

ELEVENTH JUDICIAL CIRCUIT

PAUL W. CELLA, JUDGE
POWHATAN COUNTY COURTHOUSE
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COMMONWEALTH OF VIRGINIA

CIRCUIT COURT OF AMELIA COUNTY
CIRCUIT COURT OF DINWIDDIE COUNTY
CIRCUIT COURT OF NOTTOWAY COUNTY
CIRCUIT COURT OF THE CITY OF PETERSBURG
CIRCUIT COURT OF POWHATAN COUNTY

October 2, 2019

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Henderson v. Hickory Hill Retirement Community, LLC
Nottoway Circuit Court Case Number CL19-187

Dear Mr. Downey and Ms. Reynolds:

I am writing in regard to the hearing that was held September 23, 2019.

Defendants' Plea in Bar as to Countryside Estates, LLC

At the hearing, the parties submitted an agreed order dismissing the case as to defendant Countryside Estates, LLC (Countryside), and I entered this order. Under separate cover, the Clerk's Office will mail copies to you.

Motion to Strike All Claims against Dolores V. Mullens in Her Capacity
as a Member of Hickory Hill Retirement Community, LLC

Based on Virginia Code §13.1-1019 and Virginia Code §13.1-1020, defendant Dolores V. Mullens (Mullens) argues that I should strike all claims that plaintiff, Matthew Charles Henderson, has filed against her except to the extent that those claims relate to direct acts on her part.¹ In other words, she argues that I should strike all of plaintiff's claims against her to the extent that plaintiff is seeking to hold her liable solely as an owner, member, or manager of defendant Hickory Hill Retirement Community, LLC (Hickory Hill). If I understand plaintiff's position correctly, he does not disagree with this argument. For example, on page 13 of his Memorandum in Opposition, plaintiff says that he is pursuing Mullens based on "her direct participation in the conduct at issue," such as failing to train her staff properly. Therefore, my decision is that plaintiff shall be allowed to pursue claims against Mullens only to the extent that

¹ Matthew Charles Henderson is plaintiff in his capacity as administrator of Charles L. Henderson.

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direct action on her part is alleged. In other words, Mullens's motion to strike is granted to the extent that plaintiff may have sought to hold her liable solely because she is an owner, member, or manager of Hickory Hill.

Defendants' Motion Craving Oyer

Defendants craveoyer as to the sales brochure that is referred to in paragraph 17 of plaintiff's Complaint. Defendants argue that this request is justified because this document is pertinent to defendants' demurrer regarding plaintiff's claim under the Virginia Consumer Protection Act (VCPA).² At the hearing, Mr. Downey said that he has produced the document to Ms. Reynolds, and he argued that in light of that fact, and in light of the fact that the specific language upon which plaintiff relies is quoted in the Complaint, a motion cravingoyer is unnecessary.

A motion cravingoyer is used to force a party to file with the court documents that are mentioned in a party's complaint but that are not attached to the complaint. When the court rules on a demurrer, the court can then consider both the facts alleged in the complaint and the facts stated in the document. If the facts stated in the document support the allegations in the complaint, the court may consider that, and if the facts stated in the document contradict the allegations in the complaint, the court may consider that too. Ward's Equipment, Inc. v. New Holland North America, Inc., 254 Va. 379, 493 S.E.2d 516 (1997).

I believe that Mr. Downey is correct in stating that on the facts of our case, a motion cravingoyer is unnecessary. The sales brochure has been produced to defendants, its contents do not appear to be in dispute, and the statements upon which plaintiff relies are quoted in the Complaint. Defendants' demurrer to plaintiff's claim under the VCPA does not argue that the brochure has been misquoted or that there are additional parts of it that I need to see in order to make a proper ruling. Rather, in their demurrer to plaintiff's claim under the VCPA, defendants argue that (1) the VCPA does not apply to assisted living facilities, and (2) the statements in the sales brochure are not fraudulent.

For the reasons stated above, defendants' motion cravingoyer is denied.

Defendants' Motion to Strike Inflammatory Misrepresentations

Paragraph 48 of plaintiff's Complaint alleges that defendants' licensing agency cited defendants for certain violations before Charles L. Henderson became a resident at Hickory Hill.

² Defendants' Motion Craving Oyer also refers to any agreements regarding an alleged joint venture among Countryside, Hickory Hill, and Mullens, but this was not argued at the hearing. I assume that this alleged joint venture is moot because of the dismissal of Countryside and the clarification of the scope of plaintiff's claims against Mullens, as discussed above. If I am mistaken, please let me know.

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In their Answer, defendants deny this allegation. In their Motion to Strike Inflammatory Misrepresentations, defendants argue that these allegations are “verifiably incorrect” (Motion to Strike Inflammatory Misrepresentations at 5) and ask me to strike them.

As I suggested in one of my questions at the hearing, while I understand defendants’ position, I believe that this is an issue that should more properly be decided as part of a motion in limine after discovery has been conducted. If discovery reveals that these allegations are unfounded, then they can be excluded at trial. I am reluctant, however, to strike these allegations at the pleading stage. Therefore, this motion is overruled, without prejudice to defendants’ right to raise it again later in the case, after discovery has been conducted.

Defendants’ Demurrer to Punitive Damages Claim

Defendants argue that plaintiff’s claim for punitive damages should be dismissed because “[w]illful and wanton negligence is required for an award of punitive damages,” and the “best that can be said is that the Complaint sets for claims of simple negligence,” which are insufficient for such an award. (Defendants’ Memorandum in Support of Demurrer to Punitive Damages Claim at 3.) Plaintiff argues that his allegations to the effect that Hickory Hill knowingly admitted Charles L. Henderson as a resident when it knew that it was not properly staffed to care for him are sufficient to plead the willful and wanton conduct that is required for an award of punitive damages. I believe that it would be premature for me to decide this issue on a demurrer. I believe that plaintiff should be given an opportunity to present his evidence, and then a decision can be made as to whether the evidence is sufficient for his claim of punitive damages to be submitted to the jury.

I realize that part of defendants’ argument is that in order for Hickory Hill to be held liable for punitive damages, plaintiff must prove that Hickory Hill ratified or authorized the offending acts of its employees. Plaintiff has alleged that such ratification or authorization occurred. (Complaint ¶52.) Once again, I am reluctant to decide this issue at the pleading stage. I believe that plaintiff should be given an opportunity to present evidence, and then a decision can be made.

For the reasons stated above, defendants’ demurrer to plaintiff’s claim for punitive damages is overruled.

Defendants’ Demurrer to Claims under the VCPA

Plaintiff alleges that defendants made fraudulent misrepresentations that were calculated to lure Charles L. Henderson into coming to Hickory Hill when Hickory Hill was not able to take care of him properly, and that this violated the VCPA. As noted above, defendants make two arguments. First, defendants argue that the VCPA does not apply to assisted living facilities.

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Second, defendants argue that the statements that were allegedly made constitute “sales trade talk or puffery and are not fraudulent statements.” (Defendants’ Memorandum in Support of Demurrers to Consumer Protection Act Claims at 5.)

The Supreme Court of Virginia has not ruled on whether the VCPA applies to assisted living facilities. Based on Virginia Code §59.1-199, defendants argue that it does not. That Code section exempts from the VCPA “[a]ny aspect of a consumer transaction which aspect is authorized under laws and regulations of this Commonwealth.” Defendants argue that the Social Services chapter of the Code authorizes assisted living facilities to do certain things, such as advertising (Virginia Code §63.2-1800 (B)), and that that, in effect, preempts claims under the VCPA. Citing various cases that he believes to be persuasive, plaintiff disagrees. For example, in Beaty v. Manor Care, Inc. (Civil Action No. 02-1720-A, E.D. Va. February 10, 2003), plaintiffs alleged that an assisted living facility’s brochure made certain misrepresentations, and defendants made the same argument that the defendants in our case are making. The court rejected the defendants’ argument, noting that Virginia Code §59.1-199 does not exempt entire industries from the VCPA, and that the VCPA did not regulate the type of misrepresentations that the plaintiffs had alleged. See also Humphrey v. Leewood Healthcare Center, 73 Va. Cir. 346 (Fairfax 2007) (claim against nursing home under VCPA not exempted under Virginia Code §59.1-199 because that Code section does not exempt entire industries from the VCPA, and nursing homes are not authorized to misrepresent the level of care that they are able to provide).

I acknowledge that the cases that plaintiff relies on are not controlling authority. In the absence of precedents from the Supreme Court of Virginia, however, I find the rationale of Beaty and Humphrey to be persuasive. I do not believe that Virginia Code §59.1-199 was intended to have the preemptive effect that defendants have ascribed to it.

I understand defendants’ position regarding “sales trade talk or puffery,” but I believe that at this stage, plaintiff’s Complaint contains sufficient allegations of fact to withstand a demurrer.

For the reasons stated above, defendants’ demurrer to plaintiff’s claim under the VCPA damages is overruled.

Please prepare an order.

Thank you.

Sincerely,



Paul W. Cella