SHORT FORM ORDER

INDEX No. 09-25986

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY



***PRESENT:***

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5-14-12
ADJ. DATE 7-6-12
Mot. Seq. # 007 - MotD

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| LENNY GULLO, MARIA S. GULLO and CATHERINE GULLO,<br><br>Plaintiffs,<br><br>- against -<br><br>BELLHAVEN CENTER FOR GERIATRIC AND REHABILITATIVE CARE INC., a/k/a BELLHAVEN NURSING CENTER, "ABC" CORPORATION a/k/a BELLHAVEN NURSING CENTER, APEX LABORATORY, INC. and MARK SHAPIRO, M.D.,<br><br>Defendants. | JOSEPH C. STROBLE, ESQ.<br>Attorney for Plaintiffs<br>40 Main Street, P.O. Box 596<br>Sayville, New York 11782<br><br>FUREY, KERLEY, WALSH, MATERA & CINQUEMANI, P.C.<br>Attorney for Defendants Bellhaven<br>2174 Jackson Avenue<br>Seaford, New York 11783<br><br>GEISLER & GABRIELE, LLP<br>Attorney for Defendant Shapiro<br>100 Quentin Roosevelt Boulevard<br>P.O. Box 8022<br>Garden City, New York 11530 |

Upon the following papers numbered 1 to 23 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 12 - 16, 17 - 18, 22- 23 ; Replying Affidavits and supporting papers 19 - 20 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that this motion by the defendant, Bellhaven Center for Geriatric and Rehabilitative Care, Inc. d/b/a Bellhaven Nursing Center, sued herein as Bellhaven Center for Geriatric and Rehabilitative Care, Inc., a/k/a Bellhaven Nursing Center, and "ABC" Corporation a/k/a Bellhaven Nursing Center, for an order pursuant to CPLR Section 3212 granting summary judgment dismissing the complaint and all cross claims against it is granted to the extent that the complaint is dismissed, and is otherwise denied as academic.

This is an action to recover damages for personal injuries suffered by Lenny Gullo (Gullo) due to the alleged medical malpractice of the defendant, Mark Shapiro, M.D. (Shapiro), and the alleged negligence of the defendant, Bellhaven Center for Geriatric and Rehabilitative Care, Inc. d/b/a Bellhaven Nursing Center, sued herein as Bellhaven Center for Geriatric and Rehabilitative Care, Inc., a/k/a

Bellhaven Nursing Center, and "ABC" Corporation a/k/a Bellhaven Nursing Center (Bellhaven). It is alleged that immediately prior to his employment at Bellhaven, as part of the application process, Gullo was required to take a blood test. The test was performed in November, 2005 and a laboratory report was issued on November 29, 2005, which indicated that Gullo was positive for Hepatitis C. It is alleged that Bellhaven received that report on or about December 1, 2005. However, Bellhaven failed to inform Gullo of the results. It is also alleged that Shapiro took blood from Gullo on November 15, 2005, treated Gullo from January 1, 2007 to October 31, 2007, and failed to diagnose Gullo's condition. In March, 2009, Gullo took a blood test in connection with an unrelated application for life insurance that he had submitted. It was at this point that he first learned that he has Hepatitis C. It is alleged that, due to the acts and omissions of the defendants, he has permanent liver damage and pecuniary losses. In addition, there are derivative and individual claims made by his wife and daughter.

The defendant Bellhaven moves for summary judgment on the sole ground that all claims and cross claims herein are barred by the exclusivity provision contained in Workers' Compensation Law (WCL) §§ 11 and 6 (*sic*)[1]. WCL § 11 provides, in pertinent part:

> The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom ...

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

Here, the sole question before the Court is whether the plaintiffs' only remedy for their alleged injuries lies within the Workers' Compensation Law. As a general rule, the receipt of workers' compensation benefits is the exclusive remedy that a worker may obtain against an employer for losses suffered as a result of an injury sustained in the course of employment (*see* WCL §§ 11, 29 [6]; ***Reich***

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[1] The Court notes that the WCL does not contain a section six, and it will presume that the movant meant to reference WCL 29 (6).

***v Manhattan Boiler & Equip. Corp.***, 91 NY2d 772, 779, 676 NYS2d 110 [1998]; ***Gaynor v Cassone Leasing***, 79 AD3d 967, 914 NYS2d 241 [2d Dept 2010]; ***Slikas v Cyclone Realty***, 78 AD3d 144, 908 NYS2d 117 [2d Dept 2010]; ***Dulak v Heier***, 77 AD3d 787, 909 NYS2d 743 [2d Dept 2010]). However, an injured employee may avoid the bar to recovering damages from an employer if he or she can prove that the injury was intentionally perpetrated by the employer or at the direction of the employer (*see* ***Acevedo v Consolidated Edison Co. of N.Y.***, 189 AD2d 497, 596 NYS2d 68 [1st Dept 1993]; *see also* ***Miller v Huntington Hosp.***, 15 AD3d 548, 792 NYS2d 88 [2d Dept 2005]; ***Reno v County of Westchester***, 289 AD2d 216, 734 NYS2d 464 [2d Dept 2001]; ***Fucile v Grand Union Co.***, 270 AD2d 227, 705 NYS2d 377 [2d Dept 2000]; ***Pitter v Gussini Shoes, Inc.***, 206 AD2d 464, 614 NYS2d 568 [2d Dept 1994]; ***Orzechowski v Warner-Lambert Co.***, 92 AD2d 110, 460 NYS2d 64 [2d Dept 1983]). "In order to constitute an intentional tort, the conduct must be engaged in with the desire to bring about the consequences of the act. A mere knowledge and appreciation of a risk is not the same as the intent to cause injury. . . . A result is intended if the act is done with the purpose of accomplishing such a result or with the knowledge that to a substantial certainty such a result will ensue" (***Finch v Swingly***, 42 AD2d 1035, 1035, 348 NYS2d 266, 268 [4th Dept 1973]).

It is undisputed that Gullo was employed by Bellhaven at all relevant times herein. Therefore, only those causes of action in which the plaintiffs allege an intentional tort on the part of Bellhaven may be maintained in this action. A review of Bellhaven's submission in support of its motion for summary judgment reveals that it has established its entitlement to summary judgement regarding the causes of action asserted against it, as follows: the plaintiffs' Third and Fourth Causes of Action which set forth allegations sounding in negligence and gross negligence; the Sixth, Ninth and Twelfth Causes of Action which set forth claims of negligent infliction of emotional distress by Gullo, his wife, and his daughter, respectively; the Seventh, Tenth and Thirteenth Causes of Action set forth claims by the respective plaintiffs of "violation of statute" by Bellhaven.[2]

The Court now turns to the only remaining causes of action asserted against Bellhaven. The Second Cause of Action is a derivative claim by Gullo's daughter for loss of parental guidance. The Fifth Cause of Action is a derivative claim by Gullo's wife for loss of consortium. The Eighth, Eleventh and Fourteenth Causes of Action set forth claims by Gullo, his wife, and daughter respectively alleging constructive fraud by Bellhaven. "Constructive fraud may be defined as the breach of a duty which, irrespective of moral guilt and intent, the law declares fraudulent because of its tendency to deceive, to violate a confidence, or to injure public or private interests that the law deems worthy of special protection" (***Brown v Lockwood***, 76 AD2d 721, 432 NYS2d 186 [2d Dept 1980]; *see also* ***Sears v First Pioneer Farm Credit, ACA***, 46 AD3d 1282, 850 NYS2d 219 [3d Dept 2007]; ***Williams v Lynch***, 245 AD2d 715, 666 NYS2d 749 [3d Dept 1997]; ***Grand Union Mount Kisco Employees Fed. Credit Union v Kanaryk***, 848 F Supp 446 [SD NY 1994]). "The elements of a cause of action to recover for constructive fraud are the same as those to recover for actual fraud with the crucial

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[2] By order dated April 15, 2010, the Court denied the plaintiffs' cross motion for leave to amend their complaint to include these causes of action. Therefore, they are not part of this action, and they have not been considered here.

exception that the element of scienter upon the part of the defendant, his [or her] knowledge of the falsity of his representation, is dropped ... and is replaced by a requirement that the plaintiff prove the existence of a fiduciary or confidential relationship warranting the trusting party to repose his [or her] confidence in the defendant and therefore to relax the care and vigilance he [or she] would ordinarily exercise in the circumstances" (***Brown v Lockwood***, 76 AD2d at 731, 432 NYS2d 186; *see* ***Levin v Kitsis***, 82 AD3d 1051, 920 NYS2d 131 [2d Dept 2011]; ***Leone v Sabbatino***, 235 AD2d 460, 652 NYS2d 628 [2d Dept 1997]).

Here, the plaintiffs' claims do not allege an intentional tort on the part of Bellhaven. Simply put, employment relationships do not create fiduciary relationships (*see* ***Rather v CBS Corp.***, 68 AD3d 49, 886 NYS2d 121 [1st Dept 2009]; ***Schenkman v New York Coll. of Health Professionals***, 29 AD3d 671, 815 NYS2d 159 [2d Dept 2006]; ***Mendelsohn v Ferber***, 26 Misc3d 190, 887 NYS2d 494 [Supreme Ct, Suffolk County, 2009], *affirmed* 73 AD3d 1139, 903 NYS2d 427 [2d Dept 2010]). The cause of action fails to allege facts to demonstrate that a fiduciary relationship existed between Bellhaven, on the one hand, and Gullo, on the other hand.

In addition, Gullo's wife and daughter do not allege that Bellhaven has a fiduciary duty to them. Thus, Bellhaven has established its entitlement to summary judgment regarding the plaintiffs' Eighth, Eleventh and Fourteenth Causes of Action. Inasmuch as Bellhaven has established its entitlement to summary judgment on the substantive causes of action which seek damages on behalf of Gullo, the derivative causes of action on behalf of the plaintiff's wife and daughter are also subject to dismissal (*see* ***Flanagan v Catskill Regional Med. Ctr.***, 65 AD3d 563, 884 NYS2d 131 [2d Dept 2009]; ***Cabri v Park***, 260 AD2d 525, 688 NYS2d 248 [2d Dept 1999]).

In opposition to Bellhaven's motion, the plaintiffs submit the affirmation of their attorney, a copy of the amended complaint, affidavits from each plaintiff, and a copy of the court order granting them leave to amend their complaint. In their affidavits, the plaintiffs explain the understandable difficulties that they have experienced regarding this matter. However, nothing in those affidavits changes the Court's analysis of the law as it applies to the facts of this action. As noted above, it is undisputed that Gullo was employed by Bellhaven at all relevant times herein.

In his affirmation in opposition to Bellhaven's motion, counsel for the plaintiffs contends that the Court determined that the causes of action for constructive fraud have merit in its order dated April 15, 2010. It is well settled that the Court should freely grant leave to amend the complaint, provided that the proposed amendment does not prejudice or surprise the defendant, and that it is not palpably insufficient or patently devoid of merit (*see* ***Kiaer v Gilligan***, 63 AD3d 1009, 883 NYS2d 224 [2d Dept 2009]; ***Kinzer v Bederman***, 59 AD3d 496, 873 NYS2d 692 [2d Dept 2009]). The court should not examine the merits or legal sufficiency of the proposed amendment unless it is palpably insufficient or devoid of merit on its face (*see* ***Vista Prop., LLC v Rockland Ear, Nose & Throat Assocs., P.C.***, 60 AD3d 846, 875 NYS2d 248 [2d Dept 2009]). Whereas, in a motion for summary judgment the Court must determine whether the moving party has made a showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, *supra*).

Having established its entitlement to summary judgment dismissing the complaint, it is incumbent upon the plaintiffs to produce evidence in admissible form sufficient to require a trial of the material issues of fact (*see* ***Roth v Barreto***, 289 AD2d 557, *supra*; ***Rebecchi v Whitmore***, 172 AD2d 600, *supra*; ***O'Neill v Fishkill***, 134 AD2d 487, *supra*). Here, the plaintiffs have failed to raise an issue of fact requiring a trial in this action. Accordingly, Bellhaven's motion for summary judgment dismissing the complaint against it is granted.

The Court notes that Bellhaven's motion for summary judgment also seeks to dismiss all cross claims asserted against it. A review of the pleadings reveals that its co-defendant, Mark Shapiro, M.D., has not asserted a cross claim against Bellhaven.[3] Accordingly, that branch of Bellhaven's motion is deemed academic.

Dated: 10/11/12

THOMAS F. WHELAN, J.S.C.

[3] The computerized records maintained by the Court reflect that the plaintiffs' action has been discontinued against Apex Laboratory, Inc. by stipulation dated September 22, 2009. Pursuant to CPLR 3217 [a], [b], and Uniform Rules for Trial Cts [22 NYCRR] § 202.28), said stipulation was filed with the Clerk of the Supreme Court on October 1, 2009.