

ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

JAMIE MICHELLE BRODERICK, as Guardian
of the Person and Property of AVIS JOY
KRAMER,

TRIAL / IAS PART 27
NASSAU COUNTY

Plaintiff,

Index No. 606249/2018

- against -

Motion Sequence No. 001

AMBER COURT ASSISTED LIVING, AMBER
COURT ASSISTED LIVING LLC d/b/a AMBER
COURT ASSISTED LIVING and d/b/a AMBER
COURT, AMBER COURT OF WESTBURY,
LLC d/b/a AMBER COURT ASSISTED
LIVING and d/b/a AMBER COURT, AMBER
COURT OF WESTBURY II, LLC d/b/a AMBER
COURT ASSISTED LIVING and d/b/a AMBER
COURT, AMBER COURT AT HOME LHCSA,
LLC d/b/a AMBER COURT ASSISTED LIVING
and d/b/a AMBER COURT and ALJUD
LICENSED HOME CARE SERVICES, LLC,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of
the foregoing papers, this motion is decided as follows:

The plaintiff commenced this action alleging causes of action relating to Article 28 of the

Public Health Law, negligence, and gross negligence against the defendants. Avis Joy Kramer was a resident at Amber Court of Westbury, LLC's facility from on or about July 28, 2015 through January 6, 2016, but did not reside at the other defendants' facilities, to the extent they even existed.

The defendants move pursuant to 3211(a)(1) for an order dismissing first cause of action in plaintiff's complaint against the defendants based on documentary evidence. The defendants move pursuant to 3211(a)(7) for an order dismissing first cause of action in plaintiff's complaint against the defendants for failure to state a cause of action. The defendants submit they are entitled to summary judgment because none of the defendants are nursing homes or residential health care facilities. The defendants aver Public Health Law §§ 2801-d and §2803-c does not apply to the defendants as a matter of law. The defendants further assert Amber Court Assisted Living and Amber Court of Westbury II, LLC could not have owed the plaintiff a duty of care because they were not involved with Avis Joy Kramer's residency or care. The defendants contend the Court must dismiss the plaintiff's claims of negligence and gross negligence against these entities.

The plaintiff opposes the motion. The plaintiff asserts the defense motion is not supported by documentary evidence as required by 3211(a)(1). The plaintiff avers Public Health Law §§ 2801-d provides a cause of action for residents of residential health care facilities who are injured by the deprivation of certain "resident rights" at the facilities. The plaintiff contends the defendants acted as and provided services like a residential health care facility giving rise to liability. The plaintiff alleges the complaint sufficiently states causes of action.

The defendants reply to the plaintiff's opposition. The defense reiterates the assertions that the defendants are not nursing homes, and they cannot be subject to liability under Public Health Law §§ 2801-d, but rather are governed by either Public Health Law Article 46-B which does not provide a private right of action or Public Health Law Article 36 depending upon the defendant. The defendants point out the plaintiff does not deny Amber Court of Westbury, LLC and ALJUD Licensed Home Care Services, LLC are an assisted living facility and a home health care service agency, respectively. The defendants contend the plaintiff's allegations are merely those of negligence, and submit the plaintiff seeks to create a new cause of action against assisted living facilities. The defendants assert the legislative history of Public Health Law §§ 2801-d shows it was not intended to apply to these defendants, adds the plaintiff's affidavit is meritless.

On a CPLR 3211 motion to dismiss, the court will “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). While affidavits may be considered, if the motion has not been converted to a CPLR 3212 motion for summary judgment, they are generally intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims (see *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). By contrast, a motion for summary judgment, which seeks a determination that there are no material issues of fact for trial, assumes a complete evidentiary record *Nonnon v City of New York*, 9 NY3d 825, 827 [2007].

Here, this defense motion was not converted to a motion for summary judgment. The Second Department in *Novick v South Nassau Communities Hosp.* (136 AD3d 999 [2d Dept 2016]), contrary to the defense assertions, considered motions for summary judgment, and not a motion to dismiss. Here, the plaintiff was not notified of the duty to make a full record, and proffer evidence in admissible form that could be considered by the Court for summary judgment (*Nonnon v City of New York*, 9 NY3d , *supra*).

“To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211 (a) (1), the documentary evidence must utterly refute the plaintiff’s factual allegations, conclusively establishing a defense as a matter of law [citations omitted]” (*Gould v Decolorator*, 121 AD3d 845, 847 [2d Dept 2014]). “[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case. ‘Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence’ [citations omitted]” (*First Choice Plumbing Corp. v Miller Law Offices, PLLC*, 164 AD3d 756, 758 [2d Dept 2018]). Here, the documentary evidence submitted by the defendants, including but not limited to operating certificates and affidavits, do not utterly refute the plaintiff’s factual allegations, and conclusively established a defense to the complaint as a matter of law (CPLR 3211[a][1]).

“On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory [citation omitted]” (*Hiu Ian Cheng v Salguero*, 164 AD3d 768, 770 [2d Dept 2018]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus” [citation omitted] (*Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]). Here, the complaint

sufficiently states the causes of action alleged by the plaintiff. The Court accepted the facts as alleged in the complaint as true, accorded the plaintiff the benefit of every possible favorable inference, and determined only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83 [1994]).

ORDERED that the motion is DENIED with leave to renew.

This decision will constitute the decision and order of the Court. All applications not specifically addressed are denied.

So ordered.

Dated: **December 31, 2018**

ENTER:



J. S. C.

Not - FINAL DISPOSITION

ENTERED

JAN 09 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE