SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN KELLEY** **PART** **56M**

Justice

----------X

BARBARA MARTINS, as Administrator of the Estate of DANIEL V. MARTINS, deceased,

Plaintiff,

- v -

MEMORIAL SLOAN KETTERING CANCER CENTER, MEMORIAL SLOAN KETTERING HOSPITAL, DOCTOR CRAIG MOSKOTIWITZ, DOCTOR PHILLIP CARON, DOCTOR ALLISON MOSKOWITZ,

Defendant.

----------X

INDEX NO. 805316/2019

MOTION DATE 08/09/2021

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 71, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER .

In this action to recover damages for conscious pain and suffering and wrongful death arising from medical malpractice, the defendants move pursuant to CPLR 2221(d) for leave to reargue their prior motion pursuant to CPLR 3211(a)(3) to dismiss the complaint based on the plaintiff's lack of capacity to sue (SEQ 001), which had been denied by order dated March 5, 2021. The plaintiff opposes the motion. Leave to reargue is granted and, upon reargument, that order dated March 5, 2021 is vacated, and the motion to dismiss the complaint is granted.

In initially denying the defendants' motion to dismiss the complaint, the court agreed with the defendants' contention that a non-attorney who is the representative of a decedent's estate may not appear pro se to prosecute an action on behalf of the estate, unless he or she is the sole beneficiary of the estate and the estate owes now debts to third parties. As the court explained,

> "[t]t is unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court of record in the State of New York (Judiciary Law § 478). An administrator of an

> estate, however, may appear pro se on behalf of *an estate with no creditors, providing he [or she] is the sole beneficiary of the estate*"

(*Tanami v LaSala*, 2012 NY Slip Op 33483[U], 2012 NY Misc. LEXIS 6444, *10 [Sup Ct, Bronx County, Jun. 11, 2020] [emphasis added]; *see Guest v Hansen*, 603 F3d 15, 20 [2d Cir 2010]; *Pridgen v Andresen*, 113 F3d 391, 393 [2d Cir 1997]). The reason for this rule is that the conduct of a pro se non-lawyer in the course of the litigation may adversely affect nonparties who have an interest in the entity being represented, whether that entity is a decedent's estate, a corporation, or other such entity (*see Matter of Van Patten*, 2014 NYLJ LEXIS 1160 [Surr Ct, N.Y County, Feb. 21, 2014] [applying rule to decedent's estate]). Thus, if the plaintiff were not the sole beneficiary of the estate, or there were nonparty creditors of the estate, the plaintiff would be required to be represented by counsel, and her failure to do so would mandate that her action be dismissed at the outset (*see Moran v Hurst*, 32 AD3d 909, 910 [2d Dept 2006]; *Cinderella Holding Corp. v Calvert Ins. Co.*, 265 AD2d 444, 444 [2d Dept 1999]; *Ernest & Maryanna Jeremias Family Partnership, L.P v Sadykov*, 48 Misc 3d 8, 13 [App Term, 2d Dept, 2d, 11th, and 13th Jud Dists 2015]).

The court nonetheless held that, since lack of capacity to sue is an affirmative defense, the defendants had the burden showing that the plaintiff was not the sole beneficiary of the estate or that the estate was indebted to third parties, either of which would have vitiated the plaintiff's capacity to sue without being represented by an attorney. The court concluded that the defendants failed to satisfy that burden, and held that they adduced no evidence that the plaintiff was not the sole beneficiary of the estate or that the estate was indebted to third parties.

The defendants now move for leave to reargue their motion to dismiss the complaint based on the plaintiff's lack of capacity, contending that the court had overlooked the plaintiff's bills of particulars that had been included in their initial submissions, in which the plaintiff had conceded that her decedent was survived not only by herself, but by three adult children,

Thomas Martins of New Milford, Connecticut, Steve Martins of Texas, and Andrea Martins of Nanuet, New York.

"Motions for reargument are addressed to the sound discretion of the court which decided the original motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision" (*Ito v 324 E. 9th St. Corp.*, 49 AD3d 816, 817 [2d Dept 2008]; *see* CPLR 2221[d][2]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]). The court overlooked the fact that the defendants had submitted evidence establishing that the plaintiff conceded that she was not the sole beneficiary of her decedent's estate. The Estates Powers and Trusts Law provides that

> "The property of a decedent not disposed of by will shall be distributed as provided in this section. In computing said distribution, debts, administration expenses and reasonable funeral expenses shall be deducted but all estate taxes shall be disregarded, except that nothing contained herein relieves a distributee from contributing to all such taxes the amounts apportioned against him or her under 2-1.8. Distribution shall then be as follows:
>
> "If a decedent is survived by:
>
> "A spouse *and issue*, fifty thousand dollars and one-half of the residue to the spouse, *and the balance thereof to the issue by representation*."

(EPTL 4-1.1[a][1] [emphasis added]). Consequently, the decedent's three adult children are, by operation of law, beneficiaries of the decedent's estate, regardless of whether the plaintiff claims that they are not actually beneficiaries, but merely "next of kin."

Since the plaintiff was not the only beneficiary or distributee of the decedent's estate at the time that she commenced this action, the plaintiff, as a non-attorney, lacked capacity to prosecute this action pro se as the representative of the estate, and the action must be dismissed as a nullity (*see Pridgen v Andresen*, 113 F3d at 393).

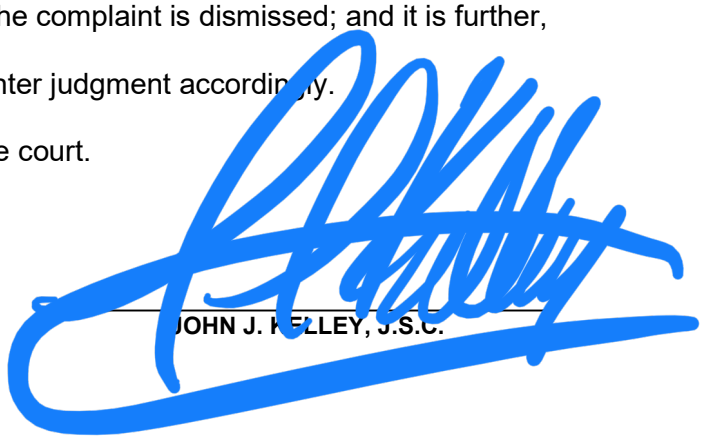
Accordingly, it is

ORDERED that the defendants' motion for leave to reargue is granted and, upon reargument, the order dated March 5, 2021, as uploaded to the New York State Court Electronic

Filing system under docket entry 49, is vacated, the defendants' motion pursuant to CPLR 3211(a)(3) to dismiss the complaint is granted, and the complaint is dismissed; and it is further,

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision and Order of the court.



12/9/2021
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**