

**Pollen v Dewitt Rehabilitation & Nursing Ctr.**

2024 NY Slip Op 33603(U)

October 10, 2024

Supreme Court, New York County

Docket Number: Index No. 150058/2024

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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JACQUELINE POLLEN, as Proposed Administratrix of  
the Estate of SONIA MARGULES, Deceased,  
  
Plaintiff,

**INDEX NO.** 150058/2024

**MOTION DATE** 07/19/2024

**MOTION SEQ. NO.** 001

- v -

DEWITT REHABILITATION AND NURSING CENTER,  
doing business as UPPER EAST SIDE REHABILITATION  
AND NURSING CENTER,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

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) and (7) to dismiss the complaint for the plaintiff's lack of capacity to prosecute the action and for failure to state a cause of action, pursuant to CPLR 3211(a)(5) to dismiss the wrongful death cause of action as time-barred, and pursuant to CPLR 3024(a) to strike allegedly scandalous and prejudicial material from the complaint. The plaintiff opposes the motion, and cross-moves pursuant to CPLR 1021 and 3025(b) to substitute Marc Adler, as executor of the estate of Sonia Margules, as the plaintiff in place and instead of Jaqueline Pollen, as the proposed administratrix of Margules's estate, which was how Pollen characterized herself in the summons and complaint, and to amend the complaint accordingly. The defendant opposes the cross motion. The defendant's motion is granted on the ground that the plaintiff lacked capacity to commence the action, and the complaint is dismissed, albeit without prejudice to commencement of a new action by Adler in his representative capacity in accordance with CPLR 205(a). The defendant's motion is otherwise denied as academic. The plaintiff's cross motion is denied.

In the summons and complaint, Pollen characterized herself as the “proposed administratrix” 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]).

Where a plaintiff lacks capacity to prosecute an action, and a defendant timely moves to dismiss the complaint on that ground, the complaint must be dismissed, and is not subject to an amendment to substitute a proper plaintiff, since the action was a nullity ab initio (see *Darboe v. St. Ann's Abh Owner LLC*, 2021 NY Misc LEXIS 37996, \*11 [Sup Ct, Bronx County, Apr. 30, 2021] [“A plaintiff who is not the personal administrator when he or she commences the lawsuit cannot file an Amended Complaint after receiving the letters of administration and rely on the relation-back doctrine of CPLR 203 to take advantage of the timeliness of the original action,

because that action is a nullity.”]). Hence, the plaintiff’s cross motion for leave to substitute Marc Adler, as executor of the estate of Sonia Margules, must be denied.

The dismissal, however, is without prejudice to the commencement of a new action against the defendant 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 them. As relevant here, CPLR 205(a) provides that:

“[i]f 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 court’s determination, it declines to address any of the other grounds for dismissal urged by the defendant, and declines to address its contention that the complaint includes scandalous and prejudicial material that should be stricken.

Accordingly, it is,

ORDERED that the defendant’s motion is granted to the extent that the complaint is dismissed on the ground that the plaintiff lacked capacity to commence the action, without prejudice to the commencement of a new action, in accordance with CPLR 205(a), by the executor of the decedent’s estate under a different index number against the defendant for the same relief, and the motion is otherwise denied; and it further,

ORDERED that the plaintiff's cross motion is denied; and it is further,  
ORDERED that the Clerk of the court shall enter judgment accordingly.  
This constitutes the Decision and Order of the court.

10/10/2024  
DATE



JOHN J. KELLEY, J.S.C.

MOTION:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION			
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
CROSS MOTION:	<input checked="" type="checkbox"/>	CASE DISPOSED			<input type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE