

STATE OF NEW YORK
SUPREME COURT : COUNTY OF STEUBEN

BEVERLY M. HART, by and through
DAVID HART, as proposed Administrator
Of the Estate of BEVERLY M. HART,

Plaintiff,

VERIFIED ANSWER

v.

Index No.: E2023-
1260CV

ELDERWOOD AT HORNELL and 1 BETHESDA
DRIVE OPERATING COMPANY,

Defendants.

Defendants, **1 BETHESDA DRIVE OPERATING COMPANY d/b/a ELDERWOOD AT HORNELL (improperly sued herein as Elderwood at Hornell and 1 Bethesda Drive Operating Company)** (hereinafter “Defendants,” or “these Answering Defendants”), through their attorneys, Hurwitz Fine PC, for their Verified Answer to the Plaintiff’s Verified Complaint herein, state as follows:

1. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs **1, 2, 3, and 15** of Plaintiff’s Complaint.

2. Deny the allegations contained in paragraphs **4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 70, 72, 74, 76, 78, 80, 82, 84, 86, 87, 88, 89, 91, 93, 94, 95, 96, 97, 99, 100, 101, 102, 103, and 104** of Plaintiff’s Complaint.

3. In answering paragraphs **67, 92, and 98**, Defendants repeat and reallege each admission or denial previously made with regard to the allegations contained and/or referred to therein with the same force and effect as if said admissions and denials were

herein again fully set forth herein.

4. In answering paragraphs **68, 69, 71, 73, 75, 77, 79, 81, 83, and 85** of Plaintiff's complaint, Defendants state that these allegations call for legal conclusions for which a response is not required. To the extent a response was intended, Defendants deny any wrongdoing.

5. In answering paragraph **90** of Plaintiff's complaint, Defendants state that these allegations call for legal conclusions for which a response is not required. To the extent a response was intended, Defendants deny any wrongdoing and otherwise deny.

6. Deny each and every other remaining allegation in Plaintiff's Complaint not herein before specifically admitted or otherwise denied.

FIRST AFFIRMATIVE DEFENSE

7. To the extent that the Complaint alleges professional negligence, it fails to state a cause of action as to these Defendants by reason of Plaintiff's failure to comply with the provisions of CPLR 3012-a.

SECOND AFFIRMATIVE DEFENSE

8. Defendants have no present knowledge of culpable conduct on the part of Plaintiff, Plaintiff's decedent, or others over whom these Defendants had no control, but in the event investigation or discovery discloses such conduct, these Defendants reserve the right to prove that such culpable conduct caused or contributed to the alleged injuries and damages.

THIRD AFFIRMATIVE DEFENSE

9. Defendants have no present knowledge of conduct on the part of Plaintiff or Plaintiff's decedent that might constitute failure to mitigate alleged damages; however, in order to avoid waiver of such a defense and to preserve these Defendants' right to prove

same at the time of trial, in the event investigation or discovery discloses such conduct, Defendants reserve the right to prove that such conduct caused or contributed to the alleged injuries and damages.

FOURTH AFFIRMATIVE DEFENSE

10. In the event that the Plaintiff recovers damages which have been paid or are payable by a collateral source, Defendants will seek an offset to such damages pursuant to Article 45 of the CPLR.

FIFTH AFFIRMATIVE DEFENSE

11. In the event that the Plaintiff recovers damages attributable to a party or parties over whom these Defendants had no control, Defendants' equitable share of any such recovery will be 50% or less and these Defendants will claim the limited liability protections set forth in CPLR Article 16.

SIXTH AFFIRMATIVE DEFENSE

12. In the event that the Plaintiff gives a release or covenant not to sue or enforce a judgment to one or more persons claimed to be liable for the same injury alleged in the Plaintiff's Complaint, these Defendants will seek an offset pursuant to §15-108 of the General Obligations Law.

SEVENTH AFFIRMATIVE DEFENSE

13. That Defendants exercised all care reasonably necessary to prevent and/or limit the injury and deprivation for which liability is asserted, including liability alleged pursuant to Public Health Law §2801-d.

EIGHTH AFFIRMATIVE DEFENSE

14. The allegations contained in Plaintiff's complaint are barred by the applicable statute of limitations.

NINTH AFFIRMATIVE DEFENSE

15. That the complaint fails to state a cause of action against these Defendants

and, therefore, should be dismissed.

TENTH AFFIRMATIVE DEFENSE

16. That to the extent the Plaintiff seeks to recover for any sum other than fair and just compensation for pecuniary injuries resulting from decedent's death, such recovery, is barred by Sections 5-4.3 of the Estates, Powers, and Trusts Law.

ELEVENTH AFFIRMATIVE DEFENSE

17. That service upon all of the Defendants has not been properly effectuated or is otherwise improper.

TWELFTH AFFIRMATIVE DEFENSE

18. Upon trial, it may appear that some or all of the damages Plaintiff claims have been caused by reason of Plaintiff's or Plaintiff's decedent own failure to mitigate damages, including but not limited to failure to obtain health insurance under the federal "Patient Protection and Affordable Care Act," and, if so, Plaintiff's damages, if any, must be diminished accordingly.

THIRTEENTH AFFIRMATIVE DEFENSE

19. That the claims in this action are barred in whole or in part pursuant to immunity granted by New York State Executive Orders, New York State Public Health Law 3080-3082, and the Emergency/Disaster Treatment Protection Act and other immunities arising out of the COVID-19 emergency as promulgated by state or federal law, rule, regulation, and/or executive order.

FOURTEENTH AFFIRMATIVE DEFENSE

20. That the claims in this action are barred in whole or in part pursuant to the Public Readiness and Emergency Preparedness Act (PREP Act) as set forth in the Declaration Under the Public Readiness and Emergency Preparedness Act for Medical

Countermeasures Against COVID-19 and its subsequent amendments.

FIFTEENTH AFFIRMATIVE DEFENSE

21. The proposed Plaintiff does not have capacity to bring this action.

SIXTEENTH AFFIRMATIVE DEFENSE

22. These Defendants reserve the right to amend this Answer and to assert additional defenses upon ascertaining more definite facts during and upon completion of discovery and investigation.

WHEREFORE, Defendants demand judgment as follows:

1. Dismissing the complaint herein;
2. Plaintiff's damages to be diminished in the proportion which the culpable conduct attributable to plaintiff or plaintiff's decedent bears to the culpable conduct which caused the damages;
3. That plaintiff's damages, if any, be reduced by such amounts as have been or may be recovered in whole or in part from collateral sources;
4. In the event plaintiff recovers a verdict herein, Defendants should only be liable for their equitable share of such verdict pursuant to Article 16 of the Civil Practice Law and Rules; and
5. For such other, further and different relief as may seem just, equitable and proper, together with the costs and disbursements of this action.

Dated: Buffalo, New York
April 9, 2024

HURWITZ FINE P.C.



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