

<b>Anhalt v Kings Adult Care Ctr., LLC</b>
2022 NY Slip Op 31350(U)
April 6, 2022
Supreme Court, Kings County
Docket Number: Index no. 520875/2017
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of April 2022.

PRESENT:

CARL J. LANDICINO, J.S.C.

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WAYNE ANHALT, by his attorney-in fact FREDDA ANHALT, and FREDDA ANHALT individually,

Index No.: 520875/2017

*Plaintiff,*

DECISION & ORDER

-against-

Motion Sequence #2

KINGS ADULT CARE CENTER, LLC,

*Defendant.*

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FILED  
KINGS COUNTY CLERK

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

NYSCEF Doc. Nos.

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed..... 51-58,  
Opposing Affidavits (Affirmations).....  
Reply Affidavits (Affirmations).....

Upon the foregoing papers, and appearance of the parties, the Court finds as follows:

Plaintiffs Wayne Anhalt, by his attorney-in-fact Fredda Anhalt, and Fredda Anhalt individually (hereinafter “the Plaintiffs”) initiated this action as against Kings Adult Health Center, LLC (hereinafter “the Defendant”) alleging a cause of action as against the Defendant for negligence, gross negligence and the negligent infliction of emotional distress. The Plaintiffs claim that on August 21, 2017 the Defendant was negligent in failing to, *inter alia*, properly supervise the Plaintiff.

As part of a Decision and Order dated June 8, 2018, this Court found that “in accordance with CPLR Rule 1202(a) the parties are directed to appear on July 23, 2018 at 9:30 a.m. for a conference concerning the appointment of a Guardian ad litem for the limited purpose of determining whether a Guardian ad litem should be appointed for the Plaintiff Wayne Anhalt in relation to this action and whether

the commencement of a proceeding pursuant to Article 81 of the Mental Health Law should be directed.” Thereafter the parties submitted supplemental affirmations. On November 9, 2018, this Court issued an Order Appointing a Guardian *Ad Litem*. On May 20, 2019, Susanne Gennusa, the appointed Guardian Ad Litem stated in her report that “a proceeding under Article 81 of the New York Mental Hygiene Law be commenced.” The Court, as part of an Order Awarding Compensation to Guardian Ad Litem and Directing M.H.L. Article 81 Application dated January 30, 2020, stated that “[t]he Court has reviewed the submitted documents and concludes that an application in relation to a guardianship proceeding pursuant to Mental Hygiene Law Article 81 should be made in the best interest of the Plaintiff Wayne Anhalt.”

The Plaintiffs now move (motion sequence #2) for an order pursuant to CPLR 2221 to reargue and vacate that portion of the this Court’s Decision and Order dated January 30, 2020 that directed that an application pursuant to Article 81 of the Mental Hygiene Law on behalf of Plaintiff Wayne Anhalt be made. The Plaintiffs contend that the matter was initiated properly as Plaintiff Fredda Anhalt had been given authority to initiate the action through a durable power of attorney completed by Plaintiff Wayne Anhalt. The Plaintiffs also contend that such authority continues even if a person is found to be incapacitated. What is more, the Plaintiffs contend that Plaintiff Wayne Anhalt does not lack capacity and that the Court’s direction to initiate an Article 81 proceeding under the Mental Hygiene Law was misplaced.

“A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law.” *McGill v. Goldman*, 261 A.D.2d 593, 594, 691 N.Y.S.2d 75, 76 [2<sup>nd</sup> Dept, 1999]. What is more, “a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented.” *Amato v. Lord & Taylor, Inc.*, 10 A.D.3d 374, 375, 781 N.Y.S.2d 125, 126 [2<sup>nd</sup> Dept, 2004].

Turning to the merits of the Plaintiffs' application and upon further review and consideration, the Court finds that the Plaintiff has provided sufficient evidence to show that the Court's underlying Decision and Order should be modified so as to allow Plaintiff Fredda Anhalt to continue as attorney in fact and eliminating the requirement that an Article 81 of the Mental Hygiene Law proceeding on behalf of Plaintiff Wayne Anhalt be initiated at this time. General Obligations Law 5-1501A(1) provides in pertinent part that "[a] power of attorney is durable unless it expressly provides that it is terminated by the incapacity of the principal." In the instant proceeding, a review of the Plaintiffs' Durable Power of Attorney form executed by Plaintiff Wayne Anhalt on May 12, 2009 states that "[t]his Durable Power of Attorney shall not be affected by my subsequent disability or incompetence." The Durable Power of Attorney Form also provides that the attorney in fact has authority over claims and litigation. (See Motion Sequence #2, Exhibit C). What is more, General Obligations Law 5-1501A(2) provides in pertinent part that "[a]ll acts done during any period of the principal's incapacity by an agent pursuant to a durable power of attorney shall have the same effect and inure to the benefit of and bind a principal." The Court in *Perosi v. LiGreci* held that the scope of a power of attorney is only limited by the principal-agency relationship created at the time of execution and not limited by later incapacity. *See Perosi v. LiGreci*, 98 AD3d 230, 239, 948 N.Y.S.2d 629, 636 [2d Dept 2002]; *see also Ernest Delaney v. Pacchiana*, 170 AD3d 1008, 1009, 94 N.Y.S.3d 591, 593 [2d Dept 2019]. Notwithstanding the GAL's indication that Mr. Anhalt indicated that he did not recall signing the power of attorney, there is no indication to this Court that he wishes to revoke it. In addition, the supporting affidavit of Dr. Oomen indicates his ability to do so if he wishes. After several conferences with the parties, the parties have advised that a settlement has been negotiated and reached and that the funds will be utilized in Wayne Anhalt's interest. (See GOL 5-1502H(5)). Accordingly, the Plaintiffs' application made pursuant to CPLR 2221 is granted and the Court's underlying Decision and Order is modified so as to allow Plaintiff Fredda Anhalt to continue as attorney

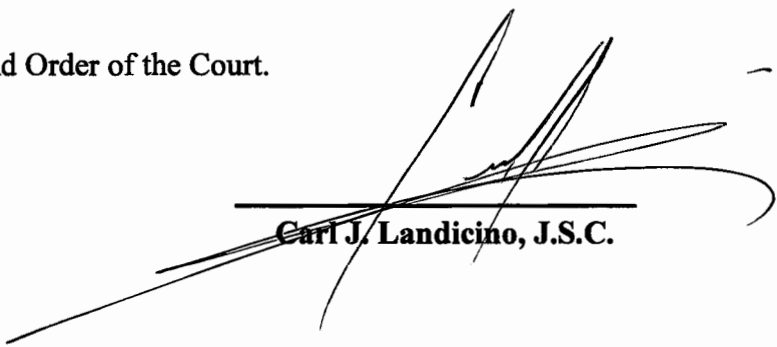
in fact and eliminating the requirement that an Article 81 of the Mental Hygiene Law proceeding on behalf of Plaintiff Wayne Anhalt be initiated at this time.

Based on the foregoing, it is hereby ORDERED as follows:

The motion by the Plaintiffs (motions sequence #2) to reargue and modify the Court's prior Decision and Order dated January 30, 2020 is granted and the Decision and Order is modified to the extent to permit Plaintiff Fredda Anhalt to continue as attorney in fact and eliminating the requirement that an Article 81 of the Mental Hygiene Law proceeding on behalf of Plaintiff Wayne Anhalt be initiated at this time.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



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**Carl J. Landicino, J.S.C.**

**FILED**  
**KINGS COUNTY CLERK**  
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