

**Bowman v Andrews**

2025 NY Slip Op 34920(U)

December 16, 2025

Supreme Court, New York County

Docket Number: Index No. 805279/2021

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*

-----X

MARILYN BOWMAN,

Plaintiff,

- v -

ROBERT ANDREWS, KOK-MIN KYAN, CHRISTINA  
ZOTTOLA, LENOX HILL HOSPITAL, NORTHWELL  
HEALTH, INC., HARRY KARAMITSOS, and  
ADVANTAGECARE PHYSICIANS,

Defendants.

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INDEX NO. 805279/2021

MOTION DATE 09/24/2025  
09/24/2025

MOTION SEQ. NO. 003, 004

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 82, 83, 87

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 80, 81, 84, 85, 86

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, the defendant Harry Karamitsos moves pursuant to CPLR 3211(a)(5) to dismiss the amended complaint insofar as asserted against him on the ground that the action is time-barred as to him (MOT SEQ 003). The plaintiff opposes that motion. The defendant AdvantageCare Physicians (AdvantageCare) separately moves for the same relief as to it, on the same ground (MOT SEQ 004). The plaintiff opposes that motion as well. The motions are denied, albeit without prejudice to the submission of properly noticed motions for summary judgment dismissing the complaint as against the moving defendants on the ground that the action is time-barred as to them.

Both Karamitsos and AdvantageCare seek relief pursuant to CPLR 3211(a)(5). 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). 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 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]). Prior to making his motion on July 21, 2025, Karamitsos had served an answer on February 25, 2025. Prior to making its motion on July 24, 2025, AdvantageCare had served an answer on September 26, 2024. The court notes that both of the movants have preserved the affirmative defense of the statute of limitations by asserting it in their respective answers.

Consequently, to the extent that the movants seek relief on a ground enumerated in CPLR 3211(a)(5), 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”]).

In *Molina v Mount Sinai Morningside Hosp.* (2024 NY Slip Op 32724[U], 2024 NY Misc LEXIS 3607 [Sup Ct, N.Y. County, Jul. 9, 2024] [Kelley, J.]), this court was presented with a situation virtually identical to that presented by the motions in the instant case. In that case, four of the defendants had answered the complaint, asserting the statute of limitations as an affirmative defense, but thereafter made a post-answer motion pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against them on that ground. This court explained that resort to that statute was inappropriate because the movants already had served an answer, but that it would decline to convert the motion to summary judgment motion by providing notice to the parties pursuant to CPLR 3211(c), and instead deem the motion to be one for summary judgment, since the parties appeared to have charted a summary judgment course (*see Seasons Hotels v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]). The plaintiff appealed. On appeal, the Appellate Division, First Department, reversed this court's order, explaining that, even though "the issue of whether decedent's medical records support plaintiff's contention that this matter was timely under the continuous treatment doctrine or Lavern's Law involves questions of fact" (*Molina v Mount Sinai Morningside Hosp.*, \_\_\_\_ AD3d \_\_\_\_, 2025 NY Slip Op 06815, \*1 [1st Dept, Dec. 9, 2025]),

"Supreme Court erred by treating defendants' motion as one for summary judgment without employing the correct procedure as required under CPLR 3211(c). *After determining that the Mt. Sinai defendants' CPLR 3211(a)(5) motion to dismiss on statute of limitations grounds was served after their answer and thus untimely*, the court converted the motion to one for summary judgment. However, the court never provided notice of its intention to convert, and it is undisputed that neither side requested that the matter be considered as one for summary judgment (*see Four Seasons Hotels v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]).

"Contrary to the Mt. Sinai defendants' contention, the parties did not chart a summary judgment course. Instead, in opposition, plaintiff focused on the issue of defendant's CPLR 3211 motion to dismiss, solely relying on CPLR 3211(a)(5) case law, and argued, among other things, that the motion should be denied given that discovery from defendants was outstanding"

(*id.*) (emphasis added). Applying the strictures of that appellate determination as guidance, the court concludes that the parties here did not chart a summary judgment course. In the exercise

of its discretion under CPLR 3211(c) (see 1995 CAM LLC v West Side Advisors, LLC, 221 AD3d 420, 420 [1st Dept 2023], revd other grounds \_\_\_\_ NY3d \_\_\_\_, 2025 NY Slip Op 05782 [Oct. 21, 2025]), the court declines to provide notice to the parties that it intends to convert the motions into summary judgment motions. Rather, it denies the motion as “untimely,” albeit without prejudice to the movants’ submission of properly noticed motions for summary judgment dismissing the complaint on the ground that the action is time-barred as to them, after all relevant discovery has been completed.

In light of the foregoing, it is,

ORDERED that the motion of the defendant Harry Karamitsos (MOT SEQ 003) to dismiss the complaint insofar as asserted against him as time-barred is denied, without prejudice to his submission of a properly noticed motion for summary judgment dismissing the complaint on the ground that the action is time-barred as to him; and it is further,

ORDERED that the motion of the defendant AdvantageCare Physicians (MOT SEQ 004) to dismiss the complaint insofar as asserted against it as time-barred is denied, without prejudice to its submission of a properly noticed motion for summary judgment dismissing the complaint on the ground that the action is time-barred as to it.

This constitutes the Decision and Order of the court.

JOHN J. KELLEY, J.S.C.

12/16/2025  
DATE

MOTION 003:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
MOTION 004:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE