

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D23676
O/prt

_____AD3d_____

Argued - May 26, 2009

ROBERT A. SPOLZINO, J.P.
MARK C. DILLON
HOWARD MILLER
THOMAS A. DICKERSON, JJ.

2008-03451

DECISION & ORDER

Kathleen Auer, etc., respondent, v Affiliated
Home Care of Putnam, Inc., appellant.

(Index No. 579/06)

Cook, Netter, Cloonan, Kurtz & Murphy, P.C., Kingston, N.Y. (Robert D. Cook of counsel), for appellant.

O'Neil & Burke, LLP, Poughkeepsie, N.Y. (Richard J. Burke, Jr., of counsel), for respondent.

In an action, inter alia, to recover damages for wrongful death, the defendant appeals from an order of the Supreme Court, Dutchess County (Sproat, J.), dated March 4, 2008, which denied its motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The Supreme Court properly denied the defendant's motion for summary judgment dismissing the complaint, as the defendant failed to establish its prima facie entitlement to judgment as a matter of law. The plaintiff's decedent, who had multiple sclerosis, choked on a hotdog. At the time of the incident, the defendant's employees, two home health care aides, were assigned to care for the decedent. One of the aides unsuccessfully attempted to perform either the Heimlich maneuver or cardiopulmonary resuscitation on the decedent and called for an ambulance. The decedent was taken to the hospital, where he died. It is undisputed that the defendant was required to assist the decedent with feeding and that both of the aides were in another room when the decedent choked on the hotdog. "Where a defendant is responsible for caring for an individual, the defendant's abandonment of that individual can result in liability" (*Willis v City of New York*, 266 AD2d 207, 208;

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Reavey v State of New York, 125 AD2d 656). There are triable issues of fact as to whether the defendant breached its duty of care to the decedent by leaving him unattended while he was eating (see *Esposito v Personal Touch Home Care*, 288 AD2d 337; *Reavey v State of New York*, 125 AD2d at 657).

SPOLZINO, J.P., DILLON, MILLER and DICKERSON, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court