

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

KATHLEEN G. TETI and	:	
ANTHONY G. TETI,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	NO. 01-1720
	:	
VILLANOVA UNIVERSITY,	:	
VILLANOVA UNIVERSITY SCHOOL	:	
OF LAW,	:	
REVEREND EDMUND J. DOBBIN,	:	
DEAN MARK SARGENT,	:	
EMERGENCY MEDICAL SERVICES OF	:	
VILLANOVA UNIVERSITY	:	
JOHN DOE and	:	
RICHARD ROE,	:	
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J.

October 24, 2001

Presently before the Court is Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and Plaintiffs' response thereto in the form of a cross-motion for leave to file an amended complaint. For the reasons stated below, Plaintiffs' Motion for Leave to File an Amended Complaint is granted and Defendants' Motion to Dismiss is granted in part and denied in part.

## **I. BACKGROUND**

Plaintiffs Kathleen Teti and her husband Anthony Teti ("Plaintiffs" or the "Tetis") filed this action as pro se litigants under the Americans with Disabilities Act ("ADA") against Villanova University (the "University"), its President, Reverend Edmund J. Dobbin ("Reverend Dobbin"), Villanova University School of Law (the "Law School"), its Dean, Mark Sargent ("Dean Sargent"), Emergency Medical Services of Villanova University ("EMS"), and John Doe ("Doe") and Richard Roe ("Roe"), individuals whose identities are presently unknown, (collectively the "Defendants"). According to Plaintiffs' complaint, Ms. Teti was denied access to the use of an elevator at the library of the Law School and as a result, injured herself when she fell down a dark stairwell. Ms. Teti also brings state law negligence and fraud claims against the Defendants. In addition, Mr. Teti brings a claim for loss of consortium.

## **II. LEGAL STANDARD**

Under Fed. R. Civ. P. 12(b)(6), the party moving for dismissal has the burden of proving that no claim has been stated. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991). To prevail, the movant must show "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80, 84 (1957).

In considering a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), the court must only consider those facts alleged in the complaint. See ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S. Ct. 1843, 1849, 23 L. Ed. 2d 404 (1969). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). A complaint should be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59, 65 (1984).

Rule 15(a) of the Federal Rules of Civil Procedure permits a party to amend a pleading "once as a matter of course at any time before a responsive pleading is served." Because a motion to dismiss for failure to state a claim is not a "responsive pleading," "the plaintiff may amend the complaint once 'as a matter of course' without leave of court." Shane v. Fauver, 213 F.3d 113, 115 (3d Cir. 2000). After amending once or after an answer has been filed, the plaintiff may amend only with leave of court or written consent of the opposing party, but

"leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). This proposition is especially true for pro se plaintiffs, for whom the court should grant leave at least once if there is any indication of a valid claim. Frasier v. General Elec. Co., 930 F.2d 1004, 1007 (2d Cir. 1991). However, a district court may exercise its discretion to deny leave to amend when the proposed amendment is legally insufficient and it would be futile to grant leave to amend. See Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962). An amendment is futile if it merely restates the same facts as the original complaint in different terms, fails to state a legal theory, or could not withstand a motion to dismiss. In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997). Just as a court will not dismiss the complaint unless it is beyond a doubt that there are no facts to support relief, a court should not refuse leave to amend unless the same rigorous standard is met.

In this case, the Tetis have responded to Defendants' Motion to Dismiss with a cross-motion for leave to file an amended complaint. Because the Tetis have not yet amended the complaint and Defendants have not yet filed an answer to the Tetis' initial complaint, it appears that Plaintiffs are entitled to amend the pleadings "as a matter of course." Nonetheless, Defendants should not be required to file a new motion to dismiss

simply because an amended pleading was introduced while their motion was pending. Since the issues raised by the Defendants' Motion to Dismiss along with Defendants' Response to Plaintiffs' Motion for Leave to File an Amended Complaint apply equally to both versions of the Tetis' complaints, leave to amend will be denied as futile only if the new matter proposed in Plaintiffs' Amended Complaint cannot withstand a 12(b)(6) motion to dismiss for failure to state a claim, i.e., if it appears beyond doubt that the plaintiff can plead no set of facts that would entitle him to relief. See Ricciuti v. N.Y.C. Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991). Therefore, the Defendants' Motion to Dismiss will be treated as applying to all pending versions of the Tetis' complaints. See Robert M. v. Hickok, CIV.A.98-4682, 1999 WL 371645, at \*1 (E.D. Pa. June 8, 1999) (Fullam, J.).

### **III. DISCUSSION**

#### **A. ADA**

In Count I of the Tetis' Amended Complaint, Ms. Teti asserts violations of Title III of the ADA under 42 U.S.C. § 12182 against all Defendants, alleging discrimination in a place of public accommodation. Under Title III of the ADA, liability may be imposed on those who "own" "lease" or "operate" places of public accommodation. 42 U.S.C. § 12182(a). Defendants contend that, with the exception of the University, the remaining Defendants cannot be liable under Title III of the ADA because

they do not own or operate the library at the Law School, nor does Plaintiff's complaint allege that they do.

The Tetis have cured this deficiency in the Amended Complaint by alleging that "Villanova University Law Library/Villanova Law School/Villanova University, Doe and Roe at all times relevant owned and operated its library[,]" Amended Complaint at ¶ 20, and "Reverend Edmund J. Dobbin, Dean Mark Sargent, Doe and Roe at all times relevant were in charge of operating its library[.]" Amended Complaint at ¶ 22. Defendants, on the other hand, have not shown beyond doubt that the Tetis can prove no set of facts in support of their claim that the University, Reverend Dobbin, the Law School, Dean Sargent, Doe or Roe own or operate the law library. "The term 'operate' has been interpreted as being in a position of authority and having the power and discretion to perform potentially discriminatory acts." Coddington v. Adelphi Univ., 45 F. Supp. 2d 211, 215 (E.D.N.Y. 1999). Courts considering whether a named defendant "operates" a place of public accommodation within the meaning of the ADA focus on the issue of control. See Guckenberger v. Boston Univ., 957 F. Supp. 306, 323 (D. Mass. 1997) (holding a president of a University to "operate" the institution for purposes of the ADA). Granted, courts deciding ADA public accommodations cases have applied the "control test" with the aim of identifying the proper party to be

sued, and not for the purpose of finding more than one individual responsible for ADA violations. Nevertheless, Ms. Teti may pursue her ADA claim with respect to all defendants for this purpose.

**B. Section 1983**

The Tetis appear to concede that their Section 1983 claim lacks an element necessary to obtain relief, for this claim is absent from Plaintiffs' Amended Complaint. To successfully bring a claim under Section 1983, a plaintiff must demonstrate: "(1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." Robb v. City of Philadelphia, 733 F.2d 286, 290-91 (3d Cir. 1984). Because none of the named Defendants are state actors, Plaintiffs cannot prevail on a Section 1983 claim. See Fischer v. Driscoll, 546 F. Supp. 861, 863-64. (E.D. Pa. 1982) ("The mere fact that Villanova is chartered by the Commonwealth of Pennsylvania does not make Villanova a state actor."). Therefore, Defendants' Motion to Dismiss this claim is granted.

**C. Negligence**

In Count II of the Tetis' Amended Complaint, Ms. Teti alleges that all Defendants were negligent in that Defendants:

- (a) failed to have proper facilities to accommodate Plaintiff's disability;

- (b) failed to provide Plaintiff with an unlocked elevator which is available to use instead of stairwells;
- (c) failed to provide adequate and proper lightning [sic] in the stairwells;
- (d) failed to provide sufficient handicap parking facilities for Plaintiff's disability;
- (e) failed to ensure that Plaintiffs rights were not violated under the American [sic] with Disabilities Act. [sic]
- (f) otherwise failing to exercise due and proper care under the circumstances;
- (g) acting in a negligent manner by failing to supervise or control its personnel, manage the grounds surrounding the university.

Amended Complaint at ¶ 29, 31. Ms. Teti further alleges that "[b]y reason of aforesaid negligence of the Defendants, the Plaintiff, Kathleen Teti suffered severe and permanent injuries to her knees, back and arm[.]" Amended Complaint at ¶ 32.

Construing Plaintiff's allegations liberally, because the Federal Rules of Civil Procedure require only general "notice" pleading, and accepting Plaintiff's allegations as true, the Court holds that Ms. Teti has set forth sufficient information for the Court to determine that some legal theory exists on which relief could be accorded to Ms. Teti. Therefore, Defendants' Motion to Dismiss Ms. Teti's negligence claim is denied.

#### **D. Misrepresentation**

In Count III of Plaintiff's Amended Complaint, Ms. Teti asserts fraud and negligence against Defendants EMS, Doe and Roe for misrepresentations made by EMS employees to the University concerning Ms. Teti's fall at the law library.

The elements of intentional or fraudulent misrepresentation are: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intention of misleading another party into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. GMH Assocs., Inc. v. Prudential Realty Group, 752 A.2d 889, 902 (Pa. Super. Ct. 2000) (adopting Restatement (Second) of Torts § 525 (1977)).

Negligent misrepresentation requires proof of: (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; (4) which results in injury to a party acting in justifiable reliance on the misrepresentation. Bortz v. Noon, 729 A.2d 555, 561 (Pa. 1999) (adopting Restatement (Second) Torts § 552).

Therefore, under Pennsylvania law, three key elements of both fraudulent misrepresentation and negligent

misrepresentation are: (1) a communication of a misrepresentation to a recipient; (2) justifiable reliance by the recipient on the misrepresentation; and (3) injury to the plaintiff as a result of the recipient's reliance. See Kurtz v. American Motorists Ins. Co., No. 95-1112, 1995 U.S. Dist. LEXIS 17417, at \*5 (E.D. Pa. Nov. 20, 1995) (Hutton, J.)

Ms. Teti claims that the EMS arrived at the law library to attend to Ms. Teti after she fell down the stairwell. Amended Complaint at ¶ 37, 38. Ms. Teti further alleges that the EMS personnel falsely submitted a report to the University that Ms. Teti fell in the parking lot of the University exiting her car. Amended Complaint at ¶ 39. It is Ms. Teti's belief that "the EMS did so fraudulently mislead the University in an attempt to protect the University from suit and therefore the University will rely upon such fraudulent report against the Plaintiffs." Amended Complaint at ¶ 41. Finally, Plaintiffs assert that they have suffered extreme emotional trauma because of EMS' conduct and they "will forever be fearful of calling emergency medical staff[.]" Amended Complaint at ¶ 43.

Plaintiffs' legal theory is apparently that a misrepresentation was made to a third party with the intent to influence the third party, and with the foreseeable consequence that the third party's reliance on the misrepresentation would be detrimental to the plaintiff. The mere fact that the alleged

misrepresentation was made to a third party and not the Tetis is not fatal to Plaintiffs' claim. See Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 935 n.19 (3d Cir. 1999) (citing In re Orthopedic Bone Screw Prods. Liab. Litig., 159 F.3d 817 (3d Cir. 1998) (recognizing that "a misrepresentation claim is not necessarily precluded when the alleged injury arises from a third party's (and not the plaintiff's) reliance on defendant's misrepresentations").

However, in a third-party situation, such as the one described here, the harm that results to a plaintiff as a result of the third party's reliance must be direct. See Steamfitters, 171 F.3d at 935 n.19; see also Kurtz, 1995 U.S. Dist. LEXIS 17417, at \*10-\*12. In the instant case, the EMS' report to the University was not communicated to treat or advise the Tetis but solely for the purpose of informing the University of an accident which occurred on its grounds. Accordingly, the EMS made no representation intended to induce Plaintiffs to act and, indeed, no action was taken by Plaintiff in reliance on the EMS' report to the University. The fact that the Tetis are now fearful of calling emergency medical staff is due to the Teti's contention that EMS was incompetent, not because the University relied on EMS' accident report. The Tetis injury is too attenuated to state a claim upon which relief may be granted with respect to

the misrepresentations made to the University. Consequently, Plaintiffs' misrepresentation claims are dismissed.

#### **E. Loss of Consortium**

In Count IV of Plaintiffs' Amended Complaint, Mr. Teti claims that he has been deprived of the services, society, companionship and consortium of his wife as a result of the negligence of the Defendants. See Amended Complaint at ¶ 46. Any interference with a right growing out of a marriage relationship "by the negligent injury to one spouse, . . . afford[s] the other spouse a legal cause of action to recover damages for that interference." Burns v. Pepsi-Cola Metro. Bottling Co., 510 A.2d 810, 812 (Pa. Super. Ct. 1986). Because the primary tort claim in Count II of Plaintiffs' Amended Complaint has not been dismissed, the loss of consortium claim will not be dismissed.

#### **IV. CONCLUSION**

For the reasons set forth above, Plaintiffs' Motion for Leave to File an Amended Complaint is granted. Defendants' Motion to Dismiss for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) is denied with respect to Counts I, II, and IV of the Amended Complaint. Defendants' Motion to Dismiss Count III of Plaintiffs' Amended Complaint is granted.

An appropriate Order follows.

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JOHN DOE and	:	
RICHARD ROE,	:	
	:	
Defendants.	:	

**ORDER**

AND NOW, this 24<sup>th</sup> day of October, 2001, it is hereby

ORDERED:

(1) Upon consideration of the Plaintiffs' Motion for Leave to File an Amended Complaint (Docket No. 5), and Defendants' response thereto (Docket No. 6), said motion is GRANTED.

(2) Upon consideration of Defendants' Motion to Dismiss (Docket No. 3) and Plaintiffs' response thereto (Docket Nos. 4 and 5), Defendants' Motion is Denied with respect to Counts I, II and IV of Plaintiffs' Amended Complaint.

Defendants' Motion to Dismiss is GRANTED with respect to Count  
III of Plaintiff's Amended Complaint.

BY THE COURT:

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RONALD L. BUCKWALTER, J.