

**Kaufman v Beth Abraham Health Servs.**

2007 NY Slip Op 32703(U)

August 23, 2007

Supreme Court, New York County

Docket Number: 0105855/2005

Judge: Barbara Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK**

PART 12

Index Number : 105855/2005

KAUFMAN, BARBARA A.

vs

BETH ABRAHAM HEALTH

Sequence Number : 003

DISM ACTION/INCONVENIENT FORUM

INDEX NO.

105855/05

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

**FILED**

AUG 29 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8/23/07

**BARBARA R. KAPNICK J.S.C.  
J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 12

-----X  
BARBARA A. KAUFMAN, individually and  
as Administrator for the Estate of  
KATHERINE ALOISE,

**DECISION/ORDER**  
Index No. 105855/05  
Motion Seq. No. 003

Plaintiff,

-against-

BETH ABRAHAM HEALTH SERVICES, RAMON  
SANTOS and ROBIN SCHMULSON,

Defendants.

-----X  
BARBARA R. KAPNICK, J.:

In this action, plaintiff Barbara A. Kaufman, individually and as Administrator for the Estate of her mother, Katherine Aloise, deceased, seeks to recover damages for prima facie tort/injurious falsehood (first cause of action), defamation (second cause of action), violation of trust and breach of fiduciary duty (third cause of action), and intentional infliction of emotional distress (fourth cause of action).

Mrs. Aloise resided at the Weinberg Apartments, a complex of rent-subsidized housing units managed by defendant Beth Abraham Health Services ("Beth Abraham").<sup>1</sup> Defendants Ramon Santos and Robin Schmulson were employed by Beth Abraham.

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<sup>1</sup> Plaintiff claims that defendant Beth Abraham owned the building where Mrs. Aloise lived, but defendant contends that it was the managing agent of the building, not the owner.

Plaintiff's Amended Complaint claims that defendant Santos (i) drove Mrs. Aloise on one occasion to the bank, but "abandoned her there, to her shock and distress;" (ii) after undertaking to prepare Mrs. Aloise's application for Medicaid and "insisting that he had particular knowledge respecting the application, defendant Santos delayed for an extraordinary period, offering one excuse after another, and Mrs. Aloise did not receive Medicaid, despite defendant Santos' assurances, repeated approximately every month, until February 2004;" (iii) failed to effectuate a reduction in Mrs. Aloise's rent, for which she was eligible because of the extraordinary expenses that, not being on Medicaid, she bore for home health care aides, as well as pharmaceuticals and transportation to and from physicians' offices; and (iv) "falsely told Mrs. Aloise that, because she lived in defendant Beth Abraham's building, she was required to use its medical unit, CCM."

The Amended Complaint further alleges that "[i]n light of these acts, without limitation, plaintiff Kaufman asked defendant Schmulson and others at defendant Beth Abraham repeatedly in 2003 to remove defendant Santos from her mother's case." Defendant Santos was subsequently removed from Mrs. Aloise's case, and it is alleged in the Amended Complaint that

[w]ith the intent, upon information and belief, of retaliation, defendant Santos and, through him, defendant Beth Abraham, commencing in August 2003 and continuing,

on information and belief, until at least May 2005, made untrue statements about plaintiff Barbara Kaufman that were and are viciously injurious to her and caused her and her mother great damage and needless severe cost of funds and time, as well as extreme and unconscionable mental suffering and anguish.

Specifically, plaintiff claims that defendant Santos made false statements about her to Adult Protective Services ("APS") in order to induce APS to bring a guardianship proceeding. According to plaintiff, Santos falsely told APS that Ms. Kaufman was stealing money from Mrs. Aloise, that Ms. Kaufman had placed Mrs. Aloise in the apartment alone without assistance from private aides, that Ms. Kaufman verbally abused her mother and intimidated her, and that Ms. Kaufman was "exploiting" her mother by "sabotaging" Beth Abraham's services to Mrs. Aloise.

Plaintiff claims that these false statements "savagely injured" her personal reputation and feelings, caused her to suffer great distress, mental strain and distraction, and resulted in an investigation which "wrongfully and groundlessly impugned her character."

Finally, plaintiff claims that "the investigation or the false statements on which it was based, or both, were published by the defendants to physicians treating Mrs. Aloise, and led one or more such physicians to curtail communications with Ms. Kaufman, thereby

undermining Mrs. Aloise's treatment and, among other things, delaying diagnosis of Mrs. Aloise's lymphoma."

Defendants now move for an order pursuant to CPLR §§ 3211 (a) (1), (5) and (7) dismissing plaintiff's Amended Complaint in its entirety on the grounds that: (i) plaintiff's claims are time barred; (ii) plaintiff's Amended Complaint still fails to state a cause of action upon which relief can be granted; (iii) plaintiff's Amended Complaint fails to plead a defamation and breach of fiduciary duty claim with the particularity required pursuant to CPLR § 3016(a) and (b); and (iv) plaintiff is not entitled to punitive damages.

As to the issue of the statute of limitations, defendants argue that: (a) plaintiff's first cause of action for prima facie tort is untimely, since the only time specific allegations occurred before February 2004, more than one year prior to the filing of the Complaint in April 2005, and thus beyond the applicable one-year statute of limitations; (b) plaintiff's second cause of action for defamation is untimely because plaintiff has not set forth which of the statements purportedly made by defendants commencing in August 2003 were made within one year of the filing of the Complaint; and (c) plaintiff's fourth cause of action for intentional infliction of emotional distress is untimely, because it is premised on

alleged acts and omissions occurring in 2003 and ending in February 2004.

Plaintiff argues that neither the first nor the second cause of action should be subject to the one-year statute of limitations, applicable to defamation claims, because she has not merely alleged an injury to her reputation, but has also alleged that defendants' statements caused physicians to curtail their communication with plaintiff and undermined her mother's medical treatment.

However, pursuant to CPLR § 215(3), "an action to recover damages for ... libel, slander, [and/or] false words causing special damages" must be commenced within one year. See, Roman v. Comp USA, Inc., 38 A.D.3d 751 (2<sup>nd</sup> Dep't 2007).

"[I]t is well settled that a plaintiff may not circumvent the one-year statute of limitations applicable to defamation actions (CPLR 215[3]) by denominating the action as one for intentional interference with economic relations, prima facie tort, or injurious falsehood if, in fact, the claim seeks redress for injury to reputation." Matter of Entertainment Partners Group, Inc. v. Davis, 198 A.D.2d 63, 64 (1st Dep't 1993). See also, Ramsay v. Mary Imogene Bassett Hospital, 113 A.D.2d 149 (3rd Dep't 1985),

app. dismiss'd, 67 N.Y.2d 1028 (1986); Cunningham v. Hagedorn, 72 A.D.2d 702 (1st Dep't 1979).

Moreover, the Appellate Division, First Department, has specifically held that "[t]he statute of limitations for prima facie tort is one year". Angel v. Bank of Tokyo-Mitsubishi, Ltd., 39 A.D.3d 368 (1<sup>st</sup> Dep't 2007). See also, Havell v. Islam, 292 A.D.2d 210 (1<sup>st</sup> Dep't 2002). Likewise, the statute of limitations for injurious falsehood is one year. See, Clark v. New York Tel. Co., 41 N.Y.2d 1069 (1977); CPLR § 215(3).

Therefore, this Court finds that both the first and second causes of action are subject to the one-year statute of limitations.

In addition, plaintiff's fourth cause of action for intentional infliction of emotional distress is subject to the one-year statute of limitations. See, Kwarren v. American Airlines, 303 A.D.2d 722 (2<sup>nd</sup> Dep't 2003); Kourkoumelis v. Arnel, 238 A.D.2d 313 (2<sup>nd</sup> Dep't 1997).

Plaintiff argues that the first and fourth cause of action are nonetheless timely asserted because she has alleged a continuing wrong. Plaintiff, however, has not specifically alleged what

statements or actions were made within the applicable one-year limitations period.

Accordingly, that portion of the motion seeking to dismiss the first, second and fourth causes of action as time barred is granted.

Defendants next argue that plaintiff's third cause of action for violation of trust and breach of fiduciary duty must also be dismissed on the grounds that there was no fiduciary relationship between the plaintiff and/or plaintiff's mother and defendant Beth Abraham and/or its employees. Defendants further argue that plaintiff has failed to allege this claim with sufficient particularity, as required by CPLR § 3016(b).

It is well settled that "[a] fiduciary relationship does not exist between parties engaged in an arm's-length business transaction (citation omitted), which is normally the situation between landlord and tenant (citations omitted)." Dembeck v. 220 Central Park South, LLC, 33 A.D.3d 491, 492 (1<sup>st</sup> Dep't 2006).

Although plaintiff claims that Mrs. Aloise provided defendants with financial documentation in connection with defendants' filing of applications for medical coverage and a rent reduction on Mrs.


Aloise's behalf, this Court finds that the providing of such information does not, standing alone, create a confidential fiduciary relationship. Moreover, the alleged statements were not related to the confidential information which was purportedly obtained.

Accordingly, based on the papers submitted and the oral argument held on the record on September 27, 2006, defendants' motion to dismiss plaintiff's Amended Complaint is granted in its entirety.

The Clerk may enter judgment dismissing plaintiff's Amended Complaint with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Date: August 23, 2007

  
Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK**  
J.S.C.

**FILED**

AUG 29 2007

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