

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 2, 2025

CV-23-2035

CRAIG DeRUSSO et al.,
Appellants,

v

THE CHURCH AID OF THE
PROTESTANT EPISCOPAL
CHURCH IN THE TOWN OF
SARATOGA SPRINGS, INC.,
Doing Business as HOME OF
THE GOOD SHEPARD AT
HIGHPOINTE,
Respondent.

OPINION AND ORDER

Calendar Date: November 18, 2024

Before: Garry, P.J., Egan Jr., Clark, Pritzker and Mackey, JJ.

The Tuttle Law Firm, Clifton Park (James B. Tuttle of counsel), for appellants.

O'Connor, O'Connor, Bresee & First, PC, Albany (Elizabeth J. Grogan of counsel), for respondent.

Egan Jr., J.

Appeal from an order of the Supreme Court (James E. Walsh, J.), entered October 18, 2023 in Saratoga County, which granted defendant's motion to partially dismiss the complaint.

Plaintiff Craig DeRusso was a resident at the Home of the Good Shepherd at Highpointe in the Town of Malta, Saratoga County, a facility that is owned and operated by defendant and that is licensed as an assisted living residence, enhanced assisted living residence and special needs assisted living residence. Alleging that his care at the residence was deficient in various respects, plaintiffs commenced this action in March 2023 and asserted, among other things, a cause of action alleging violations of Public Health Law § 2801-d. Public Health Law § 2801-d creates a private right of action for patients at a "residential health care facility," however, and defendant moved to dismiss the Public Health Law § 2801-d claim because the residence is an assisted living facility rather than a residential health care facility. Plaintiffs opposed the motion and filed an amended complaint which asserted that, although the residence is an assisted living facility, it is nevertheless a residential health care facility providing health-related service to its patients within the meaning of Public Health Law article 28. Supreme Court thereafter granted the motion and dismissed the Public Health Law § 2801-d claim. Plaintiffs appeal.

We affirm. The primary goal of statutory interpretation is to effectuate the intent of the Legislature and, "[a]s the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]; *see Matter of United Jewish Community of Blooming Grove, Inc. v Washingtonville Cent. Sch. Dist.*, 42 NY3d 348, 354 [2024]). Public Health Law § 2801-d creates a private right of action distinct from traditional claims for medical malpractice and negligence, and it provides, in relevant part, that "[a]ny residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined [in Public Health Law article 28], shall be liable to [the] patient for injuries suffered as a result of said deprivation" (Public Health Law § 2801-d [1]; *see Currie v Oneida Health Sys., Inc.*, 222 AD3d 1284, 1290 [3d Dept 2023]). A residential health care facility is defined, in turn, as "a nursing home or a facility providing health-related service" (Public Health Law § 2801 [3]; *see* Public Health Law § 2801 [4] [b]).

An assisted living facility, in contrast, is governed by Public Health Law article 46-B instead of Public Health Law article 28, being defined as a facility that "provides or arranges for housing, on-site monitoring, and personal care services and/or home care services (either directly or indirectly), in a home-like setting to five or more adult residents unrelated to the assisted living provider" (Public Health Law § 4651 [1]). The Legislature has left no doubt that assisted living facilities are distinct from the ones governed by Public Health Law article 28, directly stating in Public Health Law § 4651

(1) that "[a]ssisted living and enhanced assisted living *shall not include* . . . residential health care facilities or general hospitals licensed under [Public Health Law article 28]" (Public Health Law § 4651 [1] [emphasis added]). In short, notwithstanding the efforts of plaintiffs to argue otherwise, the plain and unambiguous language of Public Health Law § 4651 (1) compels the conclusion that assisted living facilities and residential health care facilities are mutually exclusive categories even if an assisted living facility "provide[s] services consistent with that of a residential health care facility" as defined in Public Health Law article 28 (*Matter of Macheski v Commissioner of N.Y. State Dept. of Social Servs.*, 243 AD2d 1025, 1026 [3d Dept 1997]; *see also* 10 NYCRR 1001.2 [a]).

Public Health Law article 46-B was enacted well after Public Health Law article 28, and, when the Legislature did so, it could have permitted some overlap between assisted living facilities and residential health care facilities or otherwise amended Public Health Law § 2801-d to expand the scope of the statute to include residents of assisted living facilities (*see* Public Health Law § 2801-d, as added by L 1975, ch 658; § 4651, as added by L 2004, ch 2). It did not, and "[t]he failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended" (*Pajak v Pajak*, 56 NY2d 394, 397 [1982]; *see Matter of Sweeney v Dennison*, 52 AD3d 882, 884 [3d Dept 2008]). Even accepting that the omission was unintentional, however, "it is for the Legislature and not the courts to remedy the omission" (*Preferred Mut. Ins. Co. v State of New York*, 196 AD2d 384, 386 [3d Dept 1994]). We therefore agree with the Second Department that the private cause of action created by Public Health Law § 2801-d is unavailable to residents of assisted living facilities, and disagree with a line of cases from the Fourth Department allowing the possibility that it might be (*see Broderick v Amber Ct. Assisted Living*, 200 AD3d 840, 841-842 [2d Dept 2021]; *but see Cunningham v Mary Agnes Manor Mgt., L.L.C.*, 188 AD3d 1560, 1562 [4th Dept 2020]; *Burkart v People, Inc.*, 129 AD3d 1475, 1477-1478 [4th Dept 2015]). Thus, as the amended complaint alleges, without dispute, that Craig DeRusso lived in an assisted living facility during the relevant period, the alleged facts "are insufficient to state a claim that the assisted living facility . . . was [also] a residential health care facility against which a private right of action pursuant to Public Health Law article 28 may be maintained," and Supreme Court properly dismissed plaintiffs' Public Health Law § 2801-d claim as a result (*Broderick v Amber Ct. Assisted Living*, 200 AD3d at 842).

Defendant's remaining contentions, to the extent that they are properly before us and have not been rendered academic by the foregoing, have been examined and are unavailing.

Garry, P.J., Clark, Pritzker and Mackey, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style with a prominent "R" and "M".

Robert D. Mayberger
Clerk of the Court