

Short Form Order

Supreme Court of the County of Suffolk
State of New York - Part XL

PRESENT:

HON. JAMES HUDSON

Acting Justice of the Supreme Court

X-----X

ROSE D'ANGELO,

Plaintiff,

-against-

MARK C. KUJAWSKI, THERESA D. PHIN, and
KUJAWSKI & KUJAWSKI

Defendant(s).

X-----X

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MOT. SEQ. NOS.:001-MD

002-MD

003-MG

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Upon the following E-filed documents numbered 2to 22 on this Motion/Order to Show Cause for Dismissal (001); for Dismissal (002); and Cross-Motion to Amend the Complaint 23-29 (003-Not E-filed);(and after hearing counsel in support and opposed to the motion), it is

ORDERED, that pursuant to CPLR § 2001, the Court will consider the mislabeled cross-motion of Plaintiff as properly titled and filed; and it is further

ORDERED, that the Clerk of the Court is directed to mark Plaintiff's cross-motion as motion sequence 003 and file same; and it is further

ORDERED, that Plaintiff's cross-motion (003) to amend its complaint is granted; and it is further

ORDERED, that Defendants motions (motion sequences 001 & 002) to dismiss Plaintiff's complaint pursuant to CPLR Rule 3211 are denied as academic; and it is further

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ORDERED, that Defendants shall have thirty (30) days from the date of receipt of this decision and Order with notice of entry within which to answer; and it is further

ORDERED, that Plaintiff shall serve a copy of this decision and Order with notice of entry on the attorneys for the parties and upon the clerk of this court.

In this action for professional malpractice, Defendants move to dismiss pursuant to CPLR Rule 3211(a)(4). Plaintiff opposes the motion and cross-moves to amend her Complaint. Defendants oppose and reply.

Plaintiff retained Defendant attorneys to bring an action on behalf of her deceased son. Plaintiff signed the retainer agreement as "Rose D'Angelo, as Proposed Administrator [sic.] of the Estate of Nicholas A. D'Angelo." Subsequent to the retainer, Plaintiff received her appointment as Administratrix to her son's Estate. On December 15, 2016, Plaintiff filed the instant action personally, in her own name. Defendants now move to dismiss pursuant to CPLR Rule 3211(a)(4) on the basis that Plaintiff has no privity with Defendants. Defendants argue that Plaintiff retained them as proposed Administratrix of her late son's estate and subsequently received the appointment and therefore her privity with Defendants rests solely in that capacity.

Plaintiff now cross-moves to amend her complaint so as to name her as Plaintiff in her capacity as Administratrix. Defendants oppose the application, seeking the remedy of dismissal. Generally, leave to amend a pleading should be freely granted in the absence of prejudice or surprise resulting directly from the delay in seeking leave (*see, Aurora loan Services, LLC v DiMura*, 104 A.D.3d 796 [2nd Dept 2013]; *Rosicki, Rosicki & Assoc., P.C. v Cochems*, 59 AD3d 512, 873 [2nd Dept 2009]; *Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15[2nd Dept 2009]; *Bennett v Long Is. Jewish Med. Ctr.*, 51 AD3d 959 [2nd Dept 2008]; *Lucido v Mancuso*, 49 AD3d 220 [2nd Dept 2008]). Furthermore, a court should not examine the merits or legal sufficiency of the proposed amendment unless it is palpably insufficient or patently devoid of merit on its face (*see, Rosicki, Rosicki & Assoc., P.C. v Cochems, supra* at 514; *Lucido v Mancuso, supra* at 227).

Here, Defendants had actual knowledge that Plaintiff was the legal representative for her late son's estate, even before service of the original complaint, as they were her former attorneys. It cannot be said that Defendants would be surprised by the amendment. The consideration, however, of Defendants' suffering prejudice transgresses the possibility of surprise. The analysis requires that the Court also consider what disadvantage Defendants would suffer from procedural standpoint. Here, the Court finds guidance from the Court of Appeals in the case of *Caffaro v Trayna*, 35 NY2d 245 (1974). In that case, the Court

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upheld a substitution of a party on analogous facts. In *Caffaro, supra* the case involved the substitution of the Executrix for an individual in a wrongful death suit and an amendment of the Complaint to include the new cause of action. In that case, the Court reversed the denial of the amendment, finding that the original action had put the defendants on notice. *Caffaro, supra*, dealt with the substitution of a party for the Plaintiff and the addition of a new cause of action. Here, this Court only considers the question of substitution. For these reasons, this Court finds that the amendment is permissible. The caption shall now read as follows:

X-----X
ROSE D'ANGELO, as Administratrix of the
Estate of NICHOLAS A. D'ANGELO,
Plaintiff,

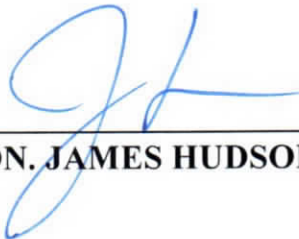
-against-

MARK C. KUJAWSKI, THERESA D. PHIN and
KUJAWSKI & KUJAWSKI,
Defendants.
X-----X

The remaining motions of Defendants are denied as academic.

The foregoing constitutes the decision and Order of the Court.

**DATED: JULY 13, 2017
RIVERHEAD, NY**



HON. JAMES HUDSON, A.J.S.C.