

Rapoport v Cambridge Dev., LLC

2009 NY Slip Op 32985(U)

December 17, 2009

Supreme Court, New York County

Docket Number: 105141/06

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number : 105141/2006
RAPOPORT, SOLOMON
vs.
CAMBRIDGE DEVELOPMENT
SEQUENCE NUMBER : 013
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 9/15/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Repeating Affidavits _____

PAPERS NUMBERED

1-3

4-5

6

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the memorandum decision and order annexed hereto.*

FILED
DEC 21 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/17/09

J.S.
JANE S. SOLOMON s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
SOLOMON RAPOPORT,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 105141/06

CAMBRIDGE DEVELOPMENT, LLC d/b/a
ATRIA RETIREMENT LIVING and
THE AVONDALE GROUP, INC., f/k/a
HOME CARE SERVICES OF AMERICA, INC.,

Defendants.

-----X
JANE SOLOMON, J.S.C.:

Motion sequence nos. 013 and 014 are consolidated for disposition. In motion sequence no. 013, defendant Cambridge Development, LLC d/b/a Atria Retirement Living (Cambridge) moves, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint and all cross claims raised against it. In motion sequence no. 014, defendant The Avondale Group, Inc. f/k/a Home Care Services of America, Inc. (Avondale) moves for the same relief as to it.

In September 2005, plaintiff moved into an apartment in Atria West Side, a residential facility operated by Cambridge that is located on West 86th Street (the Facility). At that time, plaintiff was approximately 81 years old, and he had been diagnosed as suffering from moderate Alzheimer's disease. On the morning of December 31, 2005, as plaintiff was running in the lobby of the Facility, he stumbled and fell onto the marble floor, severely injuring his neck. As a result of that injury, plaintiff was irremediably paralyzed. Plaintiff thereafter

commenced an action against Cambridge, and, after Cambridge commenced a third-party action against Avondale, plaintiff commenced a direct action against Avondale. The two direct actions were consolidated by order dated January 25, 2008.

Plaintiff's complaint against Cambridge alleges that plaintiff's accident was caused by the negligence of Cambridge in maintaining its premises and in its "supervision, control, custody and care of the plaintiff" (Bielli Affirm., Exh. 1, ¶ 21), and by its violation of unspecified provisions of the Mental Hygiene Law of the City and State of New York. However, both in his bill of particulars and in his deposition testimony, plaintiff acknowledged that he did not slip on anything, and that his fall was not otherwise the result of a defective condition. Plaintiff's complaint against Avondale alleges that that defendant was negligent in its "supervision, control, custody and care and evaluation and in [its] failure to evaluate and re-evaluate the plaintiff." Volpi Affirm., Exh. D, ¶ 33.

The Residency Agreement (Agreement) that plaintiff's daughter, Frances Leichter, entered into with Cambridge, on plaintiff's behalf, provides that:

[t]he parties to this [Agreement] understand that the Facility is a residential facility providing lodging, board, and housekeeping services. Landlord may refuse to admit or retain Tenant if in Landlord's sole judgment, Tenant is not physically, mentally, or emotionally able to reside in the Facility.

Volpi Affirm., Exh. L, at 1. The services and amenities that Cambridge provided in exchange for the fixed basic monthly rent

included an unfurnished private apartment with an emergency call system, three meals a day, a snack bar that was open 24 hours a day, housekeeping and linen services on a weekly basis, utilities (excluding telephone service), air conditioning, local transportation, and recreational and social programs. The Agreement also provides that Cambridge could terminate it for the following reason, among others: "disorderly or improper conduct by Tenant which materially affects the orderly operation of the Facility or affects the health, safety or welfare of anyone including Tenant." *Id.* at 3.

Aimée Carino, the executive director of the Facility since September 2007, states in her affidavit that, at the time of plaintiff's accident, the Facility was an Independent Living Facility which provided independent housing for the elderly, and the services included in the Agreement, but neither provided residents with medical care or treatment, personal care, supervision, medication management, or case management, nor contracted with any other entity for the provision of such services. Residents who required such, and other, services independently contracted for the services with third-party providers. Ms. Carino also states that, at the time of plaintiff's accident, New York State Department of Health Regulations did not require licensure of the Facility, inasmuch as it neither performed, provided for, nor contracted for services that required such licensure. Nicholas J. Monjiardo, who is currently employed by the health facilities consulting

firm Cicero Consulting Associates, LLC., and who was employed by the New York State Department of Health for 26 years, during 10 of which he supervised the State's Certificate of Need Program as director of the Division of Health Care Planning and Resource Management, provides an affidavit. He states, based upon the Agreement and plaintiff's complaint and bills of particulars, as well as the affidavit of Ms. Carino, that at the time of plaintiff's accident, the Facility did not fall into any of the categories of residential care facility requiring licensure, and that the Facility did not have a duty under the Public Health Law, Department of Health regulations, or Department of Social Services regulations to supervise, control, limit, or monitor plaintiff's activities.

Avondale maintained an office and personnel on the ground floor of the Facility, and provided certain services to residents on a contractual basis. At the time of plaintiff's accident, Ms. Leichter had engaged Avondale to dispense plaintiff's medications to plaintiff on a daily basis, and to provide fluid with which he could swallow them. Jeffrey M. Levine, M.D., who is board certified in internal medicine and geriatric medicine, and who currently consults with governmental agencies and subcontractors regarding issues of quality of care to geriatric patients, states in his affidavit that the service that Ms. Leichter purchased from Avondale is known in the industry as "assisted self-medication," and that, by custom and practice, that service does not give rise to any duties beyond

the dispensing of medication, such as, for example, medical supervision or treatment, or a duty to control the recipient's activities.

Plaintiff, however, relying upon deposition testimony that all incoming residents at the Facility were evaluated by both Cambridge and Avondale, contends that both Avondale and Cambridge were negligent in allowing him to become a resident, inasmuch as he had Alzheimer's, and in allowing him to remain at the Facility, once he had been observed running, and once Avondale knew that one of the medications that plaintiff was taking was prescribed to patients with Alzheimer's. Even assuming that the evaluations of plaintiff created a duty to him, it is undisputed that plaintiff was not disoriented, that he was enjoying himself at the Facility, and that he actively participated in all the outings that were available. There is no evidence in the record that plaintiff's Alzheimer's was at a stage that made it dangerous for him to be a resident at the Facility, or that the disease in any way precipitated his fall. Plaintiff testified at his second deposition that when he was a resident at the facility he routinely ran, sometimes outside, around the block, and other times inside, around the lobby. There is no evidence that plaintiff's running was in some way brought about as a result of his disease.

In his papers in opposition to defendants' motions, plaintiff's lawyer states, in an entirely conclusory manner, that defendants failed to use reasonable care in evaluating him, and

