

Secondo v KRNH, Inc.
2009 NY Slip Op 31810(U)
August 5, 2009
Supreme Court, Richmond County
Docket Number: 103228/06
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No. 103228/06
Motion No.:004**

**ARLENE SECONDO as the ADMINISTRATRIX of the
ESTATE OF DAVID SECONDO, and
ARLENE SECONDO, Individually,**

Plaintiffs

against

**KRNH, INC., d/b/a NORTHEAST CENTER FOR SPECIAL
CARE,
ABU S.M. HAQUE, M.D., and
RICHARD HODDER, M.D.,**

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant, Richard Hodder, M.D. moves pursuant to *CPLR* § 3212 for an order granting summary judgment in his favor dismissing the plaintiff's complaint. The defendant's motion is denied in its entirety.

Facts

This is an action for alleged medical malpractice resulting in the death of David Secondo. The decedent was a resident in the defendant, KRNH, Inc.'s ("KRNH") facility. The decedent plaintiff had a history of schizophrenia. The plaintiff alleges, *inter alia*, that the defendants failed to follow their own rules, regulations, procedures, and protocols by failing to have the decedent seen by a surgeon one day after being seen by a gastroenterologist when the decedent had

complained of being unable to move his bowels.

The defendant, Richard Hodder, M.D. (“Dr. Hodder”) moves for an order granting him summary judgment and dismissing the plaintiffs’ complaint. Dr. Hodder argues that his position as Medical Director at KRNH was largely administrative. During his examination before trial Dr. Hodder testified as follows:

- Q. So when you went as medical director to Northeast Center, what were your duties? And again, this is when you were part-time.
- A. Usual duties would be to basically make sure that the medical guidelines for the facility met the legal regulatory and clinical standards of the practice of medicine in long-term care.¹

In addition, in response to a question asking whether any of duties included supervising the doctors in their day to day care, Dr. Hodder testified that:

Yes. It would occur if – first of all, if the doctor asked me to look at someone that they were having difficulty with, and that sometimes would come up particularly with kidney patients, the elderly, the geriatric patients. And the second, I thought I had oh, if any of the other departments, like if the nursing said, you know, I don’t like the way doctor X is doing that, I would look at the chart, I’d talk to the nurse. And then most times it was a matter of getting people to understand. A lot of times medical standards change and the nursing tends to follow a pattern and then the doctors keep up with the literature, and so something new may happen or there’s variations, you know, the way you use a drug or something like that, and I would be called on to help the nursing also.²

The co-defendant Abu S.M. Haque, M.D. (“Dr. Haque”) opposes Dr. Hodder’s motion arguing that the testimony of Nila Belmar, R.N. a nurse practitioner that assisted on the

¹ Testimony of Richard Hodder, M.D. September 10, 2008, p 15.

² *Id.* at 17.

decedent's case raised an issue of fact.

During Nurse Belmar's examination before trial, she confirmed that Dr. Hodder was available for consultation if she had a question concerning a treating doctor's orders.³ Nurse Belmar also testified that she involved Dr. Hodder in the decedent's case, she testified to the following:

Q. Do you recall, as part of that consultation with Dr. Haque, whether or not he had suggested that you get either a GI or surgical consult or both?

A. I remember talking to Dr. Hodder about the recommendation for surgical, and since it was a gastrointestinal problem, before you send him to surgical, he needed to be seen by a gastrointestinal specialist to find the root of the problem and work from there and then to go to surgical consultation.⁴

Q. And I just need to clarify the conversation you had on May 24th with Dr. Hodder and Dr. Haque. Who did you see first regarding the GI consult?

A. Probably I saw Dr. Hodder first, most likely.

Q. Do you remember why you saw Dr. Hodder before seeing Dr. Haque that day?

A. First of all, he's the Medical Director, and the report says fecal retention, so there's something I have to notify him, and that's mainly the reason I have to notify, is fecal retention.

Q. Having to notify the Medical Director regarding fecal retention, is that part of the rules and regulations of your position or is that part of the hospital's rules and

³ Testimony of Nila Belmar, September 17, 2008 p.54.

⁴ *Id.* at 55.

- regulations?
- A. Long-term care, there's always some, you know, red flag when there's a fecal retention or possibly impaction.⁵

The plaintiffs did not oppose the Dr. Hodder's motion for summary judgment dismissing the complaint.

Discussion

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.⁶ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁷ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁸ A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion."⁹ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an

⁵ *Id.* at 140 and 141.

⁶ *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁷ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

⁸ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

⁹ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

issue is arguable.¹⁰ In this case, the testimony of Nurse Belmar raises an issue of fact as to whether Dr. Hodder's role as Medical Director was purely administrative. As such, Dr. Hodder's motion is denied.

Accordingly, it is hereby:

ORDERED, that Dr. Hodder's motion for summary judgment dismissing the plaintiffs' complaint is denied in its entirety; and it is further

ORDERED, that the parties return to DCM Part 3 on **Monday, September 14, 2009 at 9:30 A.M.** for a pre-trial conference.

ENTER,

DATED: August 5, 2009

Joseph J. Maltese
Justice of the Supreme Court

¹⁰ *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].