IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL DIVISION

DANIEL BAER and ROSE BAER through Stephen Baer as their Agent with Power of Attorney, for themselves and all others similarly situated	:	NO. 2018-13760
vs.	:	
SHANNONDELL, INC.	:	

2018-13760-0166 10/10/2023 1:58 PM # 14129198
Rcpt#Z4591930 Fee:$0.00 Order - Other
Main (Public)
MontCo Prothonotary

**MEMORANDUM IN SUPPORT OF ORDERS
DATED SEPTEMBER 29, 2023 and OCTOBER 10, 2023
ALTERING CLASS DEFINITION (SEQ. #159)**

HAAZ, J. **October 10, 2023**

Plaintiffs filed a Motion to Alter Class Certification on December 9, 2022. Defendant responded and opposed same on January 17, 2023 and Plaintiffs filed a reply thereto on January 24, 2023. Oral argument was heard on September 21, 2023 and the court issued an Order granting Plaintiffs' motion on September 29, 2023. This memorandum is filed in accordance with Rule 1701(d) of Pa.R.Civ.P.

Plaintiffs originally moved for certification of the class as follows:

> "All present or former Residents (or their legal representatives) of Shannondell at Valley Forge who signed a Residence and Care Agreement before February 1, 2013 and received an Entrance Fee refund that included a Vacancy Fee deduction for Appliance Depreciation or Appliance Replacement Fees and/or Replacement Fees for Cabinets, Countertops or Other Materials."

On December 29, 2021 the court issued an Order and accompanying twenty-six page Opinion certifying the class limited to Residents who received an Entrance Fee refund after

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May 23, 2012.[1] The court's Order certifying the class excluded Residents who received their refund before May 22, 2012 because they were not among the former Residents who may have suffered actual harm before expiration of the respective statutes of limitations for breach of contract (four years) and the Continuing Care Providers Registration and Disclosure Act ("CCPRDA"), 40 Pa.C.S.A. §3217(a)(six years).

Plaintiffs filed an earlier Motion for Alteration of Class Certification Order which the court denied on February 22, 2022. The court's Order further stated:

> "Plaintiffs are granted leave to file a new motion pursuant to Pa.R.C.P. 1710(d) seeking to amend or expand the class definition if evidence in discovery indicates that Shannondell fraudulently misrepresented or concealed the Residents' rights or claims arising from their Residence and Care Agreements."

Plaintiffs' instant motion to alter class certification alleges that merits discovery has established a *prima facie* case for tolling the statute of limitations which would allow approximately 250 additional people to be included in the class. Plaintiffs allege that merits discovery has established the following facts which require tolling of the statute of limitations for Residents (or their representatives) who received Vacancy Fee refunds before May 23, 2012.

Plaintiffs' motion includes the following factual allegations:

1. After a Resident's death, Shannondell processed the Entrance Fee refund and prepared a "Resident Refurbishment" statement listing the deductions included in the preparation and calculation of the Residents' beneficiaries' refund of the Vacancy Fee. Shannondell sent a

[1] The December 29, 2021 Order reads in pertinent part: "All present or former Residents (or their legal representatives) of Shannondell at Valley Forge who signed a Residence and Care Agreement before February 1, 2013 and received an Entrance Fee refund after May 22, 2012 that included a Vacancy Fee deduction for Appliance Depreciation or Appliance Replacement Fees and/or Replacement Fees for Cabinets, Countertops or Other Materials."

check and a Resident Statement to the Resident's representative but did not include a copy of the Resident Care Agreement ("RCA") signed by the Resident upon admission.

2. The Resident Statement did not include any reference to the Resident Care Agreement, or parts thereof, which supposedly allowed certain deductions in calculating the Vacancy Fee refunds.

3. Instead, the Statement attached invoices showing Shannondell's purchases of new appliances, cabinetry or other property for the unit and listed the total amount as a deduction for "Appliance Replacement" or for an "Appliance Depreciation Fee" with a notation that such a deduction was 'STANDARD." Neither deduction was accompanied with a reference directing the recipient to the section of the RCA that purportedly supported that deduction.

4. Shannondell did provide Residents with vendors' invoices for replaced property which implied it was entitled to reimbursement for these invoices and deductions from Vacancy refunds.

5. Shannondell failed to disclose that it broadened their definition of "appliances" to include hundreds of rooftop HVAC compressors, each dedicated to a different unit, and HVAC equipment in the utility closet of every unit. This effectively resulted in higher deductions and reduced Vacancy Fee refunds to Residents' beneficiaries. Shannondell did not reference replacement or repair of HVAC equipment in its communications with Residents' beneficiaries or the basis for these deductions.

6. There is no specific language in the Resident Care Agreements before February 1, 2013 which supports deductions for appliance replacement or depreciation.

7. Shannondell annually filed materials with the Insurance Department of the Commonwealth of Pennsylvania pursuant to requirements of the Pennsylvania Continuing Care Providers Registration and Disclosure Act, 40 Pa. Cons. Stat. §3201 *et. seq.* and the regulations implementing that Act, 151 Pa. Code §151.2 *et. seq.* Notwithstanding that it had made changes to the RCA, Shannondell did not disclose the changes in its filing dated April 25, 2013; or in its next filings in April of 2014, 2015 or 2016.[2]

8. By misrepresenting or withholding information about its supposed right to deduct appliance depreciation and replacement fees, and by not informing the Pennsylvania Insurance Department of such deductions, Shannondell misled the public, which included Residents or their representatives, from determining if deductions from the Vacancy Fee refunds were proper.

Plaintiffs claim the doctrine of fraudulent concealment is applicable to the above facts which should toll the statute of limitations.[3] Defendant argues that application of equitable tolling does not apply here because Plaintiffs have failed to demonstrate that Shannondell committed an affirmative independent act of concealment upon which the Plaintiffs justifiably relied. See *Kingston Coal Co. v. Felton Mining Co., Inc.*, 690 A.2d 284, 281 (Pa. Super. 1997). Shannondell argues that "mere silence in the absence of a duty to speak cannot suffice to prove fraudulent concealment." *Lange v Burd,* 800 A.2d 336 (Pa. Super. 2002).

Shannondell had an affirmative, contractual duty to refund the vacancy fees to the Residents' beneficiaries. A fact finder may conclude that Shannondell's actions of inspecting the vacated units, preparing the Refurbishment sheet, calculating the deductions and refund, failing

[2] Section VII(3) of pre-February, 2013 versions did not define the Vacancy Fee to include a deduction for "appliance depreciation not to exceed actual replacement costs." Effective February 1, 2013, Shannondell revised Section VII(3) to include within the Vacancy Fee definition a deduction for "appliance depreciation not to exceed actual replacement costs."

[3] *Fine v. Checcio,* 870 A.2d 850, 860-61 (Pa. 2005) and cases cited therein.

to provide supporting documentation to the beneficiaries and transmitting these documents with incorrect or unauthorized deductions constitutes affirmative actions on its part which intentionally or unintentionally misled the Residents' beneficiaries. See *Molineaux v. Reed*, 532 A.2d 792, 794 (Pa 1987). ("Defendant's conduct need not rise to fraud or concealment in the strictest sense, that is, with an intent to deceive; unintentional fraud or concealment is sufficient.")

Shannondell further maintains that a Resident's claim of justifiable reliance would command an individualized assessment of the facts and details of each Resident refund which would warrant decertification of the class. The court agrees with Shannondell that individualized fact intensive inquiries may be required regarding those Residents (or representatives) who received Vacancy Fee refunds before May 23, 2012.[4] The court does not agree that this subclass will necessarily present a legal impediment to certification. *Samuel-Bassett v. Kia Motors American, Inc.*, 34 A.3d 1 (Pa. 2011). Alleged individual issues as to the application of statutes of limitations will not defeat certification if there are other common issues. *Kraft v. Allstate Ins.Co.*, 511 A.2d 1356 (Pa. Super. 1986). See also *In re: Linerboard Antitrust Litigation*, 305 F.3d 145, 162 (3d. Cir. 2002) (antitrust litigation); *Mowbray v. Waste Management Holdings, Inc.*, 208 F.3d 288, 295-7 (1st Cir. 2000) (breach of contract); *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 924 (3d Cir. 1992) (securities litigation). Here, the common questions of Defendant's alleged liability predominate over the individual ones.[5]

[4] A reasonable diligence determination is fact intensive and ordinarily is for the jury to decide. *Nicalaov v. Martin*, 195 A.3d 880 (Pa. 2018).

[5] It may well be that the court will need to decertify this sub-class and/or bifurcate the litigation to individualized issues in Sub-Class Two at a later time.

The court must take a liberal approach and resolve any doubts by allowing the class definition as proposed. Cf. *Liss & Marion, P.c. v. Recordex Acquisition Corp.*, 937 A.2d 503, 508 (Pa. Super. 2007), aff'd 603 Pa. 198, 983 A.2d 652 (2009); *Cambanis v. Nationwide Ins. Co.*, 348 Pa. Super. 41, 45, 501 A.2d 635, 637 (Pa. Super. 1985) (class certification requirements must be liberally applied; and any doubt should be resolved in favor of certification).[6]

The factual circumstances regarding the issuance of the Vacancy Fee refunds, considered in the light most favorable to Plaintiffs, establishes a *prima facie* case of fraudulent concealment which will allow, at this stage of the proceedings, a sub-class of claimants who received a Vacancy Fee refund before May 23, 2012.

Accordingly, Plaintiffs' motion to alter the class certification will be granted. See *Janicik v. Prudential Ins. Co.*, 451 A.2d 451 (Pa. Super. 1982); *Debbs v. Chrysler Corp.*, 810 A.2d 137 (Pa. Super. 2002).[7]

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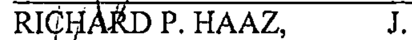
[6] The Order certifying Sub-Class Two does not affect the court's analysis regarding numerosity, common question requirements, typicality, adequacy of representation, or whether the class action will be a fair and efficient method of adjudication. See Opinion dated December 29, 2021 (Seq. #95) which is incorporated herein.

[7] Plaintiffs also have argued that Shannondell maintained a confidential and/or fiduciary relationship with the class representatives which would make it inequitable to bar their claims under a second basis for tolling. In this regard, Plaintiffs have asked this court to adopt the analysis set forth in *Falls Church Group, Ltd. v. Tyler, Cooper & Alcorn LLP*, 281 Comm. 84, 109, 912 A.2d 1019, 1035 (2007). No Pennsylvania case has held that a facility such as Shannondell maintains a confidential and/or fiduciary relationship with its residents or beneficiaries. See *Yenchi v. Ameriprise Financial, Inc.*, 161 A.2d 811 (Pa. 2017). Since this is a fact specific analysis, this court defers deciding this issue at this time.

The class certification Orders dated December 29, 2021 and September 29, 2023 will be modified so as to include two sub-classes. A corresponding Order shall accompany this Memorandum.

BY THE COURT:



RICHARD P. HAAZ, J.

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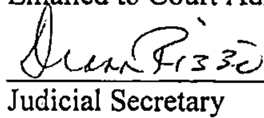

Judicial Secretary