

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION**

Carmen Mercado, deceased, by and through her )  
independent administrator, Lizette Fernandez, )

Plaintiff, )

v. )

No. 21 L 6263

Glen Elston Nursing and Rehabilitation )  
Centers, Inc. and Continental Nursing and )  
Rehabilitation Center, LLC Rehab., )

Defendants. )

**MEMORANDUM OPINION AND ORDER**

Causes of action brought pursuant to the Survival Act permit a decedent's representative to maintain statutory or common law claims that accrued before the decedent's death. The date of accrual for a Survival Act cause of action is the date of the decedent's death. Here, the plaintiff timely filed her complaint based on the date of the decedent's death. Since the complaint was timely filed, the defendant's motion to dismiss must be denied.

**Facts**

On June 6, 2019, Glen Elston Nursing and Rehabilitation Centers, Inc. ("Glen Elston") transferred Carmen Mercado to Continental Nursing and Rehabilitation Center, LLC, Rehab, ("Continental"). Mercado had intermittently resided at Glen Elston during the previous six years until her transfer. Mercado suffered from kidney failure and dysfunction and was prone to risks of infections. On June 18, 2019, Mercado died while a resident at Continental.

On June 17, 2021, Lizette Fernandez, as Mercado's independent administrator, filed her complaint at law. The complaint alleges that during Mercado's residency, both facilities failed to provide Mercado with necessary care and services and their intentional or negligent acts or omissions injured Mercado. Notably, Fernandez alleges Mercado's injuries included "disability and disfigurement." Count one is pleaded in negligence against Glen Elston while count two is brought under the Nursing Home Care Act against Continental. Fernandez claims the defendants negligently failed to: (1)

provide Mercado with necessary services to maintain her physical, mental, and psychosocial well-being in accordance with a comprehensive assessment and plan of care; (2) supervise and report on her condition; (3) follow precaution and transfer protocols; and (4) train staff in the use of lifts for patients and procedures for catheters.

On October 6, 2021, Glen Elston filed a motion to dismiss count one. The parties fully briefed the matter.

### Analysis

Glen Elston brings its motion to dismiss pursuant to the Code of Civil Procedure. 735 ILCS 5/2-619(5). A section 2-619 motion to dismiss authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). A court considering a section 2-619 motion must construe the pleadings and supporting documents in a light most favorable to the nonmoving party. *See Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. *See Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324 (1995). As has been stated: “The purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation.” *Czarobski*, 227 Ill. 2d at 369.

Section 2-619(a)(5) of the code provides that a defendant is entitled to a dismissal if the “action was not commenced within the time limited by law.” 735 ILCS 5/2-619(a)(5). Glen Elston’s central argument is that Fernandez did not timely file her complaint. Glen Elston explains that its last contact with Mercado occurred on June 6, 2019; consequently, the two-year statute of limitations had passed before Fernandez filed her complaint on June 17, 2021. *See* 735 ILCS 13/202. In response, Fernandez asserts that Mercado was disabled before her death and, therefore, the timeliness of her claims are controlled by Code of Civil Procedure sections 13-211 and 13-209 that afford her two years from the date of Mercado’s death to bring suit.

Section 13-211 provides that a person under a legal disability has two years to bring suit after the disability has been removed. 735 ILCS 5/13-211(a). A “person under legal disability” means,

a person 18 years or older who (a) because of mental deterioration or physical incapacity is not fully able to manage his or her person or estate, or (b) is a person with mental illness or is a person with developmental disabilities and who because of his or her mental

illness or developmental disability is not fully able to manage his or her person or estate. . . .

5 ILCS 70/1.06. For its part, section 13-209 provides in relevant part that,

[i]f a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives: (1) an action may be commenced by his or her representative before the expiration of that time, or within one year from his or her death whichever date is the later.

735 ILCS 5/13-209(a)(1).

If Mercado had been disabled before her death, Fernandez would have had two years to file suit based on the date Mercado's disability was removed, which would have been her date of death. *See Zayed v. Clark Manor Convalescent Ctr., Inc.*, 2019 IL App (1st) 181552, ¶ 28. Fernandez, however, has not pleaded that Mercado suffered a legal disability. Rather, the complaint alleges only that Mercado "sustained substantial personal and pecuniary injuries . . . including, but not limited to, disability and disfigurement." Merely classifying Mercado's condition as a disability does not give it legal significance. Rather, a person under legal disability is defined as a person who has some disability or incapacity preventing her from being "fully able to manage his or her person or estate." *Parks v. Kownacki*, 193 Ill. 2d 164, 178 (2000). Although a person need not have been adjudicated as disabled to have a legal disability, she must have some argument that her disability is one contemplated by the legislature. *Id.* Here, Fernandez suggests without evidence that Mercado's kidney failure and other health problems created a legal disability. Importantly, Fernandez does not allege or argue that Mercado had any difficulty managing her person or her estate. Absent such an allegation or other proof of legal disability, Fernandez's mere allegation is insufficient for this court to conclude that Mercado was legally disabled.

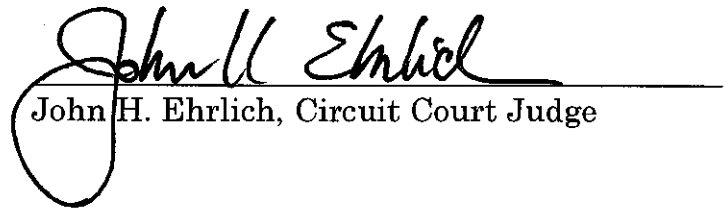
Despite Mercado not having a legal disability, Fernandez has brought a survival claim against Glen Elston under a negligence theory. Glen Elston is correct that personal injury actions are subject to a two-year statute of limitations, 735 ILCS 5/13-202; however a survival action allows for recovery of damages for injury sustained by the deceased up to the time of death. *Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204, ¶ 34 (citing *Wyness v. Armstrong World Indus., Inc.*, 131 Ill. 2d 403, 410-11 (1989)). Although the Survival Act does not, itself, create a cause of action, the statute allows a decedent's representative to maintain statutory or common law actions that had previously accrued before the decedent's death. *Id.* (citing *National Bank*

of *Bloomington v. Norfolk & W. R. Co.*, 73 Ill. 2d 160, 172 (1978)). The statute of limitations for survival actions is found in section 13-209 and is, therefore, predicated on the decedent's death. See *Castello v. Kalis*, 352 Ill. App. 3d 736, 744 (1st Dist. 2004). In sum, the date of Mercado's death—June 18, 2019—is controlling. Since Fernandez filed her complaint on June 17, 2021, the complaint was timely filed.

Conclusion

Based on the foregoing, it is ordered that:

1. Glen Elston's motion to dismiss is denied; and
2. Glen Elston has until May 11, 2022 to answer the complaint.

  
John H. Ehrlich, Circuit Court Judge

**Judge John H. Ehrlich**

**APR 18 2022**

**Circuit Court 2075**