Allen v Scalera
2018 NY Slip Op 34269(U)
November 30, 2018
Supreme Court, Albany County
Docket Number: Index No. 902819-18
Judge: Michael H. Melkonian
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

RITA ALLEN, Deceased, by and though WENDY ALLEN, as Administratrix of the Estate of RITA ALLEN,

Plaintiff,

-against-

DECISION AND ORDER

ANTHONY SCALERA, LEWIS TITTERTON, KATHRYN ROMAGUERA, LOIS BOUREN and EVERGREEN COMMONS,

Defendants.

(Supreme Court, Albany County, Motion Term, September 17, 2018)
Index No. 902819-18
(RJI No. 01-18-129224)

(Acting Justice Michael H. Melkonian, Presiding)

APPEARANCES: Finkelstein & Partners, LLP
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MELKONIAN, J.:

In May 2018, plaintiff Wendy Allen commenced this action as Administratrix of the Estate of her deceased mother (hereinafter referred to as "plaintiff"), Rita Allen (hereinafter

referred to as "decedent") seeking to recover money damages for personal injuries sustained by decedent while under the custody of defendant Evergreen Commons. Defendants Anthony Scalera, Lewis Titterton, Kathryn Romaguera, Lois Bouren and Evergreen (hereinafter collectively referred to as "defendants") now move pre-answer pursuant to CPLR §§§ 3211(a) (5), (7), (8) and (10), 3012-a and 3013 to dismiss the complaint.

The following factual allegations are taken from the summons and complaint. On October 1, 2015, decedent was admitted to Evergreen Commons, a residential health care facility/nursing home. Decedent, who was 97 years old at the time of her admission to Evergreen Commons, allegedly suffered c. difficile infection, urinary tract infection, sepsis, and bowel perforation, which allegedly caused her death on October 31, 2015. Based on these factual allegations, plaintiff commenced this personal injury action on behalf of her deceased mother alleging that defendants were negligent in their care and supervision of decedent while she was a resident at Evergreen Commons by filing a summons and complaint on May 2, 2018. Plaintiff asserts causes of action based on negligence, gross negligence, conscious pain and suffering, wrongful death and deprivation of rights under Public Health Law § 2801-d.[1]

Defendants seek an order pursuant to CPLR § 3211(a)(8) dismissing the complaint on the ground, *inter alia*, that plaintiff named a non-existent entity as a party defendant in this action.

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[1]Although the defendants' motion initially sought dismissal of plaintiff's wrongful death claim as time barred, the plaintiff has conceded that the wrongful death cause of action against this defendant is time barred. Accordingly, the fourth cause of action is dismissed.

An entity that does not have legal capacity "cannot take title to real or to personal property, ... acquire rights by contract or otherwise, incur debts or other liabilities either in contract or tort, sue or be sued" (Kiamesha Dev. Corp. v Guild Properties, Inc., 4 NY2d 378, 389 [1958]; Farrell v Housekeeper, 298 AD2d 488 [2nd Dept. 2002]). Further, service of a summons and complaint cannot be effected upon a nonexistent entity (see, Zaleski v Mlynarkiewicz, 255 AD2d 379 [2nd Dept. 1998] citing Maldonado v Maryland Rail Commuter Serv. Admin., 239 AD2d 740 [3rd Dept. 1997] affirmed 91 NY2d 467 [1998]; see, also, Kinder v Braunius, 63 AD3d 885 [2nd Dept. 2009]).

In support of the motion, defendants submit a copy of the summons and complaint as well as the affirmation of their attorney, Brian M. Quinn, Esq. Here, the complaint alleges, *inter alia*, that defendant Evergreen Commons is a "domestic limited liability company ... [in] New York" that owned, controlled, operated, managed, maintained and controlled a residential health care facility located at 1070 Luther Road, East Greenbush, New York at time of decedent's alleged personal injuries and wrongful death. Mr. Quinn attaches a print-out from the New York State Department of State, Division of Corporations (DOS), dated August 10, 2018, which indeed indicates that an entity known as "Evergreen Commons, LLC" filed for authorization with the State of New York in March 2016, several months after decedent's death. Mr. Quinn avers, *inter alia*, that since Evergreen Commons, LLC was not incorporated until several months after decedent's death in October 2015, the allegations of the complaint as to Evergreen Commons' incorporation in New York or its ownership or management of the residential health care facility are false and the complaint must be dismissed as against it.

In opposition, plaintiff submits the affirmation of her attorney, Ann Johnson, Esq. Ms. Johnson does not dispute the authenticity of the print-out from the Secretary of State or its substantive contents. Nor does she dispute that Evergreen Commons is not a proper party. Rather, Ms. Johnson argues that plaintiff will suffer irreparable prejudice if this action is dismissed as she will be left without any remedy at all. Ms. Johnson argues that such an inequitable result would ignore the fundamental purpose of Public Health Law § 2801-d, which is to provide a remedy to one of the most vulnerable sections of the population - the elderly and infirm. Ms. Johnson further argues that none of the individual defendants will suffer any prejudice, and an effective judgment can be entered, should the action continue. She argues that the individual defendants are each directly liable to the plaintiff and their liability is joint and several, meaning that each defendant is independently liable to the plaintiff for the full amount of damages. Finally, Ms. Johnson argues that there also cannot be any prejudice to Evergreen, as defense counsel claims that there is no such entity.

It is well settled that on a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the pleading is to be afforded a liberal construction and the facts as alleged in the complaint must be accepted by the court as true and are to be accorded the benefit of every favorable inference (see, Leon v Martinez, 84 NY2d 83, 87-88 [1994]).

It is undisputed that the plaintiff incorrectly named "Evergreen Commons," a nonexistent entity, as a defendant in the summons and complaint and failed to serve the

proper entity.[2] The naming of a nonexistent entity was, in fact, no naming at all and no effective service was achieved (see, Zaleski v Mlynarkiewicz, 255 AD2d 379 [2nd Dept. 1998] citing Maldonado v Maryland Rail Commuter Serv. Admin., 239 AD2d 740 [3rd Dept. 1997] affirmed 91 NY2d 467 [1998]; see, also, Kinder v Braunius, 63 AD3d 885 [2nd Dept. 2009]; Zarzycki v Lan Metal Prods. Corp., 62 AD3d 788 [2nd Dept. 2009]).

As such, the Court grants defendants' motion to dismiss the complaint against defendant "Evergreen Commons" (CPLR § 3211[a][8]).

Defendants also move for dismissal pursuant to CPLR § 3211 (a)(1 0) on the grounds that plaintiff has failed to join a necessary party. Counsel for the defendants contends that inasmuch as plaintiff has failed to name and join the residential health care facility where the alleged injuries occurred, the complaint should be dismissed against the individual defendants who plaintiff identifies as having an "ownership interest" in Evergreen Commons as well as a "controlling interest" in Evergreen Commons.

CPLR § 3211(a)(10) permits dismissal when it is shown that a person indispensable to the action has not been, and cannot be, made a party, and imposes a "demanding" set of conditions to justify dismissal: (1) the person is not subject to jurisdiction and will not appear voluntarily; (2) no CPLR § 1001(b) alternative is available; and (3) such person is so essential to the litigation that it cannot justly proceed in his absence (Practice Commentaries, CPLR 3211:34). Dismissal is a "last resort" (Saratoga County Chamber of

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[2]Indeed, plaintiff's own papers in opposition to defendants' motion demonstrate that the proper legal name for the residential health care facility identified herein is "Rensselaer Planning, LLC."

Commerce, Inc. v Pataki, 100 NY2d 801, 821 [2003]).

Here, plaintiff is seeking to impose liability on the individuals defendants by virtue of their alleged status as "controlling person[s]" (Public Health Law § 2808–a[1]) or owners of the residential health care facility where the injuries took place. However, a "controlling person" may be liable under the status only if the residential health care home facility is in fact liable (Public Health Law § 2808-a).[3] Inasmuch as a "controlling person's" liability under Public Health Law § 2808-a is dependent upon the underlying liability (if any) of a residential health care facility under some specific provision of Article 28 combined with the fact that the residential health care facility may be adversely affected by a judgment herein, the Court agrees with counsel for the defendants that the residential health care facility itself is a necessary party to this action under CPLR § 1001(a).

The Court has considered the plaintiff's remaining contentions and concludes that they are insufficient to defeat the defendants' motion.

Accordingly, defendants' motion to dismiss the complaint is granted.

This constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for the defendants. All other papers are delivered to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

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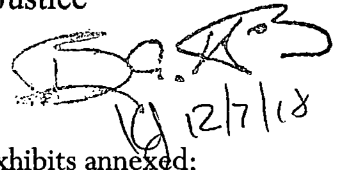
[3]Pursuant to that statute, where a residential health care facility, such as a nursing home, is liable "under any provision of this article to any person or class of persons for damages" (Public Health Law § 2808–a[1]), the "controlling person" (Public Health Law § 2808–a[1]) of the facility is also jointly and severally liable.

SO ORDERED.
ENTER.

Dated: Troy, New York
November 30, 2018

MICHAEL H. MELKONIAN
Acting Supreme Court Justice



Papers Considered:

(1) Notice of Motion dated September 17, 2012;
(2) Affirmation of Nicole DelVecchio, Esq., dated September 17, 2012, with exhibits annexed;
(3) Affidavit of Melissa Palazzolo dated September 17, 2012, with exhibit annexed;
(4) Affirmation of Daniel G. Heppner, Esq., dated October 16, 2012, with exhibits annexed;
(5) Affidavit of Maryanna J. Darmiento dated October 15, 2012;
(6) Affidavit of Perry Starer, M.D., dated October 15, 2012, with exhibits annexed;
(7) Affirmation of Nicole DelVecchio, Esq., dated November 14, 2012, with exhibit annexed.