez v River Val. Care Ctr., Inc.*, 175 AD3d 432, 433 [1st Dept 2019]; *Richards v Lourdes Hosp.*, 58 AD3d 927, 927-928 [3d Dept 2009]). The motions thus must be granted, and the complaint dismissed insofar as asserted against the movants.

The dismissals, however, are without prejudice (see *Carrick v Central Gen. Hosp.*, 51 NY2d at 252; see *Rodriguez v River Val. Care Ctr., Inc.*, 175 AD3d at 433; *Snodgrass v Professional Radiology*, 50 AD3d 883, 884-885 [2d Dept 2008]; *Bernardez v City of New York*, 100 AD2d 798, 799-800 [1st Dept 1984]).

In light of the foregoing, it is,

ORDERED that, on the court's own motion, the motions of the defendants Melissa Chu Lam, M.D., Jacqueline Rozov, M.D., Bryan Mahoney, M.D., Dimitri Kassapidis, D.O., Maribel Sumergido, R.N., Emily Nicole Anthonisen, N.P., Christopher Beyer, M.D., James Salonia, M.D., The Mount Sinai West Hospital, Mount Sinai Hospitals Group, Inc., the The Mount Sinai Health System, Inc., and the defendants Candice Nikisha Fraser, M.D., and Trinity Medical Care NY, PLLC, pursuant to CPLR 3211(a)(3) are deemed to be motions for summary judgment dismissing the complaint insofar as asserted against each of them; and it is further,

ORDERED that the motion of the defendants Melissa Chu Lam, M.D., Jacqueline Rozov, M.D., Bryan Mahoney, M.D., Dimitri Kassapidis, D.O., Maribel Sumergido, R.N., Emily Nicole Anthonisen, N.P., Christopher Beyer, M.D., James Salonia, M.D., The Mount Sinai West Hospital, Mount Sinai Hospitals Group, Inc., the The Mount Sinai Health System, Inc., for

summary judgment dismissing the complaint insofar as asserted against them is granted, and the complaint is dismissed, without prejudice, insofar as asserted against the defendants Melissa Chu Lam, M.D., Jacqueline Rozov, M.D., Bryan Mahoney, M.D., Dimitri Kassapidis, D.O., Maribel Sumergido, R.N., Emily Nicole Anthonisen, N.P., Christopher Beyer, M.D., James Salonia, M.D., The Mount Sinai West Hospital, Mount Sinai Hospitals Group, Inc., the The Mount Sinai Health System, Inc; and it is further,

ORDERED that the motion of the defendants Candice Nikisha Fraser, M.D., and Trinity Medical Care NY, PLLC, for summary judgment dismissing the complaint insofar as asserted against them is granted, and the complaint is dismissed, without prejudice, insofar as asserted against the defendants Candice Nikisha Fraser, M.D., and Trinity Medical Care NY, PLLC; and it is further,

ORDERED that the action is severed against the defendants Melissa Chu Lam, M.D., Jacqueline Rozov, M.D., Bryan Mahoney, M.D., Dimitri Kassapidis, D.O., Maribel Sumergido, R.N., Emily Nicole Anthonisen, N.P., Christopher Beyer, M.D., James Salonia, M.D., The Mount Sinai West Hospital, Mount Sinai Hospitals Group, Inc., the The Mount Sinai Health System, Inc., and against the defendants Candice Nikisha Fraser, M.D., and Trinity Medical Care NY, PLLC; and it is further,

ORDERED that the Clerk of the court is directed to enter judgment dismissing the complaint, without prejudice, insofar as asserted against the defendants Melissa Chu Lam, M.D., Jacqueline Rozov, M.D., Bryan Mahoney, M.D., Dimitri Kassapidis, D.O., Maribel Sumergido, R.N., Emily Nicole Anthonisen, N.P., Christopher Beyer, M.D., James Salonia, M.D., The Mount Sinai West Hospital, Mount Sinai Hospitals Group, Inc., the The Mount Sinai Health System, Inc.; and it is further,

ORDERED that the Clerk of the court is directed to enter judgment dismissing the complaint, without prejudice, insofar as asserted against the defendants Candice Nikisha Fraser, M.D., and Trinity Medical Care NY, PLLC; and it is further,

ORDERED that the plaintiff's cross motion is denied as academic.

This constitutes the Decision and Order of the court.

3/15/2022
DATE


JOHN J. KELLEY, J.S.C.

MOTION 1:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/>	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	
MOTION 2:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/>	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	

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