SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU : PART 17

----------X

LLOYD MARKSAMER, as Executor of the
ESTATE OF JESSE N. MARKSAMER,[1]

Plaintiff,

- against -

ENGEL BURMAN SENIOR HOUSING AT MASSAPEQUA, LLC d/b/a THE BRISTAL ASSISTED LIVING AT WESTBURY,

Defendant.

----------X

DECISION AND ORDER

Index No.: 4946/2009

Original Return Dates: 08/09/10
08/30/10

Motion Seq. Nos.: 001-002

P R E S E N T :
HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 11 were submitted on this Notice of Motion and Notice of Cross-Motion on April 5, 2011:

	Papers numbered:
Notice of Motion, Affirmation and Affidavits in Support (4)	1-6
Notice of Cross-Motion and Affirmation	7-8
Reply Affirmation and Affidavit	9-10
Reply Affirmation	11

The motion of the Defendant WESTBURY SENIOR LIVING, INC. d/b/a THE BRISTAL AT WESTBURY (sued herein as ENGEL BURMAN SENIOR HOUSING AT MASSAPEQUA, LLC d/b/a THE BRISTAL ASSISTED LIVING AT WESTBURY) pursuant to C.P.L.R. 3212 for summary judgment relief dismissing the Complaint, and the Cross-Motion of the Plaintiff LLOYD MARKSAMER as fiduciary of the ESTATE OF JESSE N. MARKSAMER pursuant to C.P.L.R.

[1]Following the commencement of this action, the Plaintiff JESSE MARKSAMER passed away on September 5, 2010. LLOYD MARKSAMER was issued Letters Testamentary by the Nassau County Surrogate's Court on October 8, 2010. By Stipulation of the parties dated October 25, 2010 (as corrected by the Court), the caption is amended as above.

3212 for partial summary judgment on the issue of liability, are decided as follows:

On or about October, 2008, the Plaintiff, JESSE MARKSAMER (then 91 years of age) fell and broke his hip while participating with four (4) other residents in an off-site bowling function arranged and supervised by the Defendant THE BRISTAL, a facility licensed by the New York State Department of Health as a "proprietary enriched housing" program for independent adults (Riedman Affidavit Paragraphs 1, 3; Exhibit "K"). It is alleged that the Plaintiff had participated in similar previous bowling trips coordinated by THE BRISTAL, including as recently as THREE (3) weeks prior to the accident – all without incident.

Prior to bowling his first frame, it is alleged that the Plaintiff selected a regulation-type ball and entered upon the lane and then "kind of jogged * * * [his] way * * * to the line where you are supposed to throw the ball" (J. Marksamer Dep., 42-45). However, immediately upon releasing the ball at the foul line, the Plaintiff "suddenly lost * * * [his] balance" and fell forward to the floor (J. Marksamer Dep., 42-45). The supervisor assigned to the outing was seated at a nearby scorer's table, and did not personally witness the Plaintiff's fall since she was assisting another resident out of her seat when the incident occurred (Slavinski Aff. Paragraphs 7-8; Slavinsky Dep., 70-72).

Although the Defendant claims that the Plaintiff had been instructed not to run prior to releasing the ball (Slavinski Dep., 67-69), the Plaintiff denied that any such instructions were ever given to him (J. Marksamer Dep., 25; Harrison Aff., Exhibit "L").

By Summons and Complaint filed with the Clerk of the Nassau County on March 8, 2009, the Plaintiff JESSE N. MARKSAMER, by and through his Attorney-in-Fact, LLOYD MARKSAMER (the son of the Plaintiff), commenced the within personal injury action as against the Defendant THE BRISTAL (Harrison Aff., Exhibit "A"). The Complaint contains four causes

of action grounded upon negligence, negligent hiring/supervision, breach of stated statutory duties imposed by the Public Health Law, and gross negligence. The third cause of action has since been voluntarily withdrawn (*see* Harrison Aff., Paragraph 8; Exhibit "E".)

In its Answer, the Defendant denied the material allegations of the Complaint and interposed various affirmative defenses. All discovery has been completed and a Certification Order issued on March 18, 2010. The Defendant now moves for summary judgment dismissing the Complaint. The Plaintiff opposes the application and has cross moved for summary judgment on his respective claims.

Gross negligence consists of " ... conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing (citation omitted)". Colnaghi, U.S.A. v. Jewelers Protection Services, Ltd., 81 N.Y.2d 821, 823-824 (1993); *see also* Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 554 (1992); Schwartz v. Martin, 82 A.D.3d 1201 (2nd Dept. 2011); Goldstein v. Carnell Associates, Inc., 74 A.D.3d 745, 746-747 (2nd Dept. 2010); Haire v. Bonelli, 57 A.D.3d 1354, 1358 (3rd Dept. 2008). A review of the relevant facts belies the assertion that the conduct of the Defendant rose to these levels. *See* Domoroski v. Smithtown Center for Rehabilitation, ___Misc 3d___, 2011 WL 1527197 (Sup. Ct., Suffolk Co. 2011). Specifically, neither the available medical records nor the manner in which the Defendant supervised or conducted the five-person bowling outing rise to the requisite level of "wanton or malicious" behavior "activated by evil or reprehensible motives." Anzolone v. Long Island Care Center, Inc., 26 A.D.3d 449, 451 (2nd Dept. 2006); Hirt v. Bellhaven Nursing Center, Inc., ___Misc 3d___, 2011 WL 844093 (Sup. Ct. Suffolk Co. 2011); *see also* Colnaghi, U.S.A. v. Jewelers Protection Services, Ltd., *supra*; Finsel v. Wachala, 79 A.D.3d 1402, 1404 (3rd Dept. 2010).

Moreover, "[t]o establish a cause of action based on negligent hiring, negligent retention, or negligent supervision, it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury (citations omitted) Shor v. Touch-N-Go Farms, Inc., ___A.D.3d___, 2011 WL 1497881 (2nd Dept. 2011); Yildiz v. PJ Food Service, Inc., 82 A.D.3d 971 (2nd Dept 2011); Jackson v. New York Univ. Downtown Hosp., 69 A.D.3d 801 (2nd Dept. 2010). Additionally, " '[t]here is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee' (citations omitted)." Carnegie v. J.P. Phillips, Inc., 28 A.D.3d 599, 600 (2nd Dept. 2006); *see also* Shor v. Touch-N-Go Farms, Inc., *supra.* Here, the Court cannot summarily conclude such facts existed, *see* Boadnaraine v. City of New York, 68 A.D.3d 1032 (2nd Dept. 2009); Schiffer v. Sunrise Removal, Inc., 62 A.D.3d 776, 779 (2nd Dept. 2009), as the record is devoid of any suggestion that the Defendant knew or had reason to know, *inter alia*, that any of its involved staff members possessed an alleged propensity for the "conduct" which purportedly caused injury to the Plaintiff. *See e.g.* Shor v. Touch-N-Go Farms, Inc., *supra.*; Yildiz v. PJ Food Service, Inc., *supra.*; Boadnaraine v. City of New York, *supra.*

Notwithstanding the foregoing, however, a triable issue of fact exists with respect to the First Cause of Action (sounding in negligence) based upon the evidence submitted.

A review of the relevant medical records and case note submissions made by the parties, indicates that the then 91-year old Plaintiff had experienced memory lapses, periods of confusion, more frequent instances of inactivity – factors which prompted in part an increase in his previously existing level of care at the facility as of February, 2008 (Harrison Aff., Exhibit "T" [Case Note dated August 4, 2008; Doctors Progress Notes, April 17, 2008]). Further, the Plaintiff had been

receiving treatment in the months prior to the incident for significant and apparently chronic foot maladies, including "painful elongated toe nails," hammer toe problems, and "burning painful thick lesions" on his feet – problems generating sequella identified by his examining podiatrist as, *inter alia*, "hallux valgus deformity" (lateral deviation of the great toe) in both feet; walker-aided "gait;" and "creptius" (joint grinding or crackling), all of which apparently affected the Plaintiff's range of motion in both the ankle and foot joints (Harrison Aff., Exhibit "T" [Notes of Myles Grossman, D.P.M., dated, November 2, 2007 - February 28, 2009]).

Additionally, the notes of the Defendant document some six (6) falling incidents which occurred between January, 2006 and February, 2008, and also contain findings made during a May, 2008 physical examination which list decreased balance and memory as among the "present illness[es]" then afflicting the Plaintiff.

Although the Defendant has presented evidence suggesting, *inter alia*, that the Plaintiff voluntarily participated in the off-site bowling activity; that he had done so in the past; and that he was sufficiently ambulatory and fit to safely bowl, the parties' conflicting contentions and claims with respect to the physical condition of the Plaintiff and the appropriateness of the activity in question have generated factual issues which cannot be summarily resolved on the record presented.

The Court further agrees that the reliance of the Defendant on the assumption of the risk doctrine is not determinative. It is true that "by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation (citation omitted)". Mangan v. Engineer's Country Club, Inc., 79 A.D.3d 706 (2nd Dept. 2010); *see generally* Kremerov v. Forest View Nursing Home, Inc., 24 A.D.3d 618, 621 (2nd Dept. 2005); Anand v. Kapoor, 15 NY3d 946,

947-948 (2010); Morgan v. State of New York, 90 N.Y.2d 471, 484 (1997); Miskanic v. Roller Jam USA, Inc., 71 A.D.3d 1102, 1103 (2nd Dept. 2010). However, and in light of, *inter alia*, the medical records and notes which suggest that the elderly Plaintiff had experienced prior issues with falling, diminished memory, periods of confusion, and even possibly the onset of dementia, factual questions exist as to whether this Plaintiff was capable of perceiving and/or fully comprehending the alleged risks associated with his participation in the bowling outing or any instructions given to him in connection therewith (*cf.* Kremerov v. Forest View Nursing Home, Inc., *supra.*; *see* Morgan v. State of New York, *supra.* at 484).

Lastly, assuming that the on-site supervisor could not have intervened in time to prevent the Plaintiff from actually falling as he did (*e.g.*, Schleef v. Riverhead Cent. School Dist., 80 A.D.3d 743 (2nd Dept. 2011), factual questions nevertheless exist with respect to whether the Plaintiff should have been permitted to participate in the outing in light of the level of supervision which was to be afforded.

Summary judgment is drastic relief as it effectively denies a party the opportunity to prosecute or defend their position and present evidence at trial. Thus, summary judgment should only be granted where no triable issues of fact are raised, *see* Andre v. Pomeroy, 35 N.Y.2d 361 (1974), and the cause of action or defense is established sufficiently to warrant a Court directing judgment in favor of the movant as a matter of law. *See* Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Alvarez v. Prospect Hospital *et al.*, 68 N.Y.2d 320 (1986); Rebecchi v. Whitmore, 172 A.D.2d 600 (2nd Dept. 1991). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See* Gilbert Frank Corp. v Federal Ins. Co., *supra.* The responsibility of the Court in deciding a motion for summary judgment relief is not to resolve issues

of fact or decide matters of credibility, but merely to determine whether such issues exist. *See* Hantz v. Fishman, 155 A.D.2d 415 (2nd Dept. 1989); *see also* Barr v. County of Albany, 50 N.Y.2d 247 (1980); Daliendo v. Johnson, 147 A.D.2d 312 (2nd Dept. 1987). However, where appropriate, summary judgment should be granted by the Court.

Based upon the foregoing, the Defendant has established its *prima facie* entitlement to judgment as a matter of law dismissing the Second Cause of Action (negligent hiring/supervising personnel) and the Fourth Cause of Action (gross negligence) only (Complaint, Paragraphs 21-24; 32-39). However, as certain factual issues have been raised with regard to this incident, the balance of the motion of the Defendant for summary judgment dismissing the First Cause of Action (negligence) and the cross-motion of the Plaintiff for summary judgment relief on the issue of liability must each be denied.

The Court has considered the remaining contentions of the parties and concludes that they are lacking in merit.

Accordingly, after due deliberation, it is,

ORDERED, that the motion by the Defendant WESTBURY SENIOR LIVING, INC. d/b/a THE BRISTAL AT WESTBURY, sued herein as ENGEL BURMAN SENIOR HOUSING AT MASSAPEQUA, LLC D/B/A THE BRISTAL ASSISTED LIVING AT WESTBURY, for summary judgment dismissing the Complaint is **granted** with respect to the Second Cause of Action and the Fourth Cause of Action only, and the motion is otherwise **denied**, and it is further

ORDERED, the that cross-motion of the Plaintiff for summary judgment on the issue of liability is **denied** in its entirety.

All applications not specifically addressed herein are deemed **denied**.

The foregoing constitutes the Decision and Order of the Court.

Dated: Mineola, New York
June 21, 2011

ENTER:

JOEL K. ASARCH, J.S.C.

Copies faxed to:
Zwiebel and Fairbanks, LLP
Attorneys for Plaintiff

Murphy & Higgins, LLP
Attorneys for Defendant