

2014 WL 4377446 (Mass.App.Ct.) (Appellate Brief)
Appeals Court Of Massachusetts.

Catherine BARBER, Plaintiff-Appellant,

v.

LIVING CARE VILLAGES OF MASSACHUSETTS, North Hill Snf and Kevin L. Burke, Defendants-Appellees.

No. 2014-P-0520.

August 25, 2014.

On Appeal from Judgment of the Norfolk Superior Court

**Brief of Defendants/Appellees Living Care Villages of Massachusetts,
Inc. d/b/a North Hill Snf Needham, MA and Kevin L. Burke**

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***1 I. Statement of the Issues**

1. Whether the superior court properly granted the motion for summary judgment of the defendant-appellee Kevin L. Burke (“Burke”) on the basis that Burke was not an officer or employee of Living Care Villages of Massachusetts, Inc. d/b/ North Hill (“North Hill”) at the time of the alleged incident and that Burke did not otherwise participate in the wrongful conduct alleged in the complaint?
2. Whether the superior court properly granted the motion for summary judgment of the defendant-appellee North Hill on the basis that the plaintiff-appellant Catherine Barber (“the plaintiff” or “Ms. Barber”) failed to proffer sufficient evidence to support her claims of assault and battery, civil rights violations, invasion of privacy, and intentional infliction of emotional distress?

***2 II. Statement of the Case**

This case arises from an August 3, 2005 incident that allegedly occurred at a skilled nursing facility then owned and operated by Living Care Villages of Massachusetts, Inc. d/b/a North Hill (“North Hill”)(SRA 0093-0100). On or about August 1, 2008, the plaintiff-appellant Catherine Barber (“Ms. Barber” or “plaintiff”) filed her pro se unverified complaint against North Hill and Kevin L. Burke (“Burke”) whom the Ms. Barber listed in the caption as the President of North Hill (SRA001, 0093-0100).¹

In her complaint, Ms. Barber, who had been a patient at North Hill, attempted to assert numerous claims arising from her discharge from the facility on or about August 3, 2005 (SRA0093-0100). The purported claims consist of: “assault and battery” (count one); “constitutional, civil, human rights” violations (count two); “complicity in the violation of civil rights” (count three); “invasion of privacy” (count *3 four); “intentional infliction of emotional distress” (count five); and “corporate malpractice” (count six) (SRA0093-0100).

The court convened a medical malpractice tribunal, pursuant to [G.L. c. 231, sec. 60B](#), on September 25, 2009 to review count six of the complaint, which alleged “corporate malpractice” (SRA006, 0093-0100). The tribunal found the claim insufficient, requiring the posting of a bond (SRA0006). Ms. Barber filed several motions seeking to waive the bond requirement, each of which the court denied (SRA0006-0007, 0011). Ms. Barber did not post the bond, thereby extinguishing this claim (SRA0006-0019).

On or about August 4, 2010, Burke moved for summary judgment on the grounds that he was not an officer or employee of North Hill at the time of the alleged incident, and that he did not otherwise participate in the alleged wrongful conduct (SRA008, 0050-0061). The court allowed Burke's motion for summary judgment on or about September 23, 2010 (SRA0067). On or about October 1, 2013, the court entered final judgment on Burke's motion (SRA0178).

***4** On or about April 5, 2013, North Hill filed a motion for leave to serve a further motion for summary judgment (SRA0012). The court allowed the motion on or about April 18, 2013, and ordered that the motion for summary judgment be filed on or before June 7, 2013 (SRA0012-0013). North Hill served its motion for summary judgment, along with the plaintiff's opposition, under [Superior Court Rule 9A](#), on or about June 7, 2013 (SRA0013). After a hearing on September 13, 2013, followed by the filing of further memoranda requested by the court, the court allowed North Hill's motion for summary judgment on or about October 1, 2013 (SRA0014,0180). After filing numerous motions for reconsideration and other post-judgment motions, all of which the court denied, the plaintiff filed a notice of appeal on or about October 30, 2013 (SRA0015-0016, 0190).

III. Statement of The Facts

Ms. Barber, at age 75, underwent certain surgery at Newton-Wellesley Hospital on July 18, 2005(SRA0127). She was discharged on July 22, 2005 and admitted to North Hill, a skilled nursing facility, for rehabilitation. (SRA0127). During her admission at ***5** North Hill, Ms. Barber was provided care and therapy (SRA 0128).

At or near the time of Ms. Barber's planned discharge, North Hill learned that her home was unsanitary and unsafe, with it otherwise noted during the admission that Ms. Barber had issues with anxiety, paranoia, poor judgment, flight of ideas, and distrust of others (SRA0128, 0131, 0150-151). The Board of Health of the Town of Wellesley informed North Hill that the home was condemnable and proceeded to obtain condemnation of the home following an inspection (SRA0128, 0137-138). It found that the home had various “unsafe conditions”, including, no bed, no refrigerator, unusable bathroom and other issues (SRA0137-138). The Board of Health for the town found various conditions violative of “the State Sanitary Code” and “which were deemed to endanger the health and safety of the resident Ms. Barber[.]” (SRA0137-0138).

to return home and her failure to appreciate the risk of self-harm, North Hill contacted **Elders** at Risk Protective Services (“**Elders** at Risk”) who had an agent come to North Hill and meet with Ms. ***6** Barber and otherwise investigate (SRA0128). **Elders** at Risk found that Ms. Barber was at risk for self **neglect** and harm due to her post-operative status, the unsafe and unsanitary home, and the lack of insight and appreciation for the risk of harm to herself given her home's condition (SRA0128, 0138-0154). Ms Barber became increasingly upset and agitated, pacing the corridors and still insisting to return to her home (SRA0128, 0132-0135). North Hill requested a consult with its contractor psychiatrist, Dr. Bruce Kaster (“Dr. Kaster”) (SRA0128, 0156).

Dr. Kaster found that Ms. Barber was “paranoid, tangential, exhibiting hoarding unsafe behaviors”, including demanding to go back to a condemnable home, which was hazardous with no running water (SRA0128, 0156). He found her at risk and making unsafe decisions requiring a psychiatric evaluation under [G.L. 123, sec. 12\(a\)](#) (SRA0128, 0156).

North Hill requested an ambulance to transport Ms. Barber to Newton-Wellesley Hospital for the evaluation (SRA0129). Ms. Barber remained agitated, and at some point before the ***7** ambulance arrived, had attempted to arrange for her own transportation from the facility to bring her home (SRA0134).

Ms. Barber went to the elevator to leave the facility on her own before the ambulance arrived (SRA0158). Nurse June Hickey (“Nurse Hickey”), North Hill’s then-nursing supervisor, interceded and spoke to Ms. Barber, advising her that she could not leave before the ambulance arrived (SRA0158). After Ms. Barber replied that she still intended to get on the elevator and leave before the ambulance arrived, Nurse Hickey stood between Ms. Barber and the elevator with her arms extended across the elevator doorway (SRA0158). When the elevator door opened, Ms. Barber took her cane and used it to nudge one of Nurse Hickey’s arms to try and move past her and access the elevator (SRA0158). The elevator door then closed, and Nurse Hickey remained standing in front of the elevator and Ms. Barber (SRA0158). Momentarily, ambulance attendants came out of elevator with a stretcher, requesting that Ms. Barber get on the stretcher so that they could transport her from the facility (SRA0159). Ms. Barber then became compliant; she *8 voluntarily got on the stretcher and left North Hill without incident (SRA0159). At no time did anyone at North Hill strike, hit, assault or make any physical contact with Ms. Barber (SRA0129, 0159).

A physician at the Newton-Wellesley Hospital examined Ms. Barber and found that she was unable to care for herself in the community and that she needed to be assessed for safety, mental status and possible medication treatment (SRA0160-0168). She underwent an extended voluntary stay and evaluation at Newton-Wellesley Hospital before being discharged on August 19, 2005 (SRA0160-0163).

Burke was not an employee or officer of North Hill as of August 3, 2005 (SRA0060). Burke became President of North Hill on or about March 1, 2006, approximately seven months after the alleged incident (SRA0060).

IV. Argument

A. Summary Judgment Standard

Summary judgment must be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *9 *Community National Bank v. Dawes*, 369 Mass. 550, 553 (1976); *Mass. R. Civ. P. 56 (c)*. The moving party must show the absence of a genuine issue of material fact requiring a trial, *Pederson v. Time, Inc.*, 404 Mass. 414, 16-17 (1989), “by demonstrating that proof [] that [an essential] element [of the plaintiffs claim] is unlikely to be forthcoming at trial. *Flesner v. Technical Communications, Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). The party opposing the motion must respond with specific facts establishing the existence of a genuine issue for trial. *Pederson*, 404 Mass. at 17. The opposing party cannot rest on mere assertions of disputed facts to defeat the motion. *Lalonde v. Eisner*, 405 Mass. 207, 209 (1989).

B. Burke Was Entitled To Summary Judgment As The Undisputed Facts Showed That He Was Not An Officer Or Employee of North Hill At The Time Of The Alleged Incident And Also That He Did Not Otherwise Participate In The Wrongful Conduct Alleged In The Complaint.

Although Ms. Barber’s complaint is difficult to decipher and construe, the theory of liability against Burke appears to be based solely on his role as President of North Hill (SRA0093-0100). Burke did not take office as President and Director of North Hill, *10 however, until March 1, 2006, approximately seven months after Ms. Barber’s alleged incident occurred on August 3, 2005 (SRA0060).

As Ms. Barber’s claims against Burke are apparently based solely on his role as President of North Hill and Burke was not even an employee or officer of the corporation at the time of the alleged incident, there is simply no basis for imposing liability on him. Accordingly, the court appropriately allowed Burke’s motion for summary judgment on all claims asserted against him.

Further, even if Ms. Barber had proffered competent evidence that Burke was an officer or employee of North Hill at the time of the alleged incident, there is still no basis for holding him liable. Burke cannot be held individually liable for any breach of a duty that his employer may have owed the plaintiff. *Lyon v. Morphew*, 424 Mass. 828, 831 (1997). “Employees are liable for torts in which they personally participated.” *Id.* at 831 citing *LaClair v. Silberline Mfg. Co.*, 379 Mass. 21, 29 (1979).

“Officers and employees of a corporation do not incur personal liability for torts committed by their employer merely by virtue of the position they hold in *11 the corporation.” *Id.* citing *Leavitt v. Glick Realty Corp.*, 362 Mass. 370, 374 (1972) and *Refrigeration Discount Corp. v. Catino*, 330 Mass. 230, 235(1953). Further, “[c]ompensated officers of a charitable organization are held to the same standard as other corporate officers.” *Id.* Likewise, any claim for alleged civil rights violations under the Massachusetts Civil Rights Act requires proof that the conduct of a particular defendant interfered with or attempted to interfere with the plaintiff’s constitutional rights “by threats, intimidation, or coercion.” G.L. c. 12, sec. 11H and 11I.

Ms. Barber did not proffer evidence to support a finding that Burke personally participated in any alleged wrongful conduct giving rise to the claims. Absent such evidence, Burke cannot be liable to Ms. Barber on any of her purported claims. Because there is no evidence that Burke participated in any alleged wrongful conduct, Barber cannot prevail on her claims and the court appropriately granted Burke’s motion for summary judgment.

C. The Superior Court Properly Granted North Hill’s Motion For Summary Judgment On The Basis That Ms. Barber Failed To Proffer Sufficient Evidence To Support Her Claims of Assault and Battery, Civil Rights *12 Violations, Invasion Of Privacy, and Intentional Infliction Of Emotional Distress.

1. Ms. Barber failed to provide any affidavits or other evidence establishing a genuine issue of material fact on her assault and battery claim.

Ms. Barber failed to proffer any evidence to support her claims against North Hill, including her alleged assault and battery claim. An assault and battery is “the intentional and unjustified use of force upon the person of another, however slight, or the intentional doing of a wanton or grossly negligent act causing personal injury to another.” *Jesionowski v. Beck*, 937 F. Supp. 95, 105 (D. Mass. 1996) quoting *Commonwealth v. McCan*, 277 Mass. 199, 203 (1932).

In its motion for summary judgment, North Hill established by affidavit that none of its employees used any force or otherwise made any inappropriate physical contact with Ms. Barber during her discharge from North Hill (SRA0127-0129, SRA0158-0159). North Hill relied on the affidavit of Alice Rose, the then-interim *13 director of the facility, to establish this (SRA0128-129). Ms. Rose’s affidavit indicates that North Hill’s actions were done solely to prevent Ms. Barber from harming herself due to Ms. Barber’s failure to appreciate and acknowledge that her home was unsafe and uninhabitable because it was being condemned by the Town of Wellesley (SRA0128, pars. 5-9). Ms. Rose’s affidavit further establishes that, “At no time did anyone at North Hill strike, hit or assault Ms. Barber.” (SRA0129, par. 11).

Additionally, North Hill relied on the affidavit of June Hickey, its then-supervisor of nursing who was present at the time of Ms. Barber’s discharge from the facility on August 3, 2005 (SRA0157-0158). Consistent with Ms. Rose’s affidavit, Nurse Hickey’s affidavit also establishes that neither she nor any other North Hill staff members struck or made any physical contact with Ms. Barber at the time of discharge (SRA0158-0159). Nurse Hickey explained that she merely stood in front of the elevator with her “arms extended across the elevator door entrance” to prevent Ms. Barber from leaving the *14 facility before the ambulance attendants arrived to take Ms. Barber to the Newton-Wellesley Hospital for her psychiatric evaluation (SRA0158, pars. 4-5). Nurse Hickey did not, however, “lay my hands on or physically contact Ms. Barber in any way.” (SRA0159, par. 7). The only physical contact between Nurse Hickey and Ms. Barber occurred when, “Ms. Barber took her walking cane and used it to nudge one of my arms to try to get past me onto the elevator.” Soon after this happened, the ambulance attendants arrived, and Ms. Barber compliantly got on a stretcher as they requested, and she went without further incident to the hospital for the evaluation (SRA0015*, par. 8). In the affidavit, Nurse Hickey states, “Neither I nor any North Hill staff members struck the plaintiff or made any physical contact with her during the discharge when Ms. Barber was attempting to get on the elevator to leave the facility.” (SRA0159, par. 9).

Nurse Hickey’s brief interaction with Ms. Barber at the elevator cannot be deemed an unjustified use of force giving rise to potential liability against North *15 Hill for assault and battery. To establish liability for assault and battery, a plaintiff

must demonstrate that the actions at issue were not objectively reasonable, considering all the circumstances, without regard to a defendant's underlying intent and motivation. *Jesionowski*, 937 F.Supp. at 104-105. Nurse Hickey's actions were objectively reasonable, as a matter of law, given the circumstances, including Dr. Kaster's [Section 12\(a\)](#) order and Ms. Barber's substantial risk of self-**neglect**.

The Rose and Hickey affidavits were part of North Hill's [Superior Court Rule 9A\(b\)\(5\)](#) statement of undisputed material facts that comprised the summary judgment record (SRA0085-00168). In response to the motion, Ms. Barber did not submit any countervailing affidavits or other evidence to refute the undisputed material facts set out in the Rose and Hickey affidavits. Rather, she submitted a two-page hand-written opposition that did not address the pertinent issues or dispute any of the facts established by North Hill in its motion (SRA0170-0171).

***16** Pursuant to [Superior Court Rule 9A\(b\)\(5\)\(ii\)](#), Ms. Barber was required to have served a written response addressing each material fact set out in the North Hill's [Superior Court Rule 9A\(b\)\(5\)](#) statement. She did not do so. [Superior Court Rule 9A\(b\)\(5\)\(ii\)](#) states that, "For purposes of summary judgment, the moving party's statement of material fact shall be deemed admitted unless controverted as set forth in this paragraph." Here, Ms. Barber did not make any attempt in her opposition to controvert North Hill's material facts set out in the [Superior Court Rule 9A\(b\)\(5\)](#) statement. As a result, North Hill's material facts were appropriately deemed admitted for purposes of the motion. Ms. Barber's pro se status does not excuse her obligation to comply with applicable rules or face the consequences of non-compliance. See *Mains v. Commonwealth*, 433 Mass. 30, 36 (2000) (pro se litigant not excused from rules pertaining to filing motion for new trial); *Mmoe v. Commonwealth*, 393 Mass. 617, 620 (1985) ("the rules bind a pro se litigant as they bind other litigants."); *Kornatowski v. Family Mut. Savings Bank*, 388 Mass. 1011 (1983) quoting *International Fidelity Ins. Co. v. Wilson*, 387 Mass. 841, 847 (1983) ("A pro se litigant is bound by the same rules of civil procedure as litigants with counsel.").

Further, a party opposing a motion for summary judgment cannot rely on allegations in an unverified complaint to defeat the motion. See *Gadbout v. Cousens*, 396 Mass. 254, 262-263 (1985) ("Allegations in an unverified pleading are not accorded any evidentiary weight in determining whether there exists a genuine issue of material fact under [rule 56\(c\)](#).") An unverified complaint is not the functional equivalent of an affidavit submitted under [Rule 56 \(e\)](#). See *Pupecki v. James Madison Corp.*, 376 Mass. 212, 217 (1978) (by contrast, treating a *verified* complaint as an affidavit under [Rule 56](#) [emphasis added]). Accordingly, the trial court could not consider the wholly unsubstantiated allegations in Ms. Barber's complaint that she was struck by an unidentified person with her own cane during her discharge from North Hill (SRA0095, par. 12). ***18** Likewise, other unsworn statements of the plaintiff, including those made at oral argument and in her briefs, cannot be given any evidentiary weight.

The court properly refused to consider Ms. Barber's unsupported allegations that anyone at North Hill assaulted her. In its ruling on the motion, the court found: "The pro se plaintiff by affidavit or otherwise, and despite being given the opportunity to supplement her opposition, has failed to present any evidence in the summary judgment record that raises genuine material issues of fact as to her remaining claims." (SRA0180). Accordingly, summary judgment was proper on the assault and battery claim.

2. Ms. Barber failed to provide any affidavits or other evidence establishing a triable issue on her alleged civil rights claims.

The alleged civil rights claims also are unavailing. Again, Ms. Barber's allegations pertaining to these claims are vague and difficult to comprehend. Ms. Barber purports to set them out in counts two and three of her complaint (SRA0093-0100). The claims appear to be premised on the Massachusetts Civil Rights Act, G.L. c. 12, sec. 111. Under this statute, the plaintiff "must prove that (1) her exercise or enjoyment of rights secured by the Constitution or the ***19** law of either the United States or the Commonwealth, (2) have been interfered with, or attempted to be interfered with, and (3) that the inference or attempted interference was by 'threats, intimidation or coercion.'" *Bally v. Northeastern Univ.*, 403 Mass. 713, 717 (1989). An objective "reasonable person" standard is used to determine whether conduct constituted threats, intimidation or coercion. *Haufler v. Zotos*, 446 Mass. 489, 505 (2006).

Ms. Barber has not identified any implicated constitutional rights, or a deprivation of those rights resulting by means of threats, intimidation or coercion. Here, Nurse Hickey simply and briefly stood in front of the elevator before the arrival of the emergency ambulance service and did so pursuant to the Dr. Kaster's involuntary commitment order under [G.L. c. 123, sec. 12 \(a\)](#), which order is not subject to any challenge. The very nature of a [Section 12\(a\)](#) order is involuntary commitment allowing for restraint and transport to a hospital for evaluation. [G.L. c. 123, sec. 12\(a\)](#).

No rational view of the undisputed material facts supports any claim that North Hill can be liable under G.L. c. 11, sec. 111. Again, Ms. Barber failed to come *20 forward with evidence to support any civil right violations, and the court's granting of summary judgment for North Hill on these claims was required.

3. Ms. Barber failed to provide any affidavits or other evidence establishing a triable issue on her alleged invasion of privacy claim.

Ms. Barber purports to assert a claim for “invasion of privacy” in count four of her complaint (SRA0093-0100). The claim, which appears to be based on [G.L. c. 214, sec. 1B](#), is also meritless. G.L. c. 214, sec. 1B provides, in part: “[a] person shall have a right against unreasonable, substantial or serious interferences with his privacy.”

“In order for a plaintiff to succeed on an invasion of privacy claim, [she] must prove not only that the defendant unreasonably, substantially and seriously interfered with [her] privacy by disclosing facts of highly personal or intimate nature, but also that it had no legitimate reason for doing so.” *Spencer v. Roche*, 755 F. Supp.2d 250, 271-72 (D. Mass. 2010) quoting *Martinez v. New England Med. Ctr. Hosps., Inc.*, 307 F. Supp. 2d 257, 267 (D. Mass. 2004) citing *Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 409 Mass. 514, 518 (1991). The statute *21 does “not prohibit serious or .substantial interferences which are reasonable or justified. *Schlesinger*, 409 Mass. at 518.

The undisputed statement of facts before the court, which Ms. Barber did not challenge with any countervailing evidence, show there was no unreasonable or unjustified invasion by North Hill of any privacy right. Accordingly, the court appropriately ordered summary judgment for North Hill on that claim.

4. Ms. Barber failed to establish a triable issue on her alleged intentional infliction of emotional distress claim.

Barber's claim for intentional infliction of emotional distress similarly fails. Barber attempts to assert such a claim in count five of her complaint(SRA0093-0100).

To prove a claim for intentional infliction of emotional distress, a plaintiff must show (1) that the defendant knew or should have known that the conduct would cause emotional distress; (2) that the conduct was “extreme and outrageous”; (3) that the conduct caused emotional distress; and (4) “that the emotional distress was severe.” *Polay v. McMahan*, 468 Mass. 379, 385 (2014). The standard of proof is high. Id. *22 “Liability cannot be predicated on ‘mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities,’ nor even is it enough ‘that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by “malice,” or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.’ “ Id. citing *Tetrault v. Mahoney, Hawkes & Goldings*, 425 Mass. 456, 466 (1997), quoting *Foley v. Polaroid Corp.*, 400 Mass. 82, 89 (1987). Conduct is deemed “extreme and outrageous” only if it is “beyond all possible bounds of decency, and [is] regarded as atrocious, and utterly intolerable in a civilized community.” *Roman v. Trustees of Tufts College*, 461 Mass. 707, 718 (2012), quoting *Foley v. Polaroid Corp.*, *supra*.

The undisputed facts establish that North Hill's conduct was not even remotely extreme and outrageous or beyond all bounds of decency, as a matter of law. Because Ms. Barber cannot meet the high standard of proof for this claim, summary judgment on the claim was warranted.

***23 V. Conclusion**

For the above reasons, defendants-appellants request the Court to affirm the judgments of the Superior Court.

Footnotes

[1](#) The references to the Supplemental Record Appendix are cited as “SRA [page number]”.

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