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| <b>Rothstein v Dewitt Rehabilitation &amp; Nursing Ctr., Inc.</b>  |
| 2021 NY Slip Op 30358(U)   |
| February 5, 2021   |
| Supreme Court, New York County   |
| Docket Number: 152778/2020   |
| Judge: Margaret A. Chan  |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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ELLYN ROTHSTEIN, as Proposed Administrator of the Estate of ANITA ROTHSTEIN, Deceased,

Plaintiff,

INDEX NO. 152778/2020

MOTION DATE 9/18/20

MOTION SEQ. NO. 001

- v -

DEWITT REHABILITATION AND NURSING CENTER, INC. d/b/a UPPER EAST SIDE REHABILITATION AND NURSING CENTER and CESSENA CARE, LLC, JEWISH HOME LIFECARE, MANHATTAN d/b/a THE NEW JEWISH HOME, THE JEWISH HOME AND HOSPITAL FOR AGED and SHOREFRONT OPERATING LLC d/b/a SEAGATE REHABILITATION AND NURSING CENTER,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document numbers 30, 31. 32. 33. 34. 35. 36, 37,42, 43, 44, 45, 46, 27, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to DISMISS

Defendants Dewitt Rehabilitation and Nursing Center, Inc. d/b/a Upper East Side Rehabilitation and Nursing Center and Cassena Care LLC (together "Dewitt") for an order dismissing (i) the complaint pursuant to CPLR 3211(a)(3) for lack of capacity to sue, and (ii) plaintiff's claim for punitive damages for failure to state sufficient facts to support such damages. Defendants Jewish Home Lifecare, Manhattan d/b/a The New Jewish Home, and The Jewish Home and Hospital for Aged (hereinafter "JHLM") cross move for the same relief. Plaintiff opposes the motion and cross motion, and cross moves pursuant to CPLR 305 and 3025(b) to amend the supplemental summons and amended verified complaint to reflect the appointment of Ellyn Rothstein as the Administrator of the Estate of Anita Rothstein, deceased. Dewitt and JHLM oppose plaintiff's cross motion. For the reasons below, defendants' motion and cross motion to dismiss are denied, and plaintiff's cross motion to amend is granted

This action alleges violations of the Public Health Law, negligence and wrongful death against each of the defendants' skilled nursing home facilities. It is alleged that plaintiff's decedent, Anita Rothstein ("the decedent"), sustained

personal injuries and/or worsening injuries as well as deprivation of her rights under statutes/regulations during her residency at each nursing home. The injuries alleged include development and worsening of pressure ulcers, leg laceration, skin impairment, weight loss, infections, sepsis, severe pain and suffering, mental anguish and death.

Dewitt and JHLM argue that this action must be dismissed as it was commenced before plaintiff was appointed as the administrator of decedent's estate. It is well established that a proposed administrator lacks capacity to commence an action on behalf of a decedent (*see Carrick v Central General Hosp.*, 51 NY2d 242, 249, 250 [1980]; *Muriel v New York City Health and Hosp. Corp.*, 52 AD3d 792, 792 [2d Dept 2008][proposed administrator lacked capacity to proceed with medical malpractice action]; *Deutsch v LoPresti*, 272 AD2d 506, 507 [2d Dept 2000][parents lacked capacity to bring wrongful death action on behalf of their infant son as they had not obtained letters of administration prior to commencing the action]). At the same time, however, the courts have denied motions to dismiss for lack of capacity when the defect is cured by the appointment of plaintiff as administrator prior to the filing of a motion to dismiss (*Burwell v Yonkers Gen. Hosp.* 6 AD3d 478, 481 [2d Dept 2004]; *Plotkin v New York City Tr. Auth.*, 220 AD2d 653, 654 [2d Dept 1995]). Here, plaintiff was appointed as administrator of decedent's estate on July 14, 2020 (NYSCEF # 54), which is before Dewitt's motion to dismiss was filed on July 20, 2020 (NYSCEF # 30) and JHLM's cross motion to dismiss was filed on August 31, 2020 (NYSCEF # 42).

Accordingly, Dewitt's motion and JHLM's cross motion are denied, and the cross motion for leave to amend to substitute Ellyn Rothstein as Administrator of the Estate of Anita Rothstein is granted (*see D'Angelo v Kujawski*, 164 AD3d 648, 650 [2d Dept 2018] [affirming trial court order granting plaintiff leave to amend to substitute herself in her representative capacity in place of her individual capacity]).

Dewitt and JHLM also move to dismiss plaintiff's request for punitive damages under Public Health Law ("PHL") 2801-d. PHL 2801(d)(2) provides that punitive damages are available "where the deprivation of a right or benefit is found to have been willful or in reckless disregard of the lawful rights of a patient." Here, viewing the allegations in the complaint in favor of the plaintiff, the motion to dismiss is denied as premature because discovery may establish that punitive damages are recoverable under the statute (*see Osborne v. Irvington House-the Nicholas Rango Health Care Facility*, 19 Misc3d 1132[A][NY Sup Ct April 15, 2008][holding that PHL 2801(2)(d) would appear to [impose] a less stringent standard than that under the law governing medical malpractice]; *Tanenbaum v. Dewitt Rehabilitation and Nursing Ctr., Inc.*, 2020 WL 1929805 [Sup Ct NY Co 2020][denying motion to dismiss punitive damage claim under PHL 2801[d][2] as premature]). In addition, the cases relied on by defendants are not to the contrary

as they involved the dismissal of punitive damages claims under PHL 2801-d after discovery was conducted (*see e.g., Rey v Park View Nursing Home, Inc.*, 262 AD2d 624 [2d Dept 1999]; *Butler v. Shorefront Jewish Geriatric Ctr.*, 33 Misc. 3d 686, 932 N.Y.S.2d 672 [Kings Sup. Ct. 2011]; *Passet v. Menorah Nursing Home, Inc.*, 16 Misc.3d 1117[A], 2007 WL 2198233 [N.Y. Sup. Ct. 2007]).

In view of the above, it is

ORDERED that Dewitt’s motion and JHLM’s cross motion to dismiss are denied; and it is further

ORDERED that plaintiff’s motion to amend the supplemental summons and amended verified complaint to reflect the appointment of Ellyn Rothstein, as Administrator of the Estate of Anita Rothstein is granted; and it is further

ORDERED that the supplemental summons and second amended complaint in form annexed to the plaintiff’s cross motion (NYSCEF # 55) shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that defendants shall serve an answer or otherwise respond to the second amended complaint within 20 days of such service; and it is further

ORDERED that the amended caption shall read as follows:

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ELLYN ROTHSTEIN, as Administrator of the Estate of ANITA ROTHSTEIN, Deceased, Index No. 152778/2020

Plaintiff,

-against-

DEWITT REHABILITATION AND NURSING CENTER, INC.,  
d/b/a UPPER EAST SIDE REHABILITATION AND NURSING  
CENTER, CASSENA CARE, LLC, JEWISH HOME LIFECARE,  
MANHATTAN, d/b/a THE NEW JEWISH HOME, THE JEWISH  
HOME AND HOSPITAL FOR THE AGED and SHOREFRONT  
OPERATING, LLC d/b/a SEAGATE REHABILITATION AND  
NURSING CENTER,

Defendants.

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and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on the General Clerk and the County Clerk who are directed to mark their records to reflect the amendment; and it is further

ORDERED that such service upon the General Clerk and the County Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page and on the court's website at the address (www.nycourts.gov/supctmanh ); and it is further

ORDERED that the parties shall appear by telephone for a preliminary conference on March 17, 2021 at noon, with the call in information to be provided by the court prior to the conference.

This constitutes the decision and order of the court.

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| <u>2/5/21</u>         |  |  |
| DATE                  |  | MARGARET A. CHAN, J.S.C.  |
| CHECK ONE:            | <input type="checkbox"/> CASE DISPOSED                           | <input type="checkbox"/> NON-FINAL DISPOSITION  |
| APPLICATION:          | <input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER    |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER                            | <input type="checkbox"/> SUBMIT ORDER   |
|                       | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN              | <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE     |