

<b>Howard v Schnur Operations Assoc. LLC</b>
2022 NY Slip Op 30426(U)
January 10, 2022
Supreme Court, Kings County
Docket Number: Index No. 510870/2020
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Index Number 510870/2020
Seq #001 & 002

Part 91

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers
considered in the review of this Motion

ROSITA HOWARD,

Plaintiff,

Table with 2 columns: Papers, Numbered. Rows include Notice of Motion and Affidavits Annexed (1, 2), Order to Show Cause and Affidavits Annexed, Answering Affidavits (3), Replying Affidavits, Exhibits, and Other.

against

SCHNUR OPERATIONS ASSOCIATES LLC, CENTERLIGHT
HEALTH SYSTEM, INC., CENTERLIGHT HEALTHCARE
SYSTEM, INC., CENTERS HEALTH CARE IPA, LLC,
SCHNURMACHER CRN, SCHNURMACHER CENTER FOR
REHABILITATION AND NURSING, MARTINE CENTER FOR
REHABILITATION AND NURSING, AND "JANE DOE", THE
NAME BEING FICTITIOUS, THE PERSON INTENDED BEING
THE EMPLOYEE OF THE NURSING HOME WHO OPERATED
PLAINTIFF'S WHEELCHAIR,

Defendants.

Upon the foregoing papers, defendants' motion to dismiss pursuant to CPLR 3211(a)(1)
(Seq. 001) and plaintiff's motion for default judgment (Seq. 002) are decided as follows.

Plaintiff's Allegations

Plaintiff alleges that, on July 2, 2017, defendants owned or otherwise controlled a nursing
home facility located at 12 Tibbits Avenue, White Plains, New York, and, as such, were required
to comply with certain laws (complaint at ¶¶ 8-15, 25-32, 42-49, 59-66, 76-83, 93-100,
111-18.). Plaintiff was receiving treatment at defendants' facility (id. at ¶¶ 17, 34, 51, 68, 85,
102, 110, 120, 128). Defendants knew that, on July 2, 2017, their employee was moving plaintiff
in a defective wheelchair (id. at ¶¶ 16-17, 33-34, 50-51, 67-68, 84-85, 101-02, 119-20). On
that day, while being moved in the wheelchair, plaintiff fell and was injured (id. at ¶¶ 17, 34, 51,
68, 85, 102, 120). Plaintiffs alleged that defendants owned or was otherwise responsible for the

wheelchair (*id.* at ¶¶ 18–24, 35–41, 52–58, 69–75, 86–92, 103–110, 121–27). Plaintiff asserts that defendants breached their statutory and common-law duty of care by allowing plaintiff to be injured when she fell from the wheelchair while under defendant's care (*id.* at ¶¶ 129–44).

### Analysis

#### Motion to Dismiss

Defendants Centerlight Health Systems, Inc., Centerlight Health Systems, Inc. s/h/a Centerlight Healthcare System, Inc., Schnurmacher CRN and Schnurmacher CRN s/h/a Schnurmacher Center for Rehabilitation and Nursing move to dismiss plaintiff's claims against them pursuant to CPLR 3211(a)(1). To dismiss a claim pursuant to CPLR 3211(a)(1) based on documentary evidence, the documents must resolve “all factual issues as a matter of law, and conclusively [dispose] of the plaintiff's claim” (534 K, *LLC v Flagstar Bank, FSB*, 187 AD3d 971, 972 [2d Dept 2020]).

A movant seeking dismissal pursuant to CPLR 3211 must submit a copy of the pleading that is the subject of the motion (*Gibbs v Kings Auto Show Inc.*, 47 Misc 3d 1203[A], 2015 NY Slip Op 50426[U], \*2 [Sup Ct, Kings County 2015] citing *Alizio v Perpignano*, 225 AD2d 723, 724 [2d Dept 1996]). Defendants failed to submit a copy of the complaint. Such failure warrants denial of the motion (*Alizio*, 225 AD2d at 724).

This technical violation aside, defendants argue that they did not own, operate, maintain, manage, supervise, or control the facility at which plaintiff was injured, or the wheelchair from which plaintiff fell. In support of their motion, defendants submit a copy of a deed transferring ownership of the property on which the facility stood. This deed shows that, on March 15, 2017, Schnurmacher Center for Rehabilitation and Nursing transferred the property to Light Property

Holdings II Associates LLC (“Light Property”). While this document shows that defendants sold the land to Light Property, it does not prove that they sold the business to Light Property.

Conversely, defendants also submit a bill of sale, dated March 15, 2017, which states that, on that day, Schnurmacher Center for Rehabilitation and Nursing sold to Schnur Operations Associates LLC the following:

- a. Non-Fixed Equipment, excluding the Non-Fixed Equipment set forth in Schedule 2.1(a) to the Agreement;
- b. all resident records (e.g., medical charts, notes and orders relating to the medical history, diagnosis and treatment of residents) and other records of those residents who are being treated in connection with the Business at the time of the Closing to the extent legally transferable and in accordance with all applicable Laws, including but not limited to any patient notification and consent that may be required by Law;
- c. resident/patient prepayments;
- d. security deposits relating solely to the Business; and
- e. any inventory in stock at the Business at the time of the Closing.

While a wheelchair may likely meet the definition “Non-Fixed Equipment”, the parties do not submit a copy of the “Agreement” that actually defines the term. Additionally, the parties do not submit Schedule 2.1(a) to the Agreement, which lists items excluded from the definition. It is also not clear if the wheelchair may be considered “inventory”.

Defendants submit the affidavit of Johnny Lee, the Chief Financial Officer of Centerlight Health System, Inc. Mr. Lee explains that, on March 15, 2017 Schnurmacher CRN f/k/a Schnurmacher Center for Rehabilitation and Nursing sold its personal and real property at 12 Tibbits Avenue, White Plains, New York (Lee Affidavit at ¶ 4).<sup>1</sup> Defendants claim that,

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<sup>1</sup> Mr. Lee also states that, on June 4, 2018, Schnurmacher Center for Rehabilitation and Nursing changed its name to Schnurmacher CRN (Lee Affidavit at ¶ 6). Because the claims

accordingly, they did not own, operate, maintain, manage, supervise or control the subject premises or wheelchair (*id.* at ¶¶ 7–12, 17–22). However, testimonial affidavits are not proper documentary evidence on a motion to dismiss (*Cajigas v Clean Rite Centers, LLC*, 187 AD3d 700 [2d Dept 2020]; *VIT Acupuncture P.C. v State Farm Auto. Ins. Co.*, 28 Misc 3d 1230[A], 2010 NY Slip Op 51560[U], \*1 [Civ Ct, Kings County 2010], quoting *Teitler v Max J. Pollack & Sons*, 288 AD2d 302, 302 [2d Dept 2001]).

Lastly, defendants argue that there is no company called Centerlight Healthcare Systems, Inc. because there is no record of such a company with the New York State Department of State Division of Corporations. Even assuming this is true, it means only that there is no such company registered to do business in New York. It does not mean that a company never conducted business under that name.

It may be that defendants will ultimately show that they were not in any way involved in the nursing home at which Ms. Howard was hurt on the day of the accident. However, a motion to dismiss, with its high burden of proof, is not the proper procedural vehicle for this effort.

#### Motion for Default Judgment

Ms. Howard seeks default judgment against defendants Schnur Operations Associates LLC, Centers Health Care IPA, LLC, and Martine Center for Rehabilitation and Nursing. To obtain default judgment, plaintiff must establish that these defendants were properly served with process, that defendants failed to appear or answer the complaint, and that plaintiff has a viable cause of action (*Triangle Properties 2, LLC v Narang*, 73 AD3d 1030, 1032 [2d Dept 2010]).

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against Schnurmacher Center for Rehabilitation and Nursing are not dismissed by this motion, this assertion is moot.


Plaintiff established that these defendants were served with process by submitting the relevant affidavits of service. Plaintiff also established defendants' default in that they failed to appear or otherwise respond to the complaint. Lastly, plaintiff established a viable cause of action through her affidavit submitted in support of the motion.

**Conclusion**

For the foregoing reasons, defendants' motion to dismiss is denied, and plaintiff's motion for default is granted. Inquest will be at the time of trial.

This constitutes the decision and order of the court.

January 10, 2022  
**DATE**

  
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**DEVIN P. COHEN**  
Justice of the Supreme Court

**KINGS COUNTY CLERK  
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