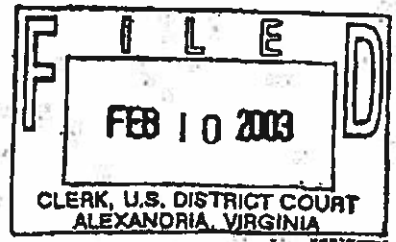


IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division



ORREN BEATY, JR., and
MARY E. BEATY,

Plaintiffs,

v.

Civil Action No. 02-1720-A

~~MANOR CARE, INC., and~~
~~JANET SMITH,~~

Defendants.


ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that:

(1) Defendants' Motion to Partially Dismiss the Complaint is GRANTED in part and DENIED in part. Plaintiffs' claims for damages for Mary Beaty's emotional distress are DISMISSED; all other Counts in the Complaint may proceed; and

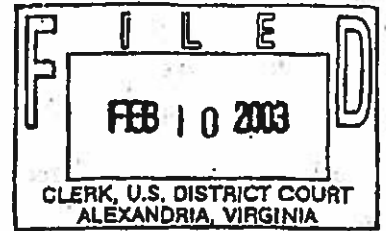
(2) the Clerk of the Court shall forward copies of this Order and the accompanying Memorandum Opinion to all counsel of record.

February ^{10th}, 2003
Alexandria, Virginia


UNITED STATES DISTRICT COURT JUDGE

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MEMORANDUM OPINION

This case is before the Court on Defendants' Motion to Dismiss Portions of the Complaint.

I. Background.

Plaintiff Orren Beaty, Jr. ("Mr. Beaty"), is an 83 year old man who has been diagnosed with Alzheimer's disease. He brings this action through his guardian and next friend, his daughter, Laura Beaty. Plaintiff Mary Beaty is Orren Beaty's wife of 57 years. This case arises out of events that occurred when Plaintiffs put Mr. Beaty into Arden Courts ("Arden Courts" or "the facility"), an assisted living facility operated by Defendant Manor Care ("Manor Care" or "Defendant") in Fairfax County, Virginia. Defendant Janet Smith was Manor Care's Regional Director of Operations for the Assisted Living Division during the relevant time period.

In brief, Plaintiffs Laura and Mary Beaty put Mr. Beaty

into the Arden Courts facility on February 1, 2001, for a period of one month, a "Short-Term Respite Stay," as designated by the facility, so that Mary Beaty, Mr. Beaty's normal caregiver, could go out of town. Plaintiffs assert that they did so based on Defendants' representations that the facility had a highly trained staff who provided 24-hour supervision of the residents to ensure their safety. During Mr. Beaty's stay, he suffered a series of injuries. First, sometime prior to February 17, 2001, Mr. Beaty hurt his back. A nurse reported that the injury was due to a fall, but Plaintiffs report seeing an abrasion and crescent shaped laceration on Mr. Beaty's cheek that were not consistent with injuries suffered in a fall. Mr. Beaty claimed that members of the Arden Courts staff hit him.

The second incident occurred on February 26, 2001. By all accounts, Mr. Beaty wandered into another resident's room, and began going through that resident's clothes. When the resident woke up, he struck Mr. Beaty in the mouth, causing a serious cut that required Mr. Beaty to be taken to the emergency room of a local hospital to receive ten stitches. A few days later, Mary Beaty asserts that she noticed "prominent bruises" on Mr. Beaty's buttocks.

Despite these incidents, Plaintiffs elected to keep Mr. Beaty at the Arden Courts facility beyond the one-month term. On March 12, 2001, Mr. Beaty again was taken to the emergency room,

this time with a broken hip. By Plaintiffs' account, Mr. Beaty was assaulted by a female resident of the facility, who first slapped him and then struck him in the leg with her metal cane. According to Plaintiffs, the resident had a history of violent behavior, and the attack occurred in view of members of the Arden Courts staff. Due to complications from the hip replacement surgery, Mr. Beaty spent approximately two weeks in the hospital, some of that time in intensive care. Today, Mr. Beaty is confined to a wheelchair and is not expected to walk again.

On November 22, 2002, Plaintiffs filed a complaint in this Court against Defendants, asserting (I) breach of contract; (II) actual fraud; (III) constructive fraud; (IV) violation of the Virginia Consumer Protection Act; (V) negligent failure to protect Orren Beaty; (VI) negligent failure to control other residents; (VII) intentional infliction of emotional distress; and (VIII) violations of the Virginia False and Deceptive Advertising Statutes. On January 13, 2003, Defendants filed a motion to dismiss portions of the Complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6), seeking dismissal of Counts II, III, IV, VII, and VIII, as well as Plaintiff Mary Beaty's claims for emotional distress damages in the contract and misrepresentation counts. That motion is currently before the Court.

II. Standard of Review

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint, see Randall v. United States, 30 F.3d 518, 522 (4th Cir. 1994), and should be denied unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." De Sole v. United States, 947 F.2d 1169, 1177 (4th Cir. 1991)

(citations omitted); see also Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In passing on a motion to dismiss, "the material allegations of the complaint are taken as admitted." Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (citations omitted).

Moreover, "the complaint is to be liberally construed in favor of plaintiff." Id. In addition, a motion to dismiss must be assessed in light of Rule 8's liberal pleading standards, which require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8.

III. Analysis

Defendants seek dismissal of various counts of the Complaint. Each will be taken in turn.

Actual and Constructive Fraud (Counts II and III):

Defendants assert that Counts II and III of the Complaint, actual and constructive fraud, should be dismissed because, as a matter of law, the alleged misrepresentations are too vague to constitute false representations of fact, but are

instead opinions. Furthermore, Defendants assert that Mr. Beaty's injuries are too remote from the alleged misrepresentations to form the basis of a fraud claim.

On January 2, 2001, Laura and Mary Beaty met with Manor Care's agent, Linda Mazaway, at the Arden Courts facility to discuss placement of Mr. Beaty, and received a brochure containing information about the facility. Plaintiffs assert that the brochure included a number of misrepresentations, all of which were underscored by Ms. Mazaway, including that: (i) Arden Courts had a highly trained staff that was specially trained and educated to deal with Alzheimer's patients and who received continual updates and refresher courses; (ii) staff would provide "24-hour supervision" and care of its residents; (iii) the facility had "high staffing ratios"; and (iv) the facility was a "safe" environment. Compl. ¶15. Furthermore, after the February 26, 2001, incident in which Mr. Beaty was struck in the mouth by another resident, Laura and Mary Beaty met with Defendant Janet Smith and other Manor Care officials. During that meeting, Plaintiffs assert further misrepresentations were made, including that Mr. Beaty was safe at the facility despite his propensity for nighttime wandering, that the staff had the education, training, and experience to supervise him, and that there was no basis for any concern about staff abuse. Compl. ¶33.

As the Supreme Court of Virginia has noted, "[i]t is

well settled that a misrepresentation, the falsity of which will afford ground for an action for damages, must be of an existing fact, and not the mere expression of an opinion.... Statements that are vague and indefinite in their nature and terms, or are merely loose, conjectural or exaggerated, go for nothing, though they may not be true, for a man is not justified in placing reliance upon them." Saxby v. Southern Land Co., 109 Va. 196, 198, 63 S.E. 423, 424 (1909). There is no "bright line test to ascertain whether false representations constitute matters of opinion or statements of fact. Rather, 'each case must in a large measure be adjudged upon its own facts, taking into consideration the nature of the representation and the meaning of the language used as applied to the subject matter and as interpreted by the surrounding circumstances.'" Mortarino v. Consultant Engineering Servs., Inc., 251 Va. 289, 293, 467 S.E.2d 778, 781 (1996) (quoting Packard Norfolk, Inc. v. Miller, 198 Va. 557, 562, 95 S.E.2d 207, 211 (1956)).

Defendants base their claim that the alleged misrepresentations were merely opinions on the assertion that "safety," "well-trained and educated," and "supervision" are all relative terms that are subject to interpretation, and as such cannot form the basis for a fraud claim without specific factual allegations. Plaintiffs do, however, put forth specific representations that, given the standard of review at this stage

in the proceedings, are sufficient to maintain a claim for fraud.

For instance, in regard to training, Plaintiffs assert that they were told that the staff received "extensive training and education, continual updates and refresher courses," all specifically tailored to the provision of care for individuals with Alzheimer's disease. Compl. ¶15(a). Defendants assert that such representations are not specific because "continual" and "updates" are fundamentally unclear. Def. Mem. at 10-11.

Similarly, Defendants argue that the alleged representation that 24-hour supervision and care would be provided, appropriate to the "very specific needs" of Alzheimer's patients, is vague and unactionable because meaningful supervision was never promised. Def. Mem. at 13. Finally, Defendants assert that representations that the facility is a "safe" environment, even in response to questions regarding specific resident needs, are unactionable because safe is a relative term.

If the Court were to apply Defendants' analysis of terms, every term would be fundamentally vague. However, as the Supreme Court of Virginia has directed, the Court must take into consideration "the meaning of the language used as applied to the subject matter and as interpreted by the surrounding circumstances." Packard Norfolk, 198 Va. at 562, 95 S.E.2d at 211. In this case, Plaintiffs were looking for a place to put an 83 year old man with Alzheimer's, who had a propensity for

wandering at night. Defendants' representations, in response to Plaintiffs' inquiries, took on the meaning inherent from the circumstances. Accordingly, Defendants' assurances regarding the ability to take care of the special needs of Alzheimer's patients, specifically Mr. Beaty, are particularly persuasive. Plaintiffs were looking for assurances that the facility would be able to respond to Mr. Beaty's specific needs, and therefore the responses were more than general opinions. At this stage in the proceedings, the Court cannot find, as a matter of law, that the statements allegedly made by Defendants are not actionable.

Furthermore, Defendants assert that a promise of future performance is not actionable in a claim of fraudulent misrepresentation. However, such representations can support a claim if there is no intention to perform when the promise is made. Colonial Ford Truck Sales v. Schneider, 228 Va. 671, 676, 325, S.E.2d 91, 94 (1985). Initially, the Court notes that it is not necessarily persuaded that Defendants' statements represented future performance. Many of Defendants' statements could apply to the current status of the facility, specifically assertions regarding the education and training level of the employees and the supervision provided. To the extent, however, that such representations may be interpreted as only promising the represented environment in the future, such representations may still be actionable. Plaintiffs allege specific facts to show

that Defendants' representations were false when made; and remained false during the time when Mr. Beaty was a resident. See Compl. ¶17, 19, 20. Furthermore, those allegations go to the fact that Defendants did not intend, and were unable, to remedy the deficiencies in the near future. See, e.g., Compl. ¶17 (training materials were missing), ¶18 (Defendants discussed the need to begin a training program). At this stage in the proceedings, accepting Plaintiffs' claims as true, the Court cannot find, as a matter of law, that Plaintiffs could not show that Defendants did not intend to keep their promises.

Defendants further assert that even if the statements could provide the basis for a fraud claim, Plaintiffs have failed to allege the necessary nexus between the asserted misrepresentations and Mr. Beaty's injuries. Proximate cause is normally a question of fact for the jury, and should only be decided by the Court when reasonable minds could not differ. Hadeed v. Medic-24, Ltd., 237 Va. 277, 285, 377 S.E.2d 589, 593 (1989). In this case, Plaintiffs assert that they would not have put Mr. Beaty into the facility, and certainly would not have continued his placement there after the one month term was over, had it not been for Defendants' representations regarding their ability to keep Mr. Beaty safe from harm in the Arden Courts facility.

Courts have held, as a matter of law, that where an

apartment complex made misrepresentations regarding the safety of the complex, and a tenant, after relying on those representations was subsequently the victim of a crime on the premises, there is no proximate causation for the resulting injury. See Yuzefovsky v. St. John's Wood Apartments, 261 Va. 97, 112, 540 S.E.2d 134, 142-43 (2001). However, other courts have found, in very similar circumstances, that proximate cause was an issue for the jury

where the injured party may not have acted as they did, if not in reliance on the representations. Miller v. Charles E. Smith Management, Inc., 172 F.3d 863 (4th Cir. 1999) (unpublished).

This case differs from the apartment complex cases, however, in that in this case both the third party aggressor and the injured Plaintiff were under the exclusive control of Defendants. In this case, given the unique situation within an assisted care facility, the Court believes that at this state of the proceedings the issue of proximate causation is one for the jury.

Accordingly, the Court will deny Defendants' motion to dismiss Counts II and III of the Complaint, actual and constructive fraud.

Count IV - Violation of the Virginia Consumer Protection Act:

Defendants assert that Plaintiffs' claim in Count IV, violation of the Virginia Consumer Protection Act (VCPA), should be dismissed because (i) opinions and statements of future events

are not actionable, (ii) there is not the requisite causation between the alleged misrepresentation and the injury, and (iii) Manor Care is exempted from the VCPA because it is in a highly regulated industry.

For the reasons set forth above in the Court's analysis of the fraud claim, the Court will deny Defendants' motion for dismissal on the basis that the representations are not actionable and lack of causation. Accordingly, the Court must only consider whether Plaintiffs' claims under the VCPA are barred because such conduct is regulated elsewhere in the Code.¹

Defendants argue that Manor Care, as an assisted-living facility that is regulated by the Virginia Department of Social Services, is exempt from the VPCA. Specifically, Defendants seek to invoke Virginia Code § 59.1-199(A), which exempts from the VPCA "[a]ny aspect of a consumer transaction which aspect is authorized under laws or regulations of this Commonwealth or the United States, or the formal advisory opinions of any regulatory body or official of this Commonwealth or the United States." Va. Code § 59.1-199(A). This Section does not exempt entire industries from the Act, rather it exempts claims arising from certain transactions that are already covered by a Virginia or federal law. Manor Care asserts, however, that all aspects of

¹ This appears to be a question of first impression in Virginia. No court to date has addressed the applicability of the VCPA to health care providers or assisted living facilities.

the transaction of which Plaintiffs complain are regulated by Virginia law.

First, Defendants assert that the brochure, and the alleged misrepresentations therein, are regulated by Virginia Code § 63.1-175(D). That Section provides that:

{a}ny facility licensed exclusively as an adult care residence shall not use in its title the words 'convalescent,' 'health,' 'hospital,' 'nursing,' ~~'sanatorium,' or 'sanitarium,' nor shall the words be~~ used to describe the facility in brochures, advertising, or other marketing material. No facility shall advertise or market a level of care which it is not licensed to provide. Nothing in this subsection shall prohibit the facility from describing services available in the facility.

Va. Code § 63.1-175(D). This Section, however, does not regulate the type of misrepresentations alleged by Plaintiffs. Plaintiffs are not alleging that the facility advertised a level of care it was not licensed to provide, but rather that it advertised care it did not provide. Furthermore, the Statute specifically states that it does not prohibit the facility from describing its services. It is precisely that description of which Plaintiffs complain. Therefore, Virginia Code Section 63.1-175(D) does not regulate the conduct that is the basis of Plaintiffs' claim.

Second, Defendants assert that the specific shortcomings of the facility alleged by Plaintiffs are regulated by Virginia law. Specifically, Defendants note that Virginia Code § 63.1-174 requires that the assisted living facility have "adequate and sufficient staff to provide services to maintain...

the physical safety of the residents on the premises," and that "the State Board shall have the authority to promulgate and enforce regulations...to protect the health, safety, welfare, and personal rights of residents." Va. Code § 63.1-174. While those statutes regulate the assisted living facility, they do not cover misrepresentations made regarding those aspects of the facility. The VPCA was designed to protect consumers' in transactions. In

this case, the transaction was the inducement to enter the contract. Plaintiffs do not bring this Count on the grounds that the supervision at Arden Courts was deficient, but rather on the basis of misrepresentations made regarding the degree of supervision.² Accordingly, the type of statute that would exempt Plaintiffs' claims from the VCPA would be one which regulated advertising and sales. As discussed above, although Virginia Code Section 63.1-175(D) is most relevant to Plaintiffs' claim, it does not apply to the specific representations made in this case.

Accordingly, the Court finds that Plaintiffs' claims are not exempted from the VCPA, and therefore will deny Defendants' motion to dismiss Count IV of the Complaint.

² If the Plaintiffs' claims under the VCPA were that the quality of care provided by the facility was deficient, such a claim likely would be exempted from the statute because the Virginia code addresses the degree of care that must be provided by adult-care facilities to their residents. See Broaden v. Nat'l Healthcare Corp., 103 F. Supp. 2d 1322, 1336-37 (N.D. Ga. 2000) (finding that Plaintiffs' claims regarding deficient care by a long-term care facility were not cognizable under the Georgia Fair Business Practices Act of 1975, a statute very similar to the VCPA).

Count VII - Intentional Infliction of Emotional Distress:

Defendants argue that Count VII of Plaintiffs' Complaint, intentional infliction of emotional distress, should be dismissed because Mr. Beaty has not experienced any physical manifestation of emotional distress to support a freestanding claim. Instead, Defendants argue that any damages for emotional distress are covered by pain and suffering damages in the negligence claims.

Under Virginia law, a plaintiff may recover damages for emotional distress "(1) where the emotional disturbance results from an actual physical injury caused by the impact or occurrence of the tort; (2) where there is no initial impact or injury but physical injury thereafter results as the causal effect of the defendant's wrong; and (3) where there is no impact or physical injury but emotional disturbance results from an intentional or wanton wrongful act caused by the defendant." Ball v. Joy Techs., Inc., 958 F.2d 36, 38 (4th Cir. 1992) (citing Hughes v. Moore, 214 Va. 27, 34, 197 S.E.2d 214, 219 (1973)). Defendants concede that Mr. Beaty is entitled to assert a claim for "emotional distress," as part of the damages resulting from the negligence claim. Defendants contend, however, that Mr. Beaty's independent claim for emotional distress must fail because "there is no allegation that the alleged conduct of Manor Care-- in negligently failing to control other residents and to protect

Orren Beaty, and in making allegedly false representations to the Plaintiff-- was conduct that Manor Care knew or should have known would result in emotional distress to Mr. Beaty." Def. Reply Mem. p. 15-16.

In order to state a claim for intentional infliction of emotional distress without physical impact or resulting physical injury, a plaintiff must show that (i) the conduct was intentional or reckless; (ii) the conduct was outrageous and intolerable; (iii) the alleged conduct and emotional distress are causally connected; and (iv) the distress is severe. Russo v. White, 241 Va. 23, 26, 400 S.E.2d 160, 162 (1991). At this stage in the proceedings, Plaintiffs have done so. Plaintiffs assert that Defendants' failure to control the two fellow residents and protect Mr. Beaty was "at least severely reckless." Compl. ¶ 95. Furthermore, the determination of whether the conduct was sufficiently extreme and outrageous is best left for a jury at this stage in the proceedings. See Womack v. Eldridge, 215 Va. 338, 342, 210 S.E.2d 145 (1974). Accordingly, Defendants' motion to dismiss Count VII will be denied.

Count VIII - False Advertising

Defendants assert that Plaintiffs' claim for false advertising must fail because the statements relied on by Plaintiffs are too vague to be deceptive and there is not a

sufficient causal nexus between the alleged misrepresentations and Mr. Beaty's injuries. For the reasons discussed in the Court's evaluation of the fraud claims, Defendants' motion to dismiss Count VII of the Complaint will be denied.

Mary Beaty's claims for emotional distress:

Plaintiffs have not alleged a separate count alleging intentional infliction of emotional distress as to Mary Beaty. Instead, Plaintiffs seek damages for emotional distress suffered by Mary Beaty under the Counts alleging breach of contract, actual and constructive fraud, violation of the VCPA, and violation of the Virginia False and Deceptive Advertising Statutes.

It is generally held that damages for emotional distress are not recoverable in an action for breach of contract, absent proof of physical injury or wanton or willful conduct amounting to a separate tort. Sea-Land Service, Inc. v. O'Neal, 224 Va. 343, 297 S.E.2d 647 (1982); see also Timms v. Rosenblum, 713 F. Supp. 948 (E.D. Va. 1989), aff'd, 900 F.2d 256 (4th Cir. 1990). Similarly, where a plaintiff has alleged a tort, the general rule is that, in the absence of accompanying physical harm or wanton and willful conduct, emotional distress damages are not recoverable. Womack v. Eldridge, 215 Va. 338, 340, 210 S.E.2d 145, 147 (1974); Hughes v. Moore, 214 Va. 27, 34, 197

S.E.2d 214, 219 (1973).

In the Complaint, Plaintiff asserts that Mary Beaty suffered "financially and emotionally," (Compl. ¶42). Specifically in the fraud and statutory claims, Plaintiffs assert that they suffered "financial losses, humiliation, mental suffering, and damages for physical injury to Plaintiff Orren Beaty." (Compl. ¶ 59, 68, 102). Plaintiffs never assert that Mary Beaty suffered physical harm.³ Because there is no allegation of any physical impact or injury to Mary Beaty, Plaintiffs' claims for emotional distress must fail. Accordingly, Defendants' motion to dismiss Mary Beaty's claims for damages for emotional distress will be granted.⁴

IV. Conclusion


For the foregoing reasons, Defendants' Motion to Partially Dismiss the Complaint will be granted in part and denied in part. Plaintiffs' claims for damages for Mary Beaty's

³ Plaintiffs attempt to remedy this oversight by attaching answers to interrogatories, in which they state that Mary Beaty's emotional distress manifested itself in the form of depression, insomnia, unexplained rashes, loss of appetite, and resulting weight loss. Pltf. Opp. Ex. 3. However, in a motion to dismiss, the Court examines the sufficiency of the Complaint itself, and should not consider additional evidence not incorporated by reference in the Complaint.

⁴ Furthermore, even evaluating Plaintiffs' claim as one for intentional infliction of emotional distress, Plaintiffs' claim fails. The only time that Plaintiffs allege that Defendants' conduct was willful and wanton was "its failure to supervise Orren Beaty, its failure to control the two fellow residents who attacked Orren Beaty, and its failure to protect Orren Beaty after assuring Plaintiffs that it could and would do so." Compl. ¶95. Because Plaintiffs do not allege any willful or wanton conduct by Defendants direct at Mary Beaty, no action for intentional infliction of emotional distress will lie.

emotional distress will be dismissed. An appropriate order will
issue.

February 10th, 2003
Alexandria, Virginia


UNITED STATES DISTRICT COURT JUDGE