SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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KEVIN W. EDWARDS as Guardian of MICHELE AIKEN,

Plaintiff,

- v -

MOUNT SINAI/ST. LUKE'S HOSPITAL,

Defendant.

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INDEX NO. 805166/2025

MOTION DATE 08/19/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for DISMISS.

In this action, inter alia, to recover damages for medical malpractice based on alleged departures from good and accepted practice, negligent hiring, training, supervision, and retention of healthcare personnel, and common-law negligence, 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 in part. The motion is granted, and the complaint is dismissed, with prejudice.

The plaintiff's sister and ward, Michelle Aiken (the decedent), died on May 3, 2023. On January 29, 2024, the plaintiff commenced a medical malpractice action against the defendant in this court under Index No. 805028/2024 (the 2024 action), naming himself as a party plaintiff, and purported to prosecute that action on behalf of the decedent as her "guardian." In that complaint, he alleged that the defendant committed medical malpractice on February 4, 2022 by improperly administering an unauthorized computed tomography scan, with contrast, to the decedent, who then was suffering from Chronic Obstructive Pulmonary Disease and diabetes, thus causing her to lapse into a coma, and remain in a vegetative state until her death on May 3, 2023. In an order dated and entered January 13, 2025, this court granted the defendant's

motion pursuant to CPLR 3211(a)(3) to dismiss the complaint in the 2024 action on the ground that, inasmuch as the plaintiff had not been duly appointed as a representative of the decedent's estate as of the date that he commenced that action, he lacked capacity to prosecute it. The dismissal was without prejudice to recommencement of a new action against the defendant for the same relief within six months of January 13, 2025, after the plaintiff had been appointed as representative of the decedent's estate.

On June 10, 2025 and, thus, within six months after January 13, 2025, the plaintiff commenced the instant action against the same defendant for the same relief that he had sought in the 2024 action. Nonetheless, the plaintiff also commenced this action in his capacity as the "guardian" of the decedent, and there is no evidence that he had even petitioned an appropriate court of competent jurisdiction for appointment as administrator of the decedent's estate, let alone that he had been appointed as the 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 "guardian" who is merely a "proposed" or "potential" 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 defendants 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 this action on the date that he filed the summons and complaint, by noting that he had not been appointed as administrator or executor of the decedent's estate as of that date. 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 an 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]). Even if the plaintiff had secured letters of administration during the pendency of this motion, the complaint must still be dismissed, since he 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 AD2d 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," this action, under most

circumstances, would be "within the ambit of CPLR 205(a)" (*Sokoloff v Schor*, 176 AD3d 120, 124, 135-136 [2d Dept 2019]). 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, 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]).

> "CPLR 205(a) is subject to three unyielding conditions. First, the new action will be permitted only if it would have been timely if commenced at the time of the prior action. Second, the new action must be commenced within six months of the termination of the prior action. Third, the prior action must be terminated for reasons other than its voluntary discontinuance, the failure to obtain personal jurisdiction over the defendant, neglect to prosecute, or a final judgment on the merits"

(*Sokoloff v Schor*, 176 AD3d 120, 127 [2d Dept 2019]).

Nonetheless, as one trial court described the issue before this court,

> "[w]here, as in this case, a plaintiff's claims are dismissed more than once, it is important to clarify whether the first condition enunciated in *Sokoloff* refers to the timeliness of the originally filed 'prior action' or the most recent dismissed action. Although repeated CPLR 205(a) applications are not per se inappropriate, this question has never been addressed directly by any state appellate authority,"

(*Armstead v New York City Health & Hosps. Corp*., 2024 NYLJ LEXIS 2494, *8 [Sup Ct, Kings County, Jul. 30, 2024]). Although the issue has been not yet been addressed by a state appellate court, it has been addressed by a federal appellate court exercising its diversity jurisdiction (*see Ray v Ray*, 22 F4th 69 [2d Cir 2021]).

In *Ray*, the United States Court of Appeals for the Second Circuit explained that CPLR 205(a) "does not permit a litigant to file an otherwise untimely 'new action' within six months of a 'prior action,' where that prior action was, itself, *only made timely* by a previous application of section 205(a)" (*Ray v Ray*, 22 F4th at 75 [emphasis added]). Were that not the correct rule, new actions could be filed "in perpetuity" based on the original filing date after multiple dismissals (*id.*, at 73). The decision of the Appellate Division, First Department, in *E & L, Inc. v Liberty Mut. Fire Ins. Co*. (227 AD2d 303, 303-304 [1st Dept 1996]), is instructive in this respect. In that action, in an initial breach of contract action, the Supreme Court had dismissed a corporate plaintiff's complaint for lack of capacity to prosecute the action, inasmuch as its board of directors had not authorized the corporation to commence the action. Although the corporation commenced such a second action within six months of the dismissal of the first action in accordance with CPLR 205(a), it had still yet to obtain its board of directors' approval therefor when it commenced the second action. The second action also was dismissed for lack of capacity. Within six months of the dismissal of the second action, the corporation finally obtained authority from its board of directors to prosecute the claim, and it commenced a third action for the same relief during that interval. The Appellate Division concluded that CPLR 205(a) permitted the commencement of the third action, but only because, in that case, the six-year limitations period applicable to the underlying claim had yet to expire when the third action was commenced, by which time the plaintiff had obtained its board of directors' authority to prosecute the claim and, thus, had obtained capacity to commence the third action.

That is not the case here. The two-year-and-six-month limitations period applicable to the plaintiff's medical malpractice cause of action (CPLR 214-a) expired on August 5, 2024 (*see* General Construction Law §§ 25-a, 30, 31, 57, 58). Hence, that limitations period *had indeed* expired before the plaintiff commenced this action on June 10, 2025. Similarly, the three-year limitations period applicable both to the negligent hiring cause of action (CPLR 214[5]; *see Calamari v Panos,* 131 AD3d 1088, 1090 [2d Dept 2015]; *Burgos v Lau*, 2025 NY Slip Op

33250[U], *2 n 2, 2025 NY Misc LEXIS 7290, *2 n 2 [Sup Ct, N.Y. County, Aug. 28, 2025] [Kelley, J.]; *Estate of Gebert v Huntington Hills Ctr. for Health*, 2024 NY Misc LEXIS 51911, *16 [Sup Ct, Suffolk County, Sep. 5, 2024]; *see also Taylor v Methodist Hosp*., 6 Misc 3d 1008[A], 2004 NY Slip Op 51750[U], *4, 2004 NY Misc LEXIS 2898, *9 [Sup Ct, Kings County, Nov. 1, 2004]) and the common-law negligence cause of action (CPLR 214[5]) expired on February 4, 2025, and, thus, the limitations period applicable to those causes of action *also had* expired before the plaintiff commenced this action on June 10, 2025.

Several trial courts, including this one, have held that the six-month extension of CPLR 205(a) is intended to allow one "full bite of the apple" only, not a chain of recommencements (*Armstead v New York City Health & Hosps. Corp*., 2024 NYLJ LEXIS 2494, *9; *see Figueroa v Jewish Home Lifecare Manhattan,* 2025 NY Slip Op 31010[U], *4-6, 2025 NY Misc LEXIS 1880, *6-8 [Sup Ct, N.Y. County, Mar. 31, 2025] [Kelley, J.]; *Tecocoatzi-Ortiz v Just Salad 600 Third, LLC*, 2023 NY Slip Op 30512[U], *8, 2023 NY Misc LEXIS 687, *11-12 [Sup Ct, N.Y. County, Feb. 17, 2023]; *Goldberg v Littauer Hosp. Assn*., 160 Misc 2d 571, 574 n 2 [Sup Ct, Albany County 1994]). "[B]oth federal and New York courts have consistently described section 205(a) as authorizing a 'second' opportunity to file a claim after a 'first' or 'initial' claim is dismissed on a non-merits final judgment" (*Ray v Ray*, 22 F4th at 73-74; *see Windward Bora, LLC v Sotomayor*, 113 F4th 236, 243 [2d Cir 2024] [CPLR 205(a) was enacted to permit a plaintiff to "gain one final chance" to litigate a claim after non-merits based dismissal]).

Hence, upon the dismissal of the 2024 action on January 13, 2025, the plaintiff was obligated to obtain letters of administration and, thus, legal capacity, before commencing the instant action, and thereupon commence this action within six months of that date, that is, by July 14, 2025 (*see* General Construction Law §§ 25-a, 30, 31). He did not obtain letters of administration by that date. If he had obtained letters of administration prior to July 14, 2025, and commenced this action on or before that date, all of his claims would have survived. As it turned out was the case, he lacked capacity on June 10, 2025, when he commenced this action,

and still lacked capacity as of July 14, 2025, when the six-month recommencement period permitted by CPLR 205(a) expired. The plaintiff only would have been permitted to interpose the his medical malpractice, negligent hiring, and common-law negligence causes of action in this new action, in his capacity as a "guardian" or "proposed administrator," had he done so on or before August 5, 2024 with respect to the medical malpractice cause of action, which was the date that the limitations period applicable to that cause of action had expired, or had he done so on or before February 4, 2025 with respect to the negligent hiring and common-law negligence causes of action, which the date that the limitation period applicable to those causes of action had expired. Since the plaintiff did not commence this new action by those deadlines, he is not entitled to second, six-month extension of time within which to interpose those causes of action, he is barred from asserting those causes of action here, and they are dismissed with prejudice.

Accordingly, it is,

ORDERED that the defendants' motion is granted, and the complaint is dismissed, with prejudice; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint, with prejudice.

This constitutes the Decision and Order of the court.

12/10/2025
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**