

Cruz v Mount Sinai Hosp.

2024 NY Slip Op 34557(U)

December 24, 2024

Supreme Court, New York County

Docket Number: Index No. 805307/2023

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** **IAS MOTION 56EFM**

Justice

-----X

HAZEL CRUZ as Proposed Administrator of the Estate of
HECTOR CRUZ, Deceased,

Plaintiff,

- v -

MOUNT SINAI HOSPITAL,

Defendant.

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INDEX NO. 805307/2023

MOTION DATE 08/15/2024

MOTION SEQ. NO. 001

**DECISION AND 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

were read on this motion to/for DISMISS/LACK OF CAPACITY.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted medical practice, wrongful death, and negligent hiring, training, supervision, and retention, the defendant moves pursuant to CPLR 3211(a)(3) to dismiss the complaint based on the plaintiff’s lack of capacity. The plaintiff opposes the motion. The defendant’s motion is granted, and the complaint is dismissed, albeit without prejudice to the commencement of a new action by the plaintiff Hazel Cruz in accordance with CPLR 205(a) after she is appointed as the administrator of the estate of her decedent, Hector Cruz.

The plaintiff commenced this action on June 28, 2023. In the summons and complaint, the plaintiff characterized herself as the “proposed administratrix” of the decedent’s estate. Although the plaintiff executed a petition for letters of administration of the decedent’s estate on December 20, 2022, and filed that petition and supporting papers with the Surrogate’s Court, New York County, on January 30, 2023, as of the date that she commenced this action, the Surrogate’s Court had yet to appoint her as the administrator of that 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 burden is on the defendant to establish that the plaintiff lacked capacity to commence this action (see *Bartel v Farrell Lines*, 215 AD3d 517, 526 [1st Dept 2023]). The defendant here has established that the plaintiff lacked capacity to commence the action on the date that she filed the summons and complaint by noting that she was only a “proposed administrator” at the time that she commenced the action. Contrary to the plaintiff’s suggestion, 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 either a proper plaintiff or an existing plaintiff who secured appointment as a proper administrator or executor of a decedent’s estate during the pendency

of the action. This is so because it is a “fatal defect” for a person who lacks capacity to commence an action, inasmuch as the defect constitutes a “failure to comply with a condition precedent” (*Morris Investors, Inc. v Commissioner of Finance*, 121 AD2d 221, 224 [1st Dept 1986]). Nonetheless, although the plaintiff lacked capacity to prosecute this action at the time that she commenced it, her lack of capacity did not technically render the action a “nullity,” and, hence, while the action remains “subject to grounds for dismissal,” it nonetheless is “within the ambit of CPLR 205(a)” (*Sokoloff v Schor*, 176 AD3d 120, 124, 135-136 [2d Dept 2019])

As such, the dismissal here 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), provided that the new action is commenced within six months of the termination of this action against it. 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]).

Accordingly, it is,

ORDERED that the defendant’s motion to dismiss the complaint is granted, and the complaint is dismissed, without prejudice, in accordance with CPLR 205(a), to the

commencement of a new action under a different index number by the administrator of the decedent's estate against the defendant for the same relief; and it is further,

ORDERED that the Clerk of the court shall enter judgment accordingly

This constitutes the Decision and Order of the court.



JOHN J. KELLEY, J.S.C.

12/24/2024
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: