

Estate of Ortiz v Atlantis Operating LLC

2023 NY Slip Op 32869(U)

August 7, 2023

Supreme Court, Kings County

Docket Number: Index No. 532100/2022

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of August 2023

HONORABLE FRANCOIS A. RIVERA

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The Estate of ELENA ORTIZ, by her Proposed Administrator, MARIA ESPINOZA,

DECISION & ORDER

Plaintiff,

Index No.: 532100/2022

- against -

Oral Argument: 6/22/2023

ATLANTIS OPERATING LLC and THE PHOENIX REHABILITATION AND NURSING CENTER,

Cal. No.: 18, Ms. No. 1

Defendant.

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Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on March 27, 2023, under motion sequence number one by Atlantis Operating LLC D/B/A The Phoenix Rehabilitation And Nursing Center (hereinafter the defendant) for an order dismissing the Complaint, pursuant to CPLR § 3211(a)(3), on the grounds that plaintiff Maria Espinoza lacks the capacity to commence the present action The motion is opposed.

- Notice of Motion
- Affirmation of counsel in support
- Exhibits A-B
- Statement of material fact
- Affirmation in opposition
- Affirmation in reply

BACKGROUND

On November 3, 2022, plaintiff commenced the instant action by filing a

summons and verified complaint. The verified complaint alleges two hundred and four

(204) allegations of fact in support of seven denominated causes of action. The first is for violation of New York Public Health Law 2801-d and 2803-c. The second and third is for negligence following the beginning of the pandemic and covid-19 exposure and spread. The fourth is for negligence per se. The fifth is for conscious pain and suffering. The sixth is for wrongful death. The seventh is for gross negligence.

The plaintiff's decedent, Elena Ortiz, died on May 27, 2020. The verified complaint alleges the following salient facts. Plaintiff's decedent, Elena Ortiz, died on May 27, 2020, because of the defendant's gross negligence in failing to protect its residents, including the plaintiff's decedent, from the SARS-COV-2 ["COVID-19"] virus before, during, and throughout the outbreak and pandemic. It is further alleged that the plaintiff's decedent was infected with and contracted COVID-19 while a resident at the defendant's nursing home and that she died thereafter because of COVID-19.

LAW AND APPLICATION

Defendant argues that the case must be dismissed pursuant to CPLR § 3211(a)(3), which provides, in pertinent part, as follows: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: ... (3) the party asserting the cause of action has not legal capacity to sue". (CPLR § 3211[a][3]).

Defendant argues that in this case, the plaintiff lacked the legal capacity to bring this action because Maria Espinoza commenced this action without first being designated as the qualified representative of the estate of Elena Ortiz.

The plaintiff has opposed the motion and argues that if the Court dismisses the action, such should be without prejudice so that the plaintiff may re-file in accordance with CPLR 205-a. The Court finds that in this case, the plaintiff lacks the capacity to commence the instant action.

EPTL § 5-4.1, is relevant to this case, and provides, in pertinent part, as follows:

“The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued....” (EPTL 5-4.1).

The language of above statute makes clear that an individual must be duly appointed as the estate's personal representative before that individual may maintain an action on behalf of the decedent. *In Carrick v. Cent. Gen. Hosp.*, 51 NY2d 242, 250 [1980]), the Court of Appeals held that like most of the other statutory requirements for wrongful death actions, the statutory requirement of a duly appointed administrator is a condition precedent to the right to bring the suit and, as such, is an essential element of the claim. (*Carrick*, 51 NY2d at 250; see also, *Mingone v. State*, 100 AD2d 897, 899 [2nd Dept 1984]). The Court finds that the plaintiff lacks the capacity to commence this action. The action is dismissed without prejudice.

CONCLUSION

The motion by Atlantis Operating LLC D/B/A The Phoenix Rehabilitation and Nursing Center seeking an order pursuant to CPLR 3211(a)(3) dismissing the complaint

of plaintiff Maria Espinoza on the grounds that she lacks the capacity to commence the action is granted. The dismissal is without prejudice.

The foregoing constitutes the decision and order of this Court.

ENTER:

Francois A. Rivera

J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.