SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

HON. ORAZIO R. BELLANTONI
JUSTICE OF THE SUPREME COURT

DR. LINDA D. MISEK-FALKOFF in her own right and for her late husband ADIN D. FALKOFF,

Plaintiff,

- against -

ORDER
Index No.: 61408/13
Motion Date: 5/21/14

(1) WESTCHESTER MEDICAL CENTER, WESTCHESTER COUNTY HEALTH CARE CORP.- CEO, OFFICERS, ADMINISTRATORS, and CERTAIN PHYSICIANS, NURSES, STAFF, EMPLOYEES -1.n., CAREGIVING SERVICES / SOCIAL WORK, EMERGENCY NURSING, ETHICS, DISCHARGE PLANNING, INFORMATION SYSTEMS / MEDICAL RECORDS/ INFORMATICS, PATIENT ADMISSIONS, PATIENT RELATIONS, PSYCHOLOGY, PSYCHIATRY, PSYCHOSOMATIC / BEHAVIORAL MEDICINE; and ASSOCIATED DEPARTMENTS,

(2) FIELDSTON LODGE CARE CENTER / NURSING HOME, INC., those with roles and status as above.

(3) Individually: DR. ROBERT BELKIN, M.D.; JOHN BRADY, R.N., DR. RANDY GOLDBERG, M.D.; JOANNE REED, LCSW; DR. TUSHAR SHAH, M.D.; DR. YVETTE SMOLIN, M.D.; MAYER SPILMAN, ADMINISTRATOR AND ETC.,

(4) AND DOES 1... n PENDING DISCOVERY,

Defendant.

Defendants Westchester Medical Center, Westchester County Healthcare Corp., and Joanne Reed, LCSW move (Mot. #001) to dismiss plaintiff's complaint pursuant to CPLR 3211 (a) (5), CPLR 3211 (a) (7), General Municipal Law § 50-h, General Municipal Law § 50-i, pursuant to Judiciary Law § 478, and for a more definite statement pursuant to CPLR 3024.

Plaintiff moves (Mot. #002), by order to show cause dated February 4, 2014, for various extensions on matters pending in this action.

Defendants Fieldston Lodge Care Center and Mayer Spilman move (Mot. #003) to dismiss plaintiff's complaint pursuant to BCL § 311-a, CPLR 3211 (a) (5), CPLR 3211 (a) (7), pursuant to Judiciary Law § 478, for a more definite statement pursuant to CPLR 3024, and for an order precluding plaintiff from filing additional actions without leave of the Court.

Defendants Dr. Robert Belkin and Dr. Randy Goldberg move (Mot. #004) to dismiss plaintiff's complaint pursuant to CPLR 3211 (a) (5), CPLR 3211 (a) (7), pursuant to Judiciary Law § 478, and for an order precluding plaintiff from filing additional actions without leave of the Court.

Defendant Dr. Yvette Smolin moves (Mot. #005) to dismiss plaintiff's complaint pursuant to CPLR 3211 (a) (5), CPLR 3211 (a) (7), pursuant to Judiciary Law § 478, and for an order precluding plaintiff from filing additional actions without leave of the Court.

The following papers were read:

Notice of Motion (Mot. #001), Affirmation, and Exhibits (13)	1-15
Affirmation in Reply and Exhibits (2)	16-18
Order to Show Cause (Mot. #002), Affidavit, and Exhibits (6)	19-24
Affirmation in Opposition	25
Affidavit in Reply and Exhibits	26-27
Notice of Motion (Mot. #003), Affirmation, and Exhibits (8)	28-37
Affirmation in Reply and Exhibit	38-39
Notice of Motion (Mot. #004), Affirmation, and Exhibits (10)	40-51
Affirmation in Reply and Exhibit	52-53
Notice of Motion (Mot. #005), Affirmation, and Exhibits (4)	54-59
Affirmation in Reply	60
Plaintiff's Affidavit in Opposition and Exhibits (4)	61-66
Plaintiff's Affidavit in Surreply and Exhibits	67-68

By way of background, Adin D. Falkoff (Mr. Falkoff) was admitted to Westchester Medical Center on or about June 4, 2010 and remained there until August 9, 2010. Mr. Falkoff was 88 years old at the time of his admission. According to the complaint, Mr. Falkoff signed a "Do Not Resuscitate" (DNR) form at some time after admission while plaintiff Dr. Linda D. Misek-Falkoff (plaintiff) was not present. Plaintiff alleges that Mr. Falkoff never told her that he had signed a DNR. Plaintiff further alleges that during Mr. Falkoff's time at the hospital, plaintiff had numerous unpleasant interactions with various members of the hospital staff and nursing home staff. Plaintiff also alleges that she was incorrectly referred to as Mr. Falkoff's "ex-wife" in some of the medical records. On August 9, 2010, Mr. Falkoff was transferred to Fieldstone Lodge Care Center. On August 13, 2010, Mr. Falkoff died at Fieldstone Lodge Center.

On August 8, 2011, plaintiff commenced an action in the Supreme Court, Westchester County under Index No. 54015/2011 against defendants Westchester Medical Center, Westchester County Healthcare Corp., and Fieldston Lodge Care Center. That action was dismissed without prejudice on June 25, 2012 due to plaintiff's failure to effectuate service pursuant to CPLR 306-b. On August 3, 2012, plaintiff commenced a second action in the Supreme Court, Westchester County under Index No. 61833/2012 against the same defendants. That action was dismissed without prejudice in its entirety on April 19, 2013 due to plaintiff's lack of standing.

On July 31, 2013, plaintiff commenced the instant action against the same defendants as well as defendants Dr. Robert Belkin, John Brady, R.N., Dr. Randy Goldberg, Joanne Reed, LCSW, Dr. Tushar Shah, Dr. Yvette Smolin, and Mayer Spilman. The complaint in the instant action alleges 14 causes of action for: (1) breach of contract and breach of the covenant of good faith and fair dealing, (2) fraud, (3) personal injury, (4) negligence, gross negligence, and negligent supervision, (5) negligent and intentional infliction of emotional distress, (6) malpractice, (7) defamation, (8) violation of Health Law, Business Law, and Public Policy, (9) tortious interference with existing and prospective business relations, (10) conversion and property trespass, (11) identity theft, misappropriation of role rights, and unconscionable overweening, (12) age, gender, and disability bias, (13) loss of consortium, and (14) wrongful death, pecuniary loss to the estate, and survivor action for unwarranted pain and suffering of patient before death. Defendants Westchester Medical Center, Westchester County Healthcare Corp., Fieldston Lodge Care Center, Dr. Robert Belkin, Dr. Randy Goldberg, Joanne Reed, LCSW, Dr. Yvette Smolin, and Mayer Spilman (defendants) now move to dismiss the complaint because, among other reasons, plaintiff fails to state a claim upon which relief can be granted. Plaintiff moved, by order to show cause dated February 4, 2014, for various extensions on matters pending in this action. The additional time sought by plaintiff has long since passed during the pendency of these motions. Accordingly, plaintiff's motion is denied as moot.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the Court is to afford the pleading a liberal construction (*see* CPLR 3026), accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and simply determine whether the alleged facts fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The Court of Appeals has explained that "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see also Harris v Barbera*, 96 AD3d 904, 906 [2d Dept 2012]). The Court addresses the claims in order.

(1) Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing.

Defendants argue that this claim fails because plaintiff fails to properly allege the existence of a contract or consideration. Defendants note that the "caregiver support program" is simply a gratuitous service offered by the hospital for which no consideration is exchanged.

The Second Department has explained that "'[t]o establish the existence of an enforceable agreement,' there must be 'an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound'" (*see Civ. Serv. Employees Ass'n, Inc. v Baldwin Union Free School Dist.*, 84 AD3d 1232, 1233-34 [2d Dept 2011]). Here, the complaint alleges facts insufficient to find the formation of a contract. Accepting plaintiff's factual allegations as true, it appears that plaintiff enrolled in a program aimed at supporting caregivers like herself and that defendants' conduct failed to meet her expectation of support and, indeed, was counterproductive. If true, this is unfortunate, but it is insufficient to establish the existence of a contract or of consideration.

The covenant of good faith and fair dealing impliedly exists in every contract (*see Michaan v Gazebo Hort., Inc.*, 117 AD3d 692 [2d Dept 2014]). The covenant "encompasses any promise that a reasonable promisee would understand to be included" and is "breached 'where one party to a contract seeks to prevent its performance by, or to withhold its benefits from, the other'" (*see id.*, quoting *Collard v Inc. Vil. of Flower Hill*, 75 AD2d 631, 632 [2d Dept 1980] *affd*, 52 NY2d 594, 421 NE2d 818 [1981]). As the complaint has failed to properly allege the existence of a contract, this claim must fail as well. Accordingly, defendants' motions to dismiss the cause of action for breach of contract and breach of the covenant of good faith and fair dealing are granted.

(2) Fraud.

Defendants argue that plaintiff fails to allege facts sufficient to evidence knowledge, reliance or damages. Defendants also note that on June 4, 2010, Mr. Falkoff executed a "Do Not Rescuscitate" form (DNR) and that this DNR creates a defense for the defendants.

The latter argument goes beyond the four corners of the complaint and, therefore, is not appropriately before the Court on a motion pursuant to CPLR 3211 (a) (7) (*see Harris v Barbera*, 96 AD3d at 906).

The Second Department has explained that essential elements of a claim for fraud are "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*see Orlando v Kukielka*, 40 AD3d 829, 831 [2d Dept 2007]). Here, the complaint vaguely alleges much wrongdoing, but the Court can discern no factual allegations of a knowing misrepresentation on which plaintiff relied. Accordingly, defendants' motions to dismiss the cause of action for fraud are granted.

(3) Personal Injury.

Defendants contend that there is no cause of action for personal injury and that, as plead, plaintiff's claim may seek redress for the tort of international infliction of emotional distress. Assuming that this is the claim, defendants then argue that the claim fails because the alleged facts cannot be deemed extreme and outrageous.

The Second Department has explained that "[t]he tort of intentional infliction of emotional distress has four elements: '(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress'" (*see Bernat v Williams*, 81 AD3d 679, 680 [2d Dept 2011], quoting *Howell v New York Post Co., Inc.*, 81 NY2d 115, 121 [1993]). In alleging the first element, the Second Department has explained that "the conduct alleged must be so outrageous in character and extreme in degree as to surpass the limits of decency so 'as to be regarded as atrocious and intolerable in a civilized society'" (*see Leonard v Reinhardt*, 20 AD3d 510, 510 [2d Dept 2005], quoting *Freihofer v Hearst Corp.*, 65 NY2d 135, 143 [1985]). Here, although the complaint alleges inappropriate conduct on the part of defendants, nothing alleged by plaintiff rises to the level of extreme or outrageous conduct to support such a claim. Accordingly, defendants' motions to dismiss the cause of action for personal injury are granted.

(4) Negligence, Gross Negligence, and Negligent Supervision.

Defendants argue, among other things, that plaintiff has failed to plead the essential elements of a claim for negligence, gross negligence, and negligent supervision.

The Second Department has explained that "[t]o prevail on a cause of action alleging negligence, a plaintiff must establish the existence of a legal duty, a breach of that duty,

proximate causation, and damages" (*see Pasquaretto v Long Is. Univ.*, 106 AD3d 794, 795 [2d Dept 2013]). Here, plaintiff appears to allege that defendants breached their duties by not complying with plaintiff's request that she be telephoned as to Mr. Falkoff's requests for "items" and defendants' failure to properly communicate with her. These allegations are too vague to survive (*see Shariff v Murray,* 33 AD3d 688, 690 [2d Dept 2006]). Accordingly, defendants' motion to dismiss the cause of action for negligence is granted.

For a party to be grossly negligent, the complained of conduct must evince near intentional wrongdoing and exhibit a reckless indifference to the rights of others (*see Ryan v IM Kapco, Inc.*, 88 AD3d 682, 683 [2d Dept 2011]). Here, the only discernable factual allegation is that the "staff psychologist" suggested in plaintiff's presence "that a patient even with disabilities had a right to choose death, and open refusal to suggest a right also to live . . . ." Again, this allegation is too vague to support a claim of gross negligence (*see Shariff,* 33 AD3d at 690). Accordingly, defendants' motions to dismiss the cause of action for gross negligence is granted.

Plaintiff's claim for negligent supervision fails for similar reasons. The complaint merely alleges that defendants Westchester County Health Care Corporation and Westchester Medical Center failed to supervise defendant Joanne Reed, LCSW who failed to supervise defendant John Brady, RN. "However, a necessary element of such causes of action is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*see Kenneth R. v R.C. Diocese of Brooklyn*, 229 AD2d 159, 161 [2d Dept 1997]). As plaintiff has not alleged any wrongdoing here or that defendants knew or should have known of the propensity of Joanne Reed or John Brady for such conduct, defendants' motions to dismiss the cause of action for negligent supervision are granted.

(5) Negligent and Intentional Infliction of Emotional Distress.

Here, defendants speculate that plaintiff's claim rests on the fact that plaintiff was referred to in some of the medical records as Mr. Falkoff's "ex-wife." This conclusion is drawn from the allegation that defendants engaged in conduct that "callously . . . encroach[ed] on marriage . . . ."

Initially, the Court notes that it has already dismissed the claim for intentional infliction of emotional distress and none of the factual allegations under this heading alter that determination. Next, the Second Department has explained that a claim for negligent infliction of emotional distress "'generally must be premised upon the breach of a duty owed to [the] plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety'" (*see Santana v Leith*, 117 AD3d 711 [2d Dept 2014], quoting *Sheila C. v Povich*, 11 AD3d 120, 130 [1st Dept 2004]). Here, plaintiff's allegations are fatally vague (*see Shariff,* 33 AD3d at 690) and, even so, fail to allege that defendants' conduct unreasonably endangered plaintiff's physical safety.

Accordingly, defendants' motions to dismiss the cause of action for negligent infliction of emotional distress are granted.

(6) Malpractice.

Defendants contend that plaintiff's claim of malpractice fails because it does not allege any departure from good and accepted standards of care or that any such departure was causally related to plaintiff's alleged injuries.

It is well established that "'[t]he essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury'" (*see Poter v Adams*, 104 AD3d 925, 926 [2d Dept 2013], quoting *DiMitri v Monsouri*, 302 AD2d 420, 421 [2d Dept 2003]). At best, the complaint alleges that there were interactions between plaintiff and defendants that were unpleasant and confrontational. The complaint also alleges that some of Mr. Falkoff's medical equipment was "barely functioning" and that Mr. Falkoff was positioned next to an "extremely chilling air conditioner." The factual allegations are insufficient to establish a claim for malpractice. Accordingly, defendants' motions to dismiss the cause of action for malpractice are granted.

(7) Defamation.

Defendants contend that plaintiff's claim for defamation must fail. Defendants assume that this claim must be based on the reference to plaintiff as "ex-wife" in some of the medical records. Assuming this to be the case, defendants then argue that this statement fails to support a claim of defamation because it was not published to any third-party, but was contained within medical records.

The Second Department has explained that "[t]o properly state a cause of action alleging defamation, a plaintiff must allege that, without privilege or authorization, and with fault as judged, at minimum, by a negligence standard, the defendant published to a third party a false statement" (*see El Jamal v Weil*, 116 AD3d 732 [2d Dept 2014]). Here, plaintiff's allegations are fatally vague (*see Shariff*, 33 AD3d at 690). The complaint does not identify the alleged false statement. Regardless, even assuming that the false statement is the reference in the medical records to plaintiff as the "ex-wife" of Mr. Falkoff, this reference was not published to a third-party, but was contained in medical records (*cf. Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). Accordingly, defendants' motions to dismiss the cause of action for defamation are granted.

(8) Violation of Health Law, Business Law, and Public Policy.

Defendants contend that there is no cause of action for a generalized violation of unspecified laws and policies. Defendants assume that the thrust of the claim is that

plaintiff was excluded from making medical decisions for Mr. Falkoff and that this constitutes a violation of certain laws.

Here, plaintiff's allegations are fatally vague (*see Shariff,* 33 AD3d at 690). Although various statutes are identified, the alleged facts are too vague to find a cause of action. Accordingly, defendants' motion to dismiss the cause of action for violation of Health Law, Business Law, and Public Policy is granted.

(9) Tortious Interference with Existing and Prospective Business Relations.

Defendants contend that plaintiff fails to allege facts sufficient to establish any aspect of this claim.

The Second Department has explained that "'[t]o establish a claim of tortious interference with prospective economic advantage, a plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff'" (*see Moulton Paving, LLC v Town of Poughkeepsie*, 98 AD3d 1009 [2d Dept 2012], quoting *Caprer v Nussbaum*, 36 AD3d 176, 204 [2d Dept 2006]). Here, the apparent allegation is that defendants failed to provide a notary public in order to notarize a document. Even assuming this is true, defendants were not interfering with a "prospective business relationship" between plaintiff and Mr. Falkoff. Accordingly, defendants' motions to dismiss the claim for tortious interference with prospective economic advantage are granted.

(10) Conversion and Property Trespass,

Defendants contend that plaintiff fails to allege facts sufficient to establish any aspect of this claim.

The Second Department has explained that "[t]o establish a cause of action to recover damages for conversion, a plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights" (*see Cusack v Am. Defense Sys., Inc.*, 86 AD3d 586, 587 [2d Dept 2011]). Here, plaintiff does not allege that defendants "exercised an unauthorized dominion" over any of the identified items, but rather that defendants failed to preserve them until plaintiff came to collect them. Accordingly, defendants' motions to dismiss the cause of action for conversion are granted.

The Second Department has explained that "[t]he essence of trespass is the invasion of a person's interest in the exclusive possession of land" (*see Zimmerman v Carmack*, 292

AD2d 601, 602 [2d Dept 2002]). As this claim involves personal property, defendants' motions to dismiss the cause of action for trespass are granted.

(11) Identity Theft, Misappropriation of Role Rights, and Unconscionable Overweening.

Defendants contend that there is no cause of action for what the complaint alleges under this heading.

Here, plaintiff alleges that plaintiff was excluded from certain medical decisions, that defendants falsified certain medical records, and that these actions undermined the "legacies" and "achievements" of plaintiff and Mr. Falkoff. The Court can discern no cognizable claim here. Accordingly, defendants' motions to dismiss the cause of action for identity theft, misappropriation of role rights, and unconscionable overweening are granted.

(12) Age, Gender, and Disability Bias.

Defendants contend, among other things, that this claim fails to allege that defendants discriminated against plaintiff solely because of age, gender, or disability.

Here, the complaint alleges that the hospital psychologist referred to Mr. Falkoff's long life as a reason to let go in spite of plaintiff's request that the psychologist give Mr. Falkoff encouragement to stay alive. The complaint also alleges that defendants assigned plaintiff the chore of stripping Mr. Falkoff's clothes and that plaintiff was belittled for having mobility issues.

Although these allegations include reference to age, gender, and a possible disability, the Court discerns no cause of action arising out of these factual allegations. Accordingly, defendants' motions to dismiss the cause of action for age, gender, and disability bias are granted.

(13) Wrongful Death, Pecuniary Loss to the Estate, And Survivor Action for Unwarranted Pain and Suffering of Patient before Death.

Defendants contend that plaintiff has failed to properly plead this claim.

The Second Department has explained that "'[t]o succeed on a cause of action to recover damages for wrongful death, the decedent's personal representative must establish, inter alia, that the defendant's wrongful act, neglect or default caused the decedent's death'" (*see Roth v Zelig*, 64 AD3d 558, 559 [2d Dept 2009]). Here, it is not clear what the "wrongful act, neglect or default" is that allegedly caused Mr. Falkoff's death. Accordingly, defendants' motions to dismiss the cause of action for wrongful death,

pecuniary loss to the estate, and survivor action for unwarranted pain and suffering of patient before death are granted.

(14) Loss of Consortium.

Defendants assert that a claim for loss of consortium must fail because there is no allegation that plaintiff has suffered any pecuniary damages as a result of the alleged wrongful death.

It is well settled that "insofar as plaintiff is attempting to recover for loss of consortium for the period prior to decedent's death, a cause of action is stated" (*see Liff v Schildkrout*, 49 NY2d 622, 632 [1980]; see also *Monson v Israeli*, 35 AD3d 680, 681 [2d Dept 2006]). After the decedent's death, however, EPTL 5-4.3 limits the damages for wrongful death to pecuniary losses (*see* EPTL 5-4.3 [a]; *Motelson v Ford Motor Co.*, 101 AD3d 957, 962 [2d Dept 2012] *lv to appeal granted,* 22 NY3d 854, 999 NE2d 548 [2013]). Here, the complaint only alleges a loss of consortium prior to Mr. Falkoff's death. However, a claim for loss of consortium is a derivative claim and does not exist apart from the underlying claim for personal injuries (*see Klein v Metro. Child Services, Inc.,* 100 AD3d 708, 711 [2d Dept 2012]). As any claim for personal injuries relating to Mr. Falkoff has been dismissed, defendants' motions to dismiss the cause of action for loss of consortium are granted.

Plaintiff's papers submitted in opposition and in surreply fail to cure the pleading defects discussed above. To the extent not specifically addressed herein, the Court finds plaintiff's remaining arguments to be without merit. Based on the foregoing, defendants' motions to dismiss are granted to the extent that plaintiff's complaint is dismissed for failing to state a claim pursuant to CPLR 3211 (a) (7). Accordingly, the conference currently scheduled for October 6, 2014 is cancelled.

Dated: September 29, 2014
White Plains, New York

HON. ORAZIO R. BELLANTONI
Justice of the Supreme Court