

**Figueroa v Jewish Home Lifecare Manhattan**

2023 NY Slip Op 33765(U)

October 24, 2023

Supreme Court, New York County

Docket Number: Index No. 153520/2022

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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GLADYS FIGUEROA, as Proposed Administrator of the  
Estate of AIDA FIGUEROA, also known as AIDA MARIA  
POMALES GONZALEZ,

Plaintiff,

- v -

JEWISH HOME LIFECARE MANHATTAN, doing business  
as THE NEW JEWISH HOME MANHATTAN, ABC  
CORPORATION, and ABC PARTNERSHIP,

Defendants.

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**INDEX NO. 153520/2022**

**MOTION DATE 08/28/2023**

**MOTION SEQ. NO. 001**

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for DISMISS.

In this action to recover damages, inter alia, for medical malpractice, nursing home negligence pursuant to the Public Health Law, and wrongful death, the defendant Jewish Home Lifecare Manhattan, doing business as The New Jewish Home Manhattan (the Jewish Home) moves pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against it for the plaintiff's lack of capacity. The Jewish Home also seeks dismissal pursuant to CPLR 3211(a)(7) for failure to state a cause of action, asserting that the plaintiff's claims are barred by the federal Public Readiness and Emergency Preparedness Act (42 USC §§ 247d-6d, 247d-6e; hereinafter the PREP Act]), and the New York Emergency or Disaster Treatment Protection Act (Public Health Law §§ 3080-3082; hereinafter EDTPA). The Jewish home also seeks dismissal for lack of subject matter jurisdiction. The plaintiff opposes the motion. The motion is granted solely on the ground that the plaintiff lacks capacity to prosecute the action (see CPLR 3211[a] [3]), and the complaint is dismissed, without prejudice to recommencement pursuant to CPLR

205(a) under a new index number. The court rejects the Jewish Home's contention that this court lacks subject matter jurisdiction over the State common-law and statutory causes of action asserted by the plaintiff. The court does not reach the merits of the Jewish Home's contentions that the action is barred by the PREP Act and EDTPA.

The plaintiff's proposed decedent died on April 26, 2020. The plaintiff commenced this action on April 25, 2022. As of that date, the plaintiff had not been issued letters of administration or letters testamentary by the Surrogate's Court pursuant to SCPA articles 10 or 14, respectively. The defendant made the instant motion on February 20, 2023 (see CPLR 2211). In opposition to the motion, the plaintiff's attorney, in an affirmation dated April 10, 2023, argued that the immunity afforded to nursing homes pursuant to EDTPA violated the New York Constitution, and that EDTPA was repealed retroactively to March 7, 2020 in any event. He further asserted that the Jewish Home failed to establish that its treatment of the decedent was specifically affected by its response to the COVID-19 pandemic, as required to fall within the ambit of Public Health Law § 3082 and, moreover, that the federal PREP Act was not applicable to, and did not preempt, the plaintiff's state-law claims.

The court rejects the Jewish Home's contention that it lacks subject matter jurisdiction to entertain the claims asserted in the complaint (see *Rivera-Zayas v Our Lady of Consolation Geriatric Care Ctr.*, 2021 US Dist LEXIS 197444, \*5 [ED NY, Oct. 12, 2021]; see also *Whitehead v Pine Haven Operating LLC*, 75 Misc 3d 985, 990 [Sup Ct, Columbia County 2022] *Leroy v Hume*, No. 20-cv-5325 [ARR] [CLP], 2021 US Dist LEXIS 152174, 2021 WL 3560876, \*1 [ED NY, Aug. 12, 2021]; *Dupervil v Alliance Health Ops., LCC*, 516 F Supp 3d 238, 241 [ED NY 2021]; *Shapnik v Hebrew Home for Aged at Riverdale*, 535 F Supp 3d 301 [SD NY 2021]; *Garcia v New York City Health & Hosps. Corp.*, No. 20-cv-9970 [CM], 2021 US Dist LEXIS 68575, 2021 WL 1317178, \*2 [SD NY, Apr. 8, 2021]).

The plaintiff nonetheless conceded that, as of the time that she commenced this action, she had yet to even petition the Surrogate's Court to be appointed as the representative of the

decedent's estate. In fact, she only petitioned the Surrogate's Court after the instant motion was fully submitted. Her attorney nonetheless suggested that, if the court were to dismiss the complaint for her lack of capacity, it do so without prejudice to recommencement of the action pursuant to CPLR 205-a after she obtained letters of administration.

In her summons and complaint, the plaintiff characterized herself as the "proposed administrator" of the decedent's estate.

"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 "proposed administrator" lacks capacity to prosecute either a personal injury "survival" action or a wrongful death action on behalf of the estate of a decedent (see *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]; *Mendez v Kyung Yoo*, 23 AD3d 354, 355 [2d Dept 2005]; *Duran v Isabella Geriatric Ctr., Inc.*, 2023 NY Slip Op 30500[U], \*9, 2023 NY Misc LEXIS 669, \*12-13 [Sup Ct, N.Y. County, Feb. 15, 2023] [Kelley, J.]; *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.]; *Stroble v Townhouse Operating Co.*, 2019 NY Misc LEXIS 18865 [Sup Ct, Nassau County, Dec. 16, 2019]; *Fleisher v Ballon Stoll Bader & Nadler, P.C.*, 2015 NY Slip Op 31855[U], \*5, 2015 NY Misc LEXIS 3625, \*6 [Sup Ct, N.Y. County, Oct. 5, 2015]). The Jewish Home's motion thus must be granted on the ground that the plaintiff lacks capacity to prosecute the action, and the complaint must be dismissed for that reason.

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 the SCPA.

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 242, 252 [1980]; see *Rodriguez v River Val. Care Ctr., Inc.*, 175 AD3d at 433; *Snodgrass v Professional Radiology*, 50 AD3d 883, 884-885 [2d Dept 2008]; *Mendez v Kyung Yoo*, 23 AD3d at 355; *Bernardez v City of New York*, 100 AD2d 798, 799-800 [1st Dept 1984]).

In light of the dismissal on the ground of lack of capacity, the court declines to express any opinion as to whether the claims sought be asserted by the plaintiff state a cause of action, whether the statutory nursing home immunity afforded by EDTPA was repealed retroactively or, conversely, whether the repealed statute must be applied in this action, whether any allegations nonetheless fall outside of the ambit of EDTPA, or whether the PREP Act bars the action.

Accordingly, it is

ORDERED that the defendant's motion to dismiss the complaint is granted solely on the ground that the plaintiff presently lacks capacity to prosecute the action, and the complaint is dismissed, without prejudice to recommencement under another index number in accordance with CPLR 205-a; and it is further,

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

This constitutes the Decision and Order of the court.

10/24/2023  
DATE



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JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE