

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 619-10-17 Wncv

MARTIN HOFFMAN, Administrator for the
ESTATE OF DERRICK HOFFMAN
Plaintiff

v.

CODY LAFOUNTAIN, et al.
Defendants

DECISION
Four Motions to Dismiss

In the complaint, Martin Hoffman, Administrator for the estate of his adult son, Derrick Hoffman, asserts that Derrick died due to abuse or neglect caused by and while in the care of Defendant Cody LaFountain, his "shared living provider." The other defendants include Rutland Mental Health Services, Inc. (RMHS), Community Access Program (CAP), United Counseling Service of Bennington County, Inc. (UCS), Jerry Laik, and Walking Tall Solutions, LLC (WTS). These other defendants are alleged to have tortiously facilitated the hiring of Mr. LaFountain as a shared living provider, hired Mr. LaFountain and placed Derrick with him, and/or supervised the arrangement. UCS has filed a motion to dismiss arguing that the complaint was not filed within the two-year repose period for wrongful death actions, 14 V.S.A. § 1492(a). Mr. Laik and WTS have filed a motion to dismiss arguing the repose period issue and that service was deficient for failure to include a Rule 4(b) Notice of Appearance form. RMHS and CAP have filed a motion to dismiss arguing the repose period issue only. Mr. LaFountain has filed a document entitled "Motion to Dismiss a Claim" along with a lengthy answer.

Mr. Hoffman cured the failure to serve a Notice of Appearance form by re-serving Defendants with the form. No party has indicated any defect in service subsequently. The court concludes that any initial deficiency in service is resolved.

The repose period

Wrongful death actions must be filed within two years of the death. 14 V.S.A. § 1492(a). The allegations of the complaint are clear that the complaint was filed just short of three years after Derrick's death. Accordingly, any claims predicated on Derrick's death fall outside the repose period and must be dismissed.

Mr. Hoffman argues, however, that the complaint also includes claims of torts that accrued prior to death, and that these claims were filed in a timely fashion under 12 V.S.A. § 557(a) because they could have been brought before death. This is noncontroversial as to the accrual and timing issues, but there is some controversy as to whether the complaint fairly includes claims other than those predicated on Derrick's death.

Without parsing each of the 11 counts of the complaint, as the parties have not, the court concludes that the fairest reading of the complaint generally is that it was intended to assert tort claims that accrued and could have been brought prior to death, along with claims predicated on death. While any wrongful death claims are untimely, the prior-to-death claims were filed in a timely manner. They survive the motions to dismiss.

Issues first raised in Mr. Laik and WTS's Reply Brief

In their reply to Mr. Hoffman's opposition to their motion to dismiss, Mr. Laik and WTS did not address the opposition arguments. Instead, they offered completely different reasons for dismissal that were neither included in their motion to dismiss nor foreshadowed by it. The court will not address those issues at this time. Issues first raised in a reply are not properly before the court. See *In re Paynter 2-Lot Subdivision*, 2010 VT 28, ¶ 13, 187 Vt. 637; *Condosta v. Condosta*, 139 Vt. 545, 547 (1981). Mr. Hoffman has not had a fair chance to address them.

Mr. LaFountain's motion to dismiss

Mr. LaFountain included a "motion to dismiss" with his answer. However, the court is unable to discern any cogent basis for dismissal asserted in it. It largely includes allegations expanding on earlier allegations in his answer. The court will treat Mr. LaFountain's "motion" as part of his answer. As a separate motion, it is denied as moot.


ORDER

For the foregoing reasons:

- (a) UCS's motion to dismiss is *granted in part and denied in part*;
- (b) Mr. Laik and WTS's motion to dismiss is *granted in part and denied in part*;
- (c) RMHS and CAP's motion to dismiss is *granted in part and denied in part*; and
- (d) Mr. LaFountain's motion to dismiss is *denied as moot*.

If no stipulated proposed pretrial scheduling order is filed by July 20, 2018, the court will schedule a scheduling conference to establish one.

Dated at Montpelier, Vermont this 28th day of June 2018.



Mary Miles Teachout
Superior Judge