

**Clarke v New York City Health & Hosps.**

2022 NY Slip Op 33110(U)

September 13, 2022

Supreme Court, Kings County

Docket Number: Index No. 509348/2017

Judge: Bernard J. Graham

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

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MARIA LEWELL CLARKE and HEGEL JEAN As  
Temporary Co-Administrators of the Estate of  
WENDY VAUGHNS-LEWELL, Deceased and on  
on behalf of next of kin

Index No.: 509348/2017

Plaintiff(s),

**DECISION/ORDER**

-against-

NEW YORK CITY HEALTH AND HOSPITALS

Hon. Bernard J. Graham  
Supreme Court Justice

Defendants  
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**Recitation, as required by CPLR 2219(a), of the papers considered on the review of this Order to Show Cause to:** dismiss the plaintiff's complaint with prejudice for willful failure to obtain updated letters testamentary; preclude the plaintiff at the time of trial from offering evidence related to claims that the CT angiogram performed on February 14, 2016 was misread.

<b>Papers</b>	<b>Numbered</b>
Notice of Motion and Affidavits Annexed.....	
Order to Show cause and Affidavits annexed.....	1-2
Answering Affidavits.....	3
Replying Affidavits.....	
Exhibits.....	
Other: ..... (memo).....	

**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

Counsel for the defendant, New York City Health and Hospitals, has moved by Order to Show Cause for an Order to dismiss plaintiff's complaint due to an alleged willful failure of the plaintiff to renew and update the Letters of Administration which would have had the effect of the representatives having the necessary authority to prosecute this matter. Defendant has further moved for an Order to preclude the plaintiffs Maria Lewell Clarke and Hegel Jean, as Temporary Co-Administrators of the Estate of Wendy Vaughns-Lewell, deceased, from offering evidence at the time of trial pertaining to allegations that the CT angiogram performed on February 14, 2016 was misread, as the claim is alleged to have been abandoned.

Opposition to the relief sought herein by the defendant to dismiss the plaintiff's complaint has been offered by the plaintiff's counsel, who argues that the failure to renew the temporary Letters of Administration was not willful but rather was an oversight and a misunderstanding within counsel's office. Plaintiff's further argue that they have not waived their right to offer evidence pertaining to claims that the CT angiogram performed on February 14, 2016 was misread.

Background:

A Notice of Claim was filed on behalf of the plaintiffs on February 23, 2016. Temporary Letters of Administration were issued to Maria Lewell Clarke and Hegel Jean, as Temporary Co-Administrators of the Estate of Wendy Vaughns-Lewell, on May 9, 2017 by the Kings County Surrogate's Court. On May 10, 2017, this action was commenced by the filing of a summons and complaint with the Kings County Clerk's office. The complaint included three causes of action: (1) medical malpractice against Woodhull Medical and Mental Health Center<sup>1</sup>; (2) wrongful death and (3) lack of informed consent. Issue was joined on about May 18, 2017, by the filing of a verified answer on behalf of the defendant.

The deposition of co-plaintiff Maria Lewell-Clarke was held on July 18, 2018 and the EBT of co-plaintiff Hegel Jean was conducted on August 3, 2018. Non-party witnesses, Dr. Joshua Dyn was deposed on November 16, 2018 and Neil Auguste, P.A. on April 18, 2019.

A Note of Issue with Certificate of Readiness was filed on behalf of the plaintiff on January 15, 2019.

The depositions of PA Neil Auguste (Physician's Assistant in the Emergency Department of Woodhull Hospital) and Dr. Fausto Gonzalez (Attending Physician in the

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<sup>1</sup> Woodhull Medical and Mental Health Center are operated by the New York City Health and Hospitals Corporation, the named defendant herein.

Woodhull Emergency Department) were held on April 18 and May 28, 2019, respectively.

Following conferences in the Med. Mal. Trial Ready Part, this matter was assigned to Judge Hon. Dawn Jimenez-Salta on September 23, 2021 for a settlement/trial scheduling conference. When this case was not resolved, a trial was scheduled for April 18, 2022. However, as a result of the transfer of Judge Jimenez-Salta to Nassau County Supreme Court, this matter was reassigned to the undersigned for trial. This Court was informed prior to the commencement of trial that the Temporary Letters of Administration had lapsed and were not renewed, and marked the case off the trial calendar.<sup>2</sup> Counsel for the defendant thereafter filed the within Order to Show Cause.

Parties' Contentions:

Here, the Court is presented with two issues: (1) whether plaintiff's prosecution of this matter during the period of time that plaintiff's temporary Letters of Administration had expired was improper and prejudicial to the defendants, and (2) whether plaintiff abandoned the claim that the CT angiogram was misread by not specifically addressing it in their opposition to defendant's motion for summary judgment.

In support of defendant's motion, counsel argues that plaintiff's initial temporary Letters of Administration expired on November 9, 2017, yet plaintiff, despite lacking legal authority, continued to prosecute the case. In addition, defendant's counsel asserts that plaintiff abandoned the claim that the CT angiogram was misread because plaintiff did not submit an affirmation from a radiologist in their opposition to defendant's motion for summary judgment to counter the assertions made by defendant's expert that the CT angiogram was accurate in all respects.

Plaintiff, by their attorneys, opposes defendant's motion, arguing that the expiration of the temporary Letters of Administration was an oversight due to a

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<sup>2</sup> Counsel for the plaintiff did petition the Surrogate's Court for updated Temporary Letters of Administration, which were then issued by that Court.

misunderstanding with the “estates department” in plaintiff’s counsel’s office. Plaintiff’s counsel further argues that they did not misrepresent the status of the Letters of Administration and weren’t cognizant of the fact that the temporary Letters of Administration had expired. As to the issue regarding the CT angiogram, plaintiff’s counsel asserts that the failure to interpret the CT angiogram is not a separate cause of action but instead was included in the allegations of malpractice. Plaintiff argues that the Court never dismissed the allegations regarding the CT angiogram and defendant, furthermore, had offered radiological experts for the purpose of opposing plaintiff’s contention regarding whether a pulmonary embolism should have been noted on the CT angiogram.

Discussion:

“A party may move for judgment dismissing one or more causes of action asserted against him on the ground that...the party asserting the cause of action has not legal capacity to sue.” CPLR §3211(a)(3). Legal proceedings for or against an estate may only be prosecuted by or against a personal representative of the estate, in a representative capacity. *See* EPTL 11-3.1, 11-4.1. “A personal representative is a person who has received letters to administer the estate of a decedent.” Greene v Kevin D. Greene, LLC, 188 AD3d 1012, 1014 [2d Dept 2020]; EPTL 1-2.13; Rodriguez v River Val. Care Ctr., Inc., 175 AD3d 432 [1<sup>st</sup> Dept 2019].

Here, plaintiff initially obtained temporary Letters of Administration on May 9, 2017, which then expired on November 9, 2017. This action was commenced by the filing of a Summons and Complaint on May 10, 2017, which was during the period the temporary Letters of Administration were in effect, and therefore plaintiff did have legal capacity to sue when the action was commenced. Temporary Letters of Administration for Maria Lewell Clarke and Hegel Jean were issued three times and were in effect for the following periods of time: May 9, 2017 – November 9, 2017; May 1, 2019 – November 1, 2019; and April 8, 2022 – October 8, 2022. Plaintiff’s counsel claims that

the Letters of Administration had expired twice due to a misunderstanding with counsel's "estates department," but was ultimately remedied upon application to the Surrogate's Court, which resulted in the reissuance of temporary Letters of Administration to the same representative plaintiffs. Although defendant refers to the provision in CPLR §1021, which states that "[if] substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made...", defendant never objected or moved to dismiss for failure to substitute during the aforementioned time periods. In addition, the defendant has not shown that they have been prejudiced by conducting discovery and engaging in settlement discussions with plaintiff's counsel, and plaintiff has shown that the action has potential merit. White v Diallo, 156 AD3d 664 [2d Dept 2017]; Borruso v New York Methodist Hosp., 84 AD3d 1293 [2d Dept 2011]; Reed v Grossi, 59 AD3d 509 [2d Dept 2009]. "Courts have shown relative liberality with respect to timeliness" of a substitution "because of 'the strong public policy' favoring disposition of cases on the merits." Peters v City of N.Y. Health & Hosps. Corp., 48 AD3d 329 [1<sup>st</sup> Dept 2008]; *see also* Tokar v Weissberg, 163 AD3d 1031 [2d Dept 2018]; White v Diallo, 156 AD3d 664 [2d Dept 2017]; Reed v Grossi, 59 AD3d 509 [2d Dept 2009]. Accordingly, the portion of defendant's motion to dismiss, pursuant to CPLR §3211(a)(3), is denied.

With respect to the portion of defendant's motion seeking to preclude plaintiff from offering evidence at trial related to the CT angiogram, this Court finds that plaintiff's allegation regarding the CT angiogram does not raise a new theory of liability, but merely amplifies and elaborates upon the facts and theories that were already alleged in the Complaint and Bill of Particulars. Cordero v 1278 Mini Mkt. Inc., 193 AD3d 479 [1<sup>st</sup> Dept 2021]. The allegations in plaintiff's pleadings regarding "failing to timely obtain and appropriately have and report the results of the tests ordered, including but not limited to pathology and blood and radiology studies"<sup>3</sup> would logically include the allegation that defendant failed to properly interpret the CT angiogram, and defendants

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<sup>3</sup> See Verified Bill of Particulars, NYSEF Doc #48, para. 3.



cannot reasonably claim prejudice or surprise. Schwartzberg v Huntington Hosp., 163 AD3d 736 [2d Dept 2018]; Alarcon v UCAN White Plains Hous. Dev. Fund Corp., 100 AD3d 431 [1<sup>st</sup> Dept 2012]. Defendant cites cases where plaintiffs failed to oppose causes of action such as lack of informed consent in their opposition, which would warrant their dismissal. *See* Elstein v Hammer, 192 AD3d 1075 [2d Dept 2021]; Wright v Morning Star Ambulette Services, Inc., 170 AD3d 1249 [2d Dept 2019]; Spiegel v Beth Israel Medical Center-Kings Highway Div., 149 AD3d 1127 [2d Dept 2017]; Rauci v Shinbrot, 127 AD3d 839 [2d Dept 2015]; Bhim v Dourmashkin, 123 AD3d 862 [2d Dept 2014]. However, the claim that defendant misread the CT angiogram is a specific allegation that is part of plaintiff's cause of action for medical malpractice, which was supported by an expert affirmation in their opposition to defendant's motion for summary judgment, not a separate cause of action (like lack of informed consent) that was completely unopposed. Further, the decision issued by Hon. Marsha Steinhardt on November 13, 2019, found that "the parties clearly present immense conflicting medical expert opinions as to the appropriate care/treatment rendered to Plaintiff-decedent," without specifying any claims or causes of action that were dismissed due to lack of opposition. As discussed above, defendant's claim that the argument regarding the CT angiogram was "improperly offered for the first time mere weeks before trial" is without merit, as it does not advance a theory outside of what is pled in the Bill of Particulars. Defendant fails to establish that they are prejudiced by this allegedly "new theory." Not only did defendant's expert address the interpretation of the CT angiogram in their summary judgment motion, but defendant also responded to plaintiff's CPLR §3101(d) disclosure within one day with two expert disclosures relating to Board-Certified Diagnostic Radiologists who would testify that there was no departure in the interpretation of the CT angiogram. Accordingly, the portion of defendant's motion to preclude plaintiff from offering evidence at trial regarding the interpretation of the CT angiogram is denied.

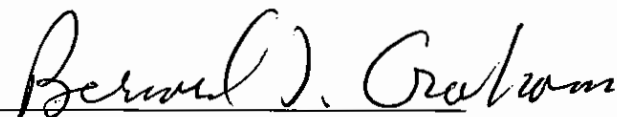
Conclusion:

Defendant's motion to dismiss plaintiff's complaint, pursuant to CPLR §3211(a)(3), and to preclude plaintiff from offering evidence at trial that the defendant misread the CT angiogram, is denied.

This shall constitute the decision and order of this Court.

Dated: September <sup>13</sup>, 2022  
Brooklyn, NY

ENTER

  
Hon. Bernard J. Graham, Justice  
Supreme Court, Kings County

HON. BERNARD J. GRAHAM