

Estate of Gallegos v S & J Operational LLC
2024 NY Slip Op 35601(U)
June 17, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 609010/2023
Judge: Maureen T. Liccione
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Short Form Order

Index No. 609010/2023

SUPREME COURT – STATE OF NEW YORK
PART 78 – SUFFOLK COUNTY**P R E S E N T:****Hon. Maureen T. Liccione**

Justice Supreme Court

-----x
THE ESTATE OF CARLOS G. GALLEGOS, by his
Personal Representative, MARIA PORTEUS,

Plaintiff,

-against-

S & J OPERATIONAL LLC d/b/a LUXOR
NURSING AND REHAB AT MILLS POND; ABC
CORPORATION; ABC PARTNERSHIP,Defendants.
-----xMot. Seq. No. 001–MG/CaseDisp
Orig. Return Date: 07/24/2023
Mot. Submit Date: 03/27/2024**PLAINTIFF'S ATTORNEY**NAPOLI SHKOLNIK, PLLC
400 Broadhollow Road, Suite 305
Melville, NY 11747**DEFENDANT'S ATTORNEY**WILSON ELSEER MOSKOWITZ
EDELMAN & DICKER, LLP
1133 Westchester Avenue
White Plains, NY 10604

Upon the e-filed documents numbered 1 to 11 and upon due deliberation, it is hereby

ORDERED that the branches of defendant S & J Operational LLC d/b/a Luxor Nursing and Rehab at Mills Pond's motion (motion sequence no. 001) to dismiss the complaint pursuant to CPLR 3211 (a) (3) for plaintiff's lack of capacity to sue and to dismiss plaintiff's wrongful death cause of action pursuant to CPLR 3211 (a) (5) and 214 because the claim is time-barred are granted; and it is further

ORDERED that the branch of defendant S & J Operational LLC d/b/a Luxor Nursing and Rehab at Mills Pond's motion (motion sequence no. 001) to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action is unnecessary to this determination; and it is further

ORDERED that the complaint is dismissed.

Plaintiff the Estate of Carlos G. Gallegos, by his alleged personal representative, Maria Porteus (Plaintiff), has brought causes of action for negligence, wrongful death, and nursing home malpractice against defendants S & J Operational LLC d/b/a Luxor Nursing and Rehab at Mills

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Pond¹ (defendant Luxor), ABC Corporation and ABC Partnership.² Plaintiff filed the summons and complaint on April 7, 2023. The complaint alleges that while Carlos G. Gallegos was a resident of defendant's nursing home facility known as Luxor Nursing and Rehab at Mills Pond he contracted COVID-19 and passed away on April 9, 2020.

Defendant Luxor moves for an order (1) pursuant to CPLR 3211 (a) (5) and 214 dismissing plaintiff's wrongful death cause of action as barred by the statute of limitations, (2) pursuant to CPLR 3211 (a) (3), seeking dismissal of the complaint as Ms. Porteus has no legal capacity to sue, and pursuant to CPLR 3211 (a) (7), dismissing the complaint with prejudice for failing to state a cause of action. Plaintiff opposes the motion and requests a stay of the proceedings until letters of administration are issued to Plaintiff and an order permitting Plaintiff to refile the instant action within 30 days of being appointed administrator for the estate of Carlos G. Gallegos.

Dismissal for Lack of Capacity to Sue

Defendant Luxor seeks dismissal of the complaint pursuant to CPLR 3211 (a) (3) alleging that the Plaintiff lacks capacity to bring this action. A personal representative who has received letters of administration of the estate of a decedent is the only party who is authorized to bring a survival action for personal injuries sustained by the decedent and a wrongful death action to recover the damages sustained by the decedent's distributees on account of his or her death (*see* EPTL 5-4.1 [1]; *Jordan v Jordan*, 120 AD3d 632 [2d Dept 2014]; *Mingone v State of New York*, 100 AD2d 897, 899 [2d Dept 1984] [dismissing action without prejudice where no administrator had been duly appointed]). The statutory requirement of a duly appointed administrator "is in the nature of a condition precedent to the right to bring the suit and, as such, is an essential element of the claim" (*Carrick v Cent. Gen. Hosp.*, 51 NY2d 242, 250 [1980]).

Here, it is uncontested that Ms. Porteus has not received any letters of administration to serve as the personal representative of the Estate of Carlos G. Gallegos. The Court, therefore, required to dismiss the complaint pursuant to CPLR 3211 (a) (3). The branch of the motion of defendant Luxor seeking dismissal of the complaint pursuant to CPLR 3211 (a) (3) is thus granted.

Although Luxor argues that Plaintiff's lack of capacity also warrants dismissal for failure to state a claim pursuant to CPLR 3211 (a) (7), those grounds are distinct and are inapplicable here

¹ Defendant referred to defendant as S & I Operational LLC in its motion papers, but the caption in the summons and complaint names S & J Operational LLC.

² There is no affidavit of service in the NYSCEF record for ABC Corporation or ABC Partnership.

(*Rainbow Hospitality Management, Inc. v Mesch Engineering, P.C.*, 270 AD2d 906 [4th Dept 2000]).

Dismissal of the Wrongful Death Cause of Action as Time Barred

Defendant Luxor also moves pursuant to CPLR 3211 (a) (5) and 214 to dismiss Plaintiff's wrongful death cause of action as time barred. Defendant Luxor argues that Carlos G. Gallegos passed away on April 9, 2020, and that the Executive Orders issued by Governor Cuomo tolled the statute of limitation until November 3, 2020, requiring the summons and complaint to have been filed by November 3, 2022. They were not filed until April 7, 2023. In opposition, Plaintiff contends that the wrongful death cause of action is not time barred because Plaintiff had filed a verified complaint on November 1, 2022 (2022 Complaint) against the same defendant Luxor for the same causes of actions, but which was never served on defendant Luxor in accordance with CPLR 306-b.

The statute of limitations period for a wrongful death cause of action is two years from the date of death (EPTL § 5-4.1 [1]). Gubernatorial Executive Orders tolled the statute of limitations until November 3, 2020 (*Brash v Richards*, 195 AD3d 582, 585 [2d Dept 2021]), so that the statute of limitations here did not begin to run until that date. Therefore, the instant wrongful death cause of action, which was filed more than two years after November 3, 2020, is time barred.

Plaintiff's attempt to rely on the relation back doctrine to render the wrongful death cause of action timely is unavailing. Plaintiff cites to no authority, statutory or common law, supporting her contention that the instant wrongful death cause of action relates back to the date of the unserved 2022 Complaint. In fact, there is nothing in the record even showing that the 2022 Complaint was filed, as the copy of the unserved 2022 Complaint attached as an exhibit to Plaintiff's opposition contains no index number, which would have been obtained upon filing. Thus, the branch of the motion of defendant Luxor seeking dismissal of Plaintiff's wrongful death cause of action for violation of the statute of limitations is granted.

Plaintiff's requests for relief, such as the stay of this action until letters of administration are issued to Ms. Porteus and the issuance of an order permitting plaintiff to refile the instant action within 30 days of being appointed administrator, are denied since Plaintiff did not file a cross motion (CPLR 2214 [a], 2215).

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The parties' remaining contentions are either without merit or are unnecessary to this determination.

The foregoing constitutes the decision and Order of the Court.

ENTER

DATE: June 17, 2024
Riverhead, NY

Maureen T. Liccione

HON. MAUREEN T. LICCIONE, J.S.C.

 X FINAL DISPOSITION

 NON-FINAL DISPOSITION