

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY

Part 4

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A.B.G., an infant by her mother,
Claudine Palmer ,
Claudine Palmer, Individually, and
Claudine Palmer , as Proposed Administratrix
of the Estate of A.B.G., deceased
Plaintiffs

Decision and Order
Index No. 27880/2016e

-against-

Mary J. Crocco, Jeannelle Chaperon,
Armando Bernal, Jacqueline Biggs,
Union Community Health Center, Inc.,
St. Barnabas Hospital, and St. Barnabas
OB/GYN , P.C.,
Defendants

Howard H. Sherman
J.S.C.

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The following papers numbered 1-5 read on the motions [Seq. 001-002] to dismiss pursuant to
CPLR 3211[a][3] , submitted April 26, 2017

	PAPERS NUMBERED	
Notice of Motion, Affirmation , Exhibits A-B [Bernal, et alia.]	1	
Notice of Motion , Affirmation , Exhibits 1-3 [Union /St.Barnabas]	2	
Affirmation in Opposition to Motions ,Exhibits A,B	3	
Affirmation in Reply , Exhibit A [Bernal, et. alia.]	4	
Supplemental Affirmation , Exhibits 1-3 [Union/St. Barnabas]	5	

Motions of 1) Defendants Armando Bernal, D.O. s/h/a Armando Bernal , Jacqueline Biggs, CNM d/b/a Jacquaine Biggs, Jeannelle Chaperon, CNM s/h/a Jeannelle Chaperon, Mary J. Crocco, CNM d/b/a Mary J. Crocco, and St. Barnabas OB/GYN, P.C., to dismiss the complaint pursuant to CPLR 3211 [a][3], and 2) Defendants Union Community Health Center , Inc., and St. Barnabas Hospital for leave to amend its answer to assert the

affirmative defense of lack of capacity, and upon the granting of such relief, an order dismissing the complaint, are consolidated for purposes of disposition.

This action was commenced in November 2016, alleging medical malpractice in the prenatal diagnosis and treatment of Claudine Palmer (Palmer) resulting in injuries to and the death of the infant plaintiff. The second cause of action alleges lack of informed consent with respect to that prenatal care, and the third through fifth, claims in negligent hiring/supervision of the medical personnel, and the sixth cause of action asserts Palmer's claim for loss of services in connection with the infant plaintiff's death. The seventh cause of action alleges Palmer's claim of permanent emotional harm devolving from the loss of the infant plaintiff (see, *Broadnax v. Gonzalez*, 2 N.Y.3d 148, 777 N.Y.S.2d 416, 809 N.E.2d 645 [2004]).

Issue was joined in December 2016 with service of the answer of Union Community Health Center, Inc. and St. Barnabas Hospital. . St. Barnabas OB/GYN, P.C., and the individual defendants interposed their answers in the following month. As pertinent here, each of these five answers asserted as a defense the lack of legal capacity to commence the action.

Defendants contend that the complaint must be dismissed because it was commenced by an individual lacking the necessary capacity to do so as Palmer has not been appointed as the Administrator of the estate of the deceased plaintiff (see, EPTL § 5-4.1), as reflected in the caption in which she is denominated as the "proposed

administratrix" of the estate.

In opposition, plaintiffs argue that there is no basis for the dismissal of the claims asserted by Palmer in her individual capacity.

Discussion and Conclusions

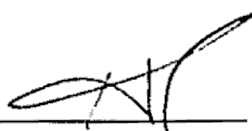
Upon consideration of the papers on submission, the court finds that Defendants Union Community Health Center, Inc., and St. Barnabas Hospital have demonstrated entitlement to the amendment sought, as it is well settled that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay (see, CPLR 3025 [b]).

On consideration of the motions pursuant to CPLR 3211[a][3], it is clear that Palmer as "proposed" administratrix lacks the legal capacity to bring those claims asserted on behalf of the deceased infant, as she has not been issued letters of administration. It is settled that "[a] personal representative who has received letters of administration of the estate of a decedent is the only party who is authorized to bring a survival action for personal injuries sustained by the decedent and a wrongful death action to recover the damages sustained by the decedent's distributees on account of his or her death" (Mingone v. State, 100 A.D.2d 897, 474 N.Y.S.2d 557 [2d Dept 1984] citing EPTL 1-2.13, 5-4.1, subd. 1; 11-3.2, subd. [b]).

Accordingly, the motions are granted to the extent of dismissing the negligence causes of action asserted on behalf of the deceased plaintiff , as well as the claim for the infant's wrongful death, and the attendant derivative claim .

Settle Order in accordance with the above.

Dated: July 31, 2017


Howard H. Sherman