

<b>Kaufman v Revival Home Health Care, Inc.</b>
2009 NY Slip Op 33403(U)
July 8, 2009
Supreme Court, New York County
Docket Number: 107752/05
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK IAS PART 2

**LOUIS B. YORK**  
J.S.C.

DUPPLICATE ORIGINAL

-----x  
BARBARA KAUFMAN, individually and as attorney  
in fact of KATHERINE ALOISE,

Plaintiff,

DECISION AND  
JUDGMENT

v.

Index. No. 107752/05

REVIVAL HOME HEALTH CARE, INC.,

Defendant.

**FILED**

AUG 20 2005

NEW YORK  
COUNTY CLERK'S OFFICE

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YORK, LOUIS B., J.S.C.

In this action alleging negligence and breach of contract, defendant, Revival Home Healthcare, Inc., ("Revival" or "the agency") moves alternatively pursuant to CPLR 3211(a)(7) and CPLR 3212 for an order dismissing the complaint and/or for summary judgment.

Plaintiff *pro se*, Barbara Kaufman<sup>1</sup>, executrix of her mother, Katherine Aloise's ("Aloise" or "mother") estate, alleges in the first cause of action of the complaint that from April 2004 through May 2005, Revival failed to provide proper home based care for her mother because the agency: 1) sent home health aides who were improperly trained and who were unable and/or unwilling to physically assist Aloise, to feed her appropriately and to provide proper housekeeping assistance; 2) failed to provide adequate physical therapy and nursing assistance; 3) permitted Montefiore Hospital personnel to transport Aloise to the Montefiore emergency room even though plaintiff had alerted the aide that Aloise's personal physician had dispatched an ambulance to bring Aloise to Mt. Sinai Hospital. The second cause of action alleges that the home health aides engaged in identity theft in that: 1) Aloise's special telephone equipment was

<sup>1</sup> Plaintiff as bringing this action as executrix of her mothers estate even though the caption incorrectly identifies her as acting in her capacity as "attorney in fact".

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delayed because Medicaid had listed a "Wendy L. Rojo" as possessing Aloise's social security number (Cmplt, para. 40); 2) Aloise was scheduled to attend a meeting with Social Security regarding an application for benefits even though Aloise allegedly had not scheduled the appointment and 3) Aloise's voter registration card was missing.

In the third cause of action Kaufman alleges that Revival falsely advertised that it permitted its client's to choose their own home health aides and that it was unwilling to honor Kaufman's requests regarding aides that were assigned to her mother.

The fourth cause of action, for property damage, states that, during the time the home health aides were in the apartment, a number of pieces of furniture were broken and a couch was permanently discolored; dishes and glassware were destroyed and venetian blinds were broken. In addition, Kaufman alleges that jewelry, linens and other of Aloise's personal items are missing.

The fifth cause of action seeks reimbursement for the home health aides' unauthorized use of Aloise's telephone.

In support of the motion, Revival contends that the complaint must be dismissed and/or summary judgment granted because plaintiff has failed to come forward with any admissible evidence to substantiate the conclusory allegations in the complaint; that even under the liberal pleading standards the complaint fails to allege facts that constitute actionable wrongs and that Kaufman has failed to demonstrate that an injury resulted from Revival's alleged omissions.

In addition, Revival argues that a breach of contract claim cannot stand because plaintiff cannot establish that she entered into an enforceable contract with Revival or that Revival breached that contract; that Revival is not liable for the alleged actions of the Home Health Aides since those aides are employed by New York Health Care ("the vendor") and, pursuant to the contract between New York Health Care and Revival, the vendor is responsible for the acts of its employees; and that the punitive damages claim must be stricken because Kaufman has failed to demonstrate that Revival's actions rise to the level of "moral culpability".

In opposition to the motion, Kaufman argues that she did enter into a contract with

Revival; that Revival is responsible for the actions of the home health aides that provided services for Aloise; that a May 2005 telephone bill demonstrates that a home health aide improperly used Aloise's telephone; and that photographs establish that Aloise once owned jewelry that is now missing.

### DISCUSSION

Under CPLR 3211(a)(7), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the pleading fails to state a cause of action." (*Tal v. Malekan*, 305 A.D.2d 281 [1st Dept. 2003]) On a motion addressed to the sufficiency of the complaint, the Court must afford the complaint liberal construction, accept as true the facts pleaded therein and determine only whether the facts fit within any cognizable legal theory. (See, e.g. *1455 Washington Ave Assoc. v. Rose & Kiernan, Inc.*, 260 A.D.2d 770 [3<sup>rd</sup> Dept 1999]) However, if the allegations set forth in the complaint do not state a valid cause of action, even when taken as true, the court must dismiss the complaint, as a matter of law. (See, *Bailey v. Grey, Siefert & Co., Inc.*, 300 A.D.2d 258 [1<sup>st</sup> Dept. 2002])

Moreover, on a motion for summary judgment, the proponent of the motion must make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact. (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *Zuckerman v. City of New York*, 49 N.Y.2d 557,562 [1980]) The motion must be supported by an "affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions." (CPLR 3212[b])

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require trial of any issue of fact (CPLR 3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for the failure to do so. (*Vermette v. Kenworth Truck Co.*, 68 N.Y.2d 714 (1986); *Zuckerman v. City of New York*, supra

at 560) Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient. (*Alvord and Swift v. Steward M. Muller Const. Co.*, 46 N.Y.2d 276 [1978]; *Fried v. Bower & Gardner*, 46 N.Y.2d 765 [1978])

The first cause of action appears to allege that Aloise was injured on account of Revival's breach of contract and/or Revival's negligence. To recover on a breach of contract claim under New York law, a plaintiff must establish the following four elements: 1) the existence of an enforceable contract; 2) performance of the contract by one party; 3) breach by the other party and 4) damages. (*Caniglia v. Chicago Tribune-New York News Syndicate, Inc.*, 204 A.D.2d 233 [1<sup>st</sup> Dept. 1994]) Here, Revival has submitted evidence that establishes that neither Aloise nor Kaufman entered into a contract with Revival. Susan Katz, Revival's administrator, testified that the patient, Katherine Aloise, executed an authorization so that Revival could provide services, (*Avila Aff.*, Ex. E, p. 63, ll 18-25) but there was no other contract between Aloise and/or Kaufman and Revival.

Kaufman's conclusory allegations that a contract existed, unsupported by a scintilla of admissible evidence, are insufficient, on a motion for summary judgment to defeat Revival's prima facie showing that it is entitled to judgment as a matter of law. Kaufman has submitted a copy of the first page Revival's folder and a copy of Revival's patient information card (*Aff. in Opp. Exs.1 & 2*) which merely demonstrate that Aloise was a client of Revival Health Care. Those documents contain none of the indicia of a contract, (i.e. duties that Revival will perform, responsibilities of client, payment, etc.), and they do not reference or incorporate any contract between Aloise and/or Kaufman and Revival. (*See, Aces Mechanical Corp. v. Cohen Brothers Realty*, 136 A.D.2d 503 [1<sup>st</sup> Dept. 1988][plaintiff's evidence as to the existence of a contract between the parties was insufficient])

Alternatively, although Kaufman has alleged all of the elements necessary to state a claim for negligence, to wit, that defendant breached a duty that it owed to plaintiff and that the alleged negligence was the proximate cause of plaintiff's injuries. (*Rodriguez v. Budget Rent-a-Car systems, Inc.*, 44 A.D.3d 216, 221 [1<sup>st</sup> Dept 2007]) she has failed to present any evidence, in

admissible form, that demonstrates that Revival's alleged negligence actually caused Aloise or Kaufman any injury. Conclusory allegations that Aloise suffered from itchiness; food poisoning; dehydration; insufficient physical therapy and mental anguish as well as unspecified suffering that allegedly resulted from Aloise's erroneous transfer to Montefiore Hospital on the advice of a physician rather than, as Kaufman instructed, to Mt. Sinai Hospital are not supported by evidence in admissible form that is sufficient to overcome Revival's prima facie showing that Aloise was not injured as a result of Revival's alleged breach of duty but rather that Aloise had a long history of severe illness both before and after Revival's care. (2/5/08 Avila Aff., Ex. K) "A prima facie case of negligence must be based on something more than conjecture; 'mere speculation regarding causation is inadequate to sustain the cause of action.' Conclusory allegations unsupported by evidence are insufficient to establish . . . liability." (*Mandel v. 360 Lexington Ave, LLC*, 32 A.D.3d 302, 303 [1<sup>st</sup> Dept 2006][internal citations omitted])

Accordingly, the branch of the motion seeking to dismiss the first cause of action is granted.

The second cause of action alleging identity theft fails to state a claim upon which relief can be granted and must be dismissed because Kaufman has failed to identify any injury that Aloise suffered as a result of defendants alleged acts. (*See, e.g., Aberbach v. Biomedical Tissue Svcs.*, 48 A.D.3d 716, 719 [2<sup>nd</sup> Dept 2008]; *Nemazee v. Premier Purchasing Partners, L.P.*, 24 A.d.3d 196 [1<sup>st</sup> Dept 2005]) Kaufman does not allege that loss of Aloise's voter registration card; the letter from Social Security regarding Aloise's eligibility for SSI and the allegation that an aide allegedly wrote Aloise's personal information in the aide's personal notebook resulted in anyone using Aloise's identity or that these alleged acts injured Aloise in any way.

Moreover, the fact that the installation of Aloise's phone was delayed because Aloise had the same Social Security number as someone named "Wendy Rojo" does not implicate Revival because Kaufman has not alleged or demonstrated that Wendy Rojo was employed by Revival to provide services to Aloise.

Accordingly, the second cause of action is dismissed for failure to state a claim.

The third cause of action appears to state a claim for deceptive acts and practices and/or false advertising. Claims for deceptive acts and practices and false advertising under General Business Law ("GBL") Sections 349<sup>2</sup> and 350<sup>3</sup> are available to an individual consumer who falls victim to misrepresentations made by one providing services through false or misleading advertising. (*Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 55 [1999]; *see also, Goshen v. Mutual Life Ins., Co.*, 98 N.Y.2d 314, 324, n.1 [2002]) To state a claim plaintiff must allege that defendant has engaged in an act or practice that is misleading in a material way and that plaintiff has been injured by reason thereof. (*Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25 [1995]) Deceptive or misleading representations or omissions are defined as those that are "likely to mislead a reasonable consumer acting reasonably under the circumstances. (*Oswego*, 85 N.Y.2d at 26) Thus, in order to prevail in a cause of action alleging deceptive acts and practices or false advertising, the plaintiff must prove that defendants made representations that were likely to mislead a reasonable consumer in plaintiff's circumstances, that the plaintiff was deceived by the misrepresentations and that as a result the plaintiff suffered injury. (*Goshen v. Mutual Life Ins. Co.*, 98 N.Y.2d at 325.

Kaufman relies on one of Revival's advertisements that was ostensibly published in *The Jewish Week* on an unknown date. That advertisement states:

All home health care agencies are **NOT** alike.  
Revival Home Health Care meets the needs of  
the Jewish Community.

YOU chose your doctor

YOU chose your hospital

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<sup>2</sup> GBL Section 349(a) provides that "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."

<sup>3</sup>GBL Section 350(a) provides that "false advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful."

***Choose YOUR home health care provider!***

**YOUR health... YOUR home... YOUR choice**

**Revival is the Right Choice!**

(Aff. In Opp. Ex. 5)

It is Kaufman's contention that this advertisement lead her to believe that Revival would allow Aloise and/or Kaufman to choose the aides that would be assigned to care for Aloise and that the agency would honor their stated preferences.

Kaufman has failed to demonstrate that, by reading the advertisement, a reasonable person in Kaufman's circumstances would be mislead into believing that the client would have control over the home health aides that Revival assigned to provide care. The advertisement merely importunes the a segment of the public to choose Revival because it can meet the needs of members of the Jewish community. It does not state or suggest that if you do, in fact, choose Revival you will be permitted to choose the home health aide that is assigned.

Moreover, Kaufman fails to allege that she or Aloise suffered an actual injury as a result of the allegedly deceptive advertisement. (*See, Vigiletti v. Sears Roebuck & Co.*, 42 A.D.3d 497 [2<sup>nd</sup> Dept 2007])

Accordingly, that branch of the motion that seeks summary judgment dismissing the third cause of action is granted.

The fourth cause of action alleging property damage and/or conversion is also dismissed as Kaufman has failed to submit any evidence sufficient to raise a triable issue of fact that the allegedly damaged items were in good condition immediately prior to the arrival of the home health aides and that the aides, rather than Aloise or another third person, damaged the items.

As to that part of the cause of action that alleges conversion, the elements of a cause of action for conversion are plaintiff's right of possession, the intent of the defendant, and the defendant's interference with plaintiff's property rights to the exclusion of plaintiff's rights.

(*Colavito v. N.Y. Organ Donor Network, Inc.*, 8 N.Y. 3d 43, 49-50 [2006]) Here, plaintiff has failed to raise a triable issue as to whether Aloise possessed the missing jewelry and other items immediately before the home health aides began providing services at Aloise home and whether anyone hired by Revival interfered with Aloise's property rights . Kaufman has merely submitted pictures from many years ago (i.e. 1989 and 1992) that show Aloise and/or Kaufman wearing items of clothing and jewelry that have allegedly gone "missing". She has not submitted any police reports or evidence of reports she made to Revival regarding the missing items, and she has failed to identify anyone who may have taken these items. Accordingly, that branch of the motion seeking summary judgment dismissing the fourth cause of action is granted

The fifth cause of action which seeks reimbursement for telephone calls allegedly made by home health aides from Aloise's home is also dismissed. Plaintiff has submitted one charge, totaling \$19.95 (Kaufman Aff., Ex. 7), and, even though Kaufman alleges in the complaint that she obtained telephone company printouts regarding other charges, (Cmplnt, paras. 72-73) she has failed to submit those printouts or present any evidence to corroborate her allegations that Aloise's telephone bills were dramatically inconsistent with Aloise's needs.

Because the court finds that all of the causes of action must be dismissed either because Kaufman failed to sufficiently allege all the elements of each of the claims or because summary judgment must be granted because Kaufman failed to submit evidence in admissible form to substantiate her claims, the court need not address the parties other contentions.

Accordingly, it is ORDERED that the motion to dismiss the complaint is granted.

The clerk is directed to enter judgment accordingly.

DATE 7/8/09

**FILED**

AUG 20 2008

NEW YORK  
COUNTY CLERK'S OFFICE

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