Domoroski v Smithtown Ctr. for Rehabilitation & Nursing Care
2011 NY Slip Op 30997(U)
March 31, 2011
Supreme Court, Suffolk County
Docket Number: 27716-08
Judge: Daniel Martin
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SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 9 SUFFOLK COUNTY

INDEX NO.: 27716-08

PRESENT:
HON. DANIEL MARTIN

Motion Date: 12/14/10
Submitted: 1/20/11
Motion Sequence Nos.: 05 - **MG/CaseDisp**

______________________________x

JEANNE DOMOROSKI as Administratrix of the Goods Chattels and Credits that were of HELEN HEWITT, Deceased,

Plaintiff,

-against-

SMITHTOWN CENTER FOR REHABILITATION AND NURSING CARE

Defendants.

______________________________x

PLAINTIFF'S ATTY:
John H. Mulvehill, Esq.
220 Cambon Avenue
St. James, NY 11780

DEFENDANT'S ATTY:
Melito & Adolfsen, P.C.
233 Broadway, 28th Floor
New York, NY 10279

The following named papers have been read on this motion:	
Order to Show Cause/Notice of Motion	X
Cross-Motion	X
Answering Affidavits	
Replying Affidavits	X

In this action, plaintiff, Jeanne Domoroski, as Administratrix of the Estate of Helen Hewitt (hereinafter referred to as "the patient"), deceased, seeks damages for the patient's wrongful death, and alleges that defendant Smithtown Center for Rehabilitation and Nursing Care (hereinafter "Smithtown") was negligent and grossly negligent in the patient's care, and violated New York Public Health Law §§ 2801-d, 2801-d (2), (6), and 2803-c, and as a result of its negligence on August 5, 2005, proximately caused her death.

The record reveals that the patient was 95 years of age and was a patient at defendant's facility from July 6, 2005 to August 5, 2005, and from August 19, 2005 to August 21, 2005. She entered Smithtown for physical rehabilitation after undergoing a total hip replacement. The patient, who weighed approximately 90 pounds, had a history of hypertension, congestive heart failure, duodenal ulcer, osteoporosis, and several pressure sores on her back, legs and feet. On August 5,

2005 at 5:35 a.m., the patient was found on the floor in her room by a nurses aide and was noted to be confused. The incident was unwitnessed. After returning the patient to bed, the charge nurse instituted neurological checks every thirty minutes, which were negative. Later that morning, the patient went to physical therapy and passed out for approximately three minutes. She was returned to her room by wheel chair and became unresponsive.

The record further reveals that the patient was transferred to Stony Brook University Hospital (hereinafter referred to as "Stony Brook") emergency room and was later admitted. A CT scan of the brain was performed and revealed no acute changes. Further tests revealed that the patient was suffering from confusion, a urinary tract infection, aspiration pneumonia, syncope, hypothyroidism, anemia, and malnutrition in addition to the above stated history. On August 13, 2005, the progress notes reveal that the Stony Brook doctors advised plaintiff that the patient's health was declining, she was near the end of her life, and her prognosis was poor. The plaintiff chose a palliative approach which would provide comfort care only. The patient was readmitted to Smithtown on August 19, 2005, and died on August 21, 2005. The death certificate reveals that the cause of death was the result of a cardiac arrest as a consequence of congestive heart failure. Subsequently, the instant action was commenced.

By way of the bill of particulars, plaintiff alleges that Smithtown carelessly and negligently failed to maintain the area in a reasonable and safe condition for the patient; carelessly and negligently refused to provide immediate appropriate medical care and attention; failed to provide immediate hospitalization to the patient; negligently allowed the patient to attend physical therapy after the patient had fallen from her bed; carelessly and negligently failed to keep the bed rails in the up position; failed to install appropriate warnings; failed to have a bed alarm in place at the time of the incident; negligently allowed the patient to remain unattended; failed to hire a sufficient number of employees to care for the patients; failed to insure that the patients had a safe means of getting in and out of bed, and carelessly and negligently failed to comply with the appropriate rules, regulations, statutes, and/or ordinances applicable to the instant case.

Smithtown now moves for summary judgment dismissing the complaint on the grounds that it rendered appropriate care and treatment to the patient and did not proximately cause her injuries and death. A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (***Stewart Title Ins. Co., Inc. v Equitable Land Servs., Inc***, 207 AD2d 880, 616 NYS2d 650 [2d Dept 1994]), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Determining whether defendants breached their duty to exercise reasonable care in safeguarding the patient requires a consideration of the standard of care customarily exercised in similar facilities in the community which, in turn, calls for the production of expert testimony (*see*,

Smee v Sisters of Charity Hosp., 210 AD2d 966, 620 NYS2d 685 [4th Dept 1994]; ***Zellar v Tompkins Community Hospital, Inc.***, 124 AD2d 287, 508 NYS2d 84 [3d Dept 1986]).

In support of the motion, Smithtown submits, *inter alia*, the pleadings, the bill of particulars, a copy of the patient's nursing home medical records, a copy of the patient's Stony Brook University Hospital medical records, the deposition testimony of the plaintiff, the deposition testimony of Lisa Hofsiss, R.N., the deposition testimony of Vivian Portes, R.N., and an affidavit by Georgette M. Bieber, R.N. The plaintiff testified that the patient moved into her home in 1995 because she could not be left alone. However, she had no coordination or mental incapacities and was able to assist plaintiff in performing household chores such as: cooking, cleaning, dusting, laundry, and washing dishes. In the three years prior to her death, the patient began to see an internist for high blood pressure and congestive heart failure. On June 28, 2005, she tripped over a coffee table and fell, breaking her left hip. She did not lose consciousness. She underwent a total hip replacement at Stony Brook without incident. The nursing staff noted pressure sores over the patient's lower back, legs and feet, which they began to treat. On July 6, 2005, the patient was transferred to Smithtown to learn to walk again. The plaintiff noticed that the patient ate less and became withdrawn after her admission to Smithtown.

The plaintiff stated that she was not notified of the patient's fall from her bed on August 5, 2005. Upon receiving the order to transfer the patient to Stony Brook, the staff notified plaintiff. At Stony Brook, plaintiff noticed the patient's mental decline for the first time. She discussed the patient's care and prognosis with the Stony Brook doctors and learned that the patient's health was declining. She agreed to institute comfort care measures. Thereafter, on August 19, 2005, the patient was readmitted to Smithtown and was mostly unresponsive. She died on August 21, 2005.

Lisa Hofsiss testified that she was the night supervisor at Smithtown on the date of the patient's fall from bed. She stated that she followed the nursing care plan that was drawn up by the day shift nurse and noted that the patient was being turned and positioned every two hours. An aide had checked the patient at 4:00 a.m. and that there were no complaints offered. At 5:35 a.m. the patient was found on the floor and was confused. Hofsiss was called into the room and she noticed that both bed rails were up. Hofsiss assumed that the patient slid out of the bed with her pad underneath her. There was a small skin tear on the right elbow. The patient did not appear to have hit her head. The staff began frequent neurological checks every thirty minutes throughout the morning, which were negative. She stated that the bed rails were placed to assist the patient to position herself, not to restrain her from leaving her bed. In addition, she stated that Smithtown was not permitted to use wrist restraints, or any kind of restraints pursuant to Department of Health regulations. After placing the patient back in bed, she applied a bed alarm which emits a shrill sound to alert the staff that a patient is getting out of bed.

Vivian Portes testified that she is employed by Smithtown as the Minimum Data Set ("MDS") coordinator and assesses patients for medicare reimbursement. She reviewed the Care Plan which was created by an inderdisciplinary care team. On admission, the nurse decides if side rails are necessary. She had no idea how the patient got out of bed onto the floor.

Georgette Bieber avers that she is a registered nurse and is certified in gerontology by the American Nurses Association. She reviewed the patient's records and opines that within a reasonable degree of nursing certainty, the staff at Smithtown acted within the standards of care

during the patient's admissions at Smithtown. Bieber notes that the patient was being monitored for high blood pressure and impaired renal function prior to fracturing her hip. At the time of her admission to Stony Brook on June 28, 2005, she had pitting edema in both her lower extremities from her toes to her thighs. The staff at Stony Brook also noted a stage II sacral decubitus ulcer and a Stage I ulcer on the patient's spine. There was no indication that the plaintiff was made aware of these ulcers. After surgery, other pressure sores were noted at the thoracic area, coccyx, peri-coccyx, and right heel. The patient was discharged to Smithtown for physical therapy and rehabilitation. The Stony Brook surgeon prescribed weight-bearing as tolerated and recommended a rolling walker. Smithtown put into effect for the patient initial interventions for prevention of additional wounds and relief of pressure including an air mattress, turning and positioning scheduled every two hours, bilateral heel boots and elevation of her heels. A dietary supplement was ordered. The nurse practitioner monitored the patient's laboratory values on a regular basis. On July 19, 2005, the patient experienced an episode of unresponsiveness lasting approximately one minute while on the toilet. The physician was notified and the patient was monitored. The patient was found to be confused and forgetful, as well as hard of hearing. The staff also noted that the patient did not attempt self transfer.

Bieber notes that the Smithtown medical record reveals that on July 25, 2005, Dr. Kao at the facility and the plaintiff agreed to initiate a do-not-resuscitate ("DNR") order on behalf of the patient. At this time the plaintiff was made aware of her mother's physical and psychosocial decline without the possibility of improvement. The record also reveals that the patient continued to lose weight. On August 5, 2005, the patient was found on the floor near her bed. After neuro checks were performed throughout the morning and found to be negative, the patient was taken to physical therapy. She experienced an episode of unresponsiveness and slumped to her left side. The staff returned the patient to her bed and administered oxygen. The patient awakened and was confused. The nurse practitioner was notified and ordered the transfer to Stony Brook for evaluation. Stony Brook diagnosed the patient with metabolic acidosis and decreased urine output that did not resolve with intravenous fluids. There were also problems related to congestive heart failure and malnutrition, inasmuch as the patient was not eating and the family had refused the insertion of a feeding tube.

At this admission to Stony Brook, the possibility of head trauma was ruled out by the performance of a CT scan of the head which revealed tissue loss and scar tissue formation likely from prior infarct or trauma. Another CT scan was performed on August 8, 2005 with the same results. A CT of the abdomen showed fluid retention in the abdomen. A diagnosis of failure to thrive was discussed with the plaintiff. On August 19, 2005, the patient was discharged from Stony Brook and readmitted to Smithtown. The patient died on August 21, 2005.

Bieber opines that Smithtown staff assessed the patient at the time of her first admission and identified her failing renal status, poor nutritional status and multiple pressure ulcers. The staff initiated a multi disciplinary care plan and provided the appropriate care and treatment. In addition, the Smithtown staff provided for the patient's safety and assisted her with her elimination needs every two hours. Therefore, the Smithtown staff did not proximately cause the patient's fall and subsequent death.

Defendant has demonstrated its *prima facie* entitlement to summary judgment dismissing the complaint. Smithtown established its entitlement to judgment, as a matter of law, by demonstrating

that it did not depart from accepted standards of care and any omissions allegedly committed by Smithtown in its care of the patient which revolve around her fall on August 5, 2005 did not proximately cause her death (*see*, ***D'Elia v Menorah Home & Hosp. for the Aged & Infirm***, 51 AD3d 848, 859 NYS2d 224 [2d Dept 2008]; ***Rosen v John J. Foley Skilled Nursing Facility***, 45 AD3d 558, 846 NYS2d 208 [2d Dept 2007]).

In addition, the evidence submitted established Smithtown's entitlement to summary judgment dismissing the cause of action alleging a deprivation of rights pursuant to Public Health Law §§ 2801-d and 2803-c (***Kash v Jewish Home & Infirmary of Rochester, N.Y., Inc.***, 61 AD3d 146, 873 NYS2d 819 [4th Dept 2009]). Public Health Law § 2801-d provides a private right of action to nursing home patients injured while in a residential health care facility. In particular, the statute provides that a nursing home may be sued for deprivation of any right effected for the well-being of a patient by any state or federal statute, code, rule or regulation. Public Health Law § 2803-c requires nursing homes to adopt and make public a statement of the rights and responsibilities of patients in such facilities. Here, the evidence submitted was sufficient to establish that the patient did not sustain an injury as a result of Smithtown's purported non-compliance with any of the statutes or regulations relied on by the plaintiff (***Kash v Jewish Home & Infirmary of Rochester, N.Y., Inc.***, *supra*).

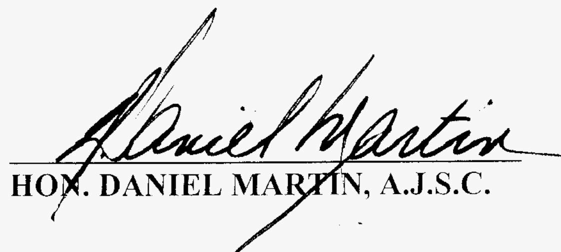
Moreover, the evidence submitted established Smithtown's entitlement to summary judgment dismissing the fourth cause of action alleging gross negligence. To constitute gross negligence, a party's conduct must evince a reckless indifference to the rights of others (***Goldstein v Carnell Assoc., Inc.***, 74 AD3d 745, 906 NYS2d 905 [2d Dept 2010]). Here, Smithtown's conduct cannot be viewed as so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the patient's rights (***Everett v Loretto Adult Community, Inc.***, 32 AD3d 1273, 822 NYS2d 681 [4th Dept 2006]).

The burden then shifted to the plaintiff to demonstrate the existence of a triable issue of fact (*see*, ***Micciola v Sacchi***, 36 AD3d 869, 828 NYS2d 572 [2d Dept 2007]; ***Kaplan v Hamilton Med. Assoc.***, 262 AD2d 609, 692 NYS2d 674 [2d Dept 1999]). In opposition to Smithtown's *prima facie* showing of entitlement to summary judgment dismissing the complaint, the plaintiff failed to submit sufficient evidence to raise a triable issue of fact as to whether Smithtown is liable for the patient's injuries and death. In opposition to the motion, plaintiff relies on the unsworn report of Paul Adler, D.O. and her attorney's affirmation. The doctor's report is not in admissible form and is rejected (***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]). The attorney's affirmation is not probative in a motion for summary judgment since he has no personal knowledge of the incident (***Zuckerman v New York***, *supra*).

Accordingly, the motion for summary judgment is granted.

So Ordered.

Dated: March 31. 2011
Riverhead, NY



HON. DANIEL MARTIN, A.J.S.C.