

**Ellis v Bushwick Ctr. for Rehabilitation & Nursing**

2022 NY Slip Op 34398(U)

December 22, 2022

Supreme Court, Kings County

Docket Number: Index No. 502005/2022

Judge: Bernard J. Graham

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This opinion is uncorrected and not selected for official publication.

At an IAS Part 36 of the Supreme Court of The State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 23<sup>rd</sup> day of December, 2022.

PRESENT:

Hon. Bernard J. Graham, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

BRENDA ELLIS, as the Proposed Administrator of the Estate of JEFFRE ROSS and THE ESTATE OF JEFFREY ROSS and BRENDA ELLIS, as the Administratrix of the Estate of JEFFREY ROSS,

Plaintiff(s),

Index No. 502005/2022

-against-

DECISION/ORDER

BUSHWICK CENTER FOR REHABILITATION AND NURSING, BUSHWICK CENTER FOR REHABILITATION AND HEALTH CARE, BUSHWICK CENTER FOR REHABILITATION AND HEALTHCARE, CENTERS HEALTH CARE, LLC, CENTERS FOR SPECIALTY CARE GROUP, LLC, CENTERS FOR SPECIALTY CARE GROUP, IPA, LLC, WARTBURG RECIEVER, LLC, WYCKOFF HEIGHTS MEDICAL CENTER, BEDFORD CENTER FOR NURSING AND REHABILITATION CENTER, INC., ALLURE CARE MANAGEMENT LLC, ALLURE CARE MANAGEMENT LLC, d/b/a BEDFORD CENTER FOR NURSING AND REHABILITATION, and THE ALLURE GROUP, LLC,

Defendant(s).

Recitation, as required by CPLR §2219(a), of the papers considered on the review of this motion to: dismiss plaintiff's complaint, pursuant to CPLR §3211(a)(5).

Papers	NYSCEF Doc. #
Notice of Motion and Affidavits Annexed.....	(seq. 1) 23-36 (seq. 2) 38-48
Order to Show Cause and Affidavits Annexed.....	

Answering Affidavits..... (seq. 1) 49-56  
 (seq. 2) 57-64  
 Replying Affidavits..... (seq. 1) 65  
 (seq. 2) 66  
 Exhibits.....  
 Other.....

**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

Counsel for defendants Wartburg Receiver LLC d/b/a Bushwick Center for Rehabilitation and Health Care i/s/h/a Bushwick Center for Rehabilitation and Nursing, Bushwick Center for Rehabilitation and Health Care, Bushwick Center for Rehabilitation and Healthcare, and Wartburg Receiver LLC (“Bushwick Center”) and Centers for Specialty Care Group LLC i/s/h/a Centers Health Care LLC, Centers for Specialty Care Group LLC and Centers for Specialty Care Group IPA, LLC (“Centers for Specialty Care”) has moved (seq. 1) for an Order, pursuant to CPLR §3211(a)(5), dismissing plaintiff’s causes of action for wrongful death and medical malpractice on the grounds that these causes of action are time-barred.

Counsel for defendants Bedford Center for Nursing and Rehabilitation, Allure Care Management, LLC, Allure Care Management LLC d/b/a Bedford Center for Nursing and Rehabilitation (“Bedford Center”) and the Allure Group, LLC (“Allure”) has also moved (seq. 2) for an Order, pursuant to CPLR §3211(a)(5), dismissing plaintiff’s causes of action for wrongful death and medical malpractice on the grounds that these causes of action are time-barred.

Opposition to the relief sought in defendants’ motions has been submitted by plaintiff, who contends that the suit was timely filed within the statute of limitations on all causes of action against the moving defendants.

**Background:**

Counsel for plaintiff initially commenced an action sounding in medical malpractice by the filing of a Summons and Complaint with the Clerk of this Court, on or about January 15, 2021 under Index No. 501216/2021 (the “first action”).

In the first action, Counsel for defendants Bushwick Center, Centers for Specialty Care, Bedford Center, Allure, and Wyckoff Heights Medical Center (“Wyckoff”) moved to dismiss plaintiff’s complaint for lack of capacity upon the grounds that plaintiff, as a “Proposed Administrator,” did not have legal capacity to bring the action. Wyckoff also moved for summary judgment. Said motions were unopposed. On July 27, 2021, following oral argument, Hon. Ellen Spodek issued an Order that granted defendants’ motions and dismissed plaintiff’s complaint.

On August 10, 2021, counsel for plaintiff served a Notice of Appeal upon counsel for Bushwick Center and Specialty Care, counsel for Bedford Center and Allure, and counsel for Wyckoff. Counsel for plaintiff subsequently filed a Notice of Withdrawal of Notice of Appeal on March 18, 2022. Judgment was entered on May 16, 2022.

On January 20, 2022, counsel for plaintiff commenced the instant action (the “second action”) by the filing of a Summons and Complaint, at which time the plaintiff was still a Proposed Administrator. On February 7, 2022, Letters of Administration were issued by the Kings County Surrogate’s Court appointing Brenda Ellis as the Administrator of the Estate of Jeffrey Ross. On April 8, 2022, plaintiff’s counsel filed an Amended Summons and Amended Complaint with the caption altered to include Brenda Ellis as the Administrator of the Estate of Jeffrey Ross, which was served on all defendants on or before May 17, 2022.

Parties’ Contentions:

This Court is presented with the issue of whether CPLR §205(a) applies to plaintiff’s causes of action for wrongful death and medical malpractice, and if so, whether these causes of action were timely filed in accordance with the Statute of Limitations.

In support of the motion to dismiss on behalf of Bushwick Center and Specialty Care (seq. 1), counsel for defendant argues that the plaintiff’s wrongful death claim is time barred, as the summons and complaint for the second action was filed over three (3) months after the statute of limitations expired on September 1, 2021. Counsel also argues

that plaintiff's claims for medical malpractice are time barred, as the summons and complaint for the second action were filed eleven (11) days after the statute of limitations expired on January 11, 2022. In addition, counsel asserts that plaintiff cannot receive the benefit of the CPLR §205(a) six-month "savings provision" because the second action was not recommenced with a proper plaintiff with capacity. Further, counsel argues that plaintiff is precluded from recommencing the second action under the doctrine of collateral estoppel, as the issue of whether the plaintiff as a proposed administrator had the capacity to commence the action on behalf of the estate was decided against that party in the first action, resulting in the dismissal of plaintiff's complaint.

In support of the motion to dismiss on behalf of Bedford Center and Allure (seq. 2), counsel for defendant asserts the same arguments as co-defendants Bushwick Center and Specialty care, as set forth above.

Plaintiff, by her attorneys, opposes the relief sought in defendants' motions by arguing that the six-month "savings provision" provided in CPLR §205(a) does apply to the second action, as the case was not dismissed on the merits (or for failure to obtain personal jurisdiction over the defendant, neglect to prosecute, or voluntary discontinuance). In addition, counsel for plaintiff asserts that the second action was filed within six (6) months of the termination of the first action, and as such, the commencement of the second action was timely. Plaintiff's counsel notes that the proposed administrator has since been appointed Administrator, an amended summons and complaint was served on all defendants, and that whatever defect had existed was cured.

Discussion:

CPLR §205(a) extends the time to commence an action after the termination of an earlier related action,<sup>1</sup> where both actions involve the same transaction or occurrence or

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<sup>1</sup> In order for the "savings provision" to apply, the action must be "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 on the merits..." CPLR §205(a).

series of transactions or occurrences. *See* CPLR §205(a); Sokoloff v Schor, 176 AD3d 120 [2d Dept 2019]. The new action may be commenced within six months after the termination of the earlier related action, provided the earlier related action was timely commenced within the statute of limitations. CPLR §205(a).

The Order of Hon. Ellen Spodek (July 27, 2021) dismissed the first action on the grounds that the proposed administrator lacked capacity to pursue the action. Such grounds for dismissal do not prevent plaintiff from recommencing the action under CPLR §205(a). Following the dismissal, plaintiff had six months to recommence the action. When plaintiff filed the second action on January 20, 2022, it was within six months of the dismissal of the first action.<sup>2</sup>

In determining whether the second action is deemed timely under CPLR §205(a), the Court must first look to when the first action was filed in conjunction with the application of the Executive Orders issued by Governor Cuomo in 2020 during the Covid pandemic.

With respect to the wrongful death cause of action, the decedent, Jeffrey Ross, died on January 16, 2019. Pursuant to EPTL §5-4.1, the plaintiff would have until January 16, 2021 to file the action.<sup>3</sup> In light of the Covid Toll,<sup>4</sup> the time to file the action was extended until September 1, 2021. Therefore, the filing of the first action on January 15, 2021 was well within the Statute of Limitations for a wrongful death claim.

With respect to the medical malpractice cause of action, the malpractice alleged in plaintiff's complaint "continued up until November 28, 2018." *See* NYSCEF Doc. #2. Pursuant to CPLR §214-a, the plaintiff would have until May 28, 2020 to file the action.<sup>5</sup> As this deadline fell within the Covid Toll, the time to file the action was extended until

<sup>2</sup> Six months from July 27, 2021 is January 27, 2022.

<sup>3</sup> The statute of limitations for an action to recover damages for wrongful death is two years from the decedent's death. *See* EPTL §5-4.1.

<sup>4</sup> Pursuant to Executive Order 202.8, the Statute of Limitations was tolled due to the Covid pandemic (the "Covid Toll"). The toll was in effect from March 20, 2020 through November 3, 2020. *See* 9 NY ADC 8.202.72.

<sup>5</sup> The statute of limitations for actions sounding in medical malpractice is two years and six months, which is measured from the date of the alleged negligent act, omission, or failure. *See* CPLR §214-a.

January 11, 2022.<sup>6</sup> Therefore, the filing of the first action on January 15, 2021 was well within the Statute of Limitations for the alleged medical malpractice claims.

Defendant argues that the “savings provision” of CPLR §205(a) does not apply to the second action because the plaintiff recommenced the second action as a “proposed administrator,” and the Letters of Administration were not issued until after the six-month period afforded by CPLR §205(a) had lapsed. According to defendant, the date of termination of the first action was July 27, 2021, which was when the action was dismissed by Order of Judge Spodek. However, plaintiff asserts that the first action was not terminated until either the plaintiff withdrew the notice of appeal on March 18, 2022, or when the judgment of dismissal of the first action was entered on May 16, 2022. “For purposes of CPLR 205(a), “termination” of the prior action occurs when appeals as of right are exhausted.” Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C. (Habiterra Associates) et al., 5 NY3d 514, 519 [2005]. This Court finds that the termination of the first action was when the judgment of dismissal of the first action was entered on May 16, 2022. Deutsche Bank National Trust Company v Banquero, 192 AD3d 660 [2d Dept 2021]. This gave plaintiff six months from May 16, 2022, which is November 16, 2022, to recommence the action. The Letters of Administration were issued on February 7, 2022, and the amended summons and complaint for the second action was served upon defendants on April 8, 2022, all of which occurred before the six-month period elapsed (as calculated from the entry of the judgment of dismissal on May 16, 2022).

At the time the first action was dismissed by Judge Spodek, the litigants believed they would be able to re-file the action within six months. It is through no fault of the parties that the Surrogate’s Court was delayed in issuing the Letters of Administration. This Court recognizes that “the Statute of Limitations was enacted to afford protection to defendants against defending stale claims after a reasonable period of time had elapsed during which a person of ordinary diligence would bring an action.” Flanagan v Mount

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<sup>6</sup> The Courts have calculated the Covid Toll to be 228 days. Baker v 40 Wall St. Holdings Corp., 74 Misc3d 381 [Sup Ct Kings County 2022].

Eden Gen. Hosp., 24 NY2d 427 [1969]. While there is an “important policy of giving repose to human affairs,” there are also exceptions to the Statute of Limitations, such as CPLR §205(a), which was designed to ameliorate the potentially “harsh consequence of applying a limitations period where the defending party has had timely notice of the action.” Rodriguez v River Val. Care Ctr., Inc., 175 AD3d 432 [1<sup>st</sup> Dept 2019]; Malay v City of Syracuse, 25 NY3d 323, 327 [2015]; Flanagan v Mount Eden Gen. Hosp., 24 NY2d at 429. Not only did the defendants have timely notice of the second action, but the defect in capacity was cured prior to defendants’ motions to dismiss the second action. Plotkin v New York City Tr. Auth., 220 AD2d 653 [2d Dept 1995]. This Court also recognizes the strong public policy in favor of resolving cases on the merits, and as such, the relief sought in the defendants’ motions to dismiss is denied.

The caption is amended to read as follows:

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 BRENDA ELLIS, as the Administratrix of the Estate of  
 JEFFREY ROSS,

Plaintiff(s),

Index No. 502005/2022

-against-

BUSHWICK CENTER FOR REHABILITATION AND  
 NURSING, BUSHWICK CENTER FOR  
 REHABILITATION AND HEALTH CARE, BUSHWICK  
 CENTER FOR REHABILITATION AND  
 HEALTHCARE, CENTERS HEALTH CARE, LLC,  
 CENTERS FOR SPECIALTY CARE GROUP, LLC,  
 CENTERS FOR SPECIALTY CARE GROUP, IPA, LLC,  
 WARTBURG RECIEVER, LLC, WYCKOFF HEIGHTS  
 MEDICAL CENTER, BEDFORD CENTER FOR  
 NURSING AND REHABILITATION CENTER, INC.,  
 ALLURE CARE MANAGEMENT LLC, ALLURE CARE  
 MANAGEMENT LLC, d/b/a BEDFORD CENTER FOR  
 NURSING AND REHABILITATION, and THE ALLURE  
 GROUP, LLC,

Defendant(s).

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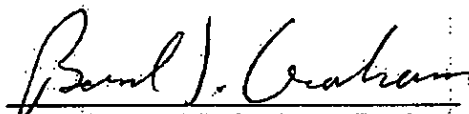
Conclusion:

Accordingly, defendants' motions (seq. 1 and 2) to dismiss for lack of capacity, pursuant to CPLR §3211(a)(5), are denied.

This shall constitute the decision and order of this Court.

Dated: December 22, 2022  
Brooklyn, NY

ENTER



Hon. Bernard J. Graham, Justice  
Supreme Court, Kings County

HON. BERNARD J. GRAHAM