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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO - CENTRAL DIVISION

CASA DE LAS CAMPANAS, INC., dba CASA DE LAS CAMPANAS, Plaintiff, vs. JOHN WILLIAM MILLER, Defendant.	Case No.: 37-2013-00039103-CL-UD-CTL **MEMORANDUM IN SUPPORT OF DEFENDANT JOHN WILLIAM MILLER'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL** Date: September 20, 2013 Time: 10:30 a.m. Dept: 73 Judge: JOEL R. WOHLFEIL Action Filed: March 13, 2013 Trial Date: July 26, 2013

Defendant, John William Miller, hereby submits the following Memorandum in Support of his Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial:

I.

AUTHORITY FOR MOTION

Code of Civil Procedure, section 629 reads in part:

> "The court, before expiration of its power to rule on a motion for new trial, either of its own motion, after five days' notice, or on motion of a party against whom a verdict has been rendered, shall render judgment in favor

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> of the aggrieved party notwithstanding the verdict whenever a motion for directed verdict for the aggrieved party should have been granted had a previous motion been made."

As will be set forth more fully, below, judgment notwithstanding the verdict is appropriate because the legal instructions and verdict form ultimately used by the Court were couched narrowly, more narrow than the wording of plaintiff's Residence Agreement, more narrow than pertinent statutory provisions, and more narrow than the plaintiff's own complaint alleged: Accordingly, given the breadth of the "engage in behavior" instruction and verdict question, they jury was directed to reach a verdict in plaintiff's favor.

In light of the statutory protections afforded holders of Life Care Contracts, like Mr. Miller, judgment notwithstanding the verdict or new trial must now be ordered.

"The motion may be granted when no substantial evidence supports the jury's verdict." See *Teich v. General Mills, Inc.* (1959) 170 Cal.App.2d 791, 794.

The court must use this test: "Disregarding conflicting evidence and giving the prevailing party's evidence and the legitimate inferences drawn from that evidence all the value to which they are legally entitled, the court finds that there is no substantial evidence to support the verdict." *Quintal v. Laurel Grove Hosp.* (1964) 62 Cal.2d 698, 703.

Assuming the Court does not find judgment notwithstanding the verdict appropriate, then new trial is appropriate. Pursuant to *Code of Civil Procedure*, section 657:

> "The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:
>
> 1. Irregularity in the proceedings of the court, jury or adverse party, or any other order of the court or abuse of discretion by which either party was prevented from having a fair trial.
>
> …
>
> 6. Insufficiency of the evidence to justify the verdict or other decision,.or the verdict or other decision is against the law.
>
> 7. Error in law, occurring at the trial and excepted to by the party making the application."

II.

TRIAL RULINGS

Mr. Miller's defenses to plaintiff's breach of contract/unlawful detainer action were raised by affirmative defense, but did not seek affirmative relief. Rather, the defenses raised appropriate legal defenses to plaintiff's claim for possession. The Court ruled that only one such defense, retaliation, could be submitted to the jury for findings of fact. The Court thus ruled, as a matter of law, that the following defenses could not be asserted, and that evidence supporting those defenses would not be received:

- Mr. Miller's continued, post-Notice (March 7, 2013) good behavior.
- Plaintiff's pre-Notice (March 7, 2013) breaches of agreement by failing to notify family and physicians of symptoms.
- Jury's view of plaintiff's retaliatory conduct restricted as redacted in the light of Mr. Miller's representative's lengthy, multiple-instances-of-conduct, complaint letter.
- Plaintiff's continuing retaliatory conduct by filing two additional lawsuits against Mr. Miller and his family.
- Jury's overall view of plaintiff's retaliatory conduct, by precluding evidence of organizing residents and protecting their free speech rights.
- Court's instructions and verdict form focusing on Mr. Miller's past incidents of conduct, rather than adopting plaintiff's Complaint language, plaintiff's contract language, and/or California's statutory language focusing on present conduct.
- Court's special verdict form directing a verdict for plaintiff, without standard unlawful detainer law focusing on materiality of Mr. Miller's alleged breach.

III.

LIFE CARE CONTRACTS CAN ONLY BE TERMINATED ON SUBSTANTIAL SHOWINGS AFTER MATERIAL PROVISIONS HAVE BEEN SATISFIED

Health and Safety Code section 1788, subdivision (a)(29) provides that a Life Care Contract **must** contain:

> "The terms and conditions under which the continuing care contract may be terminated after the cancellation period by either party, including any health and financial condition."

Health and Safety Code section 1788, subdivision (a)(30) provides that the Life Care Contract **must** contain:

> A statement that, after the cancellation period, a provider may unilaterally terminate the continuing care contract only if the provider has good and sufficient cause."

Health and Safety Code section 1788, subdivision (a)(30)(A) provides that "good and sufficient cause" cannot be the "Filing or lodging of a formal complaint with the department or other appropriate authority," or "Participation in an organization or affiliation of residents, or other similar lawful activity."

Health and Safety Code section 1788, subdivision (a)(30)(B) specifically states the provider "shall not discriminate or retaliate in any manner against any resident of a continuing care retirement community for contacting the department, or any other state, county, or city agency, and any elected or appointed government official to file a complaint or for any other reason, or for participation in a residents' organization or association."

A. Department Options

Health and Safety Code section 1788, subdivision (a)(31) states that 90 days written notice is required to unilaterally terminate a life care contract.

"Good and sufficient cause" is not defined by the statutes; however, good and sufficient cause most logically must include current, non-trivial conduct.

Health and Safety Code section 1569.54 provides authority to the Department of Social Services to order the removal of a resident where the department determines "that the resident's mental or physical condition requires *immediate* transfer from the facility in order to protect the health and

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safety of the resident." [Emphasis added.] Notice must be given by the department to the resident and his legal representative. The resident is entitled to a review of the order removing him. There must be a written plan for relocation. Here, plaintiff did not act immediately; did not provide Mr. Miller with a review; and has not provided a written plan for relocation.

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B. <u>Intentional Acts</u>

The Residence Agreement requires, for expulsion, that a resident "create a disturbance within Casa detrimental to the health, safety, or peaceful lodging of others…," <u>only</u>. "Creating" a disturbance implies an intentional act. Creating is defined, "to produce or bring about a course of action or behavior." (Webster's Ninth New Collegiate Dictionary). Producing or bringing about a particular course of action implies an intention to do the acts necessary to "create" the disturbance. The disturbance cannot be to oneself, but must be to "others".

The evidence here, including the medical evidence, raises a question of fact as to whether Mr. Miller **<u>intended</u>** to do the acts which caused the disturbance. It should have been up to the jury to determine if intentional acts were involved. Instead, the jury was instructed to determine whether Mr. Miller **<u>had</u>** "engaged in behavior."

Unintentional acts which create a disturbance can also result in an eviction under different provisions of the eviction laws, allowing exclusion because the resident is presently a danger to himself or others. Since Casa was unable to show that Mr. Miller is presently a danger to himself or others, plaintiff chose to proceed under the contract, which requires intentional acts that "create a disturbance."

Examples of unintentional acts that could create a disturbance include falling over and striking another resident, running over another resident's foot with a wheelchair, or negligently operating a car that strikes another car at Casa. Such incidents do not involve the intentional creation of a disturbance. They should not subject the resident to the cancellation of his Life Care Contract.

The language taken from *California Code of Regulations* section 87224, subdivision (b) establishes only the minimum necessary in order to obtain a 3-day notice to quit. Since the contract requires the defendant to "create" a disturbance, the language of the instruction should have been

modified to require a finding that the "resident is engaging in intentional acts which are a threat to the mental and/or physical health or safety of others in the facility."

C. <u>Material Acts</u>

Not all acts breaching a contract should result in the cancellation of the contract. This is especially true for a Life Care Contract, where the cancellation of the contract will result in the forfeiture of the resident's life savings, termination of plaintiff's obligation to care for the resident for the rest of his life, and, in this case, separation from his wife of 60 years.

Breaches of contract producing a threat to the mental and/or physical health of other residents could include the following:

1) Failure to clean up after the resident's dog, leading to a slip and fall hazard.

2) Operating a wheelchair inappropriately, causing injury to another resident.

3) Hurrying into the dining room causing another resident to fall.

4) Leaving a car inappropriately parked so as to create a hazard.

5) Inappropriate operation of an electric cart, resulting in an injury to another resident.

All of these examples could <u>result</u> in harm much worse that what occurred in the case here, .for which there were no treated injuries, nor any property damage in need of repair. Accordingly, should residents under the preceding examples have their Life Care Contracts cancelled?

A basic principle of lease law is that a breach of the lease must be material in order to avoid a forfeiture of the lease. This point is more important in Life Care Contracts, which involve greater investment than a normal residential or commercial lease.

Civil Code section 1442 provides, "A condition including a forfeiture must be strictly interpreted against the party for whose benefit it is created."

"…[A] party should not be divested of valuable rights by way of forfeiture for default…unless it is clearly made to appear that the other party to the contract has suffered or will suffer **<u>serious detriment</u>** **<u>or</u>** **<u>damage</u>** by reason of such default, or unless it is made to appear that the default was **<u>intentional</u>** **<u>or</u>** **<u>willful</u>**…" (*Atkins v. Anderson* (1956) 139 Cal.App. 2d 918, 920. [Emphasis added]. In other words, the breach should be so material that the forfeiture of the entire agreement is justified. Form Jury Instruction CACI 4304 incorporates this concept in its concluding paragraph:

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> "Defendant's failure to perform the requirements of the Residence Agreement must not be trivial, but must be a substantial violation of important obligations."

Hawley v. Orange County Flood Control District (1963) 211 Cal.App.2d 708 involved an agreement containing a "no damage for delay" clause, which was interpreted as a forfeiture of any damages related to delay. Because the party asserting the clause was at least partially at fault for the delay, damages were a question of fact calling for the consideration of all the circumstances, despite the forfeiture language.

Forfeiture restrictions have been applied specifically to insurance contracts, which provide the same kind of benefits a Life Care Contract does.

Bittinger v. New York Life Ins. Co. (1941) 17 Cal.2d 834, 841 states, "However, it is well established that forfeitures generally are not favored…This is particularly true of insurance contracts, and a forfeiture will be permitted only when expressed in the policy in clear and unmistakable terms…A policy of insurance cannot legally be forfeited merely for nonpayment of the premium when it is due where no express provision is made therefor in the policy." Similarly, Mr. Miller's conduct should have been assessed with a stricter eye than whether he "did" "engage in behavior."

A default must be determined to be material before the Life Care Contract can be forfeited, and the Court's emphasis in its instructions and verdict form left materiality, as well as current conduct, out.

IV.

LIFE CARE CONTRACTS ARE AFFORDED GREATER PROTECTIONS THAN STANDARD LEASES

Because Life Care Contracts present substantial risks to elderly consumers, actions taken by the management of Continuing Care Retirement Communities to terminate those life care contracts are heavily regulated. Casa did not follow the procedures necessary to terminate a Life Care Contract, so the unlawful detainer action was not meritorious.

Life Care Contracts are heavily regulated to reduce the risk that an elderly consumer will be unfairly evicted. The regulations require advance notice of a plan to evict the Life Care Contract

holder with an opportunity to present evidence from doctors, relatives, and other sources prior to any management decision to evict a Life Care resident can be given effect. Casa did not follow these procedures and should not be allowed to evict Mr. Miller without the due process protections provided by statute.

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A Life Care Contract promises that if an elderly consumer pays his life savings to a retirement home, the retirement home will provide continuing care, at all different levels, to the resident for the rest of his or her life, whether or not the resident can pay the monthly fee. One obvious risk to the resident is that the Continuing Care Retirement Community will go out of business. *Health and Safety Code* section 1770, subdivision (b) states, "Because elderly residents often expend a significant portion of their savings in order to purchase care in a continuing care retirement community and expect to receive care at their continuing care retirement community for the rest of their lives, tragic consequences can result if a continuing care provider becomes insolvent or unable to provide responsible care."

When an elderly resident with a Life Care Contract is selected by management for an involuntary transfer from one level of care to another, or to be kicked out the community altogether, the resident will probably be unable to defend him or herself legally. Here, Casa has asserted that it has never had to evict a resident legally. Casa will not disclose how many residents have left under pressure or have been moved involuntarily from one level of care to another. The director of nursing at Casa (Elizabeth Derry, who was not allowed to testify though summoned by the defense) has asserted that her nurses have a great deal of experience removing residents from their units, presumptively without any legal process. The chances of an elderly resident having enough money and enough help to fight a normal contract action for eviction are very slim.

Because of these risks, Life Care Contracts are regulated to reduce the chance that an elderly consumer will be unfairly moved or evicted. First, the resident is entitled to a copy of the resident's bill of rights when the resident is proposed to be moved to a different level of care under *Health and*

Safety Code section 1771.1, subdivision (e). The facility cannot retaliate against the resident for filing complaints or exercising his rights under *Health and Safety Code* section 1771.7, subdivision (g).

The only legal method of transferring or evicting a Life Care Contract resident is set forth in Health and Safety Code section 1788. Under Health and Safety Code section 1788, subdivision (a)(10), the provider must follow the following procedures to involuntarily transfer a resident from his designated living unit, either to another level of care, or out of facility.

The facility must consider "resident independence" as a goal to be promoted, but involuntary transfers can be made if the "resident *develops a physical or mental condition* that endagers the health, safety, or well-being of the resident or another person, under *Health and Safety Code* section 1788, subdivision (a)(10)(A)(ii). [Emphasis added]. The resident can also be transferred if the resident's condition or needs require a transfer to a nursing facility, hospital, or other facility, and the provider has no facilities available to provide that level of care, under Health and Safety Code section 1788, subdivision (a)(10)(A)(iv).

Before any of that happens, the provider is required to involve the resident and the resident's responsible person in the assessment process that forms the basis for the level of care transfer decision by the provider, and the provider has to provide an explanation of the assessment process, including the disclosure of any assessment tools, under *Health and Safety Code* section 1788, subdivision (a)(10)(B)(i). Then the provider must conduct a care conference with the resident and the resident's family, doctors, and other health care professionals under *Health and Safety Code* section 1788, subdivision (a)(10)(B)(ii). The facility then has to notify the resident and the resident's responsible person of the reasons for the transfer in writing under *Health and Safety Code* section 1788, subdivision (a)(10)(B)(iii). The notice of transfer must be made at least 30 days before the transfer, except where the resident or other residents are in immediate danger under *Health and Safety Code* section 1788, subdivision (a)(10)(B)(v).

Finally, the proposed transfer is entitled to be reviewed by the Continuing Care Contracts Branch of the Department of Social Services. The transfer can also be reviewed at a subsequent care conference with the resident's responsible person, the doctors, the local ombudsman and other appropriate health professionals under *Health and Safety Code* section 1788, subdivision (a)(10)(C).

The Continuing Care Contracts branch of the Department of Social Services then issues a decision under *Health and Safety Code* section 1788, subdivision (a)(10)(F).

If the decision is that the resident should be transferred out of the facility, and the resident refuses to comply with the transfer, an unlawful detainer proceeding is required.

V.

CONCLUSION

None of the predicate steps were followed prior to plaintiff's filing of this action. Accordingly, the Court should have been Mr. Miller's safety net for justice, and the predicate steps plaintiff had missed were to have been undertaken at the trial. The Court's rulings instead supported the plaintiff's view of the "summary nature" of the proceedings rather than giving effect to the statutory protections inherent in Life Care Contracts. Either judgment notwithstanding the verdict, or new trial with a full examination of the evidence, is required.

Dated: August 15, 2013 WINGERT GREBING BRUBAKER & JUSKIE LLP

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