Jenack v Goshen Operations, LLC
2019 NY Slip Op 33773(U)
February 11, 2019
Supreme Court, Orange County
Docket Number: EF008129/2018
Judge: Sandra B. Sciortino
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To commence the statutory time
for appeals as of right (CPLR 5513 [a]),
you are advised to serve a copy of this
order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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WILLIAM JENACK, as Attorney-in-Fact for MARY RICE and WILLIAM RAMLOW as Administrator of the Estate of ADELINE RAMLOW, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

GOSHEN OPERATIONS, LLC d/b/a SAPPHIRE NURSING AND REHAB AT GOSHEN; RICHARD PLATSCHEK; ESTHER FARKOVITS; MACHLA AMRAMCZYK and ROBERT SHUCK,

Defendants.

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DECISION AND ORDER

Index No.:EF008129/2018
Motion Date: 12/3/18
Sequence Nos. 1 & 2

SCIORTINO, J.

The following papers numbered 1 to 11 were read on the separate motions by Defendants for:

1) an order dismissing the Complaint pursuant to CPLR §3211(a)(3) and §3013 (Seq. No.1); and

2) an order striking the pleadings of class certification pursuant to CPLR §901 and §902 and severing the claims of individual plaintiffs pursuant to CPLR §603 (Seq. No.2):

PAPERS	NUMBERED
Notice of Motion/ Quinn Affirmation with Exhibit A	1 - 3
Affirmation in Opposition (Garber) with Exhibits 1 - 3	4 - 5
Notice of Motion//Rath Affirmation with Exhibit 1	6 - 8
Affirmation in Opposition (Garber) with Exhibits A - H	9 - 10
Memorandum of Law in Opposition	11

Plaintiffs bring this action on behalf of themselves and the other nursing home patients alleging defendants provided unsafe and inadequate care in the nursing home facility in violation of

New York's Public Health Law (PHL) §2801-d. Defendants move to dismiss the action on two bases. first, that plaintiff, William Ramlow, had not yet been appointed Executor of his mother's estate at the time the action was commenced and failed to provide the Letters showing that he has been duly appointed pursuant to EPTL § 5-4.1. Second, that the complaint is insufficiently particular as to the laws allegedly violated by defendants or the injury to plaintiffs.

EPTL § 5-4.1 provides in pertinent part as follows:

> Action by personal representative for wrongful act, neglect or default causing death of decedent
>
> 1. The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued.

"[T]he statutory requirement of a duly appointed administrator is in the nature of a condition precedent to the right to bring the suit." (*Carrick v Central Gen. Hasp.*, 51 NY2d 242, 250 [1980])

In opposition to defendants' motion, plaintiffs argue that Mr. Ramlow has been duly appointed as administrator of the decedent's estate, in accordance with the Letters of Administration issued by the Surrogate's Court. Further, while it is within the Court's power to dismiss this action, pursuant to CPLR §205 plaintiffs would be entitled to immediately re-file their complaint following such a dismissal.

CPLR §205 provides in pertinent part as follows:

> (a) New action by plaintiff. 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 upon defendant is effected within such six-month period.

In this instance, the decedent who died on November 11, 2017, executed a Last Will and Testament naming plaintiff, William Ramlow, as Executor. On May 15, 2018, Mr. Ramlow executed a Petition for Probate and Letters Testamentary which specifically states that decedent was a resident of Sapphire Nursing Home and that the proposed Executor wishes to have the estate join in a class action law suit against said institution. The complaint was filed more than two months later on July 31, 2018 and Letters were issued on September 18, 2018.

Therefore, in the interests of judicial economy, the complaint shall not be dismissed as Mr. Ramlow is now duly appointed as administrator of the Estate of Adeline Ramlow, and plaintiffs would be permitted to re-file the complaint in the event of a dismissal, pursuant to CPLR 205 (*see Carrick v Central Gen. Hasp., supra*, 51 NY2d at 251-52, "It has been held ... that a dismissal arising from the failure of a condition precedent to the right to bring suit is not a final judgment upon the merits for purposes of CPLR 205").

Defendants also argue that the complaint should be dismissed pursuant to CPLR §3013. Defendants allege that plaintiffs failed to sufficiently state a claim for violation of Public Health Law§2801-d.

CPLR §3013 provides: "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." "The pleadings are the formal statements by the parties of the material facts which constitute their respective claims and defenses" (84 N.Y. Jur 2d, Pleading §1). Notably, "[p]arties must generally be granted wide

latitude in framing their pleadings so as to raise and have determined every question affecting their interest in the subject matter of the litigation" (84 N.Y. Jur 2d, Pleading §1). "As long as the pleading may be said to [give notice to the other side], in whatever terminology it chooses, this [pleading requirement dictated by CPLR 3013] is satisfied." (Patrick M. Connors, 2013 Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3013:2) "The test is entirely sui generis." (*Id.*) Indeed, one of the very reasons the CPLR was adopted was "to make pleadings less rigid." (Siegel, N.Y. Prac § 208, [6th ed Dec. 2018 Update])

Here, plaintiffs have filed a 21-page Complaint consisting of 84 paragraphs alleging defendants' violations of state and federal statutes that mandate minimum staffing requirements which were not met, resulting in injury to the plaintiffs. Plaintiffs specifically set forth instances where plaintiffs and residents of the nursing home would ask for help with going to the bathroom but, because of insufficient staffing, would receive no assistance for hours. Plaintiffs also attached as an exhibit to the complaint the NYS Department of Health Report of a survey completed on January 29, 2018 which specifically notes that the facility did not ensure that sufficient nursing staff were available to provide the services necessary to attain the highest practicable physical, mental and psychological well-being of the residents. The report identified several incidents in which the shortage of nurses and aides led to medication delays and problems with hygiene, incontinence care and proper nutrition. The allegations alleging a violation of Public Health Law §2801-d are sufficiently pleaded.

Rather than submit opposition papers to their dismissal motion, defendants file a separate motion to strike plaintiffs' class action allegations and to sever the claims into individual actions.

Pursuant to CPLR §902, a motion to determine whether a class action may be maintained is to be made within 60 days after the time to serve the responsive pleading has expired. In light of the pending motions, defendants' time to serve their responsive pleading has not expired. Accordingly, the 60 day period in which plaintiffs have to move for class action certification has not yet begun. Normally, a decision on the propriety of certifying a class follows a motion and hearing under CPLR §902 (*see Bernstein v Kelso & Co.*, 231 AD2d 314 [1st Dept 1997] [Dismissal of class action allegations prior to service of an answer and pre-certification discovery premature]). However, courts have also held that "a motion to dismiss may be made before a motion to determine the propriety of the class and a hearing under CPLR §902 where it appears conclusively from the complaint and from affidavits that, as a matter of law, there was no basis for class action relief"]) [internal quotation marks omitted]). The requirements for class certification, as set forth in CPLR §901, are:

"a. One or more members of a class may sue or be sued as representative parties on behalf of all if:

"1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

"2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

"3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

"4. the representative parties will fairly and adequately protect the interest of the class; and

"5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

These requirements are otherwise known, respectively, as numericity, commonality, typicality, adequacy of representation, and superiority. While the issue is not decided herein, the Court notes that the "prerequisites" for declaring a class action are, at least, arguably present under

the circumstances.

The proposed class encompasses "[a]ll persons who reside, or resided, at the Facility from September 1, 2017 to the present." (Complaint at ¶52) Defendants have not disputed that allegation that the Facility has approximately 120 beds and is operating at least a 90% occupancy rate, making joinder of resident impracticable. Plaintiffs' claim regarding defendants' violation of DOH rules affecting residents predominate over individual questions. The claims of plaintiffs are typical of the claims of the class and plaintiffs can fairly and adequately protect the interest of the class. Finally, at this early stage of the proceeding, it appears that a class action will be superior to other available methods for the fair and efficient adjudication of the controversy.

Accordingly, it is hereby

ORDERED that defendants' motions are denied; and it is further

ORDERED that the defendants shall serve their answer within thirty (30) days from the date this Decision and Order is uploaded to NYSCEF; and it is further

ORDERED parties shall appear for a preliminary conference on March 20, 2019 at 9:00 a.m.

This order shall constitute the decision of this Court.

Dated: February 11, 2019
Goshen, New York

E N T E R

HON. SANDRA B. SCIORTINO, J.S.C.

TO: *Counsel of Record via NYSCEF*