

**Coffey v Klein**

2015 NY Slip Op 31915(U)

September 9, 2015

Supreme Court, Kings County

Docket Number: 504506/2015

Judge: Laura L. Jacobson

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 21 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York on the 9<sup>th</sup> day of September, 2015

PRESENT:

HON. LAURA L. JACOBSON,

Justice.

-----X  
INEZ COFFEY, as Executor of the Estate of RICHARD F. COFFEY, and INEZ COFFEY,

Index No.: 504506/2015

Plaintiffs,

-against-

DECISION/JUDGMENT

MORDECHAI KLEIN, NORMAN RAUSMAN, MARTIN RAUSMAN, HENRY RAUSMAN, MICHAEL RAUSMAN, MEDFORD MULTICARE CENTER FOR LIVING, INC., MEDFORD MULTICARE MANAGEMENT, LLC, DAVID FIELDING and KLEIN FAMILY FOUNDATION,

Defendants.

-----X

The following papers 1 to 7 read on the motion:

Papers	Numbered
Notice of Motion and Affirmation Annexed	1-2
Notice of Cross-Motion and Affirmation Annexed	3-4
Affirmation in Opposition	5
Reply	6-7

Defendants Mordechai Klein, Norman Rausman, Henry Rausman,

Michael Rausman, Medford Multicare Center for Living, Inc. (Hereinafter "Medford"), Medford Multicare Management, LLC and Klein Family Foundation ( hereinafter collectively "The Klein and Rausman Defendants"), move for an order pursuant to CPLR § 3211 (a)(7) dismissing this action. Defendant David Fielding cross moves for an order: (1) pursuant to CPLR § 3211 (a) (5) dismissing the complaint based on the failure to state a cause of action; (2) pursuant to CPLR § 3211 (a) (7) dismissing the complaint based on the expiration of the applicable statutes of limitation; and (3) pursuant to CPLR § 3024 striking the complaint, in whole or in part, due to the unnecessary insertion of scandalous and/or prejudicial statements and matters. Plaintiff's decedent was a retired New York City firefighter who suffered from chronic obstructive pulmonary disease, pulmonary fibrosis and emphysema. Plaintiff's decedent was admitted to Medford's ventilator unit on April 1, 2012. On April 23, 2012, hours before plaintiff's decedent was to be transferred home, his family received a phone call from Medford advising them that plaintiff's decedent had passed away due to falling oxygen levels. Plaintiff contends that later, the decedent's son was advised by a representative from Medford that his father had removed his oxygen mask in his sleep. Plaintiff contends that the Medford facility has a history of criminally negligent conduct that has led to the filing of a criminal complaint by the New York State Attorney General's Office alleging Medicaid and Medicare fraud as well as the

systematic neglect of patients resulting in the death of many, including residents in the ventilator unit.

On June 28, 2012, Inez Coffey was appointed Executor of the decedent's estate. Plaintiff commenced this action by the filing of a summons and verified complaint on April 11, 2014, alleging violations of New York Public Health Law §§ 2801-d and 2803-c, negligence, gross negligence, punitive damages and wrongful death. The summons and verified complaint mistakenly named Richard Coffey, as administrator of the decedent's estate. On May 19, 2014, plaintiffs filed an amended summons and complaint adding Richard Coffey, Jr., individually as a party. Issue was joined by defendant Fielding on July 1, 2014. The remaining defendants moved to dismiss in lieu of an answer and defendant Fielding cross moved to dismiss. By order dated April 15, 2015, the Honorable Wavny Toussaint granted the applications and dismissed the action based on plaintiff's lack of capacity to sue. On April 15, 2015, plaintiffs commenced the instant action with Inez Coffey named as the executor of the estate. Issue was joined by defendant Fielding on May 13, 2015. The remaining defendants moved to dismiss in lieu of an answer and defendant Fielding cross moved to dismiss.

Defendants claim that plaintiff's wrongful death and negligence claims are untimely and barred by the statute of limitations. Plaintiff's decedent died on April 23, 2012. Defendants contend that the statute of limitation

for a wrongful death claim is two years. Defendants argue that as such, for plaintiff's wrongful death claim to be timely, the action had to be instituted on or before April 23, 2014. Defendants further assert that since the statute of limitation for a medical malpractice claim is two and a half years, plaintiff was required to commence this action on or before October 23, 2014. According to defendants, since the instant action naming Inez Coffey as the executor of the decedent's estate was commenced on April 15, 2015, plaintiff's wrongful death and medical malpractice claim are clearly time barred. Additionally, defendants argue that the complaint fails to state a cause of action on behalf of Inez Coffey, individually. Defendants further assert that any claim that she could assert is now time barred. Defendants contend that plaintiff Inez Coffey is not entitled to any benefit resulting from CPLR § 205(a) because she was not a named plaintiff in the initial action and there was no cause of action asserted on her behalf in the prior dismissed action. According to defendants, CPLR § 205(a) does not permit a new individual to assert claims as an individually named plaintiff in the new action where the claims are untimely as of the commencement of the new action. Defendants argue that plaintiff's complaint fails to state an actionable cause of action against the defendants. According to defendants, the complaint contains 30 pages of factual allegations, many of which pertain to years prior and subsequent to the decedent's admission to defendant's facility and totally unrelated to the allegations involving

plaintiff's decedent. Defendants argue that the complaint does not meet the requirements of CPLR § 3013 because the complaint contains pages of factual allegations followed by a few conclusory paragraphs purporting to plead six cause of action and it is impossible to decipher which allegations pertain to which causes of action. Defendants further contend that many paragraphs of the complaint contain numerous irrelevant, prejudicial and objectionable allegations involving events that predate the decedent's admission that should be stricken by the court. According to defendants, the allegations in these paragraphs include prejudicial and irrelevant statements involving overtime expenses in 2011, the cost of food at Medford, overtime hours in 2010, the cost of medical supplies in June 2012, the respiratory care department in 2008 and 2009, and multiple facts regarding another resident who was admitted to the facility in October 2012, six months after the death of plaintiff's decedent. Defendants further assert that allegations concerning evidentiary material in the form of quotations about the general impressions or beliefs of various third parties should be stricken. Defendants argue that plaintiff's allegations in the complaint pertaining to anyone other than the decedent are inappropriate, prejudicial and irrelevant and as such, should be stricken.

The Klein and Rausman defendants contend that the complaint fails to plead a cause of action against the Klein Family Foundation in that it does not plead that the foundation is an owner, investor, shareholder or

otherwise an affiliate of Medford. The Klein and Rausman defendants further assert that the complaint should be dismissed as against defendants Mordechai Klein, Norman Rausman, Martin Rausman, Henry Rausman and Michael Rausman as the complaint fails to allege that the individual defendants personally abused, neglected or mistreated the decedent or any Medford residents. The Klein and Rausman defendants argue that the individual defendants cannot be held vicariously liable for the conduct of Medford employees and they can not be sued because they own stock in a corporation which is alleged to have been engaged in misconduct.

Defendant Fielding alleges that the complaint fails to state a cause of action against him. According to defendant Fielding, he is mentioned sporadically throughout the complaint and the facts involving him have nothing to do with the circumstances surrounding this action.

Plaintiff argues that the complaint is not time barred because pursuant to CPLR § 205(a) if a timely commenced action is terminated on grounds other than voluntary discontinuance, failure of personal jurisdiction, neglect to prosecute, or a final judgment, plaintiff may commence a new action based on the same transaction or occurrence within six months after termination, despite expiration of the statute of limitations, provided that plaintiff effects service on defendants within the six months. Plaintiff alleges that the six month toll pursuant to CPLR § 205 (a) applies to actions that have been dismissed based upon lack of capacity to sue and is

properly applied to wrongful death and medical malpractice actions. Plaintiff asserts that here, the original action was timely commenced and the instant action was recommenced on April 15, 2015, the same day that the original action was terminated . Plaintiff contends that defendants were served in May of 2015, which is well within the six month period required by CPLR § 205(a). Plaintiff claims that the factual allegations contained in the first thirty three pages of the complaint are necessary and relevant in that they illustrate the history of neglect and illegal conduct which the defendants practiced at Medford, in addition to outlining the details of the decedent's death. Plaintiff contends that these facts support plaintiff's contention that defendants engaged in willful and reckless conduct disregarding the lawful rights of the decedent, which plaintiff is required to prove in order to obtain punitive damages. Plaintiff's counsel asserts that they are not attempting to assert claims regarding medicaid fraud or for any other resident except their client. Plaintiff alleges that the purpose of the factual allegations is to demonstrate the defendants' egregious conduct which affected an entire class of individuals beyond the decedent and to demonstrate that defendants had notice of the dangerous conditions that existed at Medford for over a decade.

Plaintiff argues that the complaint properly states five causes of action which include all of the material elements of each cause of action and puts the defendants on notice of what plaintiff intends to prove. Plaintiff

contends that they properly pled a cause of action against defendant Klein Family Foundation by alleging that they are jointly and severally liable pursuant to PHL § 2808-a because, by reason of direct or indirect ownership interests, they have the ability, acting either alone or in concert with others with ownership interests, to direct or cause the direction of management or policies of the defendant's facility. Plaintiffs further assert that they have properly pled claims against individual defendants Mordechai Klein, Norman Rausman, Martin Rausman, Henry Rausman and Michael Rausman under Public Health Law. Plaintiff claims that PHL §2808-a provides a cause of action against controlling parties of residential health care facilities and pursuant to PHL §2808-a it is not necessary that a §2808-a owner actually direct or cause the direction of the management or policies of the facility, but rather that the owner have the ability to do so. According to plaintiff, the complaint states that defendant Mordechai Klein is the fiscal coordinator of Medford and the owner of 50% of Medford's corporate stock, defendant Norman Rausman is the building coordinator of Medford and the owner of 9.9% of Medford's corporate stock and defendants Martin Rausman, Henry Rausman and Michael Rausman each respectively own 9.9% of Medford's corporate stock. Plaintiff alleges that the complaint contains sufficient facts to indicate that the individual defendants had the ability to direct the management or policies of the facility. Plaintiff contends that the first cause of action alleging violations of

Public Health Law §§ 2801-d and 2803-c asserts that the individual defendants failed to provide adequate and appropriate medical care to the decedent in reckless disregard of his rights as a resident of Medford.

Plaintiff claims that the facilities reckless staff cuts and its neglect of the decedent point to facility failures that implicate the individual defendants.

CPLR §205 (a) provides that “If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service of upon defendant is effected within such six month period.” Furthermore, “[A]n error relating to the identity of the named plaintiff in the original action will not bar recommencement of the action pursuant to CPLR § 205(a)” (*Freedman v. New York Hosp. Med. Ctr. Of Queens*, 9 AD3d 415,416 [2<sup>nd</sup> Dept. 2004]). Here, the prior action was timely commenced and the new action was recommenced within six months of dismissal of the prior action and service upon defendants was effectuated within the six month period. Consequently, all claims based on causes of

action pled in the prior action are timely. As such, plaintiff's causes of action based on wrongful death, negligence, gross negligence and violation of the Public health Law are timely. However, the individual claims asserted on behalf of plaintiff Inez Coffey must be dismissed as those claims, which were not alleged in the prior action, are untimely.

Moreover, on a motion to dismiss pursuant to CPLR 3211 (a) the Court is required to accept as true each and every allegation made by plaintiff and to limit its inquiry to the legal sufficiency of plaintiff's claim. On a motion to dismiss the Court merely examines the adequacy of the pleadings (*Davis v. Boenheim*, 24 NY3d 262, 268 [2014]). "On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory... Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss... [citations omitted]" (*Endless Ocean, LLC v. Twomey, Latham, Shea, Kelley, Dubin & Quartararo*, 113AD3d 587,588 [2<sup>nd</sup> Dept. 2014]). Here, liberally construing the complaint and accepting the facts in the complaint as true as the Court is required to do, plaintiff has alleged facts sufficient to state a cause of action against all of

the defendants, including the individual Klein and Rausman defendants. Moreover, defendants argue correctly that prejudicial and irrelevant material in the complaint containing collateral matters unrelated to the instant complaint must also be stricken. Allegations in the complaint pertaining to the complaint filed by the Attorney General regarding Medicaid Fraud and neglect that do not pertain to the care received by plaintiff's decedent and allegations which predate or postdate the decedent's death are improper and stricken. Furthermore, all allegations referring to the failure to pay a consultant's invoice, the 2009 immediate jeopardy notice, defendants' emails, defendants' alleged salaries and profits are prejudicial and irrelevant and as such, must be stricken. Additionally, any allegations based on the general impressions or beliefs of various third parties are also stricken.

Accordingly, the Klein and Rausman defendants' motion to dismiss and defendant Fielding's cross motion to dismiss are both denied except that all claims asserted by plaintiff Inez Coffey individually are dismissed and the prejudicial and irrelevant allegations as cited above are stricken; and it is further ORDERED that plaintiff serve an amended complaint within thirty (30) days of service of this decision and order with notice of entry; and it is further ORDERED that defendants shall serve an answer to the amended complaint within twenty (20) days of service of the amended

complaint.

This constitutes the decision and order of the Court.

Enter:



\_\_\_\_\_  
LAURA L. JACOBSON, JSC.

HON. LAURA JACOBSON

Nancy T. Sunshine

KINGS COUNTY CLERK  
FILED  
2015 OCT 14 AM 9:25