

Zitter v Cassena Care LLC

2017 NY Slip Op 33018(U)

January 3, 2017

Supreme Court, Nassau County

Docket Number: 600327/16

Judge: Anthony L. Parga

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This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER
SUPREME COURT-NEW YORK STATE-NASSAU COUNTY**

PRESENT:

HON. ANTHONY L. PARGA
JUSTICE

-----X **PART 4**

BARBARA F. ZITTER,

Plaintiff,

**INDEX NO. 600327/16
MOTION DATE: 11/10/16**

-against-

SEQUENCE NOS.: 001

**CASSENA CARE LLC, LONG BEACH
MEMORIAL NURSING HOME, INC., d/b/a
THE KOMANOFF CENTER FOR GERIATRIC
AND REHABILITATIVE MEDICINE, MLAP
ACQUISITION I, LLC, MICHAEL MELNICKE,
LEO FRIEDMAN, ALEX SOLOVEY, PAT
BENEDICTIS, ALEX SKUTZKA, DAVID
GOLDMAN, ANATOLY VEKSLER, SAMANTHA
MICHAELS, ERNESTO ANTONINO, MARIA
ISABELLE AGUSTIN and PATRICIA DEAN,**

Defendants.

-----X

Notice of Motion, Affm., Memo of Law & Exhs.....	<u>1</u>
Affirmation in Opposition, Affs. & Exhs.....	<u>2</u>
Reply Affirmation, Affs. & Exhs.....	<u>3</u>

Upon the foregoing papers, the motion of the defendants, Cassena Care LLC, Long Beach Memorial Nursing Home, Inc., d/b/a The Komanoff Center for Geriatric and Rehabilitative Medicine, MLAP Acquisition I, LLC, Michael Melnicke, Leo Friedman, Alex Solovey, Pat Benedictis, Anatoly Veksler, Samantha Michaels, Ernesto Antonino, Maria Isabelle Augustin and Patricia Dean (hereinafter "the defendants"), which seeks an order pursuant to CPLR Rule 3211 (a)(7), dismissing the plaintiff's complaint for failing to state a cause of action; an order pursuant to CPLR Rule 3025(b), permitting the defendant leave to amend their Verified Answer; and an Order pursuant to CPLR Rule 3211(8) dismissing the Summons and Complaint as against

defendants Ernesto Antonino, Alex Skutzka, and David Goldman for lack of personal jurisdiction is determined as follows.

The within action is brought by the plaintiff and alleges negligence and medical malpractice in her first, second and fourth causes of action. The second cause of action relates to her husband and alleges “extreme distress” and the fifth cause of action is for attorney’s fees.

In reviewing the complaint, plaintiff’s first cause of action alleges *inter alia*, that defendants engaged in deliberate, conscious and intentional course of misconduct, malfeasance, misfeasance allowing third parties into plaintiff’s private room violating her right to privacy. Plaintiff also alleges negligence and medical malpractice in her first cause of action.

Plaintiff’s second cause of action alleges negligence and medical malpractice in allowing unauthorized parties into her room; in refusing to release a prescription drug to Mercy Medical Care compromising plaintiff’s recovery and her overall well being; failing to remedy her air conditioner; allowing the elevators to remain in disrepair; in allowing sewage to seep into her room’s walls; in failing to transport her timely to her doctor’s appointments causing her stress; failing to move her to a different floor in the facility upon recommendation of her neurologist and denying her physical therapy.

Plaintiff’s third cause of action alleges “extreme stress” suffered by her husband by failure of the defendants in informing him of plaintiff’s medical appointments and by the alleged negligence and malpractice caused to plaintiff.

Plaintiff’s fourth cause of action alleges, *inter alia*, medical malpractice, negligent conduct and utter disregard for plaintiff’s physical and mental well being.

Plaintiff’s fifth and final cause of action requests attorney’s fees.

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR Rule 3211(a)(7), the pleading must be liberally construed, the factual allegations must be deemed true, and the pleading party must be accorded the benefit of every possible favorable inference (*Dinger v. Cefola*, 133 A.D.3d 816, 20 N.Y.S. 3d 416 [2nd Dept. 2015]; *Webb-Weber v. Community Action for Human Services, Inc.*, 23 NY3d 448, 15 N.E.3d 1172, 992 N.Y.S.2d 163 [2014]; *Leon v Martinez*, 84 NY2d 83, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]; *Fuller v Collins*, 114A.D.3d 827, 982 N.Y.S.2d 484 [2014]; *Kopelowitz & Co., Inc. v Mann*, 83 A.D.3d

793, 921 N.Y.S.2d 108 [2011]). The “sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law....” (*Guggenheimer v. Ginzberg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182 [1977]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.” (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 832 N.E.2d 26, 799 N.Y.S.2d 170 [2005]). “When a party moves to dismiss a complaint pursuant to CPLR 3211 (a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action...” and “the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Sokol v. Leder*, 74 A.D.3d 1180, 1181, 904 N.Y.S.2d 153 [2d Dept. 2010]).

Applying the aforesaid standards to the plaintiff’s original complaint, this Court finds as follows:

As to plaintiff’s first cause of action, it is well settled that there is no common-law right of privacy in New York, and such right rests solely in statute. (*See Kiss v. County of Putnam*, 59 A.D.2d 773, 398 N.Y.S.2d 779 [2nd Dept. 1977]). As plaintiff has not cited any statute nor made a claim thereunder said claim fails.

As to plaintiff’s claims of medical malpractice in her first, second and fourth causes of action, plaintiff has failed to successfully assert the elements of a medical malpractice claim. “The requisite elements of proof in a medical malpractice [action] are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage” (*Holtain v. Sprain Brook Manor Nursing Home*, 253 A.D.2d 852, 678 N.Y.S.2d 503 [2nd Dept. 1998]). Due to plaintiff’s inartfully drafted complaint, this Court cannot discern the elements of a medical malpractice cause of action.

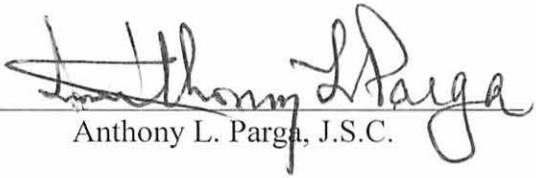
Further, any negligence claims in plaintiff’s first, second and fourth causes of action have also failed to be asserted successfully. Plaintiff does not allege the (1) existence of a duty on defendants’ part as to plaintiff; (2) a breach of said duty; and (3) injury to the plaintiff as a result thereof. (*Akins v. Glens Falls City School Dist.* 53 N.Y.2d 325, 441 N.Y.S.2d 644 [1981]).

Finally, as to plaintiff's third cause of action on behalf of her husband alleging claims for physical and mental distress, said claims are not actionable. Insofar as plaintiff is attempting to allege intentional infliction of emotional distress, this claim, as plead, fails as well. "The tort has four elements: (I) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing sever emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." (*Howell v. New York Post Co.*, 81 N.Y.2d 115 [1993]). Plaintiff has woefully failed in satisfying the elements of intentional infliction of emotional distress.

Accordingly, defendants' motion to dismiss plaintiff's summons and complaint pursuant to CPLR Rule 3211(a)(7) based on failure to state a cause of action, is granted. Defendant's request to amend their answer and dismiss the complaint against Antonino, Skutzka and Goldman are rendered academic.

This constitutes the decision and Order of this Court. Any request for relief not expressly granted herein is denied.

Dated: January 3, 2017


Anthony L. Parga, J.S.C.

Cc: Wilson Elser Moskowitz Edelman
& Dicker LLP
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ENTERED
JAN 09 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE