

JUSTIA

Karras v Margaret Tietz Ctr. for Nursing Care, Inc.

[*1] Karras v Margaret Tietz Ctr. for Nursing Care, Inc. 2018 NY Slip Op 51680(U) Decided on November 19, 2018 Supreme Court, Queens County Modica, J. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on November 19, 2018
Supreme Court, Queens County

Marina Karras, as Administratrix of the Estate of GEORGINA GOYANES, deceased, Plaintiff,

against

Margaret Tietz Center for Nursing Care, Inc., et al., Defendants.

712543/2017

For the Plaintiff: Parker Waichman LLP, by Cybele S. Louis, Esq., 6 Harbor Park Drive, Port Washington, New York 11050

For Defendants: Rubin Sheeley Paterniti Gonzalez Kaufman LLP, by Jenifer Turriziani, Esq., 420

Lexington Avenue (suite 1820), New York, New York 10017

Salvatore J. Modica, J.

The defendants move to re-argue the Court's prior decision denying a motion to dismiss for lack of capacity. See, *Karras v. Margaret Tietz Center for Nursing Care, Inc.*, 2018 WL 2222836 (Sup. Ct. Queens County Apr. 24, 2018). The motion to re-argue is granted, and the complaint is dismissed.

In its last order, the Court, as stated above, denied the motion to dismiss. The Court further ordered, in the same document, that the initial caption that listed the plaintiff as "MARINA KARRAS, as Proposed Administratrix of the Estate of GEORGINA GOYANES, deceased," be amended to eliminate the word "Proposed," since, the Court discerned that the initial defect had been cured." For the reasons stated below, the Court's initial legal conclusion was incorrect. An initial failure of jurisdiction cannot be remedied by a Proposed Administratrix eventually gaining Letters of Administration from the Surrogate, and thus a capacity to sue. Plaintiff lacked the legal capacity from the inception of this action, and cannot cure that fundamental defect by obtaining letters after the action was commenced or by serving an [*2]amended complaint.

The order of the Nassau County Surrogate granting Letters of Limited Administration is dated December 26, 2017. See NYSCEF Document Number 40. The summons and verified complaint are both dated September 11, 2017. See NYSCEF Document Numbers 1 & 2. Even though they were served on defendants on January 3, 2018 [see NYSCEF Document Numbers 3-5], after the Surrogate of Nassau County issued the Letters of Limited Administration, there was a failure of proper jurisdiction.

Statutory and case law make clear that the pre-existence of a qualified estate representative is essential to the commencement of a personal injury action or a wrongful death action. A plaintiff who fails to secure an appointment as the estate representative prior to the commencement of a lawsuit lacks the capacity to bring and maintain that lawsuit under the EPTL, and, as a result, such action must be dismissed pursuant to CPLR § 3211(a)(3). As the Appellate Division stated in *D'Andrea v. Long Island Rail Road Company*, 117 AD2d 10 (2nd Dept. 1986), in relevant part:

Our analysis begins with the recognition that a cause of action to recover damages for wrongful death was unknown at common law and exists, in this State, solely by reason of statute (EPTL 5-4.1 et. seq.; see, e.g., *Liff v. Schildkrout*, 49 NY2d 622, 631-632; *George v. Mt. Sinai Hosp.*, 47 NY2d 170, 176; *Ratka v. St. Francis Hosp.*, 44 NY2d 604, 610, 612; *Kilberg v. Northeast Airlines*, 9 NY2d 34, 38; *12 *Crapo v. City of Syracuse*, 183 NY 395, 399).¹ The statute, being in derogation of common law, is to be strictly construed (*Young v. Robertshaw Controls Co. Uni-Line Div.*, 104

AD2d 84, 88, appeal dismissed 64 NY2d 885, lv granted 110 AD2d 920, appeal withdrawn 66 NY2d 613). The principal statutory provision, EPTL 5-4.1 (1) reads, in pertinent part, as follows: "The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within two years after the decedent's death". For purposes of discussing the issues presented on this appeal, it must be noted that the foregoing statute contains two significant elements. First, it requires that the action be brought by a duly appointed personal representative, who is defined as a person who has received letters to administer the estate of the decedent (EPTL 1-2.13). Thus, "the existence of a qualified administrator is essential to the maintenance of the [wrongful death] action and *** the statutory right to recover for wrongful death does not even arise until an administrator has been named through the issuance of letters of administration" (Carrick v. Central Gen. Hosp., 51 NY2d 242, 249, n 2). Second, the statute prescribes a two-year period of limitation for commencement of a wrongful death action, which period runs from the date of the decedent's death, and not from the date of appointment of the personal representative (Bonilla v. Abbott, 113 AD2d 861).

D'Andrea v. Long Island R. Co., 117 AD2d 10, 11–12 (2nd Dept. 1986), aff'd sub nom. D'Andrea [*3]v. Long Island R.R. Co., 70 NY2d 683 (1987). See discussion in 17 West's McKinney's Forms Estates and Surrogate Practice § 14:2; "New action commenced by personal representative deemed timely, New York Medical Malpractice," § 9:189.

The defendants' motion to re-argue, in sum, is granted. The verified complaint is dismissed.

Georgina Goyanes died on September 14, 2016. Plaintiff's counsel may serve a new complaint, within the six month period provided and permitted by CPLR 205(a). See, Carrick v. Cent. Gen. Hosp., 51 NY2d 242 (1980). As stated by the New York Court of Appeals in Carrick:

[T]here can be no doubt that the prior dismissal of plaintiff's wrongful death cause of action was not a "final judgment upon the merits" within the meaning of CPLR 205 (subd [a]), notwithstanding that the dismissal was based upon plaintiff's failure to establish one of the essential elements of her right to bring suit. Like any condition precedent, the requirement of a qualified administrator in a wrongful death action, while essential to the maintenance of the suit, is in no way related to the merits of the underlying claim. Thus, a dismissal due to the omission of this requirement must be regarded as a tangential matter not affecting the validity of the claim

itself. It follows that 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, 51 NY2d at 252; accord, Robles v. Brooklyn Queens Nursing Home, Inc., 131 AD3d 1032 (2nd Dept. 2015) (prior medical malpractice actions brought by administrator of decedent's estate were dismissed for lack of capacity to sue, which was not a dismissal on the merits, as would entitle administrator to benefit of six-month extension for pleading cause of action based on same incident following termination of action in any other manner than by a voluntary discontinuance).

Finally, the Court vacates the portion of its prior order of April 9, 2018, entered on April 24, 2018, described above, that changed the caption. The Court restores the original caption of the case, describing the plaintiff as "MARINA KARRAS, as Proposed Administratrix of the Estate of GEORGINA GOYANES, deceased."

The foregoing constitutes the decision, order, and opinion of the Court.

Dated: November 19, 2018

Jamaica, New York

Honorable Salvatore J. Modica

J.S.C.