

Nuñez v Terence Cardinal Cooke Health Care Ctr.

2025 NY Slip Op 34960(U)

December 17, 2025

Supreme Court, New York County

Docket Number: Index No. 157561/2024

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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JOSE NUÑEZ, as Proposed Administrator of the Estate of
ROBERT SEPULVEDA, Deceased,

Plaintiff,

INDEX NO. 157561/2024

MOTION DATE 09/30/2025

MOTION SEQ. NO. 002

- v -

TERENCE CARDINAL COOKE HEALTH CARE CENTER,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

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, common-law negligence, and wrongful death, and pursuant to Public Health Law § 2801-d for purported violations of statutes and regulations governing nursing homes, the defendant moves pursuant to CPLR 3211(a) to dismiss the complaint, based on the plaintiff's lack of capacity to prosecute the action (CPLR 3211[a][3]) and because the action is time-barred (CPLR 3211[a][5]). The plaintiff opposes the motion. The motion is granted on both grounds, and the complaint is dismissed, with prejudice.

The defendant rendered nursing home care and nursing and medical treatment to the decedent, Robert Sepulveda, from December 1, 2019 until his death from COVID-19 on April 11, 2020. On March 6, 2023, the plaintiff, Jose Nuñez, denominating himself as the "proposed administrator" of the decedent's estate, commenced an action against the defendant in the Supreme Court, New York County, under Index No. 152101/2023 (the 2023 action), making the same allegations as he now makes in this action. In an order dated February 21, 2024, the court (Bannon, J.) granted the defendant's motion to dismiss the complaint in the 2023 action on

the ground that the plaintiff lacked capacity to prosecute the action, inasmuch as he had not been appointed as the executor or administrator of the decedent's estate, but was merely a "proposed administrator." The dismissal was without prejudice to recommencement of new action against the defendant for the same relief under a new index number, provided that, within six months of February 21, 2024, or by August 21, 2024, he had both obtained letters of administration or letters testamentary, and thereupon commenced the new action.

The plaintiff commenced this action on August 18, 2024. Although the plaintiff thus commenced this new action against the same defendant within six months of the February 21, 2024 dismissal of the complaint in the 2023 action, he had still not been appointed as executor or administrator of the decedent's estate as of August 18, 2024, but continued to denominate himself as the "proposed" administrator of the decedent's estate. 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 actually had been so appointed.

As one state appellate court explained it,

"[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 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 on that ground, and the complaint 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 for lack of capacity, 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, 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 this 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 has described the issue before this court, where a plaintiff’s claims already have been dismissed at least once for lack of capacity,

“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 apparently has still 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 statute of limitations applicable to a common-law negligence cause of action that is not premised upon medical malpractice is three years from

the date that the cause of action accrued (CPLR 214). The limitations period applicable to a medical malpractice cause of action is two years and six months from the date that the malpractice was committed, or the last date of treatment for the condition with respect to which malpractice is claimed (CPLR 214-a). The limitations period applicable to a wrongful death cause of action is two years from the date of the decedent's death (EPTL 5-4.1). Accounting for the toll on limitations periods from March 20, 2020 through November 3, 2020 that had been established by operation of Executive Law § 29-a (L 2020, ch 23, § 2 [eff Mar. 3, 2020]), Executive Order (EO) 202.8, and EO 202.67 (see *Brash v Richards*, 195 AD3d 582 [2d Dept 2021]), the two-year limitations period applicable to the wrongful death cause of action here expired on November 3, 2022 and, thus, *had indeed* expired before the plaintiff commenced this action on August 18, 2024. The two-year-and-six-month limitations period applicable to the plaintiff's medical malpractice "survival" cause of action expired on May 3, 2023, and, hence, that limitations period also *had indeed* expired before the plaintiff commenced this action on August 18, 2024. Similarly, the three-year limitations period applicable to the common-law negligence and Public Health Law § 2801-d causes of action expired on November 3, 2023, and, thus, the limitations period applicable to those causes of action *also had* expired before the plaintiff commenced this action on August 18, 2024.

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 *Pilgrim v New York City Health & Hosps. Corp.*, 87 Misc 3d 364, 367 [Sup Ct, Kings County 2025]; *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]). Thus, in the *Pilgrim* case cited above, the court dismissed a medical malpractice cause of action against a public hospital, with prejudice, because the plaintiff had yet to obtain letters of administration when he recommenced an action that previously had been dismissed for his lack of capacity, and the one-year-and-ninety-day limitations period applicable to tort claims against public benefit corporations had expired by the time the plaintiff recommenced the action. The court did not, however, dismiss a wrongful death cause of action with prejudice, despite the plaintiff's lack of capacity, since the two-year limitations period applicable to that cause of action had not yet expired when he recommenced the action. Explicitly applying the analysis that the Second Circuit articulated in *Ray*, the *Pilgrim* court reasoned that, although "[t]here is nothing in the statute addressing multiple or successive uses of CPLR 205(a), , , the plain language indicates that CPLR 205(a) is applicable only if the claims would have been timely when the 'prior action' was commenced, and only within six months of termination of that 'prior action'" (*Pilgrim v New York City Health & Hosps. Corp.*, 87 Misc 3d at 367).

Hence, upon the dismissal of the 2023 action on February 21, 2024, 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 August 21, 2024 (see General Construction Law §§ 30, 31). He did not obtain letters of administration by that date. If he had obtained letters of administration prior to August 21, 2024, 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 August 18, 2024, when he commenced this action, and still lacked capacity as of August 21, 2024, when the six-month recommencement period permitted by CPLR 205(a) expired. The plaintiff only would have been permitted again to

interpose the his wrongful death, medical malpractice, common-law negligence, and Public Health Law § 2801-d causes of action in this new action, in his capacity as “proposed administrator,” had he done so on or before November 3, 2022 with respect to the wrongful death cause of action, which was the date that the limitations period applicable to that cause of action had expired, had he done so on or before May 3, 2023 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 November 3, 2023 with respect to the common-law negligence and Public Health Law § 2801-d causes of action, which was the date that the limitations period applicable to those causes of action had expired. Since the complaint in the 2023 action was dismissed on February 21, 2024, and the plaintiff did not and could not commence this new action by those deadlines, the fact that the plaintiff still lacked capacity by August 18, 2024, when he commenced this action, mandates the conclusion that he is not entitled to a second, six-month extension of time within which to interpose those causes of action. He thus is barred by the applicable limitations periods from asserting those causes of action in this action, and they are dismissed with prejudice.

Accordingly, it is,

ORDERED that the defendant’s motion to dismiss the complaint 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 against the defendant, with prejudice.

This constitutes the Decision and Order of the court.

JOHN J. KELLEY, J.S.C.

<u>12/17/2025</u> DATE				
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE