SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** **12**

Justice

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PACIFIC INDEMNITY INSURANCE COMPANY A/S/O ALEXANDRA M. ROCKEFELLER, *et al.*,

Plaintiff,

- v -

PRIVATUS CARE SOLUTIONS,

Defendant.

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INDEX NO. 150880/2020

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12-20, 22-34, 36-39, 41, 42

were read on this motion to dismiss.

By notice of motion, defendant Privatus Care Solutions moves pursuant to CPLR 3211(a)(7) for an order dismissing the action against it. Plaintiffs oppose.

I. BACKGROUND

A. Instant action

This action arises out of a fire that occurred on January 12, 2019 in unit 96 at 435 East 52nd Street in Manhattan. Plaintiffs allege that defendant was the home health service company attending to Mary Alyce Merow, who resided with her husband John Merow in unit 96, and that defendant's negligence in failing to maintain the premises and/or to supervise its employees caused the fire and related damage. Plaintiff insurance companies had issued insurance policies to certain condominium owners in the building, all of whom allegedly suffered property damage due to the fire. Plaintiffs paid its insureds for their insurance claims, and thus became subrogated to their rights. (NYSCEF 1).

It is undisputed that the fire was started by Mary when she attempted to light or lit a cigarette. The home health aide employed by defendant was at the unit when the fire began. (NYSCEF 13). It is also undisputed that a service agreement between defendant and John Merow for Mary's care requires that defendant provide Mary with, *inter alia*, home health care services, including "safety supervision," 24 hours a day, seven days a week. (NYSCEF 17). Both Merows perished in the fire.

B. Estate of Merows's action

In the wrongful death case commenced by the Merows's estate against, *inter alia*, defendants (index number 156740/2019), the estate sues for, *inter alia*, wrongful death, negligence, and breach of contract, and alleges, as pertinent here, that Mary had been diagnosed with dementia and was unable to function independently, that during defendant's initial assessment of Mary, its nurse was told that Mary was a heavy and habitual smoker of cigarettes and had a habit of dropping things, including cigarettes and matches, and that due to that behavior, she required constant supervision. Before the fire, a home health care aide assigned to the home told defendant that she was concerned as Mary smoked and burned things.

The estate also alleges that on the night of the fire, a new employee was assigned to take one of the shifts, and was told that Mary was a smoker who required supervision. Although the new employee observed Mary asleep on the couch with cigarettes, matches, and a lighter nearby, she left the room and spent most of her shift in another room, checking on Mary every two hours. During the early morning hours, while the employee was in the bathroom, Mary had apparently lit a cigarette, setting herself and the couch on fire. By the time the employee had entered the room, the fire had started. Instead of attempting to use the fire extinguisher and smoke pull-down station in the apartment, the employee called 911 and attempted to douse the flames by taking

water from the kitchen. John also attempted to extinguish the fire, but it quickly spread to the walls and furniture.

II. CONTENTIONS

Defendant denies that it may be held liable for plaintiffs' subrogation claims absent a contractual relationship with the Merows. Nor, it contends, do the factors set forth in *Espinal v Melville Snow Contractors*, 98 NY2d 136 (2002), apply. Rather, defendant observes, plaintiffs allege that the fire was caused by its negligent omissions, rather than by affirmative negligence on its part, which is insufficient to establish that it had launched a force or instrument of harm, and that the other two *Espinal* factors are inapplicable. (NYSCEF 13).

Plaintiffs observe that in the underlying wrongful death action, the estate sues defendant for its negligence and breach of contract in failing to supervise Mary and ensure that she not start a fire, and that, therefore, the allegations involve active negligence, not just negligence by omission. They allege that pursuant to *Espinal*, defendant launched a force or instrument of harm by permitting Mary access to cigarettes, matches, and lighters and failing to supervise her to prevent her from causing a fire. Moreover, defendant is alleged to have exacerbated the dangerous condition by failing to use the fire extinguisher and smoke pull-down station to extinguish the fire. (NYSCEF 29).

According to plaintiffs, defendant's duties to Mary were so broad that they entirely displaced the Merows's own duty to maintain the premises and take care of its occupants. And, as no discovery has been exchanged, plaintiffs argue that the motion is premature as none of the relevant information is in the possession of their insureds. (*Id.*).

In reply, defendant disputes plaintiffs' characterization of its employee's behavior related to the fire as affirmative negligence, observing that Mary alone started it, and that its employee

was not required to take away her cigarettes or lighter or matches. Nor is the allegation that its employee failed to use proper safety measures to stop the fire sufficient, as these claims do not establish that it exacerbated a dangerous condition. It also denies that its agreement with the Merows was so comprehensive as to entirely displace the Merows's duty to maintain their apartment safely. (NYSCEF 36).

III. ANALYSIS

"A party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that . . . the pleading fails to state a cause of action . . ." (CPLR 3211[a][7]). When evaluating such a motion, the court must determine whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Thus, "the court must accept the facts as alleged in the complaint as true, according plaintiffs the benefit of every possible favorable inference . . ." (*JFK Holding Co., LLC v City of New York*, 68 AD3d 477 [1st Dept 2009] [internal quotation omitted]), although "conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss." (*Barnes v Hodge*, 118 AD3d 633 [1st Dept 2014]; *see also Jones v Voskresenskaya*, 125 AD3d 532, 534 [1st Dept 2015] [allegations that are "vague, speculative and unsupported by any facts" cannot sustain cause of action]).

On such a motion, the reviewing court is also required to "determine only whether the facts as alleged fit within any cognizable legal theory" and "the [motion] must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it." (*Butler v Magnet Sports & Entm't Lounge, Inc.*, 135 AD3d 680, 680-81 [2d Dept 2016]).

As a finding of negligence must be based on the breach of a duty, "a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party." *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). A duty of care is owed a third party by a contractor who has contracted to render services:

> (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launches a force or instrument of harm"; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely.

(*Medinas v MILT Holdings LLC*, 131 AD3d 121 [1st Dept 2015], quoting *Espinal*, 98 NY2d at 140).

Nothing in the service agreement between defendant and the Merows requires defendant to "maintain the premises safely" or take action related to the premises generally. Rather, the service agreement is limited to the care and supervision of Mary only. Moreover, there is no indication that John was incapable of maintaining the premises and he attempted to extinguish the fire, albeit unsuccessfully. Therefore, the third *Espinal* exception is inapplicable.

As it is undisputed that Mary started the fire, it is reasonably inferred that she thereby created the dangerous condition. At issue, therefore, is whether the failure of defendant's employee to supervise Mary at the time she lit the cigarette constitutes the launching of a force or instrument or harm, and/or whether the employee's attempt to extinguish the fire by using water rather than the fire extinguisher or pull-down station constitutes the exacerbation of a dangerous condition.

The launching of a force or instrument of harm is established by proof that a contractor created or exacerbated a dangerous condition, which requires a showing that it affirmatively left the situation in a more dangerous condition than that in which it was found; a passive omission

may create or exacerbate a dangerous condition. (*Santos v Deanco Svces., Inc*., 142 AD3d 137 [2d Dept 2016]).

While a close issue, affording plaintiff the benefit of every possible favorable inference permits the reasonable inference that the fire would not have started had the employee been supervising Mary when she lit the cigarette, that the failure to do so created a dangerous condition, and that the employee's failure to employ proper fire safety measures in attempting to extinguish the fire exacerbated a dangerous condition. Consequently, plaintiffs' factual allegations are sufficient to state a claim against defendant absent a demonstration that *Espinal* bars plaintiff's claim. (*See e.g., Malerba v New York City Tr. Auth*., 204 AD3d 570 [1st Dept 2022] [contractor did not establish that it did not launch force or instrument of harm that caused plaintiff's injuries as its contract required it to repair, service, and refill fire extinguishing system's tanks, and there was evidence that it regularly removed safety caps from tanks]; *Lopez v New York Life Ins. Co*., 90 AD3d 446 [1st Dept 2011] [as puddle of water may have been created by failure to correct drip or failure to notice and report leak, contractor did not demonstrate that it did not launch force or instrument of harm]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss is denied.

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7/5/2022
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE