

McLaughlin v St. John's Riverside Hosp.

2025 NY Slip Op 32240(U)

June 17, 2025

Supreme Court, New York County

Docket Number: Index No. 805308/2024

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 56M

Justice

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WILLIAM J. MCLAUGHLIN as Proposed Administrator
of the Estate of LORRAINE M. MCLAUGHLIN, and
WILLIAM J. MCLAUGHLIN Individually,

Plaintiff,

- v -

ST. JOHN'S RIVERSIDE HOSPITAL, LENOX HILL
HOSPITAL, NEW YORK-PRESBYTERIAN
WESTCHESTER, JOHN E. ANDRUS MEMORIAL,
INC., doing business as ANDRUS ON HUDSON, JEWISH
HOME LIFECARE, MANHATTAN, doing business as THE
NEW JEWISH HOME, MANHATTAN, VISITING NURSE
SERVICE OF NEW YORK, VNS CHOICE, VISITING
NURSE SERVICE OF NEW YORK HOME CARE, VISITING
NURSE SERVICE OF NEW YORK HOME CARE II,
PARTNERS IN CARE, and VNSNY CHHA,

Defendants.

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MOTION DATE 03/28/2025

**MOTION SEQ. NO. 001, 002, 003,
004, 005, 006**

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 32, 57, 58, 59, 80

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 10, 11, 12, 13, 33, 76, 77, 78

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 38, 39, 40, 41, 60, 61, 62, 73

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 44, 45, 46, 63, 64, 65, 79

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 50, 51, 52, 53, 66, 67, 68, 74

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 54, 55, 56, 69, 70, 71, 72

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 practice, for common-law negligence, pursuant to Public Health Law §§ 2801-d and 2803-c for purported violations of statutes and regulations governing nursing homes, and for wrongful death, the defendants Visiting Nurse Service of New York, Visiting Nurse Service of New York Home Care, Visiting Nurse Service of New York Home Care II, and VNSNY CHHA (collectively the VNSNY defendants) move pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against them, based on the plaintiff's lack of capacity to prosecute the action (MOT SEQ 001). The defendant Jewish Life Homecare, Manhattan, doing business as The New Jewish Home, Manhattan (Jewish Life), separately moves to dismiss the complaint insofar as asserted against it on the same ground, and also seeks dismissal pursuant to CPLR 3211(a)(7) for failure to state a cause of action because it never provided care or services to the plaintiff's decedent (MOT SEQ 002). The defendant St. John's Riverside Hospital (SJRH), after serving an answer to the complaint on February 12, 2025, separately moved to dismiss the complaint insofar as asserted against it based on the plaintiff's lack of capacity (MOT SEQ 003). The defendant John E. Andrus Memorial, Inc., doing business as Andrus on Hudson (Andrus), after serving an answer to the complaint on February 21, 2025, separately moved to dismiss the complaint insofar as asserted against it based on the plaintiff's lack of capacity (MOT SEQ 004). The defendant Lenox Hill Hospital (Lenox Hill), after serving an answer to the complaint on February 5, 2025, separately moved to dismiss the complaint insofar as asserted against it based on the plaintiff's lack of capacity (MOT SEQ 005). The defendant New York-Presbyterian Westchester (NYPW), after serving an answer to the complaint on February 10, 2025, and an amended answer to the complaint on February 26, 2025, separately moved to dismiss the complaint insofar as asserted against it based on the

plaintiff's lack of capacity (MOT SEQ 006). Pursuant to a stipulation dated March 20, 2025, the plaintiff discontinued the action insofar as asserted against Jewish Life. Hence, the motion pending under Motion Sequence 002 must be denied as academic. The plaintiff opposes the motions pending under Sequences 001, 003, 004, 005, 006. Those motions are granted, and the complaint is dismissed insofar as asserted against the VNSNY defendants, SJRH, Andrus, Lenox Hill, and NYPW, albeit without prejudice to commencement of a new action against those defendants for the same relief in accordance with CPLR 205(a), under a new index number, by a duly authorized representative of the estate of the plaintiff's decedent, Lorraine M. McLaughlin (the decedent).

Initially, the court notes that the movants are seeking relief pursuant to CPLR 3211(a)(3). Reliance on that statute, however, is improper. CPLR 3211(e) provides that,

“At any time *before service of the responsive pleading* is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading”

(emphasis added). The court notes that the movants have preserved the affirmative defense of lack of capacity by asserting it in their respective answers or, in the case of NYPW, in its timely served amended answer;¹ however, in light of the provisions of CPLR 3211(e),

“[a] motion to dismiss the complaint based on a ground listed in CPLR 3211(a) . . . must be made before answering (see CPLR 3211[e]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:21). A motion for summary judgment, on the other hand, does not lie until after service of the responsive pleading (*id.*). Summary judgment is, therefore, a post answer device (*id.*). Any of the grounds on which a CPLR 3211 motion could have been made here . . . can be used as a basis for a motion for summary judgment afterwards as long as the particular objection, although not taken by a CPLR

¹ Lenox Hill characterized the affirmative defense as “lack of standing,” which is related, but not identical to, the affirmative defense of lack of capacity (see *Matter of Hamm v Board of Elections in City of N.Y.*, 194 AD3d 73, 77 [2d Dept 2021]). Nonetheless, inasmuch as “for purposes of the waiver rule set forth in CPLR 3211(e), standing and capacity to sue are sufficiently related that they should be afforded identical treatment” (*Wells Fargo Bank Minn. v Mastropaolo*, 42 AD3d 239, 243 [2d Dept 2007]), and dismissal pursuant to CPLR 3211(a)(3) may be premised upon either or both defenses, the court concludes that Lenox Hill's assertion that the plaintiff lacked standing was sufficient to put him on notice that he purportedly lacked capacity.

3211 motion before service of the answer, has been included as a defense in the answer and thereby preserved (CPLR 3211[e]: Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3212:20). Having preserved the affirmative defense in their answer, defendants were not also entitled to serve a pre-answer motion to dismiss, which is a procedural irregularity. Defendants [are] required to move for summary judgment on the [CPLR 3211(a)] issue inasmuch as they had served their answer”

(*Lusitano Enters., Inc. v Horton Bros., Inc.*, 2018 NY Slip Op 32011[U], *2-3, 2018 NY Misc LEXIS 3587, *4 [Sup Ct, Suffolk County, Aug. 14, 2018]; see *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.]; *Higgins v Goyer*, 2018 NY Slip Op 33520[U], *2, 2018 NY Misc LEXIS 9607, *3 [Sup Ct, Rensselaer County, Nov. 1, 2018]; see also *McLearn v Cowen & Co.*, 60 NY2d 686, 689 [1983]). In other words, a defendant who wishes to assert the plaintiff's lack of capacity as a defense is not limited to asserting it by way of a pre-answer motion. Rather, the defendant may instead choose to raise that defense in its answer, and either move on that ground later in a motion for summary judgment, or wait until trial to have it determined (see *Wan Li Situ v MTA Bus Co.*, 130 AD3d 807, 808 [2d Dept 2015]; *Fapco Landscaping, Inc. v Valhalla Union Free School Dist.*, 61 AD3d 922, 922-923 [2d Dept 2009]; *Houston v Trans Union Credit Info. Co.*, 154 AD2d 312, 313 [1st Dept 1989] [“It is . . . acceptable practice to move for summary judgment on grounds listed in CPLR 3211(a) when these are asserted as defenses in the answer,” rather than as bases for pre-answer motions to dismiss]; see also *Meisner v Hamilton, Fulton, Montgomery Bd. of Coop. Educ. Servs.*, 175 AD3d 1653, 1654 [3d Dept 2019]).

Consequently, to the extent that the movants seek relief pursuant to CPLR 3211(a)(3), such relief is unavailable pursuant to that statute at this juncture, but is available only via a motion for summary judgment pursuant to CPLR 3212 (see *Rich v Lefkovits*, 56 NY2d 276, 282 [1982] [“we answer in the affirmative the question . . . concerning whether defendant may move after answer for summary judgment on his jurisdictional defense”]). The court concludes that, in this case, there are no disputed issues of fact with respect to whether the plaintiff had not been appointed as the administrator of the decedent's estate as of the date that he commenced this

action, leaving only a pure issue of law for the court to consider, and the parties clearly have charted a summary judgment course. Hence, the court deems the motions pursuant to CPLR 3211(a)(3) to be motions for summary judgment dismissing the complaint insofar as asserted against each of the movants on the ground that the plaintiff lacked capacity to prosecute this action when he commenced it, without the need for providing additional notice to the parties pursuant to CPLR 3211(c) (*see Seasons Hotels v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]; *Ramos v Kalsow*, 2023 NY Slip Op 32954[U], *2-3, 2023 NY Misc LEXIS 4648, *2-3 [Sup Ct, N.Y. County, Aug. 24, 2023] [Kelley, J.]; *see also Mic Prop. & Cas. Ins. Corp. v Custom Craftsman of Brooklyn, Inc.*, 269 AD2d 333, 334 [1st Dept 2000]).

With respect to the merits of the motions, the decedent died on July 7, 2023. The plaintiff commenced this action on October 25, 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 Gullede 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 various moving defendants here have established that the plaintiff lacked capacity to commence the action on the date that he filed the summons and complaint, by noting that he was only his decedent's "proposed administrator" as of the date when he 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 ultimately obtained letters of administration from the Surrogate's Court, Westchester County, on February 26, 2025, and thus was appointed as administrator of his decedent's estate, that appointment cannot save this action from dismissal because the Surrogate's Court had yet to appoint him as administrator of the decedent's estate prior to the October 25, 2024 commencement date of this action. Hence, the complaint must still be dismissed, since the plaintiff may not make a belated motion to amend the complaint herein to allege that he 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 he commenced it, his 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 moving defendants, other than Jewish Life, 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 re 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]).

The court further notes that, although the defendant VNS Choice was served with the summons and complaint on January 7, 2025 by personal delivery of two copies thereof to the New York State Secretary of State, and the defendant Partners In Care was served with the summons and complaint on January 15, 2025 in the same fashion, neither has answered the

complaint, appeared in the action, or moved with respect to the complaint. Hence, the action remains active as to those two defendants.

Accordingly, it is,

ORDERED that the motion of the defendants Visiting Nurse Service of New York, Visiting Nurse Service of New York Home Care, Visiting Nurse Service of New York Home Care II, and VNSNY CHHA to dismiss the complaint insofar as asserted against them (MOT SEQ 001) is granted, and the complaint is dismissed insofar as asserted against them, 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 these defendants for the same relief; and it is further,

ORDERED that, on the court's own motion, the action is severed against the defendants Visiting Nurse Service of New York, Visiting Nurse Service of New York Home Care, Visiting Nurse Service of New York Home Care II, and VNSNY CHHA; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendants Visiting Nurse Service of New York, Visiting Nurse Service of New York Home Care, Visiting Nurse Service of New York Home Care II, and VNSNY CHHA; and it is further,

ORDERED that the motion of the defendant Jewish Life Homecare, Manhattan, doing business as The New Jewish Home, Manhattan, to dismiss the complaint insofar as asserted against it (MOT SEQ 002) is denied as academic in light of the plaintiff's discontinuance of the action insofar as asserted against it; and it is further,

ORDERED that the motion of the defendant St. John's Riverside Hospital to dismiss the complaint insofar as asserted against it (MOT SEQ 003) is granted, and the complaint is dismissed insofar as asserted against it, 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 that defendant for the same relief; and it is further,

ORDERED that, on the court's own motion, the action is severed against the defendant St. John's Riverside Hospital; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendant St. John's Riverside Hospital; and it is further,

ORDERED that the motion of the defendant John E. Andrus Memorial, Inc., doing business as Andrus on Hudson, to dismiss the complaint insofar as asserted against it (MOT SEQ 004) is granted, and the complaint is dismissed insofar as asserted against it, 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 that defendant for the same relief; and it is further,

ORDERED that, on the court's own motion, the action is severed against the defendant John E. Andrus Memorial, Inc., doing business as Andrus on Hudson; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendant John E. Andrus Memorial, Inc., doing business as Andrus on Hudson; and it is further,

ORDERED that the motion of the defendant Lenox Hill Hospital to dismiss the complaint insofar as asserted against it (MOT SEQ 005) is granted, and the complaint is dismissed insofar as asserted against it, 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 that defendant for the same relief; and it is further,

ORDERED that, on the court's own motion, the action is severed against the defendant Lenox Hill Hospital; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendant Lenox Hill Hospital; and it is further,

ORDERED that the motion of the defendant New York-Presbyterian Westchester to dismiss the complaint insofar as asserted against it (MOT SEQ 006) is granted, and the complaint is dismissed insofar as asserted against it, 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 that defendant for the same relief; and it is further,

ORDERED that, on the court's own motion, the action is severed against the defendant New York-Presbyterian Westchester; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendant New York-Presbyterian Westchester.

This constitutes the Decision and Order of the court.

JOHN J. KELLEY, J.S.C.

<u>6/17/2025</u>					
<u>DATE</u>					
MOTION 001:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER
MOTION 002:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER
MOTION 003:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER
MOTION 004:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER
MOTION 005:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER
MOTION 006:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER
					OTHER