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Bernice Youngblood and Franklin Youngblood, Plaintiffs v. East Neck Nursing Center, Inc. d/b/a East Neck Nursing and Rehabilitation Center, Defendants, 5383/14

December 17, 2014

Cite as: Youngblood v. East Neck Nursing Center, Inc., 5383/14, NYLJ 1202679180496, at *1 (Sup., SUF, Decided December 3, 2014)

5383/14

Justice Paul Baisley, Jr.

Decided: December 3, 2014

ATTORNEYS

Plaintiffs' Attorney: John Ray & Associates, Miller Place, N.Y.

Defendants' Attorney: Drabkin & Margulies, New York, N.Y.

Upon the following papers numbered 1 to 24 read on this motion to dismiss complaint:

Notice of Motion/ Order to Show Cause and supporting papers 1-7;

Answering Affidavits and supporting papers 8-20;

Replying Affidavits and supporting papers 21-24;

it is,

ORDERED that the motion (motion sequence no. 001) of defendant East Neck Nursing Center, Inc. d/b/a East Neck Nursing and Rehabilitation Center for an order pursuant to CPLR §3211(a)(5), (a)(3), and (a)(7) dismissing this action is determined as follows.

Plaintiffs Bernice Youngblood and Franklin Youngblood commenced this action against defendant East Neck Nursing Center, Inc. d/b/a East Neck Nursing and Rehabilitation Center (the "Center") on March 13, 2014. The verified complaint alleges that Bernice Youngblood, an 85-year-old resident of the Center, suffered injuries, including extreme emotional distress, mental anguish, humiliation, shame, a diminished sense of self-worth, exposure to public obloquy, fear of imminent harmful or offensive contact, a harmful and offensive contact about and upon her body, and exposure to public ridicule, shame and humiliation, and loss of dignity, when the Center hired male strippers to perform for its nursing home patients as part of a planned "entertainment event." The complaint alleges that plaintiff Franklin Youngblood, Bernice Youngblood's son, learned of the incident when he discovered a photograph among his mother's belongings that depicted

"a muscular, almost entirely nude male, wearing revealing skinny white 'briefs', with his legs straddling over the lap of a seated Bernice Youngblood with his right hand leaning over the torso and head of Bernice Youngblood and resting on the back of the wheelchair of Bernice Youngblood, clutching a wad of bills."

Plaintiffs' complaint alleges that Bernice Youngblood suffers severe cognitive impairment as a result of Alzheimer's, advanced dementia, immobility of the lower extremities confining her to a wheelchair, and is a three-time stroke survivor, and that "while sometimes lucid," she "lacks the mental and physical capacity to competently, intelligently, knowingly, and voluntarily care for and protect herself" and that "when she is not lucid," she "cannot give informed consent or otherwise make any decisions about her personal state."

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The complaint sets forth four causes of action arising out of the incident depicted in the photograph, including causes of action for assault and battery and a cause of action for conversion of an unknown amount of plaintiff's money, and seeks compensatory and treble damages, attorneys' fees, costs and disbursements.

Defendant served a verified answer to plaintiffs' verified complaint dated April 28, 2014 setting forth 20 affirmative defenses, and now moves to dismiss plaintiffs' action pursuant to CPLR R. 3211(a). The motion is supported only by the affirmation of defendant's attorney, Caitlin A. Robin, Esq., dated July 18, 2014, and the exhibits annexed thereto, comprising a copy of the summons and verified complaint, a copy of defendant's verified answer, and a copy of a power of attorney granted to Franklin Youngblood by Bernice Youngblood on January 17, 2014.

In her affirmation defendant's attorney alleges that the incident depicted in the photograph described in plaintiffs' complaint occurred on September 6, 2012, and that accordingly plaintiffs' causes of action sounding in intentional torts, which have a one-year statute of limitation (first, second and fourth causes of action), are time-barred (CPLR §215(3)). Plaintiffs' attorney further alleges that since Bernice Youngblood is a named and appearing plaintiff and personally

verified the complaint, her son Franklin Youngblood may not pursue the same claims on her behalf in a representative capacity pursuant to the power of attorney (CPLR R. 3211(a)(3)).

Moreover, counsel alleges that there are no injuries pled in plaintiffs' complaint as to plaintiff Franklin Youngblood and that accordingly the complaint should be dismissed in its entirety as to such plaintiff for failure for state a cause of action (CPLR R. 3211(a)(7)).

Finally, plaintiffs' attorney alleges that plaintiffs' third cause of action, for conversion, should be dismissed pursuant to CPLR R. 3211(a)(7) for failure to state a cause of action. She argues that although the complaint alleges that defendant took money from Bernice Youngblood without her knowledge, permission or consent, the complaint further alleges that Bernice Youngblood was "clutching a wad of bills" at the time of the incident. Counsel argues that the complaint fails to plead how the money was in fact converted from plaintiff or what amount was allegedly taken, and that the complaint suggests that plaintiff in fact retained her money.

In opposition to defendant's motion, plaintiffs have proffered the affirmation of their attorney, Vesselin Mitev, Esq., dated August 11, 2014, together with various exhibits including newspaper accounts of the incident; copies of the pleadings and defendant's discovery demands; a copy of plaintiffs' substantively identical verified complaint in a prior action entitled Jane Dow, a nursing home patient currently under a disability, by her biological sons, Franklin and Darrell Youngblood, commenced under Index No. 10278/2013 on April 12, 2013; a copy of the short-form order of this Court (LASALLE, J.) dated October 10, 2013 dismissing the prior action without prejudice pursuant to CPLR R. 3211(a)(3); and a photocopy of the photograph described in plaintiffs' complaint.

Plaintiffs' attorney argues that plaintiffs' action is timely pursuant to CPLR §205(a) as it was commenced within six months of the dismissal of the prior action. Plaintiffs' attorney further argues that the complaint does not set forth a date on which the incident complained of occurred, and that the allegation of defendant's attorney that the incident occurred on September 6, 2012 is

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inadmissible hearsay. Plaintiffs' attorney argues that the complaint does set forth claims on behalf of plaintiff Franklin Youngblood, at paragraph 50, and accordingly he has standing to sue on his own behalf. Defendant's attorney, he argues, has erroneously conflated the concept of "capacity" with that of "standing," and that defendant has not raised any issue with respect to plaintiff Bernice Youngblood's capacity to bring this action. Finally, plaintiffs' attorney argues that the complaint properly pleads a cause of action for conversion.

Generally, CPLR R. 3211(a) motions to dismiss may be made "[a]t any time before service of the responsive pleading" (CPLR R. 3211(e)). Where issue has been joined, however, 3211(a) motions are limited to the grounds set forth in subdivision (a)(2), subject matter jurisdiction; subdivision (a)(7), failure to state a cause of action; or subdivision (a)(10), nonjoinder of a necessary party (CPLR R. 3211(e); *Hendrickson v. Philbor Motors, Inc.*, 102 AD3d 251 [2d Dept 2012]). Here, defendant's motion is predicated in part on the allegations that plaintiffs' complaint fails to state a cause of action as to plaintiff Franklin Youngblood and fails to state a

cause of action for conversion. Such allegations may properly be the subject of a post-answer CPLR R. 3211(a) motion to dismiss (*id.*). Where it appears from the submissions that the movant is not merely addressing the adequacy of the complaint but is seeking dispositive relief on the merits, the Court has discretion to convert a 3211(a) motion to a motion for summary judgment upon due notice to the parties (CPLR R. 3211(c)). Here, however, defendant has submitted no affidavits or other admissible evidence in support of its motion, which is supported only by the affirmation of its attorney, who does not allege that she has personal knowledge of the facts. Accordingly, defendant's motion must be deemed to be addressed to the sufficiency of the complaint.

In determining a motion to dismiss pursuant to CPLR R. 3211(a)(7), the Court is required to broadly examine the complaint to determine whether "from its four comers factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v. Ginzburg*, 43 NY2d 268 17 [1977]). In testing the legal sufficiency of the factual allegations, the Court is required to presume the truth of all allegations pleaded in the complaint and to resolve all inferences reasonably flowing therefrom in favor of the plaintiff (*Leon v. Martinez*, 84 NY2d 83 [1994]). If factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, the motion for dismissal will fail. Where evidentiary material is submitted, however, the Court's inquiry becomes whether the plaintiff has a cause of action, not whether it has stated one (*Guggenheimer v. Ginzburg*, *supra*, 43 NY 2d at 275; *Siskin v. Cassar*, 2014 NY App Div LEXIS 7606, 2014 NY Slip Op 7646, [2d Dept 2014]).

Defendant's attorney incorrectly states in her affirmation that "a reading of Plaintiffs' complaint reveals that there are no injuries, derivative or otherwise, pled as to Franklin Youngblood." In fact, the verified complaint alleges, at ¶50, that "As a result of the foregoing [allegations as to Bernice Youngblood], Plaintiff Franklin Youngblood was caused to suffer injuries, including but not limited to extreme emotional distress, mental anguish, humiliation, public obloquy, exposure to public ridicule, shame, and fear for the well-being of his mother." Nevertheless, the facts pleaded in plaintiffs' complaint fail to set forth a cognizable cause of action on behalf of Franklin Youngblood (*Oresky v. Scharf*, 126 AD2d 614 [2d Dept 1987]; *Markowitz v. Fein*, 30 AD2d 515 [1st Dept 1968]; *Kalina v. General Hospital of Syracuse*, 31

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Misc 2d 18 [Sup Ct 1961], *aff'd*, 18 AD2d 757 [4th Dept 1962]). It is undisputed that Franklin Youngblood did not attend or witness the complained-of incident and that he was not subjected to, *inter alia*, assault or battery or any of the other intentional acts alleged on behalf of his mother, plaintiff Bernice Youngblood. Accordingly, the motion is granted to the extent that all claims asserted on behalf of plaintiff Franklin Youngblood are dismissed.

Defendant's attorney is also incorrect that plaintiffs' complaint fails to state a cause of action for conversion.¹ The essence of a cause of action for conversion is the defendant's unauthorized dominion over the item in question to the exclusion of the plaintiffs' rights (*Daub v. Future Tech Enter., Inc.*, 65 AD3d 1004 [2d Dept 2009]). "[A]n action will lie for the conversion of money where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question" (*Lucker v. Bayside Cemetery*, 114 AD3d 162

[1st Dept 2013, quoting *Amity Loans v. Sterling Natl. Bank & Trust Co. of New York*, 177 AD2d 277, 279 [1st Dept 1991]]. Plaintiffs' third cause of action alleges that defendant, through its agents and employees, took an unknown amount of money belonging to plaintiff Bernice Youngblood from a locked commissary account at the head nurses' station, without plaintiffs' knowledge, permission or consent; and that defendant put the money towards its own use and enjoyment [i.e., the hiring of the male strippers] without the permission and consent of plaintiff. Accepting the allegations of the complaint as true, and affording plaintiffs all favorable inferences, plaintiffs' complaint sufficiently states a cause of action for conversion.

The remainder of defendant's motion is predicated on the argument that the instant action is time-barred as it was commenced beyond the one-year statute of limitation. Such argument is not properly raised in a post-answer 3211(a) motion (CPLR R. 3211(e)). In any event, the argument is unsubstantiated. In her affirmation in support of the motion, defendant's attorney concedes that the verified complaint does not set forth the date of the male-stripper incident at the Center, but avers that the incident took place on September 6, 2012. Defendant's attorney does not allege that she has personal knowledge of the event, and accordingly her statement regarding the date of the incident is inadmissible hearsay, not evidence. The affidavit of defendant's employee Melvin Hitt, sworn to August 19, 2014, is also hearsay, as well as untimely. The Court notes that defendant may not rely on the proof submitted in its reply affidavits in order to meet its burden of proof on its motion in chief (*Rengifo v. City of New York*, 7 AD3d 773 [2d Dept 2004]; *Feratovic v. Lun Wah*, 284 AD2d 368 [2d Dept 2001]).

In any event, even if the Court were to credit the hearsay statements of counsel and defendant's employee regarding the date of the incident, the action would be deemed to be timely pursuant to CPLR §205(a). The submissions reflect that plaintiffs served defendant with the summons and verified complaint in the instant action within six months after the dismissal of the prior action, which appears to have been timely commenced. The dismissal of the prior action was without prejudice and the real party in interest is unchanged. Accordingly, the instant action appears to be timely (*Lambert v. Sklar*, 30 AD3d 564 [2d Dept 2006]).

The Court notes that defendant's verified answer sets forth an affirmative defense of lack of standing (eleventh affirmative defense). Defendant did not assert an affirmative defense of lack of legal capacity to sue. To the extent that defendant's motion may be read to argue that

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either Franklin Youngblood or Bernice Youngblood lacks legal capacity to sue (CPLR R. 3211(a)(3)), such defense must be deemed to be waived (CPLR R. 3211(e)).

In light of all the foregoing, defendant's 3211(a) motion is granted only to the extent that all claims of Franklin Youngblood are dismissed and the motion is otherwise denied.

Dated: December 3, 2014

1. In her argument, counsel mischaracterizes the allegations of the complaint, which plainly states, at ¶34, that the male stripper, and not Bernice Youngblood, was "clutching a wad of bills."
