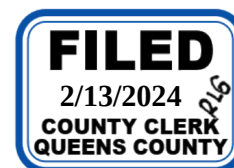


Abreu v North Shore Univ. Hosp.
2024 NY Slip Op 35559(U)
February 9, 2024
Supreme Court, Queens County
Docket Number: Index No. 707992/2023
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS



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RICARDO ABREU, JR., as proposed Administrator of
the Estate of MIRIAM PEREZ, deceased,

Index No. 707992/2023

Part MDP

Plaintiff,

Motion Date: February 7, 2024

-against-

Calendar No. 15

Sequence No. 1

NORTH SHORE UNIVERSITY HOSPITAL,
NORTHWELL HEALTH, INC., MARK B. EISEBERG,
M.D., KATIE WAGNER, M.D., JUNG-MIN KIM, M.D.,
KENIA SAMUEL, M.D., ALFRED SCHWAB, M.D.,
CELINE DEMATTEO, M.D., TANIA REBEIZ, M.D.,
ZACHARY LEVY, M.D., BENZIGER BENSAM, M.D.,
RICHARD TEMES, M.D., SHAHAB
KHAZANEHDARI, M.D., RANDALL S. FEINGOLD,
M.D., AMY SHARMA, M.D., HUE MARLEY, M.D.,
OMID KOHANI, M.D., DANIEL TOSCANO, M.D.,
JUSTIN TURPIN, M.D., FATIMA FAYYAZ, M.D., and
STEVEN SAVONA, M.D.,

Defendants.

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The following papers numbered EF-85 to EF-112 read on this motion by defendants NORTHWELL HEALTH, INC., MARK B. EISEBERG, M.D., JUNG-MIN KIM, M.D., KENIA SAMUEL, M.D., ALFRED SCHWAB, M.D., CELINE DEMATTEO, M.D., TANIA REBEIZ, M.D., ZACHARY LEVY, M.D., BENZIGER BENSAM, M.D., RICHARD TEMES, M.D., SHAHAB KHAZANEDHARI, M.D., AMY SHARMA, M.D., HUE MARLEY, M.D., DANIEL TOSCANO, M.D., JUSTIN TURPIN, M.D., FATIMA FAYYAZ, M.D., and STEVEN SAVONA, M.D. to dismiss plaintiff's Complaint pursuant to CPLR §3211(a)(3), this cross-motion by defendants OMID KOHANI, M.D. and RANDALL S. FEINGOLD, M.D. to dismiss plaintiff's Complaint pursuant to CPLR §3211(a)(3), and this cross-motion by plaintiff to amend the caption pursuant to CPLR §3025.

Papers
Numbered

Notice of Motion, Affirmation, Exhibits.....	EF85-EF90
Notice of Cross-Motion, Affirmation, Exhibits.....	EF92-EF95
Affirmation in Opposition, Exhibits.....	EF99-EF103
Notice of Cross-Motion, Affirmation, Exhibits.....	EF104-EF108
Affirmation in Opposition.....	EF109-EF110
Reply Affirmation.....	EF111
Reply Affirmation.....	EF112

Upon the foregoing papers, it is ordered that these motions are determined as follows:

Defendants Northwell Health, Inc., Mark B. Eiseberg, M.D., Jung-Min Kim, M.D., Kenia Samuel, M.D., Alfred Schwab, M.D., Celine DeMatteo, M.D., Tania Rebeiz, M.D., Zachary Levy, M.D., Benziger Bensam, M.D., Richard Temes, M.D., Shahab Khazanedhari, M.D., Amy Sharma, M.D., Hue Marley, M.D., Daniel Toscano, M.D., Justin Turpin, M.D., Fatima Fayyaz, M.D., and Steven Savona, M.D.'s (hereinafter referred to as "moving defendants") motion to dismiss plaintiff's Complaint pursuant to CPLR §3211(a)(3) is granted. Co-defendants Omid Kohani, M.D. and Randall S. Feingold, M.D.'s (hereinafter collectively referred to as "cross-moving co-defendants") cross-motion to dismiss plaintiff's Complaint pursuant to CPLR §3211(a)(3) is also granted. Plaintiff's cross-motion to amend the caption pursuant to CPLR §3025 is denied.

Plaintiff commenced this action alleging medical malpractice and wrongful death by defendants while they treated plaintiff decedent from April 27, 2021 through May 10, 2021, the date of Miriam Perez's death. Plaintiff filed the Summons and Complaint on April 17, 2023, and issue was joined on May 16, 2023.

The moving defendants argue that plaintiff's Complaint should be dismissed, as plaintiff Ricardo Abreu Jr. lacked capacity to sue when he commenced this action as the proposed administrator of deceased plaintiff Miriam Perez's estate. They argue that plaintiff Ricardo Abreu Jr. improperly commenced this action on April 17, 2023 without first having been appointed by the Surrogate's Court as a representative on behalf of plaintiff decedent Miriam Perez. Co-defendants Dr. Kohani and Dr. Savona cross-move and argue that plaintiff's Complaint must be dismissed for the above reasons. Based upon the foregoing, defendants argue that plaintiff's Complaint must be dismissed.

Plaintiff opposes defendants' motion and co-defendants cross-motion and argues that their motions should be denied as moot because plaintiff Ricardo Abreu Jr. was decreed Administrator of plaintiff decedent's estate in the Queens County Surrogate's Court on December 18, 2023.

Plaintiff further argues that it is well settled that in a wrongful death action a qualified administrator may appropriately replace a proposed administrator post-statute of limitations. (*See Carrick v. Central General Hospital*, 51 N.Y.2d 242 [1980].) Plaintiff further argues that a dismissal based upon a proposed administrator's lack of standing is not a dismissal on the merits and therefore may be rectified by CPLR §205(a). Based upon the foregoing, plaintiff argues that defendants' motion and co-defendants' cross-motion should be denied.

Plaintiff also cross-moves for leave to amend the caption to substitute plaintiff Ricardo Abreu, Jr. as the administrator of plaintiff decedent's estate. Plaintiff argues that based upon the Surrogate's Court Decree, he is entitled to leave to amend the caption to reflect that he has been appointed the administrator of Miriam Perez's estate. Defendants Dr. Ohani and Dr. Feingold oppose plaintiff's cross-motion and argue that plaintiff is not entitled to leave to amend the caption, but rather the Complaint should be dismissed based upon his lack of capacity to sue when he commenced this action.

An action for wrongful death must be commenced within two years of the decedent's death. (*Castro v. Rochdale Vil., Inc.*, 186 A.D.3d 554, 555 [2d Dept. 2020]; *see also EPTL §5-4.1[1].*) A cause of action for medical malpractice accrues on the date of the alleged wrongful act or omission, and the two-and-one-half years statute of limitations begins to run on that date. (*Schwelnus v. Urological Assoc. of L.I., P.C.*, 94 A.D.3d 971, 973 [2d Dept. 2012]; *see CPLR §214-a.*)

Pursuant to CPLR §3211(a)(3), a defendant may move to dismiss an action on the ground that the plaintiff does not have legal capacity to sue. (*See CPLR §3211[a][3].*) A proposed Administrator may not commence an action to recover for wrongful death, as a merely "proposed" Administrator lacks capacity to sue. (*Mendez v. Kyung Yoo*, 23 A.D.3d 354, 355 [2d Dept. 2005].) Where the defendants have been given timely notice of the claim being asserted by or on behalf of the injured party, an error relating to the identity of the named plaintiff in the original action will not bar re-commencement of the action pursuant to CPLR §205(a). (*McGuire v. Southside Hosp.*, 301 A.D.2d 505, 506 [2d Dept. 2003].) CPLR §205(a) provides that "a plaintiff may commence a new action upon the same transactions or occurrences as the prior action within six months after the termination of the prior action provided that the new action would have been timely commenced at the commencement of the prior action. (*Delzotti v. Bowers*, 219 A.D.3d 967, 969-970 [2d Dept. 2023].) The statutes "bestows such an allowance upon plaintiffs because the first action, though dismissed, nonetheless provides the defendants with timely notice of the transactions and occurrences on which the subsequent action is based...[t]hereby ameliorating any prejudice to the defense. (*Sokoloff v. Schor*, 176 A.D.3d 120, 135-136 [2d Dept. 2019].)

Defendants' motion and co-defendants' cross-motion to dismiss plaintiff's Complaint pursuant to CPLR §3211(a)(3) is granted, as they demonstrated the instant action is time-barred

by the applicable statute of limitations. It is undisputed that Miriam Perez passed away on May 10, 2021, and the medical malpractice claim became time-barred by as of November 10, 2023, and the wrongful death claim became time-barred as of May 10, 2023. It is also undisputed that Ricardo Abreu Jr. commenced this action as the proposed administrator of Miriam Perez's estate on April 27, 2023, but was not formally appointed as the administrator of Miriam Perez's estate until December 18, 2023, after the statute of limitations had already expired. As defendants demonstrated through the documentary evidence presented that Ricardo Abreu Jr. did not have standing to sue when he commenced this action and did not acquire standing to sue until after the statute of limitations expired, defendants demonstrated entitlement to dismissal.

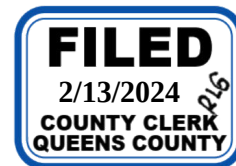
Plaintiff failed to present sufficient evidence to warrant denial of defendants' motion and co-defendants' cross-motion. Plaintiff's argument that Ricardo Abreu Jr. has since been appointed as the administrator of Miriam Perez's estate does not obviate the fact that he was not appointed until after the statute of limitations expired. Additionally, plaintiff's reliance on the *Carrick* case is misplaced. (*See Carrick, supra.*) In the *Carrick* case, the Court of Appeals considered whether a second action was timely commenced pursuant to CPLR §205(a) after the first action was appropriately dismissed because the plaintiff had not been issued letters of administration. (*Id.* At 245-246.) Contrary to the facts in *Carrick*, plaintiff's argument that a dismissal of this case may be rectified by CPLR §205(a) is premature, as CPLR §205(a) may be invoked only upon the dismissal of a prior action and commencement of a subsequent action, which has not yet happened. Based upon the foregoing, plaintiff failed to demonstrate that dismissal is not warranted, and consequently, plaintiff failed to demonstrate entitlement to amend the caption.

Accordingly, defendants Northwell Health, Inc., Mark B. Eiseberg, M.D., Jung-Min Kim, M.D., Kenia Samuel, M.D., Alfred Schwab, M.D., Celine DeMatteo, M.D., Tania Rebeiz, M.D., Zachary Levy, M.D., Benziger Bensam, M.D., Richard Temes, M.D., Shahab Khazanedhari, M.D., Amy Sharma, M.D., Hue Marley, M.D., Daniel Toscano, M.D., Justin Turpin, M.D., Fatima Fayyaz, M.D., and Steven Savona, M.D.'s motion to dismiss plaintiff's Complaint pursuant to CPLR §3211(a)(3) is granted. Co-defendants Omid Kohani, M.D. and Randall Feingold, M.D.'s cross-motion to dismiss plaintiff's Complaint pursuant to CPLR §3211(a)(3) is granted. Plaintiff's cross-motion for leave to amend the caption pursuant to CPLR §3025 is denied. It is hereby

ORDERED that plaintiff's Complaint is dismissed as to moving defendants and cross-moving defendants.

This constitutes the decision and Order of the Court.

Dated: February 9, 2024




Hon. Tracy Catapano-Fox, J.S.C.