Duncan v Black Veterans for Social Justice, Inc.
2020 NY Slip Op 33592(U)
October 23, 2020
Supreme Court, Kings County
Docket Number: 518432/2017
Judge: Lillian Wan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

Index No.: 518432/2017
Motion Date: 9/9/2020
Motion Seq.: 03

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ANTOINETTE DUNCAN, as Administrator of the Estate of ST. JULIAN DUNCAN, and ANTOINETTE DUNCAN, Individually,

Plaintiffs,

- against -

DECISION AND ORDER

BLACK VETERANS FOR SOCIAL JUSTICE, INC.,

Defendant.

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BLACK VETERANS FOR SOCIAL JUSTICE, INC.,

Third-Party Plaintiff,

- against -

GEORGE ROBINSON,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number: (Motion 03) 36-47 and 51-64 were read on this motion for summary judgment.

In this action to recover damages for personal injuries arising out of a physical altercation, the defendant, Black Veterans for Social Justice, Inc. (hereinafter BVSJ), seeks an order pursuant to CPLR § 3212 granting summary judgment on the issue of liability and dismissal of the plaintiffs' complaint. For the reasons set forth below, the defendant's motion is granted.

The instant negligence action was commenced solely against BVSJ, and BVSJ subsequently commenced a third-party action against George Robinson. Mr. Robinson has not answered the third-party complaint or otherwise appeared in this action. Mr. Duncan passed away during the pendency of this action, and his daughter, Antoinette Duncan, was appointed as

Administrator of his estate, and was substituted in his place and stead as plaintiff. Ms. Duncan also brings suit in her individual capacity.

BVSJ is a non-profit, community-based organization which assists veterans with housing, employment, and Veterans Affairs benefits. From 2014-2018, BVSJ operated a program called Supportive Services for Veteran Families. This program provided housing assistance for veterans by identifying landlords who would rent apartments to unemployed veterans with the understanding that BVSJ would pay the rent. The lease was signed by the tenant and the landlord, and each apartment typically had two or three roommates.

Both plaintiffs' decedent, St. Julian Duncan, and his roommate, third-party defendant George Robinson, were clients and participants in the Supportive Services for Veteran Families Program. On November 28, 2016, Mr. Robinson entered into a lease with landlord Jeffrey Waterman to rent Unit 2F(A) at 1125 Lenox Road, Brooklyn, New York. On February 17, 2017, Mr. Duncan entered into a lease with Mr. Waterman to rent Unit 2F(B), within the same apartment, in the same building. Each paid a monthly rent of $850.00, and BVSJ coordinated financial assistance in the form of rental payments for both units from funds provided by Veterans Affairs.

The plaintiffs allege that on May 29, 2017, Mr. Robinson entered Mr. Duncan's room while he was asleep and restrained and bound him with an extension cord. It is also alleged that Mr. Robinson punched Mr. Duncan with a chain wrapped around his closed fist, striking him in his face, head and stomach. The plaintiffs further allege that Mr. Robinson slashed Mr. Duncan's face and head with a kitchen knife and choked Mr. Duncan with his hands. As a result, Mr. Duncan sustained injuries which included, *inter alia*, subdural hematomas, multiple rib fractures, and facial lacerations.

BVSJ argues that it is not liable for the alleged assault as BVSJ did not owe a duty of care to Mr. Duncan to prevent an assault by another tenant within the apartment. BVSJ also contends that it had no control or possession over the property and did not have the authority, ability or opportunity to control either Mr. Duncan or Mr. Robinson. BVSJ further asserts that there was no special relationship between BVSJ and Mr. Duncan that would give rise to a duty of care. In support of the motion for summary judgment, BVSJ attaches, *inter alia*, the deposition testimony of Antoinette Duncan, the deposition testimony and affidavit of directors at BVSJ, and a copy of the program agreement. *See* NYSCEF Doc. Nos. 38-46.

In opposition, plaintiffs argue that the motion must be denied because defendant owed Mr. Duncan a duty of care to ensure that he was protected from the foreseeable acts of Mr. Robinson. Plaintiffs assert that there was a special relationship between the parties that created both a common-law duty of care and a contractual duty of care by virtue of the fact that both Mr. Duncan and Mr. Robinson were participants in the defendant's housing program and therefore subject to the terms and conditions of that program. Plaintiffs submit, *inter alia*, numerous progress notes, a BVSJ internal policy and procedure memorandum from September 5, 2014, the "Supportive Services for Veteran Families' Program Policy and Procedures Manual," and a memorandum describing BVSJ policies for screening and processing applicants. *See* NYSCEF Doc. Nos. 52-62.

Summary judgment may be granted only where the movant presents sufficient evidence to demonstrate that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *see also Phillips v Joseph Kantor & Co.*, 31 NY2d 307 (1972). The moving party is required to make a *prima facie* showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues

of fact. *Alvarez* at 324; *see also Zuckerman v City of New York,* 49 NY2d 557 (1980). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion. *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). If the *prima facie* burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. CPLR § 3212 (b); *see also Alvarez at* 324; *Zuckerman* at 562. Generally, the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient. *Zuckerman* at 562.

"It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff." *Pulka v Edelman*, 40 NY2d 781, 782 (1976). The threshold question of whether a defendant owes a duty of care to a plaintiff in a negligence case is a question of law for the courts to decide. *Purdy v Public Administrator of County of Westchester*, 72 NY2d 1 (1988); *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222 (2001). The absence of a duty entitles the movant to summary judgment because, absent a duty, there is no breach and no liability. *Pulka* at 782.

Generally, New York law does not impose a duty to control the conduct of third persons to prevent them from causing injury to others even where, as a practical matter, the defendant could have exercised such control. *Purdy* at 8; *Edwards v Mercy Home for Children & Adults*, 303 AD2d 543 (2d Dept 2003) (no special relationship and no duty of care owed by facility to hospital nurse who was attacked by an aggressive resident of the facility). There are limited exceptions to this rule, which arise when: (1) there is a relationship between the defendant and

the third person that "encompasses defendant's actual control of the third person's actions;" or (2) a special relationship exists between the defendant and the plaintiff that requires the defendant to protect the plaintiff from the conduct of others. *Hamilton* at 233. Special relationships that have been recognized as providing a basis for finding a duty to protect include common carriers and their patrons, innkeepers and their guests, employers and employees, parents and children, hosts who serve alcoholic beverages and their guests, owners and occupiers of premises, and physicians or mental health workers and their patients. *See generally Hamilton*; *Einhorn v Seeley*, 136 AD2d 122 (1st Dept 1988); Kreindler, Cook, Kushlefsky, and Benett, NY Practice Series, New York Law of Torts § 6:15. A key consideration in assessing whether a duty exists is whether the defendant's relationship with either the third-party tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm. *Hamilton* at 233. "Courts generally have been wary of expanding the obligation of duty, but have determined that the issue must be resolved on a case-by-case basis." *Malone v County of Suffolk*, 128 AD3d 651, 652 (2d Dept 2015). The cost of imposing a duty must also be weighed, and any expansion of a duty is to be exercised cautiously as there are concerns about "potentially limitless liability and about the unfairness of imposing liability for the acts of another." *Hamilton* at 233; *see also Davis v South Nassau Communities Hosp.*, 26 NY3d 563 (2015). As the Court of Appeals has noted, "[w]hile the temptation is always great to provide a form of relief to one who has suffered, … the law cannot provide a remedy for every injury incurred." *Davis* at 580, quoting *Albala v City of New York*, 54 NY2d 269, 274 (1981).

Plaintiffs first argue that BVSJ owed a duty of care to Mr. Duncan because it had actual control over George Robinson. Plaintiffs contend that BVSJ was responsible for placing Mr. Duncan and Mr. Robinson in the same apartment, and that BVSJ had the power to suspend or

terminate the services and financial assistance it provided to Mr. Robinson. Plaintiffs analogize the instant situation to that in *Oddo v Queens Village Committee for Mental Health for Jamaica Community Adolescent Program, Inc*., 28 NY3d 731 (2017), and argue that BVSJ had control or authority over Mr. Robinson because he was still a participant in BVSJ's program.

Significantly, in *Oddo*, the Court found that no duty of care was owed to the victim. *Oddo* involved an alternative-to-incarceration *residential* facility that provided substance abuse and mental health treatment services. A resident of the treatment program was expelled from the facility for getting into an altercation and consuming alcohol. Shortly after his expulsion, the resident assaulted the plaintiff, who was his mother's boyfriend. The plaintiff commenced a negligence action and asserted that his injuries were solely the result of the program negligently releasing the resident. The Court of Appeals held that the program did not owe a duty to the plaintiff because the defendant was discharged from its facility and the program was no longer in charge of him when the incident occurred. The Court reasoned that the program could not force a participant to remain on the premises and did not have the authority to prevent a participant from leaving. Therefore, once the participant was discharged from the program, the facility no longer had any control.

In *Fox v Marshall*, 88 AD3d 131 (2d Dept 2011), another case cited by plaintiffs in arguing that the defendant had control over Mr. Robinson, the Appellate Division, Second Department, noted that there is no bright-line rule on whether a mental health care provider treating a patient on a voluntary basis owes a duty of care to the general public. In *Fox*, which involved a motion to dismiss brought pursuant to CPLR § 3211(a)(7) for failure to state a claim, the tortfeasor resided voluntarily in a mental health facility and was issued a pass to visit his mother. The tortfeasor murdered the mother's neighbor while he was out on this pass. The

Court in *Fox* found that the facility exercised some degree of control over the tortfeasor by the mere fact that the facility had to issue a pass allowing him to leave the facility. Viewing the facts as alleged in the complaint as true, the Court found that the complaint sufficiently alleged a cause of action in negligence against the facility.

Turning to the instant matter, however, this Court finds that BVSJ did not have any actual control over Mr. Robinson. Neither Mr. Duncan nor Mr. Robinson lived in a facility that was controlled or operated by BVSJ, and both individuals freely entered into separate leases with a third-party landlord. The "Rights, Responsibilities and Expectations" agreement signed by Mr. Duncan and BVSJ staff explicitly states: "[a]t no point will the program force participants to accept a specific permanent housing unit or job. We are here to provide options that may aid in housing stability." This was a voluntary program and participants were free to come and go as they pleased.

The Court is equally unpersuaded by the plaintiffs' argument that BVSJ's acceptance of Mr. Duncan into its program created a special relationship with him that required the defendant to protect him from the conduct of others.

Recently, in *Stephanie L. v House of the Good Shepherd*, 186 AD3d 1009 (4th Dept 2020), the Appellate Division, Fourth Department, dealt with the issue of whether a child-care agency owed a duty of care to the plaintiff, a biological child. In *Stephanie L.*, the agency placed a foster child in the home of a family without disclosing the foster child's complete history, which included engaging in animal abuse and sexually inappropriate behavior. The parents later adopted the foster child, and after the adoption was finalized, the foster child sexually assaulted the biological child. The parents learned of the history after the assault, and the foster child was removed from the parents' home and the adoption was vacated. In affirming the trial court's

denial of the defendant's motion to dismiss the negligence causes of action for failure to state a claim under CPLR § 3211(a)(7), the appellate court found that defendants did owe a duty of care to the biological child to warn the parents of the foster child's complete behavioral history. The Court reiterated the standard that a duty may exist when the defendant has control of the third party, or when there is a relationship between the defendant and the third party or a relationship between the defendant and the plaintiff that places the defendant in the best position to protect against the risk of harm. The Court found it significant that the agency oversaw the foster care placement for the four years preceding the adoption, and that the agency was in the best position to protect the biological child. The agency possessed superior knowledge of the foster child's behavioral history, which they could have easily provided and were in fact obligated to disclose under Social Services Law § 373-a. Notably, a child-care agency acts *in loco parentis* and has a duty to exercise reasonable care to prevent foster children under its supervision and control from harming others. *See generally Wynn v Little Flower Children's Services*, 106 AD3d 64 (1st Dept 2013) (duty of care imposed on child-care agency to remove foster child with firesetting propensities at request of foster parents who were unable to deal with the child's behavior).

In analyzing whether a duty was required, the appellate court in *Stephanie L.* compared the facts to those in the Court of Appeals case, *Davis*, 26 NY3d 563. In *Davis*, the hospital administered medication to a patient and then discharged her without warning her that the medication could impair her ability to safely operate a vehicle. The patient was then involved in a motor vehicle accident shortly after discharge. The *Davis* Court held that the medical providers owed a duty to the injured plaintiffs to warn the patient of the dangers of the medication.

Unlike a child-care agency, which exercises supervisory authority over children in its care, BVSJ is a community organization that provides housing services to adults. The instant matter involves two adult males. BVSJ may have paired the men together in the same apartment, but each of them entered into separate lease agreements with the landlord at two different times. BVSJ is not a party to either of these leases.

In *Malave v Lakeside Manor Homes for Adults, Inc.*, 105 AD3d 914 (2d Dept 2013), the Appellate Division, Second Department, found no duty of care was owed by the adult home where one resident stabbed another resident in the lobby of the facility. The Court reasoned that residents of Lakeside Manor Homes for Adults, Inc. (hereinafter Lakeside), were free to come and go as they pleased, and that in order to remove a resident from the facility, it would need to commence an eviction proceeding. Unlike the facility in *Fox*, 88 AD3d 131, Lakeside did not require the issuance of day passes to leave the facility, and its residents did not "relinquish general autonomy." *Malave* at 915, quoting *Purdy* at 7. Significantly, *Malave* involved a resident of an adult care facility where the residents lived under the supervision of facility staff, and yet no special relationship was found.

Plaintiffs' reliance on *Garda v Paramount Theatre, LLC*, 145 AD3d 964 (2d Dept 2016), to support the contention that a common-law duty is owed when the defendant's conduct places the plaintiff in a more vulnerable position, is also misplaced. The plaintiff in *Garda* was injured by an intoxicated patron during the course of his employment duties. There is no employer-employee relationship present in the instant matter.

Plaintiffs further contend that defendant's failure to follow its own protocols in its screening and admission of Mr. Robinson led to the ultimate assault of Mr. Duncan. Plaintiffs argue that BVSJ's "Rights, Responsibilities and Expectations" agreement establishes a basis for

finding that BVSJ assumed a duty of care. Plaintiffs cite to provisions of this document such as "[a]ll have the right to be treated fairly" and that certain "unwelcomed" conduct "may result in suspension, termination of program services and/or disciplinary action." *See* Exhibit C to Affidavit of Omar Lebron, NYSCEF Doc. No. 46. None of BVSJ's internal policies guaranteed to prevent or protect against behaviors of other individuals. At most, any such behavior "may result" in the suspension or termination of the financial assistance. In *Pink v Rome Youth Hockey Ass'n, Inc.*, 28 NY3d 994 (2016), the Court of Appeals dealt with a similar issue involving the alleged failure of a defendant hockey association to enforce an internal "Zero Tolerance" policy. The policy required on-ice hockey officials to remove spectators from the game for using obscene language or for threatening or using physical violence. In finding that the defendant was entitled to summary judgment, the Court noted that "[v]iolation of a[n] [organization]'s internal rules is not negligence in and of itself." *Pink* at 998, quoting *Sherman v Robinson*, 80 NY2d 483, 489 n 3 (1992).

In *Safa v Bay Ridge Auto*, 84 AD3d 1344, 1346 (2d Dept 2011), the Appellate Division, Second Department noted that "[t]here is no basis for the proposition that a party may be liable for failing to follow a policy which it has adopted voluntarily, and without legal obligation, especially when there is no showing of detrimental reliance by the plaintiff on the defendant following that policy." *Safa* involved a situation where the plaintiff, a customer of defendant garage, was struck by a vehicle operated by another customer while standing inside the garage. Bay Ridge Auto had a policy that customers were not allowed to drive their own vehicles out of the garage, and that Bay Ridge Auto's owners would do so instead. In reversing the trial court's decision denying the defendant's motion for summary judgment to dismiss the complaint, the Court held that the defendant did not owe the plaintiff a duty of care to protect him from the acts

of customers operating their vehicles within the garage. Furthermore, the Court noted that even if a duty could have arisen from the defendant's policy of driving its customers' vehicles out of the garage, the plaintiff failed to raise a triable issue of fact as to whether the plaintiff had relied on that policy. In the instant matter, the plaintiffs have also failed to raise a triable issue of fact that Mr. Duncan detrimentally relied on any failure by BVSJ to follow a policy.

Plaintiffs also analogize the facts of this case to *DeCrescente v Catholic Charities of the Diocese of Albany*, 89 AD3d 1272 (3d Dept 2011). In that case, Catholic Charities entered into a contract with a county to provide residential domestic violence services. The plaintiff was a victim of domestic violence seeking safe shelter from her abusive husband. Catholic Charities found temporary placement in a motel for the plaintiff, after which a Catholic Charities caseworker picked up the plaintiff and drove her to the motel. The caseworker observed the plaintiff to be intoxicated and bruised. When the plaintiff was alone in the motel room, a third party came into her room and assaulted and raped the plaintiff. There, the Court found that the defendants undertook a duty to keep the plaintiff safe with knowledge that someone might be looking to harm her. The Court also noted that questions dealing with whether Catholic Charities' procedures were flawed, whether the caseworker complied with the procedures for dealing with an intoxicated person and selecting a motel placement, or whether the chosen motel should have even been considered as a placement for domestic abuse victims due to the lack of security features, all go to the issue of whether a duty was breached – not whether there is a duty in the first place. *DeCrescente* at 1275-1276. Without a duty, there can be no breach.

Unlike BVSJ, Catholic Charities was specifically contracted to provide domestic violence services to victims. Its very existence was to serve a protective function. BVSJ does not provide on-site case management services or therapeutic services, and the record before the Court

establishes that BVSJ primarily provides rental assistance. Furthermore, BVSJ did not own, control, possess or maintain the building where Mr. Duncan and Mr. Robinson resided, and BVSJ did not have a key to enter the premises.

Plaintiffs also cite to *De'L. A. v City of New York*, 158 AD3d 30 (1st Dept 2017) in support of the argument that the defendant owed a duty of care in the instant situation, and that an institutional defendant cannot be automatically relieved of liability where it violates its own procedures. *De'L. A.* did not involve the threshold issue of whether a duty of care is owed. That case involved an infant foster child who suffered a brain injury when left in the care of the teenage boyfriend of defendant foster parent's daughter in violation of the agency policy. It was undisputed that a foster care agency owes a duty of care to the child. The central issue in that case was one of proximate cause. However, the issue of causation is not reached unless a duty is found. *See Zhili Wang v Barr & Barr, Inc.*, 127 AD3d 964 (2d Dept 2015).

Plaintiffs contend that George Robinson's assault of Mr. Duncan was foreseeable and that defendants failed to act in a reasonable manner. Foreseeability alone does not determine the existence of a duty; however, it does determine the scope of the duty once it is determined to exist. *Hamilton* at 232; *Fox* at 135. Furthermore, in addressing the modification of a legal duty, its reach must be limited by what is foreseeable. *See Davis* at 569; *see also Piazza v Regeis Care Center, LLC*, 47 AD3d 551 (1st Dept 2008) (nursing home entitled to summary judgment in negligence action where plaintiff was injured in altercation with her brother while they were visiting their mother in the nursing home; defendant was not put on notice of a history of physical violence so the incident was not foreseeable and the nursing home had no duty to take steps to prevent contact between plaintiff and her brother).

Notably, there is no evidence in the instant record that Mr. Robinson had any history of physical violence towards Mr. Duncan or anyone else prior to the two men being placed in the same apartment, or since. Plaintiffs claim that defendant had knowledge of three separate incidents between Mr. Robinson and Mr. Duncan which should have put them on notice of Mr. Robinson's aggressive behavior. However, the progress notes maintained by BVSJ concerning the incidents establish that these were all verbal disputes. On April 19, 2017, a senior case manager noted that there was a "domestic dispute in which the NYPD was called." According to progress notes, Mr. Robinson indicated that "words were exchanged between him and his roommate [Mr. Duncan]."

On May 1, 2017, Mr. Duncan contacted the program and complained that his roommate, Mr. Robinson, is "taking drugs-possibly K-2 or [m]arijuana" and that his roommate urinated inside the kitchen sink that same morning. In response to this, the case manager attempted to contact Mr. Robinson and left two voicemail messages asking him to avoid confrontation with Mr. Duncan and to "keep peace between them." On May 26, 2017, three days prior to the assault, Mr. Duncan contacted his case manager complaining that he believed that Mr. Robinson was smoking marijuana and that Mr. Robinson was accusing him of doing things that he could not have done. The case manager visited the home later on May 26th and spoke to Mr. Robinson. Mr. Robinson complained that Mr. Duncan was the one using drugs, and Mr. Robinson showed the case manager furniture that he brought in from the street and had placed in the common area. Mr. Duncan arrived in the apartment during this meeting, and accused Mr. Robinson of stealing two lamps from his room. The case manager observed Mr. Robinson verbally cursing at Mr. Duncan.

While it is apparent that the roommates did not get along and had verbal disagreements, there was no reasonable way that BVSJ could have foreseen this violent incident. Even assuming *arguendo* that Mr. Robinson's attack on Mr. Duncan was foreseeable, BVSJ was not in a position to protect him from harm. Even if BVSJ had terminated or suspended the financial assistance to Mr. Robinson, it had no control over the lease that Mr. Robinson signed with the landlord. Contrary to what plaintiffs suggest, BVSJ could not simply move Mr. Robinson to a different apartment. It had no authority or ability to terminate a lease that it was not a party to, and BVSJ had no power to alter the rights and responsibilities of the parties who signed the lease. BVSJ was not the landlord and had no authority to commence eviction proceedings against Mr. Robinson, and no ability to remedy his conduct in any way. Notably, even the mere ability of a landlord to evict a tenant does not provide the reasonable opportunity or effective means to prevent a tenant's criminal behavior. *See Britt v New York City Housing Authority*, 3 AD3d 514, 514 (2d Dept 2004), quoting *Blatt v New York City Housing Authority*, 123 AD2d 591, 593 (2d Dept 1986) (trial court properly dismissed the complaint on summary judgment as landlord had no ability to control the assailant of the tenant and the incident "arose from a purely personal dispute between the two individuals") (internal quotation marks omitted).

Furthermore, unlike the child-care agency in *Stephanie L.*, BVSJ did not withhold critical information that it was duty-bound to disclose. Similarly, BVSJ is neither an inpatient facility with control over its residents nor an organization that has been contracted to perform protective services for its clients.

Additionally, it is critical to note that while the Court of Appeals in *Davis* did find that a duty of care was owed, the Court did not actually impose an *additional* obligation on a physician. *Davis* at 579. A physician who administers medication to a patient already has a duty and

obligation to advise the patient of the potential risks and side effects of the prescribed medication. *Id.* Physicians can simply discharge their obligation by warning the patient of the dangers of the medication. *Id.* at 580-581. The *Davis* Court noted that "we merely extend the scope of persons to whom the physician may be responsible for failing to fulfill that responsibility." *Id.* at 579. The Court of Appeals in *Davis* was also careful to emphasize that the case is not about preventing a patient from leaving the hospital, but about ensuring that when a patient leaves the hospital, the patient is properly warned about the effects of the medication the hospital administered. Here, it would place an onerous burden on BVSJ to find a duty under the specific facts presented. It would charge BVSJ with the impossible task of having to control and predict the behavior of individuals who receive its financial assistance. BVSJ does not have the ability to control the behavior of program participants who are placed in private residences all across the borough.

"Moreover, any extension of the scope of duty must be tailored to reflect accurately the extent that its social benefit outweighs its costs." *Hamilton* at 232. In evaluating the cost of imposing a duty in this case, a problem arises because there is no clear, articulable duty here. And if there is no articulable duty, several questions arise: how does a similarly situated defendant meet such an obligation? Is there a duty to disclose a concern about a resident, or to give a potentially offending resident a warning? Is there a duty to stop paying the rent? Is there a duty to inform the landlord to take specific action with respect to the lease? How is a similar organization supposed to know when a verbal altercation might escalate to a physical altercation? It would be unfair to charge an organization with preventing physical altercations amongst its participants, and it would unreasonably subject the organization to the "potentially limitless liability" that the Court of Appeals has cautioned against. *Hamilton* at 233.

With regard to the plaintiffs' assertion that the defendant owed Mr. Duncan a contractual duty of care, as BVSJ states in its reply papers, plaintiffs are raising this claim for the first time in opposition to the motion. Plaintiffs did not allege the existence of any contract between the parties or the breach of a contract in the complaint or bill of particulars. A new theory raised for the first time in opposition to a motion for summary judgment should not be considered as a basis for defeating summary judgment. *Pinn v Baker's Variety*, 32 AD3d 463 (2d Dept 2006).

BVSJ has established its *prima facie* entitlement to judgment as a matter of law by demonstrating that it owed no duty of care to Mr. Duncan, and that no special relationship existed between him and the defendant. In opposition, the plaintiffs have failed to raise a triable issue of fact as to whether a duty was owed by BVSJ to Mr. Duncan under the circumstances presented here. Accordingly, BVSJ's motion for summary judgment dismissing the complaint insofar as asserted against it is granted.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that defendant BVSJ's motion for summary judgment dismissing the complaint insofar as asserted against it is **GRANTED**.

This constitutes the decision and order of the Court.

DATED: October 23, 2020

Lillian Wan

Hon. Lillian Wan, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.