

Rybsztajn v Elite Care LLC

2025 NY Slip Op 30329(U)

January 21, 2025

Supreme Court, Kings County

Docket Number: Index No. 529182/22

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 21st day of January, 2025.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

-----X
BRONIA RYBSZTAJN, deceased, by the Administratrix of the Estate, JENNIFER RYBSTEIN, and on behalf of decedent's distributees,

Plaintiff,

DECISION AND ORDER
Motion Seq. 2 and 5

-against-

Index No. 529182/22

ELITE CARE LLC,

Defendant.
-----X

The following e-filed papers read herein:
Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Affidavits/Affirmations in Reply _____
Other Papers: Affidavits/Affirmations in Support _____

NYSCEF Nos.:

38-40, 70
81
82
72, 81

Upon the foregoing papers, defendant Elite Care LLC (Elite) moves for an order 1) pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the complaint of plaintiff Jennifer Rybstein, Administrator of the Estate of decedent Bronia Rybsztajn, 2) pursuant to 22 NYCRR § 130-1.1, imposing monetary sanctions against plaintiff and/or her counsel, Brach Eichner, related to the costs as a result of prior motion for leave to amend the complaint which was withdrawn, 3) pursuant to CPLR 3025 (b), granting Elite leave to amend its answer should any cause of action survive Elite's motion to dismiss and 4) pursuant to CPLR 3130, precluding plaintiff from deposing Elite. Plaintiff cross-moves, pursuant to CPLR 3025 (b), for leave to serve an amended complaint.

Plaintiff commenced this action to recover damages for wrongful death, negligence and breach of contract following the death of decedent Bronia Rybsztajn (Bronia). According to the original complaint, Elite, a provider of home companion/geriatric care management services to individuals in a home setting, employed an aide who provided companion/geriatric care management services to Bronia at her home in

Woodmere, New York. Plaintiff alleges that on April 11, 2022, Elite, through the negligence of its employees, agents and servants, “failed to follow a Plan of Care and the care instructions of [Bronia’s] family and negligently left [Bronia] unattended, permitting [Bronia] to fall to the floor,” and resulting in her death. The original complaint set forth causes of action for negligence, breach of contract and wrongful death.

On April 28, 2023, following joinder of issue, plaintiff moved for leave to amend the complaint. The proposed amended complaint expanded and provided more detailed factual allegations, added defendants including Eli Kohn, Elite’s principal, expanded and restated its negligence and wrongful death claims, and added causes of action for violation of General Business Law § 349 (a), fraud, and aiding and abetting fraud. The motion to amend, opposed by Elite, was withdrawn by notice of withdrawal without prejudice filed on July 3, 2023. Elite subsequently brought the instant motion to dismiss the original complaint along with a request for sanctions and costs on grounds that the proposed amended complaint which plaintiff sought leave to file contained scandalous allegations and was otherwise frivolous or without merit.

On December 13, 2023, plaintiff brought the instant, second motion for leave to amend the complaint. The new proposed amended complaint (PAC) likewise supplements the factual allegations and adds several defendants, including Eli Kohn, Eli Kohn’s wife, Victoria Kohn, Monica Dennie a/k/a Claudia Britton Morris, Monica Rock, Monica Britton, Claudia Dennie, and Britton Dennie, the alleged aide on duty at the time of the accident, Victoria Caputo (Caputo), the “Care Coordinator” for Elite, and 5 Towns Jewish Times Inc. (5 Towns) the publication in which Elite placed “advertorials” alleged to contain false and misleading statements as to Elite’s licensing, bonding and quality of services. The PAC sets forth causes of action for wrongful death, conscious pain and suffering, negligence per se, negligence through respondeat superior, gross negligence, negligent hiring and retention, breach of contract, fraud, aiding and abetting fraud, and (as to 5 Towns) conspiracy to commit fraud.

The court will first address the motion of plaintiff to amend the complaint. “Pursuant to CPLR 3025 (b), leave to amend or supplement a pleading is to be freely given. In the absence of prejudice or

surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Watkins-Bey v MTA Bus Co.*, 174 AD3d 553, 554 [2d Dept 2019] [citations and internal quotation marks omitted]). “A party seeking leave to amend a pleading need not make an evidentiary showing of merit” (*id.* [citations omitted]). “The court need only determine whether the proposed amendment is ‘palpably insufficient’ to state a cause of action or defense, or is patently devoid of merit” (*Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]). “If the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment upon a proper showing” (*id.* [citation omitted]).

In the PAC, plaintiff alleges that “[b]y accepting payment for the care and treatment of Bronia Rybsztajn from MKR Medical PC, a corporation in which Marc Rybstein, Bronia’s grandson was and is a principal, a contract was created of which Bronia Rybsztajn was the direct and intended third-party beneficiary” (PAC, NYSCEF Doc No. 74, ¶ 234) Plaintiff alleges that the contract required Elite, and Elite failed, “to provide the care for Bronia Rybsztajn that they advertised they could and would provide by the kind of individuals they claimed in public advertising they employed to provide such care” (PAC, ¶ 235).

According to the PAC, in the early morning hours of April 12, 2022, Elite employee “Claudia” left Bronia unattended, failing to ensure that Bronia was in a safe and/or protected position and location, and as a direct and proximate result of leaving Bronia unattended and in an unsafe position, Bronia fell, leading to her death three weeks later on May 2, 2022. Plaintiff alleges that “Claudia” was a fictitious name used by defendant Monica Dennie (a/k/a Claudia Britton Morris, Monica Rock, Monica Britton, Claudia Dennie, and Britton Dennie), who has never held any medical licenses or home care certifications of any kind, and that Bronia’s death was the direct and proximate result of the failure by Elite to adequately vet, train, screen, submit for background check and supervise its home care services employee, “Claudia.”

While “[l]iability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties” (*KTG Hospitality, LLC v Cobra Kitchen Ventilation, Inc.*, 201 AD3d 710,

711 [2d Dept 2022] [internal quotation marks omitted]), a third party may sue for breach of contract if it is an intended beneficiary, i.e., where “the parties’ intent to benefit the third party [is] apparent from the face of the contract” (*East Coast Athletic Club, Inc. v Chicago Tit. Ins. Co.*, 39 AD3d 461, 463 [2d Dept 2007]; see *Merlino v Knudson*, 214 AD3d 642, 644 [2d Dept 2023]).

The proposed cause of action for breach of contract is not palpably insufficient or patently devoid of merit as it contemplates an agreement formed between Elite and a third-party (MKR Medical PC) for Elite to provide home care to an intended beneficiary (Bronia) in exchange for payment, and that Elite failed to provide the care as promised. While there is no indication that a formal written agreement was executed, the proposed claim for breach of contract is not precluded by the Statute of Frauds since there is no allegation that the agreement, although of indefinite duration, was terminable within a year of its inception *only* by its breach (see General Obligations Law § 5-701 [a] [1]; *Wang Jia v Kang*, 161 AD3d 463, 465 [1st Dept 2018]; cf. *Sabharwal v Eminax, LLC*, 305 AD2d 336, 337 [1st Dept 2003]).

Based on the facts alleged in the PAC, the court also finds that the proposed causes of action for wrongful death, conscious pain and suffering, and negligence (respondeat superior) are sufficiently pleaded. The proposed amendments would not result in any prejudice to Elite as these claims are reasonably inferable from the allegations in the original complaint. However, the court finds that the remaining proposed causes of action, and proposed additions of Eli Kohn, Victoria Kohn, Caputo and 5 Towns as defendants, are palpably insufficient and/or patently devoid of merit.

Plaintiff grounds her negligence per se claim on Elite’s alleged violation of the provisions of Public Health Law (PHL) article 36. However, a cause of action for negligence per se based on the violation of a statute cannot lie where the statute does “not impose a specific duty on the defendants and [is] not intended to protect any particular class of individuals” (*Nicholson v. South Oaks Hosp.*, 27 AD3d 628, 629 [2d Dept 2006]). The provisions of PHL article 36 govern the licensing, registration, certification and corporate requirements of home health care service agencies, as well as the public accessibility of information relating thereto. PHL article 36 contains no provisions setting forth a specific duty upon home health care service agencies regarding the provision of services and care to clients. Thus,

even if Elite violated or failed to comply with any provisions of PHL article 36 as to licensing and/or registration, such violation cannot be deemed a breach of a duty with regard to Bronia's personal care.

“Gross negligence differs in kind, not only degree, from claims of ordinary negligence. To constitute gross negligence, a party's conduct must smack of intentional wrongdoing or evince a reckless indifference to the rights of others. Stated differently, a party is grossly negligent when it fails to exercise even slight care or slight diligence” (*Ryan v IM Kapco, Inc.*, 88 AD3d 682, 683 [2d Dept 2011] [citations, internal quotation marks, brackets and ellipsis omitted]). There is no palpable sufficiency or merit in the proposed gross negligence claim since there are no proposed factual allegations that Bronia's injuries and death resulted from intentional wrongdoing or reckless indifference by Elite's employee(s), rather than a lack of ordinary care.”

“[A] necessary element of [a cause of action for negligent hiring, training, supervision, and retention] is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury” (*Barton v City of New York*, 187 AD3d 976, 978 [2d Dept 2020], quoting *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 16 [2d Dept 1997]; see *Guarino v ProHEALTH Care Assoc., LLP*, 219 AD3d 467, 468 [2d Dept 2023]; *Johansmeyer v New York City Dept. of Educ.*, 165 AD3d 634, 635 [2d Dept 2018]). “The employer's negligence lies in having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring, retention, or supervision of the employee” (*MCVAWCD-DOE v Columbus Ave. Elementary Sch.*, 225 AD3d 845, 846–847 [2d Dept 2024 [alterations and internal quotation marks omitted]).

In the PAC, plaintiff bases her negligent hiring and retention claims on allegations that “Claudia” used aliases and that other aides hired by Elite and dispatched to Bronia's home were convicted of unidentified felonies. However, there are no proposed factual allegations demonstrating that “Claudia” or other Elite employees previously, and with Elite's knowledge, performed home health care services negligently or had a “propensity” to neglect or cause harm to Elite's clients.

The elements of fraud are (1) a misrepresentation or a material omission of fact which was false, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages (*see Swartz v Swartz*, 145 AD3d 818, 823 [2d Dept 2016]; *Ginsburg Dev. Cos., LLC v Carbone*, 134 AD3d 890, 892 [2d Dept 2015]).

As to the alleged misrepresentations, plaintiff cites to the following statements from Elite's website:

"Elite Cares provides assistance to the elderly and their families when the need for additional care begins to arise. Whether exploring the need for nursing home placement, home care, geriatric care management, or companion care, Elite's specialists are committed to giving your loved ones the proper care they deserve" (PAC, ¶ 105).

Plaintiff also includes the following statements allegedly included in the "advertorial" published by 5 Towns:

"More than merely being a business, Elite is truly a culture, passionately serving its clients as well as the community. An industry leader, the company offers top-tier geriatric care management, sending licensed home health aides, certified nursing assistants, and registered nurses to the homes of those requiring them" (PAC, ¶ 129).

"'We don't just send anybody,' says Mr. Kohn. 'Our caregivers radiate positivity and enthusiasm. We offer a diverse option of multilingual caregivers, all of whom are licensed and bonded and trained to assist with non-medical care. They undergo a strict screening process and are trusted to assist clients with all their needs'" (PAC ¶ 133).

Plaintiff alleges in the proposed fraud cause of action that

"Eli Kohn and Elite Care LLC made material misrepresentations of fact and materially misleading statements or omissions of facts, which were untrue and known to be untrue and/or made with reckless disregard as to their truth or falsity, for the purpose of inducing Jennifer and Marc Rybstein to purchase home care services from Elite Care, LLC for the care of Bronia Rybsztajn."

"Eli Kohn and Elite Care LLC knowingly and deliberately deceived Jennifer and Marc Rybstein by making and publishing false and materially misleading statements regarding Elite Care LLC and its services."

“The Defendants, jointly and severally, individually, and collectively conducted a fraud through specific statements enclosed hereto as attachments to this amended verified complaint.”

“The Defendants, jointly and severally, individually, and collectively influenced Bronia’s family, Jennifer and Marc Rybstein, through said statements and representations as repeated throughout this complaint.”

“The services which Jennifer and Marc Rybstein purchased from Elite Care, LLC and which Elite Care, LLC failed to provide as advertised were the proximate cause of the injuries suffered by Bronia Rybsztajn which eventually led to her death” (PAC ¶¶ 242-246).

Even assuming that the statements regarding Elite’s compliance with licensing and bonding requirements and quality of care are materially false, the proposed cause of action for fraud contains no allegation of justifiable reliance upon Elite’s representations, which allegation is a necessary element of fraud (*see Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 19 AD3d 1056, 1058 [4th Dept 2005], *affd* 7 NY3d 152 [2006]). Thus, the failure to plead reliance renders plaintiff’s proposed cause of action for fraud patently without merit (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Cash v Titan Financial Services, Inc.*, 58 AD3d 785, 788 [2d Dept 2009]; *Tag Mech. Sys., Inc. v V.I.P. Structures, Inc.*, 63 AD3d 1504, 1505 [4th Dept 2009]). Moreover, even if justifiable reliance was alleged, the cause of action sounding in fraud would be duplicative of the breach of contract cause of action since it is “based on identical circumstances, and does not allege that the misrepresentation[s] resulted in any loss independent of the damages allegedly incurred for breach of contract” (*Pugni v Giannini*, 163 AD3d 1018, 1020 [2d Dept 2018]; *see Doukas v Ballard*, 135 AD3d 896, 897 [2d Dept 2016]).

A cause of action for civil conspiracy to commit a tort “stands or falls with the underlying tort” (*Philip S. Schwartzman, Inc. v Pliskin, Rubano, Baum & Vitulli*, 215 AD3d 699, 703 [2d Dept 2023] [citation omitted]), as does a cause of action for aiding and abetting a tort (*see Dickinson v Igoni*, 76 AD3d 943, 945 [2d Dept 2010]). Insofar as there is no sufficient or meritorious cause of action for fraud set forth in the PAC, the aiding and abetting and conspiracy claims are also palpably insufficient and patently devoid of merit.

The PAC seeks to add Eli Kohn and Victoria Kohn as individual defendants, alleging that they are alter egos of Elite and are liable through the piercing of the corporate veil. “Generally, a member of a limited liability company cannot personally be held liable for any debts, obligations[,] or liabilities . . . ‘whether arising in tort, contract or otherwise’” (*Matter of DePetris v Traina*, 211 AD3d 939, 940-941 [2d Dept 2022]), quoting Limited Liability Company Law § 609 [a]. “The concept of piercing the corporate veil is an exception to this general rule, permitting, in certain circumstances, the imposition of personal liability on members for the obligations of the limited liability company” (*Matter of DePetris*, 211 AD3d at 941). “While the ‘decision whether to pierce the corporate veil in a given instance will necessarily depend on the attendant facts and equities [,] . . . [g]enerally[,] . . . piercing the corporate veil requires a showing that: (1) the owner[] exercised complete domination of the corporation [or limited liability corporation] in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the [party seeking to pierce the corporate veil] which resulted in [that party’s] injury’” (*id.*, quoting *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). “Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the [Limited Liability Company] was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). “Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance” (*id.*). “Mere conclusory allegations that the corporate structure is a sham are insufficient to warrant piercing the corporate veil” (*Metropolitan Transp. Auth. v Triumph Adv. Prods.*, 116 A.D.2d 526 [1st Dept 1986]).

As to domination, plaintiff alleges in a conclusory manner that “[u]pon information and belief, Elite Care LLC observes no corporate formalities and is simply the alter ego of Eli Kohn and to some extent Victoria Kohn” (PAC, ¶ 174) and that “[u]pon information and belief, Elite Care LLC is so dominated by at least Eli Kohn and likely Victoria Kohn that there is no distinction between the LLC entity and its principal(s)” (PAC, ¶ 175).

The foregoing allegations are devoid of any “sufficiently particular[ized] statements” (CPLR 3013) showing how Eli Kohn and Victoria Kohn dominated the corporate form of Elite and that such domination resulted in Bronia’s injuries and death. Thus, the proposed amendments adding Eli Kohn and Victoria Kohn as individual defendants based on piercing the corporate veil are palpably insufficient and patently devoid of merit.

With respect to proposed additional defendant Caputo, plaintiff alleges that Caputo “told [plaintiff] that she would come to the house to create a formal care plan for Bronia that was designed to keep her safe and healthy at home” (PAC, ¶ 75), but “did not come to Bronia’s home and create a formal care plan” (PAC, ¶ 77) and “never spoke with Bronia Rybsztajn or Marc Rybstein” (PAC, ¶ 78). Based on these bare allegations, the court finds no discernable legal ground upon which plaintiff may bring in Caputo as an individual defendant. Thus, the proposed amendment seeking the addition of Caputo in this action is patently devoid of merit. Finally, because the addition of 5 Towns is grounded upon the insufficient proposed cause of action for conspiracy, the proposed amendment seeking the addition of 5 Towns is patently devoid of merit.

Accordingly, the cross motion of plaintiff for leave to amend the complaint is granted to the extent that those proposed causes of action for wrongful death, conscious pain and suffering, negligence and breach of contract, and the proposed addition of “Monica Dennie a/k/a Claudia Britton Morris, Monica Rock, Monica Britton, Claudia Dennie, and Britton Dennie” as a party defendant. The cross motion is otherwise denied. In light of this disposition, those parts of Elite’s motion to dismiss the original complaint, which will be superseded by an amended complaint, or alternatively for leave to serve an amended answer to the original complaint, are denied without prejudice to renew should an amended complaint not be served and filed by plaintiff in accordance with this decision and order.

Elite seeks, in essence, a protective order precluding plaintiff from conducting a deposition of Elite as plaintiff previously served interrogatories to which Elite responded. CPLR 3130 (1) provides that “[i]n the case of an action to recover damages for personal injury, injury to property or wrongful death predicated solely on a cause or causes of action for negligence, a party shall not be permitted to serve

interrogatories on and conduct a deposition of the same party pursuant to rule 3107 without leave of court.” While the PAC includes a cause of action for breach of contract which is not palpably insufficient or patently devoid of merit, the substance of plaintiff’s action is for wrongful death premised on negligence. Further, plaintiff does not dispute service of interrogatories upon Elite and Elite’s subsequent response, nor does plaintiff address this part of Elite’s motion in its cross-moving/opposition papers. Accordingly, that part of Elite’s motion for relief pursuant to CPLR 3130 is granted (*see O’Hara v New York City Tr. Auth.*, 248 AD2d 138, 140 [1st Dept 1998]; *Cheng v. F.W. Woolworth Co.*, 65 AD2d 615, 615 [2d Dept 1978]).


That part of Elite’s motion for sanctions is denied.

Accordingly, it is hereby,

ORDERED that plaintiff shall file and serve an amended complaint which corresponds with this decision and order within thirty (30) days of the service of this decision and order with notice of entry; and it is further,

ORDERED that Elite shall serve an answer to the amended complaint or otherwise respond thereto within thirty (30) days from the date of said service.

The foregoing constitutes the decision and order of the court.



Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice