

**Schiller v Sunharbor Acquisition I, LLC**

2011 NY Slip Op 32684(U)

October 11, 2011

Sup Ct, Nassau County

Docket Number: 5793/11

Judge: Ute Wolff Lally

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY  
Justice

M01

GEORGETTE SCHILLER, AS EXECUTRIX OF  
THE ESTATE OF BERNICE A. SCHILLER,  
DECEASED, and GEORGETTE SCHILLER,  
Individually,

Motion Sequence #1  
Submitted August 18, 2011

Plaintiffs,

-against-

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SUNHARBOR ACQUISITION I, LLC, d/b/a  
SUNHARBOR MANOR, OG OPERATOR, LLC,  
AS SUCCESSOR TO SUNHARBOR MANOR  
and SUNHARBOR MANOR, LLC, d/b/a  
SUNHARBOR MANOR, FRANK R. VEZZA, M.D.,  
ROSLYN HEALTHCARE ASSOCIATES, BURTON J.  
GLASS, M.D. and BURTON J. GLASS, M.D., P.C.,

Defendants.

The following papers were read on this motion:

|                                |        |
|--------------------------------|--------|
| Notice of Motion and Affs..... | 1-3    |
| Affs in Opposition.....        | 4-6    |
| Affs in Reply.....             | 7-9    |
| Affs in Sur Reply.....         | 10-12  |
| Affs in Rejoinder.....         | 13&14  |
| Memorandum of Law.....         | 15-15c |

This motion by the defendants OG Operator, LLC, as successor to Sunharbor  
Manor and Sunharbor, LLC, d/b/a Sunharbor Manor, for an order pursuant to CPLR

3211(a)1.,7. dismissing the complaint insofar as asserted against them, and for the imposition of cost and attorneys fees pursuant to CPLR 8303-a., is disposed of as follows:

In April of 2011, the plaintiff Georgette Schiller, as Executor of the Estate of Bernice A. Schiller, commenced the within action as against, *inter alia*, OG Operator, LLC ("OG Operator"). The plaintiff's verified complaint alleges that the while in residence at the Sunharbor Manor Nursing home ("Sunharbor"), as a consequence of the nursing home's alleged negligence, Bernice Schiller sustained personal injuries which ultimately led to her death in September of 2009.

Among other things, the complaint identifies OG Operator as the licensed owner, operator and/or supervisor of Sunharbor when the decedent was a resident at the facility.

Although there is no dispute that prior to March of 2006, OG Operator owned and operated Sunharbor, OG asserts that by "Asset Purchase Agreement" dated August 17, 2004, it conveyed its assets and the real property on which the facility is located, to an unrelated, third-party purchaser, "Zelda Enterprises, LLC" ("Zelda"), for the sum of \$21 million.

Pursuant to Article IX of the Asset Purchase Agreement, Zelda agreed to promptly secure all necessary governmental permits, authorizations and approvals. Thereafter, Zelda submitted certain applications to the New York State Department of Health in the name of its assignee, "Sunharbor Acquisition, I, LLC". In 2006, Zelda allegedly received the requisite, final approvals establishing Sunharbor Acquisition as the new operator of the facility.

According to OG Operator's counsel, who personally represented OG Operator with respect to the Asset Purchase Agreement, the transaction finally closed in March of 2006, at which time, counsel asserts, the full purchase price was paid and the assets and land were conveyed to Zelda. OG Operator contends that after this point in 2006, OG Operator had no ownership interest in, or control over, the nursing home facility when the decedent's injuries allegedly occurred over three years later, in July-August of 2009.

Based upon the foregoing factual claims, the defendant OG Operator moves, pre-answer, for an order dismissing the complaint pursuant to CPLR 3211(a)1., 7., arguing that the documents and other evidence it has produced establishes that it had divested itself of all interest in the subject nursing home well prior to the decedent's residence. The motion to dismiss, is granted.

On a motion to dismiss pursuant to CPLR 3211(a)7., the Court must accept as true, the complaint's allegations "and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory" (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414; *see also, ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 227-228; *People ex rel. Cuomo v Coventry First LLC*, 13 NY3d 108, 116; *Leon v Martinez*, 84 NY2d 83, 87-88). On the other hand, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*Maas v Cornell University*, 94 NY2d 87, 91-92; *see also, Godfrey v Spano*, 13 NY3d 358, 373; *Nisari v Ramjohn*, 85 AD3d 987, 989).

Additionally, in order to succeed on a motion to dismiss pursuant to CPLR 3211(a)1., the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 591; *Leon v Martinez, supra*; *Etzion v Etzion*, 84 AD3d 1015, 1018; *Rietschel v Maimonides Med. Ctr.*, 83 AD3d 810, 811).

Although "to qualify as 'documentary', \* \* \* [a document] must be unambiguous, authentic, and undeniable," (*Fontanetta v Doe*, 73 AD3d 78, 84-85; see also, *Summer v Severance*, 85 AD3d 1011, 1012), "where a written agreement \* \* \* unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211 (a)1.(sic)" (*150 Broadway N.Y. Associates, L.P. v Bodner*, 14 AD3d 1, 5-6; see also, *Etzion v Etzion*, 84 AD3d 1015, 1018; *Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 797; *Peter F. Gaito Architecture, LLC v Simone Development Corp.*, 46 AD3d 530; *E. Lee Martin, Inc. v Saks & Co.*, 30 AD3d 1139, 1140).

With these principles in mind, the Court agrees that the evidence submitted has conclusively disposed of the plaintiff's claim insofar as interposed against OG Operator, *i.e.*, the plaintiff's allegations that OG Operator was an owner, supervisor and/or operator of the subject facility in July and August of 2009, when the decedent's injuries allegedly took place (*e.g.*, *Snyder v Voris, Martini & Moore, LLC*, 52 AD3d 811, 812-813).

Specifically, OG Operator has submitted contract documents and related materials whose conclusive import has been further substantiated through the confirmatory

statements of individuals who participated in and/or possessed personal knowledge of, the asset transfer transaction and the manner in which the governing documents were executed. These materials demonstrate, among other things, that the Asset Purchase Agreement by which OG Operator conveyed its interest in Zelda, was originally executed in March of 2004; that the transaction finally closed in March of 2006; and that thereafter, OG Operator no longer maintained any relevant ownership interest in the subject nursing home (*Olszewski v Waters of Orchard Park*, 303 AD2d 995, 996).

In opposing the motion, the plaintiff contends that the documents relied upon by OG Operator have not been properly authenticated (*Summer v Severance*, *supra*, 85 AD3d 1011; *Springer v Almontaser*, 75 AD3d 539, 540; *Fontanetta v Doe*, *supra*). However, in support of its application, OG Operator has submitted: (1) the affirmation of its counsel, who personally represented the movant during the transaction; and (2) the affidavit of the movant's managing member, Clifford R. Osinoff, who has detailed with specificity, the nature and chronology of the asset agreement and the manner in which the key documents were executed, including those which he personally executed.

Although the Osinoff affidavit was first submitted in reply, albeit to buttress factual claims made in, and documents already attached to, the movant's main submissions, here, the plaintiff availed herself of the opportunity to file responsive, sur-reply papers, as authorized by this Court (*Turturro v City of New York*, 77 AD3d 732, 734-735; *Whittaker v New York City Bd. of Educ.*, 71 AD3d 776, 778; *Valure v Century 21 Grand*, 35 AD3d 591, 592; *Guarneri v St. John*, 18 AD3d 813, 814 *cf.*, *Held v Kaufman*, 91 NY2d 425, 430). It bears noting that in order to afford the parties a full opportunity to present their claims,

this Court also allowed OG Operator to file an additional submission responding to the plaintiff's sur-reply papers. Accordingly, the parties have had ample opportunity to make their respective claims and advance responsive arguments (*Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381-382).

Lastly, after considering the parties' submissions, and upon the exercise of its broad discretion in imposing penalties and sanctions (e.g., *Gille v Long Beach City School Dist.*, 84 AD3d 1022, 1023), the Court finds that the imposition of a sanction upon the plaintiff pursuant to CPLR 8303-a is unwarranted (see generally, *Providence Washington Ins. Co. v Munoz*, 85 AD3d 1142, 1144; *Black-Kelly v Marley*, 83 AD3d 981; *Broich v Nabisco, Inc.*, 2 AD3d 474, 475).

The Court has considered the plaintiff's remaining contentions and concludes that they are insufficient to defeat that branch of the motion which is to dismiss the complaint.

Accordingly, so much of this motion by the defendants OG Operator, LLC for an order pursuant to CPLR 3211(a)1.,7. is granted to the extent that the complaint is dismissed insofar as interposed against the movant, and is otherwise denied.

Dated: **OCT 11 2011**

  
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UTE WOLFF LALLY, J.S.C.

**ENTFRED**  
OCT 17 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

TO: Sullivan Papain Block McGrath & Cannavo PC  
Attorneys for Plaintiffs  
55 Mineola Boulevard  
Mineola, NY 11501

Dollinger, Gonski & Grossman  
Attorneys for Defendant OG Operator  
One Old Country Road, Suite 102  
Carle Place, NY 11514

Ptashnik & Associates, LLC  
Attorneys for Defendants, Sunharbor Acquisition I, LLC  
45 Broadway, Suite 540  
New York, NY 10006

schiller-sunharbor,#1/cplr