

Held v Woodmere Rehabilitation & Health Care Ctr.
2009 NY Slip Op 32033(U)
August 25, 2009
Supreme Court, New York County
Docket Number: 015947/07
Judge: Daniel Martin
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 30
NASSAU COUNTY

EDWARD HELD, as Preliminary Executor of the
Estate of DOROTHY GINSBERG, Deceased.

Plaintiffs.

Sequence No.: 005 & 006
Index No.: 015947/07

- against -

WOODMERE REHABILITATION & HEALTH
CARE CENTER.

Defendant.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

In an action wherein the complaint alleges separate causes of action for negligence and medical malpractice, and violations of Public Health Law §§ 2801(d), 2803-c the plaintiff moves for summary judgment. The defendant cross moves for an order dismissing all claims for punitive damages and all claims alleging a violation of the Public Health Law prior to December 28, 2005. The plaintiff opposes that branch of that application seeking dismissal of the claims for punitive damages. For the reasons stated herein, the motion is denied and the cross-motion is granted.

The underlying complaint alleges on November 17, 2005 that the, then 97 year old decedent, was admitted to the defendant facility suffering from impaired physical and mental capabilities. Thereafter, the complaint alleges that the treatment and care provided the decedent was not in accordance with proper practice and the decedent was caused to suffer injuries which ultimately led to her death. The complaint alleges that the defendant's neglect caused the plaintiff to suffer a broken femur. Additionally, the complaint alleges that the defendant's neglect caused the decedent to become afflicted with bed sores which contributed to her ultimate demise. Lastly, the complaint contains an allegation that the actions of the defendant were willful and reckless so as to warrant the imposition of punitive damages.

The defendant's answer denied the pertinent allegations of the complaint. The answer also contains seven affirmative defenses, none of which are pertinent to the determination of either the motion or cross-motion.

In support of its motion, the plaintiff includes the affidavit of Dr. Thomas Naparest, M.D. as a medical expert certified in emergency medicine. Dr. Naparest avers that the decedent had been confined to a hospital for complaints of hip pain. When no pathology was discovered, the patient was admitted to the defendant facility for rehabilitation with a goal of having the patient re-learn how to ambulate without assistance. The patient was confined to a wheelchair. On December 28, 2005 the decedent slipped out of the wheelchair, allegedly due to the failure to secure the patient in said device by use of straps or other restraints. Dr. Naparest opines that such a fall would likely cause a fracture, but no x-rays were taken until 8 days later. The records reveal that on the date of the accident the decedent developed ulcers on both buttocks. These ulcers spread and worsened. The patient was transferred to a hospital where she was confined from January 12 to 18, 2006. On January 12, 2006 x-rays revealed a fractured femur. Hospital records indicate that the ulcers had worsened. After her release from the hospital and readmission to the defendant facility her ulcers worsened and spread. On March 14, 2006 the ulcers became necrotic and the decedent died four days later.

With respect to the decedent's broken femur, Dr. Naparest asserts that the defendant was negligent and violated the Public Health Law §§ 2801-d, 2803, in failing to discover the decedent's injury for six days after the fall from the wheelchair, during which time the patient was forced to undergo physical therapy which exacerbated her injury and suffering.

As to the bed sores afflicting the decedent, Dr. Naparest opines that they were avoidable if the plaintiff had not fallen from the unsecured wheelchair. He further opines that, having caused the bed sores, the defendant failed to properly treat them. Dr. Naparest, lastly, opines that the treatment of the decedent was reckless and warrants an award of punitive damages.

In opposition, the defendant's counsel asserts that Dr. Naparest's proof should be discounted since he is not certified in the field of geriatrics and is therefore, not competent to offer testimony as to the proper care to be required at nursing homes. The opposition papers also include an affidavit of Dr. Fredrick T. Sherman, a board certified practitioner in the areas of internal medicine and geriatrics. Upon his review of the medical records, Dr. Sherman opines that the defendant acted reasonably to prevent and limit injury to the decedent. In significant part, Dr. Sherman examines the hospital records of decedent immediately preceding her admission to defendant's facility, and notes indicia of peripheral vascular disease and other factors that caused decedent to have a predisposition to fractures. Based on his expertise in geriatrics, Dr. Sherman claims that the decedent's medical history shows no need to employ physical restraints (a step he considered extraordinary) and therefore, strapping the decedent in the wheelchair at the time of the December 28, 2005 was unwarranted. Dr. Sherman contests the finding that the fracture was directly related to the wheelchair incident and says it is equally probable (considering this patient's medical history) that the fracture was spontaneous. His

conclusion is fortified by the lack of complaints by the decedent and the failure of x-rays taken of the decedents right lower leg to reveal a fracture. As to the presence of bed sores and ulcers such afflictions he claims were unavoidable in a patient who was non-ambulatory and suffered, as the decedent did, from diabetes, incontinence, and peripheral vascular disease. Under these circumstances, the defendants' care which included monitoring of the ulcers every two hours, and insuring changes of briefs every 2-4 hours, applying medicines and the like all fall within the norms for care to be provided to a geriatric patient situated as the decedent was. Nothing in the medical records reveal any wantonness or a reckless disregard of the decedent's well-being.

By reply, the plaintiff questions the propriety of Dr. Sherman's affidavit since in parts it appears sworn testimony but states that he "affirms". Such argument borders on the frivolity necessary to invoke sanctions, since the papers sworn to by Dr. Sherman clearly show it is made under the penalties of perjury if it is false. The reply also states that there is no objection to the branch of the defendant's motion that seeks dismissal of claims accruing under the Public Health Law prior to December 28, 2005 or the dismissal of punitive damages claims for causes of action other than a violation of the Public Health Law. However, the plaintiff maintains that violation of the standard of care contemplated by the Public Health Law warrants the invocation of punitive damages.

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 A.D.3d 70, 74 (2d Dept. 2004), *aff'd. as mod.*, 4 N.Y.3d 627 (2005), *citing Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). "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.

In the instant motion, the plaintiff has failed to demonstrate an entitlement to judgment. The affidavit of the Dr. Naparest is of little probative value as to the issue of the bed sores. It simply refers to the condition, and does not specify the departure from accepted medical procedure where such sores or ulcerations are present and how the defendant deviated from such accepted standard of treatment. In a similar vein, Dr. Naparest's proof with respect to the fracture is likewise flawed. The affidavit notes the potential cause of plaintiff's injury, to wit; the fall from the wheel chair, but fails to set forth the proper circumstances where restraints in geriatric patients is warranted. In fact, nowhere in his affidavit does he use the phrase "departure from good and accepted practice". The court also notes recent learned articles have called for clarification of Public Health Law §2801-d to better balance the need to protect patients while taking into account the realities of the difficulties faced by care providers; noting that the most common cases arising from falls for failure to properly restrain and other "fall down" cases unnecessarily duplicate conventional negligence and malpractice theories of recovery. See,

NYLJ 8/13/2009 at pp 4,10.

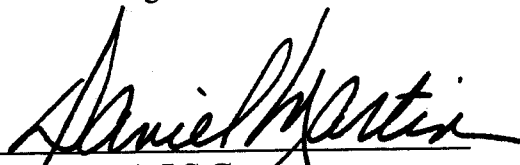
Even if this court were to have concluded that the plaintiff had met his *prima facie* burden, the plaintiff's motion would have to be denied. The opposing proof of the defendant's doctor which notes the context of the decedent's medical condition at the time of the injury, would create an issue of fact since it maintains: 1) that restraints were not warranted; 2) that the plaintiff failed to address and/or negate the possibility of spontaneous fracture; and 3) that the defendant's care for the bed sores was more than adequate to raise an issue of fact. Thus, the motion of the plaintiff is denied.

Turning to the cross-motion, the court notes those branches which seek dismissal of any claims prior to December 28, 2005 are unopposed and that branch of the defendants' cross-motion is therefore granted. As to the remaining branch which seeks dismissal of punitive claims, that branch must likewise be granted. Although Public Health Law §2801-d (2) sets forth a basis for a potential award of punitive damages, the barrier created by the statute is that the defendant must be found to have willfully, or recklessly, deprived the plaintiff of the rights or benefits conferred by the statute. The sole basis for such an award is found in paragraph #45 of the verified complaint, which merely states in conclusionary form that what heretofore had been previously alleged as negligent conduct was done in a gross, wanton, and reckless manner. Such conclusionary allegations are insufficient to be deemed a viable action for punitive damages. See, e.g., Passet v. Menorah Nursing Home, 16 Misc.3d 1117(A) 847 N.Y.S.2d 897.

Punitive awards, when authorized, are designed not to vindicate a private wrong, but as a vehicle for community retribution for conduct that is willful, wanton grossly negligent, reckless or deplorable. See, Exxon Shipping v. Baker, ___ US ___, 128 S CT 2605; Hill v. 2106 Realty Associates, 42 A.D.3d 432, 839 N.Y.S.2d 801. The record here, as established by the proof submitted by the defendant, shows that regardless of whether the defendant may be found negligent or not, there is simply no evidence that the decedent went untreated or was subjected to intentional acts which violated her person. On the contrary, the defendant has submitted numerous records which shows vigilant, but ineffective care of the decedent. There is nothing to contradict the records that the patient received care to which the response was exceedingly poor. The conduct as alleged, even if found to be negligent, does not rise to the level of wantonness or recklessness in which punitive damages may be imposed. Accordingly, the remaining branches of the defendant's motion is granted and all claims for punitive damages are dismissed.

So Ordered.

Dated: August 25, 2009


A.J.S.C.

ENTERED

SEP 01 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE