

**Dwyer v Our Lady of Consolation Geriatric Care
Ctr.**

2008 NY Slip Op 30840(U)

March 20, 2008

Supreme Court, Suffolk County

Docket Number: 0021319/2005

Judge: William B. Rebolini

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SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Richard Dwyer and Douglas Dwyer, as Executors
of the Estate of Genevieve C. Dwyer,

Plaintiffs,

-against-

Our Lady of Consolation Geriatric Care Center
d/b/a Our lady of Consolation Residence and
Rehabilitation Center,

Defendants.

Motion Sequence No.: #001; MD

Motion Date: 11/26/07

Submitted: 1/30/08

Index No.: 21319/2005

Attorney for Plaintiffs:

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Attorney for Defendants:

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Upon the following papers numbered 1 - 7 read upon this motion for summary judgment by defendant: Notice of Motion and supporting papers, 1 - 3; Affirmation in Opposition and supporting papers, 4 - 5; Reply Affirmation and supporting papers, 6 - 7.

This personal injury action was commenced by Genevieve C. Dwyer, now deceased (hereinafter "the decedent"), to recover damages for the personal injuries she sustained in a fall from her wheelchair while a resident of the defendant's nursing home facility on June 23, 2005. Due to the death of the decedent in May of 2006, the duly appointed co-executors of her estate were substituted as plaintiffs. In their capacities as personal representatives of the Estate of Genevieve C. Dwyer, the co-executor plaintiffs have taken up the prosecution of the claims originally interposed herein by the decedent, their mother.

The facts surrounding the decedent's fall are not in dispute. On June 21, 2005, the decedent was transferred from Good Samaritan Hospital where she had undergone treatment for, *inter alia*, a bowel obstruction. At that time, the decedent was unable to ambulate on her own

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due to diminished physical abilities. The decedent's treating physician arranged for her transfer to the defendant's facility, which provides subacute rehabilitation. Said transfer was conditioned upon the taking of various prescribed medications by the decedent and her engagement in physical and occupational therapy. The "Patient Assessment Form" and other admission documents prepared by the defendant's personnel upon the decedent's transfer noted, *inter alia*, the decedent's recent loss of ability to ambulate, the need for the assistance of two persons when the decedent was ambulating with a walker, and the decedent's high risk of falling and the concomitant need for proper monitoring.

At approximately 10:15 a.m. on the morning of June 23, 2005, the decedent was sitting in a wheelchair in her room at the defendant's facility when a fire alarm went off. The alarm was set off by the defendant's personnel for purposes of conducting a fire drill. The bell alarm was followed by a voice over the public address system which repeated the words "Code Red". Purportedly startled by the alarm and the voice over the public address system, the decedent attempted to get out of her wheelchair and fell sustaining the personal injuries including an alleged fractured hip. By the complaint served and filed herein, the plaintiffs charge the defendant with negligence, *inter alia*, in failing to properly and adequately supervise the decedent and in the manner in which the defendant conducted the fire drill.

The defendant now moves for summary judgment dismissing the plaintiffs' complaint. The defendant claims that the plaintiffs' claims for inadequate supervision of the decedent are without merit as are the plaintiffs' claims that the defendant was negligent in conducting the unannounced fire drill in its nursing facility. In support of these claims, the defendant relies upon the deposition testimony of its personnel, various federal statutes, state regulations, local zoning ordinances, the Life Safety Code and the standards issued by the National Fire Protection Association. The defendant also relies on the affidavit of its retained expert, a clinical engineer. The defendant argues that these submissions establish, *prima facie*, the absence of any actionable conduct on its part inasmuch as the decedent was properly monitored, that defendant was in full compliance with all applicable fire safety statutes, codes, rules and regulations and that it conducted the unannounced fire drill in accordance with industry standards.

The plaintiffs oppose the defendant's motion relying, *inter alia*, upon the affidavit of their retained engineering expert. The plaintiffs argue that the expert affidavit coupled with the other submissions adduced on the instant motion reveal that the manner in which the defendant conducted the unannounced fire drill, namely, by ringing an alarm throughout the facility and alternately announcing "Code Red" repeatedly over the public address system, constituted negligence given the nature of the facility and the physical and mental condition of the persons housed therein, including the decedent. Plaintiffs further allege that the defendant failed to properly supervise the decedent on the day of her accident.

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To establish a claim of common-law negligence, a plaintiff must demonstrate that the defendant breached a legal duty owed to such plaintiff and that said breach was a proximate cause of the injuries sued upon (see, Elliot v Long Island Home, Ltd., 12 AD3d 481 [Second Dept., 2004]). To succeed on a motion for summary judgment, the moving party must make a prima facie showing of his or her entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v N.Y. Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v City of New York, 49 NY2d 557 [1980]). In negligence cases, an award of summary judgment is usually inappropriate since the issue of whether the defendant or the plaintiff acted reasonably under the circumstances can rarely be resolved as a matter of law (see, Andre v Pomeroy, 35 NY2d 361 [1974]; Alotta v City Hospital Center at Elmhurst, 134 AD2d 391 [Second Dept., 1987]). However, an award of summary judgment in favor of a defendant is proper where defendant demonstrates the absence of culpable conduct on its part as a matter of law and the opposing papers fail to demonstrate the existence of any triable issues of fact by sufficient, competent proof in admissible form (see, Rubin v Realty Fashions, Ltd, 229 AD2d 1026 [Fourth Dept., 1996]).

Upon the application of the foregoing principles to the instant case, the Court finds that the defendant's submissions were sufficient to sustain its initial burden on this summary judgment motion. However, the opposing papers submitted by the plaintiffs demonstrated by sufficient, competent, admissible proof that triable issues of fact exist as to whether the defendant's conduct fell below the standard of care it owed to the plaintiffs' decedent and thus constituted a breach of the defendant's duty of care which proximately caused the decedent's fall and resulting injuries.

The plaintiffs' expert attested that applicable safety codes, regulations and industry standards relevant to the conduct of fire drills in facilities such as the defendant's nursing home permit such facilities to use alarms more muted and less frightening than that utilized by the defendant. Although plaintiffs' expert stopped short of opining that any applicable law, ordinance, safety codes, regulations or industry standards unequivocally required the employment of muted alarms or the non-public (staff only) type of fire alarm to which he referred, his testimony nonetheless clearly demonstrated the presence of questions of fact precluding a summary determination in this case including whether, in the exercise of reasonable care, the defendant should have foreseen the reaction of the elderly, debilitated, nonambulatory decedent to the sounding of the overt, public fire alarm in the nursing home on June 23, 2005, that is, whether defendant should have reasonably foreseen the occurrence of decedent's fall under the circumstances (see, Humbach v. Goldstein, 255 AD2d 420 [Second Dept., 1998]). As stated by the Court in Johansdottir v. Kohn, 90 AD2d 842 [Second Dept., 1982] (cited subsequently in Rizzo v. Lincoln Diner Corp., 215 AD2d 546 [Second Dept., 1995]), "[s]ummary judgment . . . is a drastic remedy inasmuch as it denies a trial to the party against whom it is granted (Millerton Agway Co-op, Inc. v. Briarcliff Farms, Inc., 17 NY2d 57 [1966]). It is rarely granted in negligence cases since the very question of whether a defendant's conduct

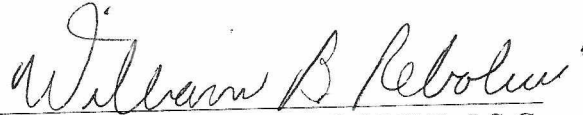
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amounts to negligence is inherently a question for the trier of fact in all but the most egregious instances (Wilson v. Sponable, 81 AD2d 1, 5; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR §C3212:8, p. 430). Thus, even in cases in which the facts are conceded, there is often a question as to whether the defendant acted reasonably under the circumstances (Ugarriza v. Schmieder, 46 NY2d 471, 475; Andre v. Pomeroy, 35 NY2d 361, 364)."

Based on the foregoing, it is

ORDERED that this motion (#001) by the defendant for summary judgment dismissing the plaintiffs' complaint in this personal injury action is considered under CPLR §3212 and is denied.

Dated: March 20, 2008


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION