

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HON. JOHN P. DUNNE, Justice

TRIAL/IAS, PART 12

**SIDNEY HIRSCHFELD, Director,
Mental Hygiene Service, Second
Judicial Department**

Plaintiff(s),

Index No. 9849/03

Motion Seq. No. 1,2,3

Motion Submission: 10/16/03

Motion to dismiss

-against-

**MITCHELL TELLER, as Administrator of
Woodmere Rehabilitation and Health Care
Center, Inc., et al.**

Defendant(s)

The following papers read on this motion:

Notice of Motion and Cross-motion XX
Answering Affidavits.....XX
Replying Affidavits..... X
Memo..... XXX

Upon the papers submitted, it is hereby ordered that the motion by defendants Mitchell Teller, Robert Kolman, Saul Greenberger and Philip Buchsbaum (collectively "Teller defendants") for an order pursuant to CPLR 3211(a)(7), (8) and

(10) dismissing the plaintiff's complaint is determined as provided herein and is adjourned to February 5, 2004.

Motion by plaintiff for an order pursuant to CPLR 3211(b) striking the first, second and third affirmative defenses in defendant Moshe Bain's answer is granted as to the second and third affirmative defenses.

Cross-motion by defendant Moshe Bain for an order pursuant to CPLR 3211(a)(2), (3) and (7) dismissing the plaintiff's complaint, or, in the alternative, an order pursuant to CPLR 3025(b) granting Mr. Bain leave to serve and file an amended answer is determined as provided herein and is adjourned to February 5, 2004.

This is an action for a declaratory judgment and for injunctive relief. The plaintiff's complaint alleges that "Sidney Hirschfeld is the Director of MHLS [i.e., Mental Hygiene Legal Service], Second Judicial Department, an agency mandated pursuant to Mental Hygiene Law Article 47 to protect and advocate for the rights of persons receiving residential or non-residential services for the mentally disabled." The defendants are alleged to be the Administrators of the named health care facilities, which facilities have not been separately named as parties.

In this action, the plaintiff seeks a judgment, inter alia, "declaring that MHLS has the right of access at any and all times to the residents of neurobiological units [and their clinical records] who are receiving services for the mentally disabled" and

for an injunction permanently enjoining the defendants from denying such access to the plaintiff. The Teller defendants move to dismiss the plaintiff's complaint as against them on various grounds. Counsel for the Teller defendants contends that the plaintiff's complaint fails to state a cause of action "because, among other things, the Mental Hygiene Law is *not* applicable to the Units [i.e., neurobiological units], or stated another way . . . the Units are not required to be licensed by the Office of Mental Health."

The rule is that: "Upon a motion to dismiss a complaint for legal insufficiency in an action for a declaratory judgment, the test 'is not whether the complaint shows the plaintiff will succeed in getting a declaration of rights in accordance with his theory and contention, but whether he is *entitled to a declaration of rights at all*. [and] If the complaint states the substance of a bona fide justiciable controversy which should be settled, a cause of action for a declaratory judgment is stated'." (**Metropolitan Package Store Assoc. v Koch**, 89 AD2d 317, 322, app. diss. 58 NY2d 1112, app. diss. 464 US 802). In this regard, the Court holds that the plaintiff's complaint alleges a bona fide justiciable controversy. As a matter of public policy, it is important to determine whether the plaintiff's statutory mandate extends to health care facilities, such as nursing homes, which do not hold operating certificates from the Office of Mental Health ("OMH").

Although the Teller defendants are moving for dismissal pursuant to CPLR 3211(a)(7), their moving papers indicate that they are actually moving for summary judgment on the merits. Since the plaintiff has responded on the merits and this action involves only legal questions, the Court will treat this branch of the Teller defendants' motion as one for summary judgment. (See **Mihlovan v Grozavu**, 72 NY2d 506, 508; **Wiesen v N.Y. Univ.**, 304 AD2d 459, 460). However, inasmuch as the Court is holding that the plaintiff has failed to join necessary parties and is directing that they be joined, no declaration will be made until the adjourned date of the Teller defendants' motion and defendant Bain's cross-motion.

The Teller defendants additionally move for dismissal pursuant to CPLR 3211(a)(8) on the grounds that "this Court lacks personal jurisdiction over the real parties in interest." The defendants also move for dismissal pursuant to CPLR 3211(a)(10) on the grounds that "MHLS has failed to join necessary parties." Counsel for the Teller defendants contends that the plaintiff has sued the individual administrators of Brookhaven (i.e., Brookhaven Rehabilitation and Health Care Center, LLC – misidentified as Brookhaven Beach Health Related Facility), Golden Gate (i.e., Golden Gate Rehabilitation and Health Care Center, LLC – misidentified as Golden Gate Health Care Center, Inc.), Meadow Park (i.e., Meadow Park Rehabilitation and Health Care Center, LLC – misidentified as Meadow Park

Rehabilitation and Healthcare Center) and Woodmere (i.e., Woodmere Rehabilitation and Health Care Center, Inc.), who “are simply employees of the entities which own and operate the Nursing Homes.”

The Court agrees with counsel for the Teller defendants that the entities which own the nursing homes and employ the individual defendants are the real parties in interest and are necessary parties to this action under CPLR 1001(a). The Court does not agree, however, that the complaint should be dismissed. Instead, Brookhaven, Golden Gate, Meadow Park and Woodmere shall be added as defendants and the plaintiff will be directed to serve each of them with a supplemental summons and complaint forthwith. Thus, that branch of the Teller defendants’ motion seeking dismissal pursuant to CPLR 3211(a)(10) is denied. As to the Teller defendants themselves, the Court holds that personal jurisdiction has been acquired over each of them pursuant to CPLR 308. (See Teller Defendants’ Exhibit E). Consequently, that branch of the Teller defendants’ motion seeking dismissal pursuant to CPLR 3211(a)(8) is denied as well.

The Teller defendants furthermore contend that this action is barred by the doctrines of estoppel and laches. It is the rule, however, that “estoppel may not be invoked against a governmental agency to prevent it from discharging its statutory duties.” (**E.F.S. Ventures Corp. v Foster**, 71 NY2d 359, 369; **Hamptons Hospital**

& Medical Center, Inc. v Moore, 52 NY2d 88, 93-94). The Court of Appeals has likewise held that “the equitable doctrine of laches may not be interposed as a defense against the State when acting in a governmental capacity to enforce a public right or protect a public interest.” (**Cortlandt Nursing Home v Axelrod**, 66 NY2d 169, 178, cert. den. 476 US 1115; see, also, 75A NY Jur2d, Limitations and Laches, §362).

Counsel for the Teller defendants contends in the Teller defendants’ memorandum of law that: “MHLS simply does not have standing to enforce the Mental Hygiene Law and regulations of the Department of Mental Hygiene to compel Brookhaven, Golden Gate, Meadow Park and Woodmere to obtain operating certificates from the commissioner of OMH.” If the plaintiff were seeking such relief, the Court would agree. However, the plaintiff is only seeking enforcement of its statutory mandate. There is no impediment to MHLS contending that the defendants are required to have OMH certificates. Indeed, counsel for MHLS explains in plaintiff’s memorandum of law that “the plaintiff’s jurisdiction is premised on the fact that the facility or place is required to have an OMH license. [and that] In this litigation, the plaintiff is only concerned with enforcing MHLS’ right to oversee the neurobiological units, and to advocate on behalf of their residents.”

Counsel for the Teller defendants additionally contends in the Teller defendants’ memorandum of law that: “Granting MHLS unfettered access to residents

of the Units would impermissibly discriminate against them.” Counsel argues that: “Just as any other Nursing Home resident would have the right to refuse to meet with MHLS attorneys’ and object to MHLS reviewing their medical records, the residents in the NBM Program [i.e., Neurological Behavior Management Program] should also have the right to refuse to meet with MHLS attorneys and object to MHLS reviewing their medical records. [and that] To conclude otherwise impermissibly discriminates against them on the basis of their mental disability.” The Court disagrees. The Legislature has given the MHLS mandatory duties to perform and the authority to carry them out with or without the consent of patients or residents or the health care facilities involved. (See Mental Hygiene Law §47.03, e.g., **In re Rudes**, 190 Misc2d 491).

The plaintiff moves for an order pursuant to CPLR 3211(b) striking defendant Moshe Bain’s first, second and third affirmative defenses on the grounds that they impermissibly plead the defense that the complaint does not state a cause of action. Counsel correctly points out that: “In the Second Judicial Department of the New York State Supreme Court, a defense that a complaint does not state a cause of action cannot be interposed in an answer; rather it must be raised by appropriate motion pursuant to CPLR 3211(a)(7).” (Citing **Petracca v Petracca**, 305 AD2d 566, 567; **Staten Island-Arlington, Inc. v Wilpon**, 251 AD2d 650; [remaining citations

omitted])). Applying this rule, defendant Bain's second and third affirmative defenses shall be dismissed.

Defendant Bain's second affirmative defense alleges that: "Plaintiff fails to state a cause of action because the Complaint seeks equitable relief, and plaintiff has failed to allege that it does not have an adequate remedy at law." Clearly, this defense is directed at the sufficiency of the complaint. In his cross-motion, defendant Bain seeks leave to amend this affirmative defense by omitting the words "fails to state a cause of action." The proposed amended second affirmative defense alleges that: "Plaintiff is not entitled to equitable relief because he has failed to allege that he does not have an adequate remedy at law." This amendment would not save this defense because it is still directed at the plaintiff's failure to allege an element of his equitable cause of action.

Defendant Bain's third affirmative defense alleges that: "Plaintiff fails to state a cause of action because the Complaint sets forth a non-justiciable controversy in that the Complaint identifies neither any resident nor any records to whom or which plaintiff has been denied access by New Surfside Nursing Home." This affirmative defense is directed at the legal sufficiency of the plaintiff's complaint as well. In his cross-motion, defendant Bain likewise seeks leave to amend this affirmative defense by omitting the words "fails to state a cause of action." The proposed amended third

affirmative defense alleges that: “The Complaint sets forth a non-justiciable controversy in that the Complaint identifies neither any resident nor any records to whom or which plaintiff has been denied access by New Surfside Nursing Home.” The proposed amendment does not change the nature of this defense. It is still directed at the plaintiff’s failure to allege a legally sufficient cause of action for a declaratory judgment.

The plaintiff’s motion is, however, denied as to defendant Bain’s first affirmative defense. This defense alleges that: “Plaintiff fails to state a cause of action in that New Surfside Nursing Home is not required to obtain a certificate from The New York State Commissioner of Mental Health and thus Mental Hygiene Legal Service is not authorized to provide services to the residents of New Surfside Nursing Home.” Irrespective of the words “fails to state a cause of action,” this affirmative defense is not directed at the legal sufficiency of the plaintiff’s cause of action (i.e., whether a justiciable controversy has been stated); but, rather, is directed at whether plaintiff is entitled to the declaratory relief requested.

Defendant Bain cross-moves to dismiss the plaintiff’s complaint as against himself pursuant to CPLR 3211(a)(2), (3) and (7). These branches of defendant Bain’s cross-motion appear to be based upon his first, second and third affirmative defenses. Counsel for defendant Bain states that: “The First Proposed Defense details

the facts explaining why plaintiff lacks legal capacity to bring this action at all” – citing CPLR 3211(a)(3). Counsel further states that: “The Second Proposed Defense asserts a defense based upon plaintiff’s failure to comply with requirements of CPLR 3013 that pleadings set forth ‘the material elements of each cause of action’.” Counsel contends that the plaintiff has failed to plead that it lacks an adequate remedy at law – citing CPLR 3211(a)(7). Counsel additionally states that “the Third Proposed Defense sufficiently alleges a defense based upon this Court’s lack of subject matter jurisdiction” – citing CPLR 3211(a)(2) and *Posner v State*, 69 Misc.2d 958.

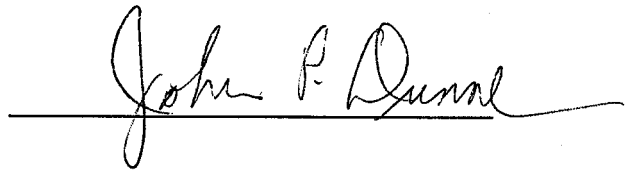
Defendant Bain’s cross-motion insofar as it seeks dismissal of the plaintiff’s complaint as against him pursuant to CPLR 3211(a)(2), (3) and (7) is being adjourned to February 5, 2004. These branches of defendant Bain’s cross-motion will be treated as a summary judgment application for the same reasons as that branch of the Teller defendants’ motion seeking dismissal pursuant to CPLR 3211(a)(7). Moreover, the Court is holding that the plaintiff’s complaint alleges a bona fide justiciable controversy. Also, the Court agrees with counsel for the plaintiff that “an allegation that no adequate remedy of law exists may be gleaned from the four corners of the plaintiff’s complaint.” As a matter of public policy, the plaintiff must perform its statutory duties and no legal remedy or money damages will suffice. Lastly, the alternative relief sought by defendant Bain (i.e., leave to serve and file the proposed

amended answer) is denied as moot.

Accordingly, defendant Bain's second and third affirmative defenses are hereby dismissed. Furthermore, Brookhaven, Golden Gate, Meadow Park, Woodmere, New Surfside Nursing Home and Haven Manor Health Care Center are hereby added as defendants and the plaintiff is directed to serve each of them with a supplemental summons and complaint forthwith. Finally, on or before the adjourned date of the Teller defendants' motion and defendant Bain's cross-motion, the parties and added parties may submit additional papers.

It is, so Ordered.

Dated: December 22, 2003

A handwritten signature in cursive script, reading "John P. Dunne", is written over a horizontal line.

Hon. John P. Dunne

ENTERED

JAN 02 2004

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**