

Rich v Canter
2026 NY Slip Op 31922(U)
May 1, 2026
Supreme Court, New York County
Docket Number: Index No. 805507/2023
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 IAS MOTION 56EFM

Justice

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ROXANNE RICH, as Proposed Administrator of the Estate of
CLAUDIA RICH, and ROXANNE RICH, Individually,

Plaintiff,

- v -

MURRAY A. CANTER, M.D., YORK ANESTHESIOLOGISTS,
PLLC, and BETH ISRAEL MEDICAL CENTER, doing business as
MOUNT SINAI BETH ISRAEL,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25,
26, 27, 28, 29, 30, 31, 32

were read on this motion to/for _____.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, lack of informed consent, and wrongful death, the defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint on the grounds that the plaintiff lacked capacity to prosecute the action when she commenced it and that the wrongful death cause of action was time-barred, or, in the alternative, pursuant to CPLR 3211(a)(3) to dismiss the complaint for lack of capacity and pursuant to CPLR 3211(a)(5) to dismiss the wrongful death cause of action as time-barred. The plaintiff opposes the motion. The motion is granted to the extent that the defendants are awarded summary judgment dismissing the wrongful death cause of action as time-barred, with prejudice, and dismissing the medical malpractice and lack of informed consent causes of action for lack of capacity, albeit without prejudice to the commencement of a new action by a duly appointed representative of the decedent's estate for the same relief, under a new index number, in accordance with CPLR 205(a). The motion is otherwise denied.

**DECISION AND ORDER ON
MOTION**

The crux of the plaintiff's claims is that the defendants committed malpractice in the course of treating her proposed decedent between July 1, 2021 and July 14, 2021, leading to her decedent's death on July 15, 2021. The plaintiff, stylizing herself as the "proposed" administrator of her decedent's estate, commenced this action on December 28, 2023, asserting causes of action sounding in medical malpractice, lack of informed consent, and wrongful death. The defendants York Anesthesiologists, PLLC, and Beth Israel Medical Center, doing business as Mount Sinai Beth Israel (together the Beth Israel defendants), served an answer to the complaint on February 8, 2024, asserting therein, as affirmative defenses, that the action was time-barred (seventh affirmative defense) and that the plaintiff lacked capacity to prosecute the action (eighth affirmative defense). On March 25, 2024, the defendant Murray A. Canter, M.D., served his answer, respectively asserting therein the same affirmative defenses as his seventh and eighth affirmative defenses.

In the first instance, those branches of the defendants' motion seeking relief pursuant to CPLR 3211(a) are denied as untimely. CPLR 3211(e) provides, in relevant part, that:

"[a]t 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) of this rule, 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) of this rule 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) [(3) or (5)] . . . 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)] issues 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]). As noted above, since, prior to making the instant motion on October 9, 2025, the Beth Israel defendants had served their answer on February 8, 2024, and Canter had served his answer on March 25, 2024, and both answers asserted the affirmative defenses of lack of capacity and statute of limitations, the defendants have preserved those affirmative defenses.

Consequently, to the extent that the defendants seek relief on a ground enumerated in CPLR 3211(a)(3) and (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 motion 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 that motion to a motion for summary judgment 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.*, 244 AD3d 489, 489-490 [1st Dept 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).

In the instant action, however, the defendants alternatively moved for summary judgment and, hence, the problems raised by the *Molina* case are not present here, and the court may proceed to decide that branch of the defendants' motion which was for summary judgment dismissing the complaint. It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (see CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (see *Flanders v Goodfellow*, 44 NY3d 57, 62-63 [2025]; *Vega v Restani Constr.*

Corp., 18 NY3d 499, 503 [2012]). In other words, “[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]; see *Haymon v Pettit*, 9 NY3d 324, 327 n [2007]). Once the movant meets that burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant’s failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *id.*; *Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

“The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even ‘arguable’” (*De Paris v Women’s Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; see *Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet the burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff’s case, but must affirmatively demonstrate the merit of his or her defense (see *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

On a motion for summary judgment dismissing a complaint as time-barred, “a defendant must establish, prima facie, that the time within which to sue has expired. Once that showing has been made,” the burden shifts to the plaintiff to raise an issue of fact as to “whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period” (*Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530, 531 [1st Dept 2020], quoting *Quinn v McCabe, Collins, McGeough & Fowler, LLP*, 138 AD3d 1085, 1085-1086 [2d Dept 2016]; see *Murray v Charap*, 150 AD3d 752 [2d Dept 2017]; *Williams v New York City Health &*

Hosps. Corp., 84 AD3d 1358 [2d Dept 2011]; *Rakusin v Miano*, 84 AD3d 1051 [2d Dept 2011]). 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). The failure to commence an action within the applicable limitations period bars the plaintiff from seeking a remedy (see *Tanges v Heidelberg N. Am., Inc.*, 93 NY2d 48, 54-55 [1999]; *Paver & Wildfoerster v Catholic High Sch. Assn*, 38 NY2d 669, 676 [1976]). It is well settled that a court may not extend a statute of limitations (see CPLR 201; *McCoy v Feinman*, 99 NY2d 295, 300-301 [2002]; CPLR 201 ["no court shall extend the time limited by law for the commencement of an action"]), even by a single day (see *Bacalokonstantis v Nichols*, 141 AD2d 482, 483-484 [2d Dept 1988]). The defendants established, prima facie, that the plaintiff's proposed decedent died on July 15, 2021, but that the plaintiff commenced this action on December 28, 2023 by filing a summons and complaint (see CPLR 304[a]). In opposition to that showing, the plaintiff failed to raise a triable issue of fact as to whether she actually commenced the action in a timely fashion, whether some other limitations period was applicable to the claim, or whether the limitations period was tolled for some reason or another. Since the date that the plaintiff commenced the action was after July 15, 2023, the date on which the limitations period applicable to the wrongful death cause of action had expired, that branch of the defendants' motion which was for summary judgment dismissing the wrongful death cause of action as time-barred must be granted.

Although the decedent died on July 15, 2021, when the plaintiff commenced this action on December 28, 2023, naming herself as a party plaintiff, she purported to prosecute this action on behalf of the decedent's estate as a "proposed administrator" of that estate. There is no evidence that the plaintiff had been appointed as the representative of the decedent's estate as of the date that this action was commenced, or even that she had petitioned an appropriate court of competent jurisdiction for appointment as the representative of the decedent's estate.

"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" or "proposed administratrix" 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 defendants have established, prima facie, 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, or for summary judgment dismissing 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 if 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 further 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 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 she commenced it, her lack of capacity did not technically render the action a “nullity,” and, hence, while the medical malpractice and lack of informed consent causes of action remain “subject to grounds for dismissal,” they nonetheless are “within the ambit of CPLR 205(a)” (*Sokoloff v Schor*, 176 AD3d 120, 124, 135-136 [2d Dept 2019]). As relevant to the instant dispute, 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]). The summary dismissal of the medical malpractice and lack of informed consent causes of action here thus is without prejudice to the commencement of a new action against the defendants for the same relief by a duly appointed representative of the decedent’s estate, 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.

Accordingly, it is

ORDERED that the defendants’ motion is granted to the extent that they are awarded summary judgment dismissing the wrongful death cause of action, with prejudice, and dismissing the medical malpractice and lack of informed consent causes of action, without prejudice to the commencement of a new action against the defendants, under new index number, that asserts those causes of action, provided that the new action is commenced by a duly appointed representative of the decedent’s estate within the time permitted by CPLR 205(a), the wrongful death cause of action is dismissed, with prejudice, and the medical malpractice and lack of informed consent causes of action are dismissed, without prejudice to the commencement of a new action against the defendants, under new index number, that asserts those causes of action, provided that the new action is commenced by a duly appointed representative of the decedent’s estate within the time permitted by CPLR 205(a).

This constitutes the Decision and Order of the court.

5/1/2026
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: