

**Castro v Fraser**

2022 NY Slip Op 33247(U)

September 22, 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 06/30/2022

MOTION SEQ. NO. 003

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.,

Defendants.

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DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 88, 89, 90, 91, 92,
93, 94, 95, 96

were read on this motion to/for DISMISSAL.

In this action to recover damages for medical malpractice and wrongful death, the
defendant Claudia Holland, M.D., moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the
complaint insofar as asserted against her based on documentary evidence and for failure to
state a cause of action, or, in the alternative, pursuant to CPLR 3211(a)(3) to dismiss the
complaint insofar as asserted against her based on the plaintiff's lack of capacity to prosecute
this action. The plaintiff opposes the motion. The motion is granted, and the complaint is
dismissed, without prejudice, insofar as asserted against the defendant, based on the plaintiff's
lack of capacity.

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. By order dated July 1, 2022, this court awarded summary judgment 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 each of them, based on the plaintiff's lack of capacity. Those dismissals also were without prejudice.

The complaint must be dismissed insofar as asserted against Holland pursuant to CPLR 3211(a)(3) for the same reasons as set forth in this court's orders disposing of Motion Sequences 001 and 002, as the plaintiff, who has yet to be appointed as a full administrator of her decedent's estate, but is only a "voluntary administrator" or "proposed administrator," lacks capacity to prosecute the action. As with those dismissals, the dismissal here is without prejudice, in accordance with CPLR 205(a) (*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]).

The court notes, however, that there is no basis upon which the complaint should be dismissed pursuant to CPLR 3211(a)(1) and (7). CPLR 3211(a) provides, in pertinent part, that

"A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

"(1) a defense is founded upon documentary evidence; or

"(7) the pleading fails to state a cause of action"

Dismissal under CPLR 3211(a)(1) should be granted only where documentary evidence absolutely refutes the factual allegations and conclusively establishes a defense as a matter of law (see *730 J & J LLC v Fillmore Agency, Inc.*, 303 AD2d 486, 486 [2d Dept 2003]). Documentary evidence must be of undisputed authenticity and unambiguous, and its contents must be essentially undeniable (see *VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). Where the elements of a cognizable cause of action are set forth within the four corners of the complaint, dismissal under CPLR 3211(a)(7) will be denied “unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it” (*Mulvaney v County of Westchester*, 2019 NY Slip Op 34768[U], \*5, 2019 NY Misc LEXIS 24692, \*5 [Sup Ct, Westchester County, Apr. 23, 2019]; see *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Here, the defendant relies on her own affirmation in an attempt to refute the plaintiff’s allegations, and prove that she did not provide treatment to the plaintiff’s decedent. However, the affirmation does not qualify as documentary evidence or otherwise warrant dismissal of the complaint (see *Fulton v NYU Langone Hosps.*, 2020 NY Slip Op 30718[U], \*4, 2020 NY Misc LEXIS 1134, \*4-5 [Sup Ct, N.Y. County 2020, Mar. 3, 2020] [defendant doctor’s own affirmation and affidavit were insufficient for the purpose of granting dismissal under CPLR 3211(a)(1) and (7)]). Holland’s affirmation does not absolutely refute the plaintiff allegations but, rather, creates a dispute regarding the facts alleged in the complaint.

Accordingly, it is

ORDERED that the motion is granted to the extent that the complaint is dismissed insofar as asserted against the defendant Claudia Holland, M.D., without prejudice; and it is further,

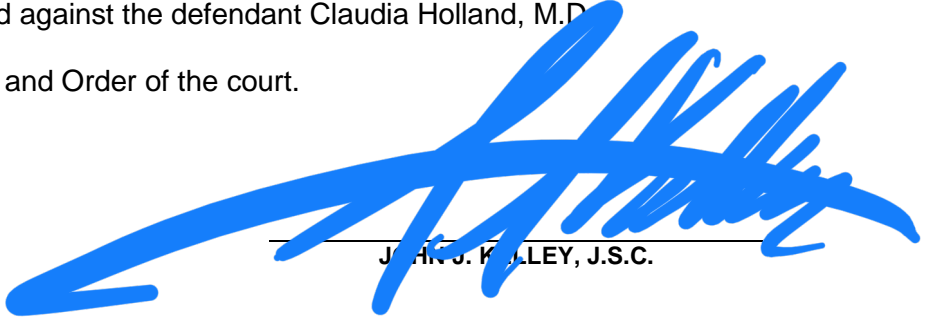
ORDERED that the action is severed against the defendant Claudia Holland, M.D.; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint, without prejudice, insofar as asserted against the defendant Claudia Holland, M.D.

This constitutes the Decision and Order of the court.

9/22/2022

DATE



J. H. 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