

**DeRusso v Church Aid of the Prot. Episcopal Church  
in the Town of Saratoga Springs, Inc.**

2023 NY Slip Op 34788(U)

October 18, 2023

Supreme Court, Saratoga County

Docket Number: Index No. EF2023790

Judge: James E. Walsh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT  
STATE OF NEW YORK

COUNTY OF SARATOGA

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**CRAIG DERUSSO AND JANET DERUSSO,**

Plaintiffs,

**DECISION and ORDER**

RJI # 45-1-2023-0641

Index # EF2023790

-against-

**THE CHURCH AID OF THE PROTESTANT  
EPISCOPAL CHURCH IN THE TOWN OF  
SARATOGA SPRINGS, INC., D/B/A HOME OF  
THE GOOD SHEPHERD AT HIGHPOINTE,**

Defendant.  
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**APPEARANCES**

James B. Tuttle, Esq.  
The Tuttle Law Firm, LLP  
Attorneys for Plaintiffs  
1520 Crescent Road, Suite 300  
Clifton Park, New York 12065

Elizabeth J. Grogan, Esq.  
O'Connor, O'Connor, Bresee & First P.C  
Attorneys for Defendant The Church Aid of the Protestant Episcopal  
Church in the Town of Saratoga Springs, Inc.,  
d/b/a Home of the Good Shepherd at Highpointe  
20 Corporate Woods Blvd.  
Albany, New York 12211

WALSH, J

On or about March 22, 2023, Plaintiffs filed a Summons and Complaint seeking damages for personal injuries sustained by Plaintiff Craig DeRusso while he was a resident at Defendant's facility. In lieu of an Answer, by Notice of Motion, filed on May 26, 2023, Defendant moved for an Order pursuant to Civil Practice Law and

Rules (CPLR) §3211(a)(7) seeking to dismiss the second cause of action in the Complaint. On July 11, 2023, Plaintiffs filed an Amended Complaint and on July 12, 2023, Plaintiffs filed opposition to the instant motion. Defendant submitted a reply Affirmation and Memorandum of Law on July 18, 2023.

Like the initial Complaint, the Amended Complaint contains four causes of action: 1) Negligence; 2) violations pursuant to Public Health Law (PHL) §2081-d; 3) Intentional Tort; and 4) Negligent Hiring/Retention. The Court will accept the Amended Complaint and bases its determination on the allegations made therein. Defendant still seeks an Order dismissing the alleged violations of PHL §§ 2801-d in the second cause of action as defective on its face.

Preliminarily, “on a motion to dismiss pursuant to CPLR §3211, the pleading is to be afforded a liberal construction. [The Court is to] accept the facts as alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. [A] dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]. *Citations omitted*. Pleadings are to be construed liberally and the determination for the Court is whether the cause of action exists rather than whether it has been properly stated. *See Kelly v. Bank of Buffalo*, 32 AD2d 875 (4<sup>th</sup> Dept. 1969); *CPLR §3026*. All inferences are to be construed in the favor of the non-moving party, as a ruling in the moving party’s favor deprives a litigant of their day in court.

Defendant contends that it operates an “assisted living facility,” governed by PHL Article 46 and not a “residential health care facility” governed by PHL Article 28. PHL §2801-d creates a private right of action by patients against residential health care facilities for deprivation of rights conferred by statute, regulations and contract, including those specified in PHL §2803-c. Defendant submits that as it is licensed as an “assisted living facility”, which is specifically exempted from the definition of a residential health care facility, the second cause of action pursuant to PHL §2801-d is inapplicable. In contrast, Plaintiffs submit that Defendant performs residential health care services and that it remains an issue of fact at this early stage of the proceedings as to whether the cause of action pursuant to PHL §2801-d is viable as an issue of law. Specifically, Plaintiffs assert that, Defendant is properly classified as an entity falling within “residential health care services,” as an umbrella category, which includes establishments offering any “health-related services.” PHL §2801(3). The term “health-related service” is defined as administered services within a facility including lodging, sustenance, physical care, documentation of health-related information, dietary supervision, and hygienic services, which Plaintiff avers to receiving from Defendant. *Id.* at § 2801(4)(b).

PHL §2801(3) defines “residential health care facility” as encompassing “nursing home(s) or . . . facilit(ies) providing health-related service(s).” However, PHL § 4651(a) specifically provides that “assisted living and enhanced assisted living shall not include: (a) residential health care facilities or general hospitals licensed under article twenty-eight of this chapter.” In further support thereof, Defendant provides

the certification issued by the Office of Aging and Long-Term Care of the New York State Department of Health which designates Defendant as an Assisted Living Residence (ALR), Enhanced Living Residence (EALR), and a Special Needs Assisted Living Residence (SNALR). These certifications, conferred in 2009, remain in effect until 2025.

Plaintiff relies on *Cunningham v. Mary Agnes Manor Mgt., LLC*, 188 AD3d 1560 [4th Dept. 2020], wherein the Appellate Division Fourth Department reversed the lower court's dismissal of a cause of action pursuant to PHL §2801-d, finding that Plaintiff there sufficiently established an issue of fact as to whether the health related services provided by Defendant there overcame Defendant's assertion that as an assisted living facility, PHL §2801-d did not apply.

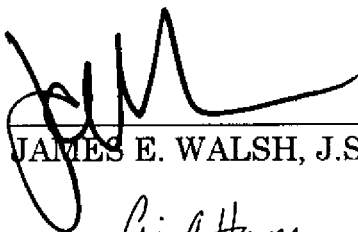
In contrast, the Appellate Division Second Department examined this issue a year later in 2021 in *Broderick v. Amber Ct. Assisted Living*, 200 A.D.3d 840 (2<sup>nd</sup> Dept. 2021) and concluded that the lower court there should have dismissed the cause of action against defendant which operated an assisted living facility as such was specifically exempted from the definition of residential health care facility by PHL §4651(a). The Court determined that even accepting Plaintiffs' allegations as true, that Defendant performed health-related services at its assisted living facility, that such facility cannot be designated as a "de facto residential health care facility" in contravention of the clear language of PHL §4651(a). *Id.* at 841–842.

Where a statute is clear on its face, the Court must effectuate the intent of the Legislature. *See, Riley v. Cnty. of Broome*, 95 N.Y.2d 455 (2000). As a "residential

health care facility” is specifically excluded from the definition of “assisted living residence” and the private right of action championed by PHL §2801-d applies to “residential health care facilities”, even accepting Plaintiffs allegations regarding the health-related services performed by Defendant as true, the Court agrees with the examination from the Appellate Division Second Department in *Broderick*. Defendant’s motion to dismiss the second cause of action from the Amended Complaint pursuant to CPLR §3211(a)(7) is granted.

This shall constitute the Decision and Order of the Court. No costs are awarded to any party. The Court is hereby uploading the original Decision and Order into the NYSCEF system for filing and entry by the County Clerk. Defendant’s counsel is still responsible for serving notice of entry of this Decision and Order in accordance with the Local Protocols for Electronic Filing for Saratoga County. A conference to be conducted virtually is hereby scheduled with counsel for **November 20, 2023 at 10:00 a.m.** for the purpose of addressing the status of discovery and establishing a scheduling order, if needed.

Dated: October <sup>18<sup>th</sup></sup>, 2023  
Ballston Spa, New York

  
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JAMES E. WALSH, J.S.C.

Papers received and considered:

  
Entered Saratoga County Clerk

10/18/2023

Notice of Motion to Dismiss on behalf of Defendant, filed May 26, 2023

Attorney Affirmation in Support of Defendant’s Motion to Dismiss of Elizabeth J. Grogan Esq., dated May 26, 2023

**Memorandum of Law in Support of Defendant's Motion to Dismiss of Elizabeth J. Grogan Esq., dated May 26, 2023**

**Amended Verified Complaint of James B. Tuttle, Esq., dated July 11, 2023.**

**Attorney Affirmation in Opposition to Defendant's Motion to Dismiss of James B. Tuttle, Esq., dated July 12, 2023**

**Memorandum of Law in Opposition to Defendant's Motion to Dismiss of James B. Tuttle, Esq., dated July 12, 2023**

**Reply Attorney Affirmation in Further Support of Defendant's Motion to Dismiss of Elizabeth J. Grogan Esq., dated July 18, 2023, with Exhibit #A**

**Reply Memorandum of Law in Further Support of Defendant's Motion to Dismiss of Elizabeth J. Grogan Esq., dated July 18, 2023**