

Ragiel v Park Ave. Extended Care Ctr. Corp.

2008 NY Slip Op 33642(U)

September 8, 2008

Sup Ct, Nassau County

Docket Number: 15248/05

Judge: Ute W. Lally

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SCAW

SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

REGINA RAGIEL, as executrix of the estate of
Josephine Mathes,

Plaintiff(s),

MOTION DATE: 7/11/08
INDEX No.:15248/05
MOTION SEQUENCE NO:2

-against-

CAL. NO.:2008H0619

PARK AVENUE EXTENDED CARE CENTER CORP.
d/b/a Park Avenue Extended Care Center,

Defendant(s).

The following papers read on this motion:

- Notice of Motion/ Order to Show Cause..... 1-3
- Answering Affidavits..... 4,5
- Replying Affidavits..... 6,7
- Briefs:

Upon the foregoing papers, it is ordered that this motion by defendant for an order pursuant to CPLR 3212 granting partial summary judgment in favor of defendant dismissing the fifth cause of action and dismissing so much of the sixth cause of action as seeks to recover pursuant to the authority of Public Health Law § 2801-d for care rendered prior to September 26, 2002 and for punitive damages is granted in its entirety.

This is an action commenced on September 26, 2005, in which plaintiff Regina Ragiel, as Executrix of her mother Josephine Mathes' estate, seeks to recover as follows: As and for her first cause of action, for medical malpractice; As and for her second cause of action, for violations of federal regulations; As and for her third cause of action, for negligent supervision; As and for her fourth cause of action, for negligent monitoring; As and for her fifth cause of action, for punitive damages; As and for her sixth cause of action, for violations of Public Health Law § 2801-d, including statutory punitive damages; and, As and for her seventh cause of action for wrongful death.

The defendant seeks dismissal of the fifth cause of action whereby the plaintiff seeks to recover punitive damages as well as

to limit the sixth cause of action in time and scope.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Sheppard-Mobley v King, 10 AD3d 70, 74, aff'd. as mod., 4 NY3d 627, citing Alvarez v Prospect Hosp., 68 NY2d 320, 324; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (Alvarez v Prospect Hosp., supra, at p. 324). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference (See, Demishick v Community Housing Management Corp., 34 AD3d 518, citing Secof v Greens Condominium, 158 AD2d 591).

"New York does not recognize an independent cause of action for punitive damages (quotations omitted)" (Aronis v TLC Vision Centers, Inc., 49 AD3d 576; see also, Randi A.J. v Long Island Surgi-Center, 46 AD3d 74, 80). Nevertheless, "courts may sometimes read [a] complaint as claiming to demand damages on the underlying cause of action, and in spite of improper pleading and inartful drawing of the complaint, sustain the punitive damages claim if the complaint otherwise alleges the defendant's willful and malicious conduct" (Carmody-Wait 2d § 29:23 Punitive Damages, citing Bunker v Bunker, 73 AD2d 530). "Punitive damages are recoverable in a medical malpractice action only where the defendant's conduct evinces a high degree of moral culpability [or constitutes] willful or wanton negligence or recklessness (quotations omitted)" (Hill v 2016 Realty Associates, 42 AD3d 432, 433; see also, Lee v Health Force, Inc., 268 AD2d 564; Rey v Park View Nursing Home, Inc., 262 AD2d 624). Punitive damages are available under Public Health Law § 2801-d(2) "where the deprivation of any . . . right or benefit [as defined by Public Health Law § 2801-d] is found to have been willful or in reckless disregard of the lawful rights of the patient."

The courts have not been consistent over whether the burden required for an award of punitive damages in a medical malpractice action and the burden imposed by Public Health Law § 2801-d(2) for an award of punitive damages under that statute differ. In Osborne ex rel. Osborne v Rivington House-The Nicholas A. Rango Health Care Facility (19 Misc3d 1132[A] [Supreme Court New York County 2008]), the court stated that the standard to recover punitive damages

under the Public Health Law § 2801-d(2) "appear[s] to be a less stringent standard than that under the law governing medical malpractice." However, other courts have analogized the standard for punitive damages under Public Health Law § 2801-d(2) and medical malpractice [See, Everett v Loretto Adult Community, Inc., 32 AD3d 1273 (all punitive damage claims dismissed because plaintiff failed to raise an issue of fact as to whether defendant's conduct could be viewed as so reckless or wantonly negligent as to be the equivalent of a conscious disregard of rights of others); Passet v Menorah Nursing Home, 16 Misc.3d 1117(A) (all punitive damages claims dismissed because plaintiff presented no evidence of reckless or wanton conduct); Williams v Ruby Weston Manor, et al., Index No. 6667/05 Short Form Order June 23, 2006 (Supreme Court Kings County) (all punitive damages claims dismissed because plaintiff failed to allege failures by defendant that transcended normal negligence or malpractice)].

In support of its motion, defendant has chronicled in minute detail the care that the decedent received while at its facility, in particular with respect to skin problems and decubitus ulcers from which she suffered intermittently while at its facility, as well as while at area hospitals during her nearly three and one half year stay. In so doing, the defendant has established that its conduct did not evince a high degree of moral culpability or willful or wanton negligence or recklessness, nor did its conduct evince a willful or reckless disregard of the decedent's lawful rights, thereby establishing its entitlement to summary judgment and shifting the burden to plaintiff to establish the existence of a material issue of fact.

The plaintiff has failed to meet her burden under either standard for an award of punitive damages. She has not established the existence of an issue of fact as to whether the defendant's conduct evinced a high degree of moral culpability or a willful or wanton negligence or recklessness nor has she established the existence of an issue of fact as to whether the defendant's conduct evinced a willful or reckless disregard of the decedent's lawful rights. While the plaintiff has brought to the court's attention significant episodic misconduct by defendant's staff or related employees, such as errors in the decedent's medical records as well as financial misconduct engaged in by overstating the number of staff nurses, the hours worked by them, and their qualifications, none of these transgressions have been alleged let alone demonstrated to have had any effect on the decedent's care, which is required for an award of punitive damages. Plaintiff's claims for punitive damages are dismissed.

To the extent that the plaintiff seeks to recover damages pursuant to Public Health Law § 2801-d for care rendered to the

decident prior to September 26, 2002, those claims are also dismissed. Claims pursuant to Public Health Law § 2801-d are a "liability created or imposed by statute" (CPLR 214[2]) and the Statute of Limitations is accordingly three years (Zeides v Hebrew Home for the Aged at Riverdale, Inc., 300 AD2d 178, 179). Since claims under Public Health Law § 2801-d are separate and distinct from claims for "medical, dental or podiatric malpractice," the continuous treatment doctrine does not apply (See, CPLR 214-a).

Dated: SEP 08 2008

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J.S.C.

ENTERED
SEP 10 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE