

Stepheny v Terence Cardinal Cooke Health Care Ctr.

2025 NY Slip Op 32239(U)

June 17, 2025

Supreme Court, New York County

Docket Number: Index No. 805250/2024

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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INDEX NO. 805250/2024

SHAWANDA STEPHENY as Proposed Administratrix for
DALLAS DAVIS, and SHAWANDA STEPHENY, Individually,

MOTION DATE 03/28/2025

Plaintiff,

MOTION SEQ. NO. 001

- v -

TERENCE CARDINAL COOKE HEALTH CARE CENTER,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 10, 11, 12, 13, 14

were read on this motion to/for DISMISS.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted medical practice, common-law negligence, pursuant to Public Health Law §§ 2801-d and 2803-c for purported violations of statutes and regulations governing nursing homes, and wrongful death, the defendant moves pursuant to CPLR 3211(a)(3) to dismiss the complaint based on the plaintiff's lack of capacity to prosecute the action. The plaintiff opposes the motion. The motion is granted, and the complaint is dismissed, albeit without prejudice to commencement of a new action against the defendant for the same relief pursuant to CPLR 205(a), under a new index number, by a duly authorized representative of the estate of the plaintiff's decedent, Dallas Davis (the decedent).

The decedent died on September 5, 2022. The plaintiff commenced this action on September 5, 2024. In the summons and complaint, the plaintiff characterized herself as the decedent's "proposed administrator."

"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 her decedent's "proposed administrator" as of the date when she commenced the action. 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, and that

defect constitutes a “failure to comply with a condition precedent” (*Morris Investors, Inc. v Commissioner of Finance*, 121 AD2d 221, 224 [1st Dept 1986]). Hence, even though the plaintiff had petitioned the Surrogate’s Court, New York County, on January 5, 2023 to be appointed as administrator of her decedent’s estate, and filed an amended petition for that relief with that court on February 20, 2024, and, thus, prior to her commencement of this action, those filings cannot save this action from dismissal because the Surrogate’s Court had yet to appoint her as administrator of the decedent’s estate prior to the September 4, 2025 commencement date of this action. Moreover, even if the plaintiff had secured letters of administration during the pendency of this motion, the complaint must still be dismissed, since she may not make a belated motion to amend the complaint herein to allege that she now has capacity to prosecute the subject claims (*see Mingone v State of New York*, 100 at 899; *Cianciotto v Hospice Care Network*, 32 Misc 3d 916, 919 [Dist Ct, Nassau County 2011]; *cf. Favourite, Ltd. v Cico*, 42 NY3d 250, 260 [2024] [where dismissal of complaint due to dissolution of corporate plaintiff was without prejudice, Supreme Court did not lack discretion to consider motion to amend the complaint under CPLR 3025[b] where corporation thereafter was revived and motion was made within six months of dismissal]).

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]). The dismissal here thus is without prejudice to the commencement of a new action by the plaintiff 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. 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 prosecution 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, 246, 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 is granted, and the complaint is dismissed, without prejudice to the commencement, in accordance with CPLR 205(a), of a new action under a different index number by the duly appointed administrator or executor 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.

6/17/2025

DATE



JOHN J. KELLEY, J.S.C.

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: