

Ramos v Kalsow

2023 NY Slip Op 32954(U)

August 24, 2023

Supreme Court, New York County

Docket Number: Index No. 805319/2022

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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JORGETTE RAMOS, as voluntary administrator of the
estate of ALISHA GRIFFIN, and JORGETTE
RAMOS, INDIVIDUALLY,

Plaintiff,

- v -

SERGEI KALSOW, M.D.,

Defendant.

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INDEX NO. 805319/2022

MOTION DATE 05/05/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for DISMISSAL.

In this action to recover damages for medical malpractice and wrongful death, the defendant moves pursuant to CPLR 3211(a)(3) to dismiss the complaint based on the plaintiff's lack of capacity to prosecute the action. The plaintiff opposes the motion. The motion is deemed to be a motion for summary judgment, the motion thereupon is granted, and the complaint is dismissed, albeit without prejudice to commencement of a new action for the same relief pursuant to CPLR 205(a) by a duly authorized representative of the estate of the plaintiff's decedent, Alisha Griffin.

In the first instance, the defendant is seeking relief pursuant to CPLR 3211(a)(3). Reliance on that statute, however, is improper. CPLR 3211(e) provides that

"At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading"

(emphasis added). The court notes that the defendant here preserved the affirmative defense of lack of capacity by asserting it in his answer as his fifth affirmative defense; however, in light of the provisions of CPLR 3211(e),

“[a] motion to dismiss the complaint based on a ground listed in CPLR 3211(a) . . . must be made before answering (see CPLR 3211[e]: Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:21). A motion for summary judgment, on the other hand, does not lie until after service of the responsive pleading (*id.*). Summary judgment is, therefore, a post answer device (*id.*). Any of the grounds on which a CPLR 3211 motion could have been made here . . . can be used as a basis for a motion for summary judgment afterwards as long as the particular objection, although not taken by a CPLR 3211 motion before service of the answer, has been included as a defense in the answer and thereby preserved (CPLR 3211[e]: Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3212:20). Having preserved the affirmative defense in their answer, defendants were not also entitled to serve a pre-answer motion to dismiss, which is a procedural irregularity. Defendants [are] required to move for summary judgment on the [CPLR 3211(a)] issue inasmuch as they had served their answer”

(*Lusitano Enters., Inc. v Horton Bros., Inc.*, 2018 NY Slip Op 32011[U], *3-4, 2018 NY Misc LEXIS 3587, *5-6, [Sup Ct, Suffolk County, Aug. 14, 2018]; see *Higgins v Goyer*, 2018 NY Slip Op 33520[U], *2, 2018 NY Misc LEXIS 9607, *3 [Sup Ct, Rensselaer County, Nov. 1, 2018]; see also *McLearn v Cowen & Co.*, 60 NY2d 686, 689 [1983]).

Consequently, to the extent that the defendant seeks relief pursuant to CPLR 3211(a)(3), such relief is unavailable pursuant to that statute at this juncture, but is available only via a motion for summary judgment pursuant to CPLR 3212 (see *Rich v Lefkovits*, 56 NY2d 276, 282 [1982] [“we answer in the affirmative the question . . . concerning whether defendant may move after answer for summary judgment on his jurisdictional defense”]). Nonetheless, in this case, there are no disputed issues of fact with respect to the plaintiff's status as a voluntary administrator, leaving only a pure issue of law for the court to consider, and the parties clearly have charted a summary judgment course. Hence, the court deems the motion to be a motion for summary judgment dismissing the complaint for lack of capacity, without the need for providing additional notice to the parties pursuant to CPLR 3211(c) (see *Seasons Hotels v*

Vinnik, 127 AD2d 310, 320 [1st Dept 1987]; see also *Mic Prop. & Cas. Ins. Corp. v Custom Craftsman of Brooklyn, Inc.*, 269 AD2d 333, 334 [1st Dept 2000]).

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 defines a “voluntary administrator” as “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, however, “[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] [emphasis added]). 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]). Consequently a “voluntary administrator” has no 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]; *Castro v Fraser*, 2022 NY Slip Op 30903[U], *5, 2022 NY Misc LEXIS 1368, *7 [Sup Ct, N.Y. County, Mar. 15, 2022] [Kelley, J.]).

The defendant established his prima facie entitlement to judgment as a matter of law by noting that the plaintiff lacked capacity, as a voluntary administrator of her decedent’s estate, to prosecute this personal injury survival and wrongful death action. In opposition, the plaintiff failed to raise a triable issue of fact. Hence, the defendant must be awarded summary judgment dismissing the complaint based on the plaintiff’s lack of capacity.

The dismissal, however, is without prejudice to the commencement of a new action for the same relief, under a new Index Number, in accordance with CPLR 205(a), within six months of the termination of the claims against the defendant, after the plaintiff is appointed as the executor or administrator of the decedent's estate by the Surrogate's Court pursuant to SCPA article 10. As relevant here, CPLR 205(a) provides that

“If an action is timely commenced and is 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 upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.”

A “disposition based solely upon the absence of a duly appointed administrator does not preclude reprosecution of the underlying claim through the mechanism of CPLR 205 (subd [a]) once a qualified administrator has been appointed” (*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]).

In light of the foregoing, it is,

ORDERED that, on the court's own motion, the defendant's motion pursuant to CPLR 3211(a)(3) is deemed to be a motion for summary judgment dismissing the complaint insofar as asserted against him; and it is further,

ORDERED that the defendant's motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed, without prejudice; and it is further,

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

8/24/2023

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