

Stiglitz v Amber Ct. Assisted Living, LLC
2020 NY Slip Op 35209(U)
May 1, 2020
Supreme Court, Nassau County
Docket Number: Index No. 610952/19
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER

Acting Supreme Court Justice

.....
SUSAN STIGLITZ, as Administrator of the Estate of
HESTHER J. KAUFMAN, Deceased, SUSAN STIGLITZ,
Individually, CHARLES MOSKOWITZ and LEIGH
STIGLITZ,

TRIAL/IAS PART 33
NASSAU COUNTY

Plaintiffs,

Index No.: 610952/19
Motion Seq. Nos.: 01, 02
Motion Dates: 12/17/19
02/24/2020

-against-

AMBER COURT ASSISTED LIVING, LLC and
MMR CARE CORP. d/b/a DALEVIEW CARE CENTER,

Defendants.
.....

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation, Certification and Affidavit, Affidavit and Exhibits	1
Notice of Cross-Motion (Seq. No. 02), Affirmation, Affidavit and Exhibits	2
Supplemental Affirmation in Further Support of Cross-Motion (Seq. No. 02) and Exhibit	3
Affirmation in Opposition to Cross-Motion (Seq. No. 02) and in Reply to Motion (Seq. No. 01) and Exhibits	4
Reply Affirmation to Cross-Motion (Seq. No. 02), Affidavits and Exhibit	5

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant Amber Court Assisted Living, LLC (“Amber”) moves (Seq. No. 01), pursuant to CPLR § 3211(a)(8), for an order dismissing plaintiffs’ Verified Complaint as against it on the grounds that the Court has no jurisdiction of the person of defendant Amber; and moves, pursuant to CPLR § 3211(a)(7), for an order dismissing the Second Cause of Action as against defendant Amber, and any other causes of action in plaintiffs’ Verified Complaint alleging violations of Article 28 of the Public Health Law as against defendant Amber, for failure to state

a cause of action; and moves, pursuant to CPLR § 3211(a)(7), for an order dismissing the Third Cause of Action for breach of contract as it is improperly duplicative of the First Cause of Action for negligence; and moves, pursuant to CPLR § 3211(a)(7), for an order dismissing the Fifth Cause of Action for failure to state a cause of action for fraud due to plaintiffs' failure to allege fraud with specificity as per CPLR § 3016; and moves, pursuant to CPLR § 3211(a)(7) and (8), for an order dismissing the Fifth Cause of Action for fraud and any omitted causes of action in the Verified Complaint due to plaintiffs' failure to file the Verified Complaint with the Court and failure to serve defendant Amber with a complete copy of the Verified Complaint.

Plaintiffs oppose the motion (Seq. No. 01) and cross-move (Seq. No. 02), pursuant to CPLR § 3025(c) [should be CPLR § 3025(b)], for an order granting them leave to amend their Complaint and supplement their Summons. Defendant Amber opposes the cross-motion (Seq. No. 02).

In support of the motion (Seq. No. 01), counsel for defendant Amber submits, in pertinent part, that, “[p]laintiff (*sic*) commenced this action alleging nursing home negligence; violations of Public Health Law § 2801-d; fraud; breach of contract; and wrongful death on behalf of the decedent, Hester J. Kaufman, by (*sic*) filing of a Summons dated August 9, 2019.... Plaintiff's (*sic*) allegations stem from an alleged March 9, 2018 to June 29, 2018 residency at Amber Court of Westbury, and have nothing to do with the separate and distinct entity, Amber Court Assisted Living, LLC.... This is an electronically filed matter and plaintiff (*sic*) filed two documents on August 9, 2019. Document #1 is labeled Summons and the electronically filed document is plaintiff's (*sic*) Summons dated August 9, 2019.... Document #2 is labeled Complaint, however, the electronically filed document is plaintiff's (*sic*) Summons dated August 9, 2019.... As such, plaintiff (*sic*) filed the Summons twice but failed to file the Complaint with

the Court in this matter. Pursuant to an Affidavit of Service dated October 8, 2029, Vicki Matland from Nassau Attorneys' Service identifies that she served a 'Naran Jallim' on behalf of Amber Court Assisted Living, LLC at the address of 3400 Brush Hollow Road, Westbury, NY 11590, with the Summons and Complaint.... Naran Jallim has never been an employee of, a member for, authorized agent, or officer, for Amber Court Assisted Living, LLC. He was not any of these things on the date he was served with the Summons and Complaint, October 8, 2019.... Naran Jallim has never been an agent authorized to receive service or been designated to receive service by Amber Court Assisted Living, LLC.... Naran Jallim is the Executive Director of Amber Court of Westbury.... Therefore, service of the Summons and Complaint on Amber Court Assisted Living, LLC has not been effectuated.... The Complaint served on Naran Jallim is incomplete and the partial Complaint fails to fully apprise Amber Court Assisted Living, LLC of plaintiff's (*sic*) allegations.... Amber Court Assisted Living, LLC was created by the filing of Articles of Organization on May 12, 2006." See Defendant Amber's Affirmation in Support of Motion (Seq. No. 01) Exhibits A-E; Defendant Amber's Affidavits in Support of Motion (Seq. No. 01).

Counsel for defendant Amber further asserts, in pertinent part, that, "[p]laintiff (*sic*) has filed this suit against Amber Court Assisted Living, LLC, which is a separate and distinct entity from Amber Court of Westbury. Amber Court Assisted Living, LLC is a dormant corporation that has never operated in any capacity. Plaintiff's (*sic*) allegations in the Complaint are not directed at Amber Court Assisted Living, LLC, but rather against an assisted living facility where plaintiff (*sic*) alleges she (*sic*) resided from March 9, 2018 to June 29, 2018. Despite New York State law being clear that a plaintiff (*sic*) cannot maintain a cause of action under Public Health Law Article 28, against an Assisted Living Facility, plaintiff (*sic*) asserts a cause of action

for same. In addition to plaintiff (*sic*) suing the wrong entity she (*sic*) has failed to properly effectuate service on Amber Court Assisted Living, LLC. Plaintiff (*sic*) has not served an employee, authorized agent, or officer of Amber Court Assisted Living, LLC. Instead, plaintiff (*sic*) has served a non-party, Naran Jallim. Even then, Naran Jallim has sworn in his Certification and Affidavit that the Complaint that was served upon him was incomplete. Plaintiff (*sic*) asserts a cause of action for breach of contract which is improperly duplicative of the negligence cause of action; as well as failing to assert her (*sic*) fraud cause of action with specificity as required under existing New York State law. Lastly, Plaintiff (*sic*) has also failed to file a copy of the Complaint with the Court as evidenced by the New York State Courts Electronic Filing System (NYSCEF).” *See id.*

Counsel for defendant Amber contends, in pertinent part, that, “[a]s evidenced by the Affidavit of Service, plaintiff (*sic*) attempted, but failed, to personally serve Amber Court Assisted Living, LLC.... CPLR 311(a)(1) provides that personal service upon a limited liability company is made by delivering a copy of the summons ‘**personally to any member or manager of the company, any agent authorized to receive process, or any other person designated by the company to receive process.**’ [citation omitted]. Jurisdiction over the defendant is not obtained by the alleged delivery of the summons and complaint to an employee because a limited liability company has individual members and they are the only individuals authorized to accept service on its behalf. [citation omitted]. Here, this Court does not have personal jurisdiction over Amber Court Assisted Living, LLC because Naran Jallim is not authorized to accept service for the company and was never designated to accept service. Naran Jallim is not an employee of, a member for, authorized agent or officer for Amber Court Assisted Living, LLC.... Naran Jallim never represented that he was an employee, member or authorized

agent at Amber Court Assisted Living, LLC... Plaintiff (*sic*) alleges in the Complaint that she (*sic*) was a resident of Amber Court of Westbury from March 9, 2018 to June 29, 2018.... Despite this, plaintiff (*sic*) incorrectly sues Amber Court Assisted Living, LLC. Raphael Weiss is the Chief Financial Officer for Amber Court Assisted Living, LLC.... Mr. Weiss' affidavit makes clear that Amber Court Assisted Living, LLC is not the same entity as Amber Court of Westbury. This affidavit also makes (*sic*) clear that Amber Court Assisted Living, LLC could not and did not have any interactions with the plaintiff (*sic*) at any time alleged in the Complaint.... Amber Court Assisted Living, LLC is not a parent company to any other entity. This entity does not have the ability to control another entity.... Amber Court Assisted Living, LLC is a New York State Department of State registered corporation, but holds no licenses, hires no employees, provides no care, offers no services, hold (*sic*) no property, and has never operated.... Amber Court Assisted Living, LLC is a dormant New York State Corporation.... Amber Court Assisted Living, LLC is not responsible for the supervision of residents of Amber Court of Westbury. Amber Court Assisted Living, LLC does not provide assistance with residency or care at Amber Court of Westbury.... Amber Court Assisted Living, LLC did not provide supervision, residency assistance, or care to the plaintiff (*sic*)... Amber Court Assisted Living, LLC does not have any contractual agreements with Amber Court of Westbury....” *See id.*

Counsel for defendant Amber argues, in pertinent part, that, “[i]n her Complaint, plaintiff (*sic*) asserts causes of action under Public Health Law § 2801-d. That section authorizes a private right of action against a ‘residential health care facility’ for the violation of certain rights enumerated in Public Health Law § 2803-c. The applicability of Article 28 of the Public Health Law is set forth in § 2800 and includes all institutions providing hospital and related services. [citation omitted]. A residential health facility is defined in Public Health Law § 2800

as a nursing home or facility providing health-related services. In turn, health-related services are defined as ‘service in a facility or facilities which provide or offer lodging, board and physical care including, but not limited to, the recording of health information, dietary supervision and supervised hygienic services incident to such service.’ [citation omitted]. In order for a facility to be considered a residential health care facility under Article 28, it must serve principally as a facility for the provision of health-related services. [citation omitted]. The plain meaning of § 2801-d unequivocally indicates that its purpose is to apply only to those facilities, i.e., nursing homes that provide in depth treatment to patients and a highly recommended routine for its residences. Plaintiff’s (*sic*) apparent basis for bringing claims under Article 28 of the Public Health Law, is based upon the erroneous belief that Amber Court Assisted Living Facility, LLC is a residential health care facility or nursing home. However, it is clear from the affidavit of Raphael Weiss that Amber Court Assisted Living Facility, LLC is in fact, a dormant corporation that holds no licenses, hires no employees, provides no care, offers no services, holds no property, and has never operated.... As such, the Second Cause of Action, must be dismissed as it cannot be maintained against Amber Court Assisted Living Facility, LLC due to it not being a residential health care facility, i.e. nursing home.” *See* Defendant Amber’s Weiss Affidavit in Support of Motion (Seq. No. 01).

Counsel for defendant Amber also argues, in pertinent part, that, “[i]t is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. [citation omitted]. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract. [citation omitted]. In the plaintiff’s (*sic*) Complaint, the plaintiff (*sic*) clearly duplicated her (*sic*) allegations of negligence

as a breach of contract cause of action. The alleged breach of contract arises out of the (*sic*) circumstances as the negligence cause of action.... Pursuant to CPLR 3016, ‘Where a cause of action ... is based upon ... fraud ... the circumstances constituting the wrong shall be stated in detail.’ The material facts relied upon as constituting the fraud and the various elements thereof should be specified so that the Court may determine whether they constitute fraud in law. [citations omitted].... Plaintiff (*sic*) has failed to adequately assert with specificity, the elements of a fraud cause of action. As such, the plaintiff’s (*sic*) Fifth Cause of Action should be dismissed.”

In opposition to the motion (Seq. No. 01) and in support of the cross-motion (Seq. No. 02), counsel for plaintiffs submits, in pertinent part, that, “[w]hen AMBER COURT filed its within Motion to Dismiss, Plaintiffs were alerted to the fact that they had mistakenly sued the wrong AMBER COURT corporate entity in their original Complaint. Plaintiffs bring this Cross-Motion to Amend their Summons and Complaint to include, *inter alia*, the correct name of the corporate entity actually responsible for the harms inflicted upon Plaintiffs and their Decedent: ‘AMBER COURT ASSISTED LIVING OF WESTBURY’, in place and instead of the AMBER COURT ‘shell’ corporation mistakenly named in Plaintiffs’ Complaint. Plaintiffs have also added a new cause of action for Medical Malpractice against a new Defendant: the physician AMBER COURT assigned to treat the Decedent on the facility’s premises, whose medical practice upon information and belief is limited to the treatment of AMBER COURT residents, AMBISHA PATHAK, M.D.... Apparently, AMBER COURT’s filing of the within Motion to Dismiss *also* alerted this *Court* to a clerical error Plaintiffs made when they E-filed their Summons and Verified Complaint on August 9, 2019; although Plaintiffs correctly E-Filed their Summons, they mistakenly E-filed a duplicate copy of said Summons, mistakenly labeled

as their ‘COMPLAINT’, instead of E-filing a copy of their Verified Complaint. Plaintiffs then purchased their Index Number and believed they had successfully completed their E-filing of the Summons and Complaint in this matter. Once this Court received AMBER COURT’s E-filed Motion to Dismiss it apparently checked Plaintiff’s E-filed ‘Complaint’ and discovered their error, because the Court returned Plaintiffs’ erroneously E-Filed ‘Complaint’ the same day that AMBER COURT filed its within Motion, and asked Plaintiffs to correct same ... - which Plaintiffs did, in response to the Court’s request, on December 2, 2019.... The Court promptly E-filed the ‘corrected’ ‘Complaint’ in place and instead of the erroneously labeled document from the NYSCEF web site (*sic*), rendering moot Defendant’s Motion to Dismiss for Plaintiff’s (*sic*) failure to file a complete copy of Plaintiffs’ Verified Complaint.” See Plaintiffs’ Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibits A, D and E.

In further support of the cross-motion (Seq. No. 02), counsel for plaintiffs asserts, in pertinent part, that, “[i]t is well-settled that leave to amend pleadings should be freely granted in the absence of prejudice to any party to the action, [citation omitted], unless the proposed amendment is ‘palpably insufficient or patently devoid of merit.’ [citations omitted]. Because we are still in the pleading stage of this case and Defendant AMBER COURT has yet to impose its Answer, no prejudice can result to any party herein if Plaintiffs’ Motion to Amend their Complaint is granted at this early stage of litigation.... Plaintiffs have met all the requirements for their within Cross-Motion for Leave to Amend the Complaint: (1) Plaintiffs’ Proposed Supplemental Summons and Amended Complaint name the correct AMBER COURT corporate entity: AMBER COURT OF WESTBURY, LLC (not only are the names of the correct corporate entity and the incorrectly-named corporate entity almost identical but, upon information and

belief, both entities have the same or similar corporate officers); and, (2) The attached Affidavit of Plaintiff Susan Stiglitz, dated February 4, 2020, confirms the merit and sufficiency of the amendments Plaintiffs wish to make to their Complaint; (3) There has been *no* delay by Plaintiffs in seeking leave of Court to amend their pleadings, much less the ‘gross delay’ prohibited by CPLR §2001; and, (4) Since, upon information and belief, the same principals are officers of both corporate entities, AMBER COURT ASSISTED LIVING, LLC and AMBER COURT ASSISTED LIVING OF WESTBURY, LLC, respectively, no prejudice or unfair surprise will result to any party herein if Plaintiffs’ Cross-Motion is granted. [citation omitted]. Furthermore, as is set forth in the certified Dearth Certificate ..., Ms. KAUFMAN died on June 29, 2018, from her injuries caused by Defendants’ respective tortious acts and omissions. Thus, Plaintiffs’ action was timely filed. And, as is set forth hereinbelow in greater detail, AMBER COURT received service of all but the signature page of Plaintiffs’ Complaint, which was more than sufficient to place said Defendant on notice of Plaintiffs’ causes of action against it.” *See* Plaintiffs’ Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibits A and H; Plaintiffs’ Affidavit in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02).

Counsel for plaintiffs additionally submits, in pertinent part, that, “[d]efendant AMBER COURT failed to meet its movant’s burden of showing that Plaintiffs’ service of process upon it was *so* fatally flawed as to be deemed constitutionally deficient to establish personal jurisdiction over said Defendant for purpose of this lawsuit. This is because the self-serving Affidavits it submitted in support of its Motion to Dismiss are insufficient to rebut the *presumption* of good service raised by the Affidavit of Service sworn to by process server Vicki Matland on October 8, 2019.... ‘It is well settled in New York that a process server is entitled to rely upon the

representations of an employee who claims to be authorized to receive service of process.’ [citations omitted]. . . . The case law is clear: as long as the employee represents that they are authorized to accept service of process for their employer, and as long as there are indicia of reliability at the scene that support the person’s representation of authority, the process server may effectuate personal service upon the corporation by service upon that individual. [citations omitted]. In the case at bar Plaintiffs’ process server unequivocally swore in her Affidavit of Service . . . that Mr. Jallim informed her she was authorized to accept service on behalf of AMBER COURT. Accordingly, the process server was *entitled* to rely on Mr. Jallim’s assurance because the law does not require a process server to conduct an internal investigation into the inner power structure of AMBER COURT’s management team. Accordingly, Defendant’s Motion to Dismiss on grounds of allegedly improper service of process upon AMBER COURT via personal service upon Authorized Agent Naram (*sic*) Jallim, must be denied in its entirety.” *See* Plaintiffs’ Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibit F.

Counsel for plaintiffs further argues, in pertinent part, that, “AMBER COURT’s allegation that Plaintiffs cannot maintain a cause of action against it pursuant to Public Health Law §2801-d, because the statute only applies to nursing homes while AMBER COURT is only licensed as an Adult Home and ALF, is totally without merit. In actual fact, PHL §2801(3) defines ‘residential health care facility’ – the type of facility to which Article 28 of the Public Health Law applies – as: ‘a nursing home *or a facility providing health-related service.*’ [citations omitted]. . . . **At the very least, Plaintiffs must have the opportunity to obtain full discovery from Defendant AMBER COURT**, including a copy of Decedent’s complete medical and other records of her residency there, and copies of AMBER COURT’s corporate,

(sic) licensing, Medicaid, operations and financial records required, *inter alia*, to prove Plaintiffs' allegations that AMBER COURT was illegally operating a *de facto* nursing home with respect to its illegal retention of Decedent HESTER KAUFMAN, such that the Court must hold AMBER COURT accountable pursuant to PHL 2801-d and PHL 2803-c, and their associated regulations, for illegally retaining a patient who required a higher level of care than an ALF could provide, and denying that resident the care and treatment she required to survive and thrive, which deprivations caused the excruciatingly painful, drawn out demise of Decedent HESTER KAUFMAN.... In light of the extremely detailed pleading of fact and law relevant to Plaintiffs' cause of action for Fraud, Plaintiffs respectfully ask the Court to deny Defendant AMBER COURT's meritless Motion to Dismiss Plaintiffs' cause of action for Fraud, for an alleged failure to plead the cause of action with requisite specificity.... While commercial law litigants are prevented from bringing causes of action for Breach of Contract and Negligence in the same action, because they are duplicative of each other, actions alleging nursing home and ALF abuse and neglect are brought on a completely different legal theory – pursuant to which actions for Breach of Contract and Negligence are not duplicative of each other, because they arise from different, and easily distinguishable, sets of facts.... In Mrs. KAUFMAN's within case, the services AMBER COURT denied to Decedent were not creatures of Decedent's Residency Agreement – they were guaranteed to Decedent by operation of statutes and regulations that are separate and apart from the Residency Agreement Contract. Accordingly, Plaintiffs' claims for denial of statutorily-guaranteed nursing, medical, therapeutic, medication administration and nutritional services, *inter alia*, are separate and apart from – and independent of the enumerated services contained in the Residency Agreement. Similarly, Plaintiffs' claims for negligence against AMBER COURT alleging that whatever services its employees, agents

and/or assigns *did* happen to provide to Decedent were provided negligently, and caused her to sustain serious injuries culminating in her untimely death on June 29, 2018, are separate and apart from Plaintiffs' claims that AMBER COURT failed to provide certain services at all, in violation of the terms of Decedent's Residency Agreement. One of the reasons why Plaintiffs are entitled to maintain separate causes of action for Breach of Contract and Negligence in the same lawsuit is because they are entitled to seek separate elements of damages for each cause of action – for each different set of tortious acts,....”

As indicated, plaintiffs submit the Affidavit of plaintiff Susan Stiglitz in support of their cross-motion (Seq. No. 02). *See* Plaintiffs' Affidavit in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02).

In opposition to the cross-motion (Seq. No. 02) and in reply to the motion (Seq. No. 01), counsel for defendant Amber submits, in pertinent part, that, “[i]n the cross-motion, plaintiffs' counsel admits that plaintiff (*sic*) had brought the action against an incorrect corporate entity and now seeks leave to amend the Complaint to name a different Amber Court entity. Importantly, plaintiffs also seek to add a new defendant, Isha Pathak, M.D. (hereinafter ‘Dr. Pathak’), who was not named as a defendant in the original complaint. A review of plaintiffs' proposed amended Complaint indicates that it essentially contains the same causes of action as stated in the original Complaint, and adds a cause of action for medical malpractice against Dr. Pathak. Accordingly, it is respectfully requested that the Court consider our motion to dismiss several of the plaintiffs' causes of action as equally pertaining to the proposed Amended Complaint. [citations omitted]. Plaintiffs seek leave pursuant to CPLR § 3025(c) (*sic*) to serve the proposed Amended Complaint. Plaintiffs' counsel recognizes in paragraph 16 of her affirmation that it is necessary for plaintiffs to establish the merits of the proposed Amended Complaint. The only

support with respect to merits is the affidavit of plaintiff Susan Stiglitz, a lay person and not a medical or nursing expert. In the event plaintiffs are granted leave to serve the proposed Amended Complaint then it will be necessary for plaintiff (*sic*) to make service upon the new defendant Dr. Pathak, who is not an employee of defendant Amber Court and who will not be represented by this office. The instant motion seeks dismissal of plaintiffs' cause of action against Amber Court pursuant to the New York Public Health Law § 2801-d. As discussed in the motion, New York Public Health Law § 2801-d only pertains to skilled nursing facilities, commonly known as nursing homes. Annexed hereto as **Exhibit 'A'** is the Operating Certificate issued by New York State Department of Health to Amber Court of Westbury, LLC, the new defendant named in plaintiffs' proposed Amended Complaint. The Operating Certificate describes Amber Court as being a (*sic*) 'adult home- assisted living'. Therefore, since defendant Amber Court is an adult living facility and not a nursing home, the provisions of Public Health Law § 2801-d are not applicable and this cause of action should be dismissed with respect to Amber Court. Plaintiffs' counsel recognizes in her supporting affirmation ... that Article 28 of the Public Health Law provided for the regulation of nursing homes while Article 46-b of the Public Health Law provides for the regulation of assisted living residences. Accordingly, it is conceded by plaintiffs' counsel that New York law makes a clear distinction between these two very different types of facilities. Plaintiff herself acknowledged this distinction at the time of admission. Annexed hereto at **Exhibit 'B'** is the Admission Agreement for plaintiff's (*sic*) decedent Hester Kaufman, which we note was signed by plaintiff Susan Stiglitz. As indicated on page 1 of the Admission Agreement, it is acknowledged that Amber Court is an adult care facility and the services provided in the Admission Agreement are consistent with the operation

of an adult care facility and not a nursing home.” *See* Defendant Amber’s Affirmation in Opposition to Cross-Motion (Seq. No. 02) and in Reply to Motion (Seq. No. 01) Exhibits A-C.

Counsel for defendant Amber further contends, in pertinent part, that, “[d]efendant Amber Court also moves to dismiss plaintiff’s (*sic*) cause of action for breach of contract on the ground that it is duplicative of plaintiffs’ cause of action for negligence. The motion details that it is a well established principle of law that a simple breach of contract is not considered a tort. [citation omitted]. Plaintiff’s (*sic*) counsel concedes this point in paragraph 43 of her affirmation but then argues without any legal support that a claim of breach of contract with respect to an adult care facility is somehow outside the general rule prohibiting a separate cause of action for breach of contract in addition to a negligence claim. Plaintiff (*sic*) cites no authority for the novel proposition that in cases involving an adult care facility plaintiffs should be permitted to maintain a separate cause of action for breach of contract in addition to the negligence cause of action. Plaintiffs’ counsel argues at some length that in an action against a nursing home, a plaintiff is permitted to have both a negligence cause of action and an action pursuant to the Public Health Law § 2801-d. While this may be correct, it obviously does not stand for the proposition that plaintiff (*sic*) can also have a breach of contract cause of action in addition to the negligence cause of action.”

The Court will first address plaintiffs’ cross-motion (Seq. No. 02) for an order granting them leave to amend their Verified Complaint and supplement their Summons.

Generally, leave to amend a pleading should be freely granted. *See* CPLR § 3025(b). The party seeking such amendment must demonstrate a proper basis for same. *See Wieder v. Scala*, 168 A.D.2d 355, 563 N.Y.S.2d 76 (1st Dept. 1990). Such an application must be supported by an affidavit that the proposed amendment is meritorious. *See Zaid Theatre Corp. v. Suna Really*

Co., 18 A.D.3d 352, 797 N.Y.S.2d 434 (1st Dept. 2005). While the decision to grant or deny the requested relief is left to the sound discretion of the court (*see Gitlin v. Chirinkin*, 60 A.D.3d 901, 875 N.Y.S.2d 585 (2d Dept. 2009)), a motion for leave to serve an amended pleading will only be denied where the amendment is wholly devoid of merit or is significantly prejudicial to the non-moving party. *See Norman v. Ferrara*, 107 A.D.2d 739, 484 N.Y.S.2d 600 (2d Dept. 1985); *Jenal v. Brown*, 80 A.D.3d 727, 916 N.Y.S.2d 780 (2d Dept. 2011). The merits of the proposed amended pleading will not be reviewed “... unless the insufficiency or lack of merit is clear and free from doubt.” *Norman v. Ferrara, supra* at 740, 741. Therefore, in considering a motion for leave to amend, it is incumbent on the court to examine the sufficiency and merits of the proposed amendment. *See Moyse v. Wagner*, 66 A.D.3d 976, 888 N.Y.S.2d 148 (2d Dept. 2009).

Based upon the above, in the Court’s discretion, plaintiffs’ motion, pursuant to CPLR § 3025(b), for an order granting them leave to amend their Complaint and supplement their Summons, is hereby **GRANTED**. And it is further

ORDERED that the caption shall be amended to read as follows:

.....
SUSAN STIGLITZ, as Administrator of the Estate of
HESTHER J. KAUFMAN, Deceased, SUSAN STIGLITZ,
Individually, CHARLES MOSKOWITZ and LEIGH
STIGLITZ,

Plaintiffs,

-against-

AMBER COURT OF WESTBUTY, LLC, MMR CARE
CORP. d/b/a DALEVIEW CARE CENTER and
ISHA PATHAK, M.D.,

Defendants.
.....

And it is further

ORDERED that plaintiffs shall serve upon all of the parties herein the Supplemental Summons and Amended Complaint by June 1, 2020. A copy of this Decision and Order shall be served with those papers.

The Court will now address defendant Amber’s motion (Seq. No. 01).

Based upon the Court granting plaintiffs’ cross-motion (Seq. No. 02), as detailed above, the branches of defendant Amber’s motion, pursuant to CPLR § 3211(a)(8), for an order dismissing plaintiffs’ Verified Complaint as against it on the grounds that the Court has no jurisdiction of the person of defendant Amber; and, pursuant to CPLR § 3211(a)(7) and (8), for an order dismissing the Fifth Cause of Action [Amended Complaint Sixth Cause of Action] for fraud and any omitted causes of action in the Verified Complaint due to plaintiffs’ failure to file

the Verified Complaint with the Court and failure to serve defendant Amber with a complete copy of the Verified Complaint, are hereby **DENIED as moot**.

“In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), ‘the court will 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.’” *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) quoting *Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) quoting *Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys “R” Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiffs can succeed on any reasonable view of facts stated. *See Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiffs can ultimately establish the truth of their allegations. *See 219 Broadway Corp. v. Alexander’s Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the Verified Complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). However, bare legal conclusions are not presumed to be

true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013). "In assessing a motion to dismiss under 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon v. Martinez, supra* at 88.

When viewing plaintiffs' Amended Complaint in light of the criteria set forth above, the Court finds that plaintiffs have failed to sustain the Amended Complaint Third Cause of Action [improperly listed as the Fourth Cause of Action in the Proposed Amended Complaint] against defendant Amber for Public Health Law § 2801-d violation. The Court finds that defendant Amber is an assisted living facility and, therefore, does not fall under this statute. *See Novick v. South Nassau Communities Hosp.*, 136 A.D.3d 999, 26 N.Y.S.3d 182 (2d Dept. 2016).

Therefore, the branch of defendant Amber's motion (Seq. No. 01), pursuant to CPLR § 3211(a)(7), for an order dismissing the Second Cause of Action [now Amended Complaint Third Cause of Action] as against defendant Amber, and any other causes of action in plaintiffs' Complaint alleging violations of Article 28 of the Public Health Law as against defendant Amber, for failure to state a cause of action, is hereby **GRANTED**.

Additionally, when viewing plaintiffs' Amended Complaint in light of the criteria set forth above, the Court finds that plaintiffs have failed to sustain the Amended Complaint Fourth Cause of Action against defendant Amber for breach of contract. This cause of action is duplicative of the Amended Complaint Second Cause of Action for negligence.

Therefore, the branch of defendant Amber's motion (Seq. No. 01), for an order dismissing the Third Cause of Action [now Amended Complaint Fourth Cause of Action] for breach of contract as against defendant Amber, is hereby **GRANTED**.

When viewing plaintiffs' Amended Complaint in light of the criteria set forth above, the branch of defendant Amber's motion (Seq. No. 01), pursuant to CPLR § 3211(a)(7), for an order dismissing the Fifth Cause of Action [now Amended Complaint Sixth Cause of Action] for failure to state a cause of action for fraud due to plaintiffs' failure to allege fraud with specificity as per CPLR § 3016, is hereby **DENIED**.

The parties shall appear for a Preliminary Conference on June 30, 2020, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:

_____/S/_____
DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
May 1, 2020

ENTERED
May 07 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE