At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of June, 2017.

P R E S E N T:

HON. ELLEN M. SPODEK,
Justice.

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ANNETTE HAYSLETT, AS ADMINISTRATRIX OF THE ESTATE, GOODS AND CHATTEL OF WILBUR HAYSLETT, DECEASED, and ANNETTE HAYSLETT, INDIVIDUALLY,

Plaintiff,

- against -

NEW YORK METHODIST HOSPITAL, et al,

Defendants.

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DECISION AND ORDER

Index No. 508316/15

The following e-filed papers read herein: NYSCEF#:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	55 - 84
Opposing Affidavits (Affirmations)	85
Reply Affidavits (Affirmations)	
Affidavit Affirmation in Opposition	Not e-filed
Other Papers	

Upon the foregoing papers, motion sequence numbers 6, 7 and 8 are consolidated for disposition. Plaintiff Annette Hayslett, as Administratrix of the Estate, Goods, and Chattel ("the Estate") of Wilbur Hayslett, deceased, moves for an order: (1) pursuant to CPLR 5015, vacating the judgment dated January 23, 2017; (2) pursuant to CPLR

2221(d) and (e), 2001, 2004, 2005 and 104, granting her leave to reargue and/or renew this court's decision and order dated November 24, 2015 dismissing the action; and (3) pursuant to CPLR 3025, 2001, 2004, 2005 and 1015, granting leave to amend the summons and verified complaint, nunc pro tunc. Defendant New York Methodist Hospital ("Methodist Hospital") cross-moves for an order: (1) pursuant to CPLR 3211, dismissing plaintiff's amended summons and complaint dated January 30, 2017; (2) dismissing plaintiff's motion in its entirety; and (3) striking plaintiff's amended complaint. Defendant Garden of Eden Home, LLC ("Garden of Eden"), cross-moves for an order, pursuant to CPLR 3211, dismissing plaintiff's amended summons and complaint.

Facts

Plaintiff commenced this action on July 7, 2015 as the Proposed Administrator of the Estate seeking to recover damages for medical malpractice, negligence, lack of informed consent and wrongful death.

Thereafter, defendants Caton Park Rehabilitation and Nursing Center, LLC ("Caton Park"), Crown Nursing Rehabilitation Center ("Crown Nursing"), Methodist Hospital and Garden of Eden moved for dismissal on the ground that plaintiff lacked the capacity to maintain this action because she had not been appointed the Administratrix of the Estate. Oral argument was heard on November 24, 2015 before the Honorable Laura Jacobson. On that day, the court issued orders granting the motions of Garden of Eden,

Methodist Hospital and Crown Nursing; those orders were entered on January 5, 2015. The motion made by Caton Park was granted by order dated December 22, 2015; that order was entered on December 23, 2015. Copies of the orders with notice of entry were served by Garden of Eden on January 19, 2016, by Methodist Hospital on January 20, 2016 and by Crown Center on January 21, 2016; it does not appear that Caton Park served a copy of the order. Methodist Hospital obtained a signed judgment on January 23, 2017 (the January 2017 Judgment) and served a copy of it with notice of entry the same day.

On October 5, 2016, after the motions to dismiss had been served, plaintiff filed a petition seeking to be appointed the Administrator of the Estate in Kings County Surrogate's Court (*Wilbur Lorenzo Hayslett*, File # 2016-3992). The petition was granted and letters of administration were issued on January 19, 2017. On January 30, 2017, plaintiff filed an amended summons and complaint substituting the Administratrix of the Estate as plaintiff.

Plaintiff's Motion

In support of her request to reargue and/or renew, plaintiff contends that the Surrogate's Court Order of January 19, 2017 granting her letters of administration constitutes a new fact that alters this court's decision to dismiss the action.[1] She further argues that her delay in so moving is excusable because she had been seeking to be

[1] Although plaintiff refers to a single decision dated November 24, 2015, review of the court file indicates that four separate decisions were issued, as was discussed above. It appears clear that plaintiff is seeking to vacate the dismissals obtained by all defendants, and not just by the cross-moving defendants. The court will so treat her motion.

appointed the Administratrix for some time, but had difficulty establishing the identity of the distributees pursuant to Surrogate's Court Procedure Act (SCPA) § 1005, and obtaining the required Kinship Affidavit from decedent's mother, who did not execute the affidavit until September 26, 2016. The petition was then filed with the Surrogate's Court on October 5, 2016 and letters of administration were granted on January 19, 2017. Plaintiff thus contends that since the delay was outside of her control, it should be excused pursuant to CPLR 2001 and 2005. In the alternative, plaintiff argues that the dismissals should be vacated pursuant to CPLR 5015. Plaintiff also contends that she should be granted leave to amend the summons and complaint nunc pro tunc, pursuant to CPLR 3025, to reflect her appointment as Administratrix. In so arguing, plaintiff contends that defendants will not be prejudiced by the award of this relief.

The Cross Motions by Methodist Hospital and Garden of Eden

Both Methodist Hospital and Garden of Eden argue that plaintiff's request for relief should be denied and this action should be dismissed. More specifically, they argue that plaintiff is not entitled to the relief sought under any of the statutes upon which she relies and that her demands for relief are precluded by CPLR 205(a).

Reargue/Renew

"A motion for reargument must be 'based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion'" (*HSBC Bank USA v Halls*,

98 AD3d 718, 720 [2nd Dept 2012], quoting CPLR 2221[d][2]). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted" (*William P. Pahl Equip. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [internal citations omitted]; *accord Gellert & Rodner v Gem Cmty. Mgmt.*, 20 AD3d 388, 388 [2nd Dept 2005]). Further, it is well settled that motions for reargument are addressed to the sound discretion of the court which decided the prior motion (*see e.g. Matter of New York Cent. Mut. Ins. Co. v Davalos*, 39 AD3d 654, 655 [2nd Dept 2007]; *Howell Co. v S.A.F. La Sala*, 36 AD3d 653, 654 [2nd Dept 2007]). It must also be recognized that the court has authority to reconsider its prior decisions and orders "regardless of statutory time limits concerning motions to reargue" (*Itzkowitz v King Kullen Grocery Co.*, 22 AD3d 636, 638 [2nd Dept 2005], citing *Liss v Trans Auto Sys.*, 68 NY2d 15, 20 [1986]).

"A motion for leave to renew 'shall be based upon new facts not offered on the prior motion that would change the prior determination' and 'shall contain reasonable justification for the failure to present such facts on the prior motion'" (*Lindbergh v SHLO 54, LLC*, 128 AD3d 642, 644-645 [2nd Dept 2015], quoting CPLR 2221[e][2], [3]). "A motion for leave to renew must be supported by new or additional facts which, although in existence at the time of the prior motion, were not known to the party seeking renewal, and, consequently, were not made known to the court" (*Jacobs v Sabo*, 17 AD3d 321 [2nd Dept 2005], citing *Palmer v Toledo*, 266 AD2d 268 [2nd Dept 1999]).

Applying the above principles of law, while recognizing that it has authority to consider the merits of plaintiff's motion, despite the fact that it was not made within the 30 day time period set out in CPLR 2221(d)(3), the court denies that branch of plaintiff's motion seeking reargument. In so holding, it is first noted that it is well settled that a party lacks the capacity to maintain an action on behalf of a deceased person prior to obtaining letters of administration (*Ambroise v United Parcel Serv.*, 143 AD3d 929, 932 [2nd Dept 2016]; *Shelley v South Shore Healthcare*, 123 AD3d 797, 797-798 [2nd Dept 2014]; *Estate of Malik v New York City Hous. Auth.*, 287 AD2d 435, 435 [2nd Dept 2001]; *Deutsch v LoPresti*, 272 AD2d 506, 507 [2nd Dept 2000]). It is not disputed that plaintiff commenced this action as the Proposed Administrator and did not obtain letters of administration until January 19, 2017. Accordingly, in dismissing the action by orders dated November 24, 2015 and December 23, 2015, the court did not overlook or misapprehend either the law or the facts. Moreover, in view of these facts, it is clear that plaintiff's motion to reargue improperly seeks to include matters of fact not offered on the prior motion.

The court also denies that branch of plaintiff's motion seeking to renew. Inasmuch as she did not receive the letters of administration until over a year after the orders dismissing the action were issued, as discussed above, the alleged new fact relied upon was not in existence when the prior motions were made. In denying renewal, the court also finds that plaintiff does not offer a reasonable excuse for her delay in obtaining

the letters of administration. More specifically, it appears that she did not proceed expeditiously and, in fact, failed to respond to communications from her attorney for approximately five months because "she was going through personal issues."

CPLR 205(a)

As is argued by the cross-moving defendants, plaintiff's motion must also be denied as precluded by CPLR 205(a). More specifically, that statute provides, in relevant part, that:

> "If 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, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, 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.*"

(Emphasis added).

In interpreting this provision, the Court of Appeals explained that:

> "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 v Central General Hosp.*, 51 NY2d 242, 252 [1980]; *see generally George v Mt. Sinai Hospital*, 47 NY2d 170, 175 [1979]). Thus, succinctly stated, "CPLR 205(a) provides a second opportunity to the claimant who has failed the first time around because of some error pertaining neither to the claimant's willingness to prosecute in a timely fashion nor to the merits of the underlying claim" (*Wells Fargo Bank v Eitani*, 148 AD3d 193, 200 [2nd Dept 2017], *appeal dismissed* ___ NY3d ___, 2017 NY Slip Op 75380 [2017]).

The Appellate Division, First Department further explained that:

> "*Carrick* and its progeny make clear [that] the only factors necessary for invoking CPLR 205(a) are that there has been a prior timely commenced action, providing the defendants with notice of the claims against them asserted by or on behalf of the injured party, and that the dismissal was not on the merits but for reason of a defect such as the lack of a qualified administrator, all of which elements are present herein. No additional factors are mandated by *Carrick* or the authority derived therefrom (*see e.g. Mendez v Kyung Yoo*, 23 AD3d 354 [2nd Dept 2005]; *Vasquez v Wood*, 18 AD3d 645 [2nd Dept 2005])."

(*Carmenate v City of New York*, 59 AD3d 162, 163 [1st Dept 2009]). Accordingly, the benefit of the six-month extension saving provision of CPLR 205(a) grants a plaintiff an opportunity to commence a new action where a prior action is dismissed for lack of capacity to sue (*see e.g. Robles v Brooklyn-Queens Nursing Home*, 131 AD3d 1032, 1033 [2nd Dept 2015] [internal citations omitted]).

As is argued by defendants herein, after this action was dismissed against Garden

of Eden, Methodist Hospital and Crown Nursing by order dated November 24, 2015, and against Caton Park by order dated December 22, 2015, plaintiff had six months from dismissal to recommence an action, i.e., no later than June 22, 2016. Even construing plaintiff's filing of an amended summons and complaint on January 30, 2017 as an effort to commence a new action, the six-month extension afforded to her pursuant to CPLR 205(a) had long since expired. Thus, she is not entitled to the six-month extension granted pursuant to CPLR 205(a) and her attempt to interpose her claims is barred by the statute of limitations (*cf. Brown v Lutheran Med. Ctr.*, 107 AD3d 837, 838 [2nd Dept 2013]; *Brown v Huntington Med. Group*, 238 AD2d 367, 368 [2nd Dept 1997]).

In seeking leave to serve an amended summons and complaint, plaintiff cites no authority permitting the court to hold that this procedural tactic should allow her to recommence her action beyond the six-month extension afforded by CPLR 205(a). Moreover, it is well settled that motions for leave to amend pleadings pursuant to CPLR 3025(b) will be granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit (*see e.g. MBIA Ins. v Greystone & Co.*, 74 AD3d 499 [1st Dept 2010]). Here, plaintiff provides proof that she has been granted letters of administration. She fails, however, to provide any facts to support a finding that her claims of medical malpractice, negligence, lack of informed consent or wrongful death are meritorious, nor does she offer an affidavit from an expert so claiming. This also warrants denial of plaintiff's request for leave to serve

an amended complaint (*see generally Green v New York City Hous. Auth.*, 81 AD3d 890 [2nd Dept 2011]). Similarly, plaintiff offers no basis that would allow the court to grant her the relief she seeks under CPLR 2001 or CPLR 2004 in view of the above holding.

Finally, the court finds that plaintiff is similarly not entitled to any relief pursuant to CPLR 5015. Since the orders dismissing the action that plaintiff now seeks to vacate arose from motions made on notice by defendants, plaintiff's proper remedy is by way of appeal rather than a motion to vacate the judgment (*see e.g. Clarke v UPS*, 300 AD2d 614, 614-615 [2nd Dept 2002] [internal citations omitted]; *see generally Achampong v Weigelt*, 240 AD2d 247 [1st Dept 1997]). Morever, even assuming, arguendo, that the dismissals may be vacated pursuant to CPLR 5015, plaintiff's motion would still be denied on the grounds that she fails to establish a reasonable excuse for her delay in seeking relief. Furthermore, she fails to establish that she has a meritorious action, as discussed above.

Defendants' Cross Motions for Dismissal

Inasmuch as this court has denied plaintiff's motion to vacate the orders dated November 24, 2015 and December 22, 2015 dismissing the action, the cross motion by Methodist Hospital and Garden of Eden seeking dismissal are denied as moot.

Conclusion

All relief requested is denied. The action is dismissed pursuant to the previous orders of this court.

The foregoing constitutes the order, decision and judgment of this court.

E N T E R,

J. S. C.