

Then v Doe

2025 NY Slip Op 35007(U)

December 22, 2025

Supreme Court, New York County

Docket Number: Index No. 805048/2023

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

ROSALINA THEN as Proposed Administrator of the Estate
of ASUNCION NAVARRO, deceased,

Plaintiff,

INDEX NO. 805048/2023

MOTION DATE 10/14/2025

MOTION SEQ. NO. 001

- v -

ALEXA "DOE" (name being fictitious, as a presently
unidentified nurses' aide) and NEW YORK FOUNDATION
FOR SENIOR CITIZENS HOME ATTENDANT SERVICES,
INC.,

Defendants.

**DECISION + ORDER ON
MOTION**

-----X

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, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for JUDGMENT – DEFAULT/X-MOTION DISMISS.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, common-law negligence not based on medical malpractice, and wrongful death, the plaintiff moves pursuant to CPLR 3215 for leave to enter a default judgment on the issue of liability against the defendant New York Foundation for Senior Citizens Home Attendant Services, Inc. (New York Foundation). New York Foundation opposes the motion, and cross-moves pursuant to CPLR 3215(c) and 3211(a)(3) to dismiss the complaint insofar as asserted against it on the respective grounds that the plaintiff did not take steps for leave to enter a default judgment against it within one year of its default, and that the plaintiff lacks capacity to prosecute this action. The plaintiff opposes the cross motion. The plaintiff's motion is denied. New York Foundation's cross motion is granted, and the complaint is dismissed insofar as asserted against it, without prejudice.

Where a plaintiff moves for leave to enter a default judgment, he or she must submit proof of service of the summons and complaint upon the defaulting defendants, proof of the

defendants' defaults, and proof of the facts constituting the claim or claims (see CPLR 3215[f]; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003]; *Bigio v Gooding*, 213 AD3d 480, 481 [1st Dept 2023]; *Gray v Doyle*, 170 AD3d 969, 971 [2d Dept 2019]; *Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 418 [1st Dept 2016]; *Atlantic Cas. Ins. Co. v RJNJ Services, Inc.* 89 AD3d 649, 651 [2d Dept 2011]; see also *Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 202 [2013]). A defendant is deemed to be in default when he or she fails timely to "appear" or "plead" in an action (CPLR 3215[a]; see *Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 109 AD3d 699, 700-701 [1st Dept 2013]). CPLR 3215(c), however, provides that:

"If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action."

On February 10, 2023, the plaintiff, identifying herself as the "proposed administrator" of the estate of the decedent, Asuncion Navarro, commenced this action on the decedent's behalf against New York Foundation and Alexa "Doe," the fictitious name of an unidentified nurses' aide. On February 16, 2023, the plaintiff caused two copies of the summons and complaint to be served upon New York Foundation by delivering them to the New York State Secretary of State and paying the statutory fee. Inasmuch as the copies of the summons and complaint were not personally delivered to New York Foundation, that corporation had until the first business date 30 days thereafter (see CPLR 3012[c]; General Construction Law § 25-a), or until March 20, 2023 (see General Construction Law § 20) within which to appear, answer the complaint, or move with respect thereto. New York Foundation did not answer, appear, or move by March 20, 2023 and, hence, was in default as of March 21, 2023. Consequently, the plaintiff was obligated to take steps to enter a default judgment against New York Foundation on or before March 21, 2024.

The plaintiff, however, did not move for leave to enter a default judgment against New York Foundation until September 23, 2025. “The language of CPLR 3215(c) is not discretionary, and a claim for which a default judgment is not sought within the requisite one-year period will be deemed abandoned” (*Wells Fargo Bank, N.A. v Martinez*, 181 AD3d 470, 471 [1st Dept 2020]; see *HSBC Bank USA, N.A. v Slone*, 174 AD3d 866, 867 [2d Dept 2019]). Consequently, the complaint must be dismissed insofar as asserted against New York Foundation on that ground. Nonetheless, since “a dismissal under CPLR 3215 (c) is a dismissal for a failure to prosecute” such a dismissal “consequently [is] not a dismissal on the merits or with prejudice” (*EMC Mtge. Corp. v Smith*, 18 AD3d 602, 603 [2d Dept 2005]). In this respect, the plaintiff’s “[f]ailure to take proceedings for entry of judgment may be excused, however, upon a showing of sufficient cause,” which requires her to “demonstrate that it had a reasonable excuse for the delay in taking proceedings for entry of a default judgment and that it has a potentially meritorious action” (*Aurora Loan Servs., LLC v Hiyo*, 130 AD3d 763, 764 [2d Dept 2015]; see *BAC Home Loans Servicing, L.P. v Bertram*, 171 AD3d 994, 995 [2d Dept 2019]; *HSBC Bank USA, N.A. v Hasis*, 154 AD3d 832, 833-834 [2d Dept 2017]).

The excuse proffered by the plaintiff is that, although the decedent died on February 1, 2021, and the plaintiff filed a petition for the issuance of letters of administration with the Surrogate’s Court, New York County, on September 9, 2022, the backlog of cases in the Surrogate’s Court delayed her ability to take steps to enter a default judgment against New York Foundation. She further alleged that she has a meritorious cause of action since, although the Emergency or Disaster Treatment Protection Act (Public Health Law former §§ 3080-3082; hereinafter EDTPA), immunized a significant portion of New York healthcare providers from liability for conduct engaged in during the COVID-19 emergency (March 7, 2020 through April 6, 2021), her case falls within the statutory exemption for willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm (see Public Health Law former § 3082[2]). In this respect, she alleged that the individual defendant, Alexa “Doe,” who

was employed by New York Foundation, willfully exposed the decedent to the COVID-19 virus for several hours despite her manifestation of symptoms, thus causing the decedent to contract and die from the disease two weeks later.

The court concludes that, at this juncture, the plaintiff has failed to establish a reasonable excuse for failing timely to take steps to enter a default judgment against New York Foundation. She was able to commence this action and serve New York Foundation with process in 2023. Although she lacked capacity to prosecute the action at the time she commenced it (see below), and did not obtain letters of administration until August 4, 2025, since lack of capacity is a waivable affirmative defense that must be established by a defendant (see *Bartel v Farrell Lines*, 215 AD3d 517, 526 [1st Dept 2023]; CPLR 3211[a][3], 3211[e]), and New York Foundation had not interposed an answer including that affirmative defense between March 21, 2023 and March 21, 2024, there was nothing stopping the plaintiff from making the instant motion during that interval, or at any time thereafter, while she was awaiting appointment as administrator of the decedent's estate. Moreover, without deciding the issue, the court is skeptical of the plaintiff's contention that the individual defendant willfully or recklessly exposed her decedent to the COVID-19 virus. Rather, her allegations describe simple negligence on the part of Alexa "Doe," since the latter merely failed to quarantine herself after becoming symptomatic, while continuing to assist patients, and there is no proof at this point that the decedent contracted COVID-19 from Doe, as opposed to contracting it from other residents or providers. Nonetheless, the court deems the CPLR 3215 dismissal to be without prejudice to the commencement of a new action against the same defendant on the same ground, which, under the circumstances presented here, would require the plaintiff to make a more complete showing as to both reasonable excuse and a potentially meritorious cause of action.¹

¹ Since the court is also dismissing the complaint for the plaintiff's lack of capacity, she cannot make the necessary showing here in the context of a motion to vacate this order. Rather, in any new action, she likely will have to defend against either a pre-answer motion to dismiss the complaint or a motion for summary judgment, made on the ground that she abandoned this action against New York Foundation.

As noted, the complaint must also be dismissed insofar as asserted against New York Foundation on the ground that the plaintiff lacked capacity to commence the action when she did so.

“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 New York Foundation to establish that the plaintiff lacked capacity to commence this action (see *Bartel v Farrell Lines*, 215 AD3d at 526). New York Foundation 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 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 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]). Even though 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]). 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 dismissal here thus is without prejudice to the commencement of a new action by the plaintiff against the defendants 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.

With respect to the defendant denominated as “Alexa ‘Doe,’” the plaintiff made no showing of any efforts that she made to identify that fictitious defendant, and never sought to amend the caption to substitute any entity or person as a party defendant. Consequently, the plaintiff is precluded from relying on CPLR 1024 to maintain this action against that fictitious party (see generally *Fountain v Ocean View II Assocs., L.P.*, 266 AD2d 339 [2d Dept 1999]), and the complaint must be dismissed as against her.

Accordingly, it is,

ORDERED that the plaintiff’s motion for leave to enter a default judgment on the issue of liability against the defendant New York Foundation for Senior Citizens Home Attendant Services, Inc., is denied; and it is further,

ORDERED that the cross motion of the defendant New York Foundation for Senior Citizens Home Attendant Services, Inc., to dismiss the complaint insofar as asserted against it is granted, and the complaint is dismissed insofar as asserted against the defendant New York Foundation for Senior Citizens Home Attendant Services, Inc., without prejudice; and it is further,

ORDERED that, on the court’s own motion, the action is severed against the defendant New York Foundation for Senior Citizens Home Attendant Services, Inc.; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted the defendant New York Foundation for Senior Citizens Home Attendant Services, Inc.; and it is further,

ORDERED that, on the court's own motion, the complaint is dismissed insofar as asserted against the defendant Alexa "Doe," name being fictitious, as a presently unidentified nurses' aide.

This constitutes the Decision and Order of the court.

12/22/2025

DATE



JOHN J. KELLEY, J.S.C.

MOTION:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<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
CROSS MOTION:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<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