

2010 WL 8752331 (Fla.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Florida,
15th Judicial Circuit.
Palm Beach County

Marda ZIMRING, as Personal Representative of the Estate of Lucille Levin,
deceased, and Marda Zimring and Linda Henderson, Individually, Plaintiffs,

v.

BROOKDALE SENIOR LIVING, INC., d/b/a Arc Boca Raton, Inc., Guardian Pharmacy of
Southeast Florida, LLC., d/b/a Colonial Healthcare, Lori Kaplan, Maurie George Batshon,
Richard Kalkstein, Hospice of Palm Beach County, Inc., and Eric J. Pesetsky, M.D., Defendants.

No. 50 2008 CA 23651 XXXX MB AE.
June 22, 2010.

**Defendant's, Brookdale Senior Living, Inc., d/b/a Arc Boca
Raton, Inc., Motion to Dismiss Plaintiffs' Amended Complaint**

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COMES NOW, Defendant, BROOKDALE SENIOR LIVING, INC., d/b/a ARC BOCA RATON, INC. (hereinafter
"Brookdale"), by and through undersigned counsel, pursuant to [Fla. R. Civ. P. 1.140\(b\)\(6\)](#), and hereby files this Motion to
Dismiss Plaintiffs' Amended Complaint, and in support thereof states as follows:

1. Plaintiffs filed a twenty (20) count Amended Complaint against multiple Defendants, alleging, as against Brookdale: Count I -- Wrongful Death Claim under Florida Statute §429; Count II -- Survival Claim under Florida Statute §429; Count III -- Wrongful Death Claim under Florida Statute §400; Count IV -- Survival Claim under Florida Statute §400; Count V -- [Florida Statute §415.1111](#) Claim; Count VI -- Breach of Fiduciary Duty; and Count VII -- Misleading Advertising Claim under [Florida Statute §817.41](#). See Pls.' Am. Compl. attached as Exhibit "A."

2. Plaintiffs' Amended Complaint must be dismissed as it consists entirely of claims and/or allegations which do not state a cause of action against Brookdale.

I. Motion to Dismiss Standard

3. The primary purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal. [Sobi v. Fairfield Resorts, Inc.](#), 846 So. 2d 1204,1206 (Fla. 5th DCA 2003).

4. Whether the allegations of a complaint are sufficient to state a cause of action is a question of law. [Siegle v. Progressive Consumers Ins. Co.](#), 819 So.2d 732 (Fla. 2002).

5. In evaluating the sufficiency of a complaint on a motion to dismiss, the court is "required to resolve every reasonable conclusion or inference in favor of" the plaintiff. [Meyers v. City of Jacksonville](#), 754 So. 2d 198, 202 (Fla. 1st DCA 2000).

6. Although the allegations of the complaint must be construed most favorably to the pleader, conclusions of law or unfounded constructions of facts are not admitted. *Ellison v. City of Fort Lauderdale*, 175 So. 2d 198, 200 (Fla. 1965). Mere statements of opinion or conclusions unsupported by specific facts will not suffice. *Okeelanta Power Ltd. P'ship v. Fla. Power & Light Co.*, 766 So. 2d 264, 267 (Fla. 4th DCA 2000); *Brandon v. County of Pinellas*, 141 So. 2d 278, 279 (Fla. 2d DCA 1962). The court will not be bound by bare allegations that are unsupported or unsupportable. *Other Place of Miami, Inc. v. City of Hialeah Gardens*, 353 So. 2d 861, 862 (Fla. 3d DCA 1977).

7. A complaint, standing alone, must state a cause of action. *City of Coral Springs v. Fla. Nat'l Properties, Inc.*, 340 So. 2d 1271, 1272 (Fla. 4th DCA 1976). An insufficient complaint cannot be saved from a motion to dismiss by testimony at a hearing. *Id.*

8. It is reversible error to dismiss a complaint based on matters not contained in the complaint. *Wallen v. Isaac*, 561 So.2d 469 (Fla. 2d DCA 1990). However, the court can interpret and rule on the applicability of a statute in ruling on a motion to dismiss. *Woolzy v. Gov't Employees Ins. Co.*, 360 So.2d 1153 (Fla. 3d DCA 1978).

II. Count I and Count II of Plaintiffs' Amended Complaint Must Be Dismissed For Failure To State A Cause of Action.

9. As to Count I, Wrongful Death under Florida Statute §429, and Count II, Survival Claim under Florida Statute §429, Plaintiffs specifically allege that Brookdale violated Ms. Levin's statutorily mandated resident rights. *See* Pls.' Am. Compl. ¶¶ 39, 50 attached as Exhibit "A."

10. Florida Statute §429.28, entitled "Resident bill of rights," enumerates certain rights to an assisted care community resident. §429.28, Fla. Stat. (2010).

11. Florida Statute §429.29, entitled "Civil actions to enforce rights," provides that "[a]ny person or resident whose rights as specified in this part are violated shall have a cause of action" and that "[s]ections 429.29-429.298 provide the exclusive remedy for a cause of action for recovery of damages for the personal injury or death of a resident arising out of negligence or a violation of rights specified in s[ection] 429.28." §429.29, Fla. Stat. (2010).

12. Paragraphs 39 a -- z and 50 a -- z of Plaintiffs' Amended Complaint, however, allege numerous violations of "rights" not specifically provided for in Florida Statute §429.28. For instance, Plaintiffs allege that Ms. Levin had "the right to have the facility obtain the services of a pharmacist who shall determine that prescriptions and medications are correct." *See e.g.* Pls.' Am. Compl. ¶¶ 36 (k) attached as Exhibit "A."

13. However, a cursory review of Chapter 429, reveals that a majority of the alleged statutorily mandated rights found in paragraphs 39 and 50 of Plaintiffs' Amended Complaint are not mentioned in Chapter 429. §429.28, Fla. Stat. (2010).

14. Moreover, Plaintiffs' Amended Complaint improperly imposes additional duties on Brookdale that are not supported by or identified "in any other standard or guidelines specified in [the Florida Statutes] or in any applicable administrative standard or guidelines of [Florida] or a federal regulatory agency." §429.29, Fla. Stat. (2010).

15. Many of the additional responsibilities that Plaintiffs attempt to impose on Brookdale are contained in Administrative Rule 59A. *See, e.g.* Pls.' Am. Compl. ¶¶ 36 (k) attached as Exhibit "A." However, Rule 59A of the Florida Administrative Code was promulgated pursuant to the specific authority of Florida Statute §400.23 (which deals specifically with nursing homes and related health care facilities). Fla. Admin. Code R. 59A-4.109.

16. Brookdale is not and was not licensed under Chapter 400 of the Florida Statutes. *See* Pls.' Am. Compl. ¶ 6 attached as Exhibit "A." Accordingly, the duties and responsibilities created pursuant to Chapter 400, particularly Rule 59A of the Florida Administrative Code, are inapplicable to assisted care communities, such as Brookdale, which are licensed under Chapter 429 of the Florida Statutes.

17. Additionally, Plaintiffs improperly attempt to impose several duties on Brookdale which are enumerated in Title 42, Section 483 of the Code of Federal Regulations. *See, e.g.* Pls.' Am. Compl. ¶¶ 36 (1), (n), (o), (r), (s), (t), (u) attached as Exhibit "A."

18. Yet, reference to the statutory definition of "facility" quickly eliminates the entire section's applicability to the facts of this case. 42 C.F.R. § 483.5(a). The Code defines facility as "a skilled nursing facility that meets the requirements of sections 1819(a), (b), (c), and (d) of the Act, or a nursing facility that meets the requirements of section 1919(a), (b), (c), and (d) of the Act." 42 C.F.R. § 483.5 (a) (2010).

19. Plaintiffs' have not alleged that Brookdale was a corporation licensed to do business as a Nursing Facility or a Skilled Nursing Facility. Quite contrary, the Amended Complaint provides "Defendant, Brookdale, was and is a corporation licensed to do business as an assisted living facility in Palm Beach County, Florida." *See* Pls.' Am. Compl. ¶ 6 attached as Exhibit "A."

20. As such, the duties created in Title 42, Section 483 of the Code of Federal Regulations are entirely superfluous to the resolution of Plaintiffs' claims and inconsequential to the duty owed to Ms. Levine by Brookdale, an assisted living facility.

21. Therefore, Counts I and II of Plaintiffs' Amended Complaint must be dismissed for failure to state a cause of action for wrongful death or survival under Florida Statute §429.

III. Count III and Count IV of Plaintiffs' Amended Complaint Must Be Dismissed For Failure To State A Cause of Action.

22. As previously discussed, Chapter 400 addresses nursing homes and related health care facilities while Chapter 429 addresses assisted care communities. §§ 429.01-429.931 and 400.0060-995, Fla. Stat. (2010).

23. Plaintiffs allege wrongful death and survivor claims pursuant to both Chapter 400 and Chapter 429 of the Florida Statutes.

24. In support of same, Plaintiffs allege that Ms. Levin was a resident of Brookdale and that Brookdale is a corporation licensed to do business as an assisted living facility. *See* Pls.' Am. Compl. ¶ 6 attached as Exhibit "A." Yet, contrary to Plaintiffs' allegation that Brookdale is a licensed assisted living facility, Plaintiffs also allege that Brookdale held itself out to the public as a nursing home. *See* Pls.' Am. Compl. ¶ 15 attached as Exhibit "A."

25. Plaintiffs' contention that Brookdale is subject to the standards and guidelines set forth in Chapter 400 of the Florida Statutes (which applies only to nursing homes and related healthcare facilities) is contrary to established legal precedent in Florida.

26. Brookdale is not and was not a nursing home or related health care facility licensed under Chapter 400 of the Florida Statutes. *See* Pls.' Am. Compl. ¶ 6 attached as Exhibit "A." Therefore, Brookdale was not bound by the same duties and responsibilities applicable to nursing home facilities.

27. Brookdale was at all relevant times an assisted living facility bound only by the duties and responsibilities ascribed to it in Florida Statute Chapter 429 and the applicable administrative standard and guidelines of Florida and the federal regulatory agencies.

28. Chapter 429 provides the exclusive remedy for actions arising out of negligence or the violation of rights enumerated in Chapter 429 as it relates to assisted care communities. §429.29, Fla. Stat. (2010).

29. Therefore, Count III, Wrongful Death under Florida Statute §400, and Count IV, Survival Claim under Florida Statute §400, should be dismissed for failure to state a cause of action since Plaintiffs do not allege that Brookdale violated any applicable statute or administrative standard or guideline of Florida or the federal regulatory agencies.

IV. Count V of Plaintiffs' Amended Complaint Must Be Dismissed For Failure To State A Cause of Action.

30. Count V of Plaintiffs' Complaint alleges violations by Brookdale of [Florida Statute §415.1111](#).

31. Chapter 415 is entitled “Adult Protective Services” and was specifically designed to protect the **elderly** and disabled from **abuse**, neglect, and exploitation by individuals.

32. To state a cause of action under [section 415.1111](#), a complaint must set forth factual allegations which demonstrate that the plaintiff or the plaintiff's decedent was a “vulnerable adult” as defined by section 415.102(27), that the defendant was a “caregiver” as defined by section 415.102(4), and that the defendant committed “**abuse**” as defined by section 415.102(1), or “neglect” as defined by section 415.102(15), or “exploitation” as defined by section 415.102(7) with respect to the vulnerable adult.

33. [Section 415.1111](#) provides a civil cause of action by vulnerable adults against any “alleged perpetrator” that is named by and notified of an investigation by the Florida Department of Children and Families (DCF). [§415.1111, Fla. Stat. \(2010\)](#).

34. [Florida Statute §415.102](#) defines an alleged perpetrator as “a *person* who has been named by a reporter as the *person* responsible for **abusing**, neglecting, or exploiting a vulnerable adult.” [§415.102, Fla. Stat. \(2010\)](#) (emphasis added).

35. Thus, Florida Statute §415 does not provide for a cause of action against a facility. Brookdale is not a perpetrator as defined by [Florida Statute § 415.102](#) and, as a matter of law, Brookdale cannot be deemed to be in violation of [Florida Statute §415.1111](#).

36. Moreover, [Florida Statute §415.1111](#) specifically states that Brookdale, as a licensee under Chapter 429, cannot be found vicariously liable for any acts or omissions of its employees or agents and that any action against Brookdale shall be brought pursuant to Chapter 429. Specifically, [section 415.1111](#) states, in pertinent part:

Notwithstanding the foregoing, any civil action for damages ... against *any licensee or entity* who establishes, controls, conducts, manages, or operates a facility licensed under part I of chapter 429 *relating to its operation of the licensed facility shall be brought pursuant to s. 429.29*. Such licensee or entity shall not be vicariously liable for the acts or omissions of its employees or agents or any other third party in an action brought under this section.

[[§415.1111, Fla. Stat. \(2010\)](#)(emphasis added)].

37. Therefore, [Section 415.1111](#) *explicitly* requires claims relating to the operation of a Chapter 429 licensed facility to be brought pursuant to Chapter 429. *Id.*

38. However, in direct contravention of [Florida Statute 415.1111](#), paragraph 74 of Plaintiffs' Amended Complaint alleges that:

Brookdale's responsibilities and obligations to Lucille Levin, as outlined in [Florida Statute §415.1111](#), are non delegable such that Defendant, *Brookdale has direct liability for violations, deprivations, or infringements by any person or entity under Defendant, Brookdale's control, direct or indirect*, including its employees, agents, servants, administrators, consultants and independent contractors, whether in-house or outside entities, individuals, agencies, or pools. [*See Pls.' Am. Compl. ¶ 74 attached as Exhibit “A”*].

39. In [Bohannon v. Shands Teaching Hosp. and Clinics](#), 983 So. 2d 717, 721 (1st DCA 2008), the First District affirmed the lower court ruling that plaintiff's Chapter 415 claim failed to state a cause of action because the claim was clearly alleging

medical negligence, and the Florida legislature did not intend Chapter 415 to provide an alternate cause of action for medical negligence.

40. In the instant case, the circumstances are substantially similar to *Bohannon*. Here, Plaintiffs' allegations are clearly a claim for Chapter 429 violations of an assisted care community resident's statutory rights, essentially an assisted care community negligence claim. Just as the *Bohannon* court found the Florida legislature did not intend Chapter 415 to provide an alternate cause of action for medical negligence, this Court should find that the Florida legislature did not intend Chapter 415 to provide an alternate cause of action for assisted care community negligence.

41. By the plain meaning of Florida Statutes §429.029 and §415.1111, neither statute was intended as an alternate cause of action since each provision is explicitly, mutually exclusive of the other.

42. Moreover, the allegations of Plaintiffs' Amended Complaint are mere conclusions tracking the language of the statute, unsupported by facts, and are legally insufficient. *Ellison*, 175 So. 2d at 200; *Silvers v. Drake*, 188 So. 2d 377 (Fla. 1st DCA 1966).

43. For the reasons set forth above, Count V of Plaintiffs' Amended Complaint must be dismissed for failure to state a cause of action.

V. Count VI of Plaintiffs' Amended Complaint Must Be Dismissed For Failure To State A Cause of Action.

44. Count VI of Plaintiffs' Amended Complaint asserts a claim against Brookdale based on an alleged breach of fiduciary duty. However, this claim is merely a disguised cause of action sounding in negligence.

45. Count VI alleges all of the necessary elements to establish a negligence cause of action: duty from Defendant to Plaintiffs and breach of that duty proximately causing Plaintiffs' damages. See Pls.' Am. Compl. ¶¶ 85-90 attached as Exhibit "A."

46. For example:

a. The title of Count VI is Breach of Fiduciary Duty.

b. Paragraph 85 of Plaintiffs' Amended Complaint alleges that Brookdale's fiduciary duty to Lucille Levin arose out of the "special relationship" between Lucille Levin and Brookdale.

c. Paragraph 86 alleges that "Defendant, Brookdale, owed the duty of loyalty, the duty to refrain from self-dealing, the duty not to take unfair advantage, the duty to act in the best interest of Lucille Levin, and the duty to disclose material facts."

d. Paragraph 87 alleges that Defendant breached the foregoing fiduciary duties to the detriment of Lucille Levin.

e. Paragraph 88 alleges that Ms. Levin suffered injuries "as a direct and proximate result of Defendant, Brookdale's failure and breaches of duty."

f. Paragraph 89 and 90 allege that Plaintiffs' suffered damages as a result of Defendant's alleged breach of fiduciary duty.

47. There should be no doubt in the mind of the Court that in Count VI Plaintiffs have plead an action for negligence that allegedly proximately caused Plaintiffs' injuries.

48. However, Florida Statute 429.29 reads, in pertinent part:

Sections 429.29-429.298 provide the *exclusive remedy* for a cause of action for recovery of damages for the personal injury or death of a resident *arising out of negligence or a violation of rights specified in s[ection] 429.28*. This section *does not* preclude theories of recovery *not* arising out of negligence or s[ection] 429.28 which are available to a resident or to the agency.

[§429.29, Fla. Stat. (2010)(emphasis added)].

49. Read in a different way to avoid the double negative, the statute permits negligence theories of recovery against an assisted living facility only within the provisions of §429.28. In drafting this clause, the legislature intended to bring all negligence claims against assisted care communities under Florida Statute 429.29 and to preclude claims exactly like Plaintiffs' Count VI.

50. The second sentence quoted above reserves the right of an individual to bring actions based on theories *other than negligence*. Examples would be breach of contract action, injunctive relief, or criminal proceedings.

51. Since Count VI is an action for negligent breach of duty, and Florida Statute 429.29 precludes actions for negligence outside of Chapter 429, Count VI of Plaintiffs' Amended Complaint should be dismissed for failure to state a cause of action.

52. Moreover, the definition of “fiduciary relationship” is contained in Chapter 415.102. “Fiduciary relationship” is defined as a “relationship based upon the trust and confidence of the disabled adult or **elderly** in the caregiver, relative, household member, or other person *entrusted with the use or management of the property or assets* of the disabled adult or **elderly** person.” §415.102, Fla. Stat. (2010) (emphasis added).

53. This definition clearly limits “fiduciary” relationships to those wherein an **elderly** person's property or assets are at issue. The definition does not encompass the various duties that Plaintiffs' claim are owed to an assisted care community resident.

54. Additional guidance can be obtained from §415.102(1)(2)(B)(1) wherein “exploitation” defines breaches of fiduciary relationships as misuse of power of attorney or the **abuse** of guardianship duties resulting in the unauthorized appropriation, sale, or transfer of property. Again, the term “fiduciary relationship” surrounds **financial** matters and the use or misuse of the assets of an **elderly** individual.

55. Yet, Plaintiffs have not alleged, nor can they allege, that Defendant, Brookdale, breached any duty to Lucille Levin by appropriating, converting, selling, or transferring her property or assets without her consent. There is neither evidence nor allegations that Brookdale improperly or fraudulently mishandled Ms. Levin's **financial** affairs or divested her of any of her property or even that Brookdale was in a position to do so.

56. Accordingly, Count VI of Plaintiffs' Amended Complaint for breach of fiduciary duty should be dismissed for failure to state a cause of action.

VI. Count VII of Plaintiffs' Amended Complaint Must Be Dismissed For Failure To State A Cause Of Action

57. Plaintiffs' Amended Complaint also alleges a claim against Brookdale for misleading advertising, citing violations of Florida Statute §817.41.

58. However, Florida Statute § 817.41 specifically applies to persons or retailers. §817.41(1)-(5), Fla. Stat. (2010).

59. Brookdale is neither a person nor a retailer. Thus, no cause of action exists against Brookdale pursuant to Florida Statute §817.41.

60. Inasmuch as it may be argued that Brookdale is a retailer, [Florida Statute §817.41\(3\)](#) and (5) only prohibit retailers from “using the term or phrase ‘wholesale sale,’ ‘below cost sale,’ or terms of similar purport, in connection with the sale of goods, wares, or merchandise at retail” and from “knowingly and willfully advertis[ing] merchandise for sale at a special or wholesale price, in any way or by any medium whatsoever, if he or she does not have sufficient quantities of the advertised merchandise to meet the reasonably foreseeable demand.” [§817.41, Fla. Stat. \(2010\)](#).

61. Absent from Plaintiffs' Complaint are any allegations that Brookdale is or was a retailer and that Brookdale used the abovementioned sale terms. Plaintiffs merely allege that Brookdale disseminated statements about its facility which it knew or should have known were untrue or misleading, including “assertions regarding the quality of care...the level of skill and training of the staff of the facility, and the quality of the programs offered by the facility.” *See* Pls.' Am. Compl. ¶¶ 96-97 attached as Exhibit “A.”

62. Taking Plaintiffs' allegations as true, it is obvious that Count VII of Plaintiffs' Amended Complaint cannot support a cause of action under [Florida Statute §817.41](#) and must be dismissed.

WHEREFORE, Defendant, BROOKDALE SENIOR LIVING, INC., D/B/A ARC BOCA RATON, INC., respectfully requests this Honorable Court grant its Motion to Dismiss Plaintiffs' Amended Complaint and that Plaintiffs' Amended Complaint be dismissed for failure to state a cause of action and for any other relief this honorable Court deems just and proper.

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