

**Castro v Fraser**

2022 NY Slip Op 32137(U)

July 1, 2022

Supreme Court, New York County

Docket Number: Index No. 805144/2021

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 56M**

*Justice*

-----X

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

Plaintiff,

**INDEX NO.** 805144/2021

**MOTION DATE** 05/11/2022

**MOTION SEQ. NO.** 002

- 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.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 76, 77, 78, 79, 80,  
81, 82, 83, 84, 85, 86, 87

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages for medical malpractice and wrongful death, the  
defendants Serin Seckin, M.D., Nikita Shah, M.D., Rayze Simonson, M.D., Chelsea Knighten,  
M.D., and Raymond Jean, M.D. (collectively the movants), move pursuant to CPLR 3212 for  
summary judgment dismissing the complaint insofar as asserted against them on the ground  
that the plaintiff lacks capacity to prosecute this action. The plaintiff opposes the motion. The  
motion is granted, and the complaint is dismissed insofar as asserted against the movants.

By order dated March 15, 2022, this court deemed the separate CPLR 3211(a)(3)  
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. (collectively the Mount Sinai defendants), and the defendants Candice Nikisha Fraser, M.D., and Trinity Medical Care NY, PLLC (together the Trinity defendants), to be motions for summary judgment, and thereupon awarded summary judgment dismissing the complaint insofar as asserted against each of them, based on the plaintiff's lack of capacity. Those dismissals were without prejudice.

The court explained that, although the plaintiff characterized herself as the "proposed administrator" of the decedent's estate, by the time that she commenced this action, she had been appointed by the Surrogate's Court as a "voluntary administrator" of the estate. As the court further explained, 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]), and noted that "[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, the court explained that "[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]). The court concluded that, consequently, neither a "proposed administrator" nor a "voluntary administrator" had 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 movants here asserted, as their eighth affirmative defense, that the plaintiff lacked capacity to prosecute this action. They thus preserved their right to move for summary judgment on that ground (see CPLR 3211[3]; *McLearn v Cowen & Co.*, 60 NY2d 686, 689 [1983]; *Rich v Lefkovits*, 56 NY2d 276, 282 [1982]).

It is well settled that the movant on a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (see CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, “[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *id.*; *Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

“The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even ‘arguable’” (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; see *Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively

establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (see *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

The movants established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff, at most, was appointed as a voluntary administrator, and not as an unlimited administrator, of her decedent's estate. Hence, they have demonstrated that the plaintiff lacks capacity to prosecute this medical malpractice and wrongful death action. In opposition, the plaintiff did not show that she has since been appointed as the unlimited administrator of her decedent's estate and, hence, failed to raise a triable issue of fact in opposition to the movants' showing. Consequently, summary judgment must be awarded to the movants dismissing the complaint insofar as asserted against them. As with the dismissals of the complaint against the Mount Sinai defendants and the Trinity defendants, the dismissals here are without prejudice.

Accordingly, it is

ORDERED that the motion is granted, summary judgment is awarded to the defendants Serin Seckin, M.D., Nikita Shah, M.D., Rayze Simonson, M.D., Chelsea Knighten, M.D., and Raymond Jean, M.D., dismissing the complaint insofar as asserted against them, and the complaint is dismissed insofar as asserted against the defendants Serin Seckin, M.D., Nikita Shah, M.D., Rayze Simonson, M.D., Chelsea Knighten, M.D., and Raymond Jean, M.D., without prejudice; and it is further,

ORDERED that the action is severed against the defendants Serin Seckin, M.D., Nikita Shah, M.D., Rayze Simonson, M.D., Chelsea Knighten, M.D., and Raymond Jean, M.D.; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint, without prejudice, insofar as asserted against the defendants Serin Seckin, M.D., Nikita Shah, M.D., Rayze Simonson, M.D., Chelsea Knighten, M.D., and Raymond Jean, M.D.

This constitutes the Decision and Order of the court.

7/1/2022  
DATE

  
JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE