

**Miller v Dr. Susan Smith McKinney Nursing &
Rehabilitation Ctr.**

2014 NY Slip Op 30811(U)

March 24, 2014

Sup Ct, Kings County

Docket Number: 500025/2007

Judge: Ann T. Pfau

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part MMESP-2, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of March, 2014

P R E S E N T:

HON. ANN T. PFAU,

Justice.

-----X

MARIA MILLER, Individually and as Administrator of the Estate of Elva Miller, Deceased,

Plaintiff,

Index No. 500025/2007

- against -

DECISION AND ORDER

DR. SUSAN SMITH MCKINNEY NURSING AND REHABILITATION CENTER, KINGS COUNTY HOSPITAL CENTER, NEW YORK CITY HEALTH & HOSPITALS CORPORATION,

Defendants.

-----X

The following papers were read on motion sequence 02:

Electronically filed documents numbered 7 - 22.

Defendant New York City Health & Hospitals Corporation (HHC), sued here as Dr. Susan Smith McKinney Nursing and Rehabilitation Center, Kings County Hospital Center, New York City Health & Hospitals Corporation, moves for summary judgment dismissing the complaint. The motion is granted in part as follows.

Plaintiff alleges that HHC is liable for medical malpractice, wrongful death, and under Public Health Law § 2801-d. Plaintiff's decedent, Elva Miller, died intestate on December 23, 2006. Letters of administration were granted to plaintiff by a decree dated September 11, 2007, and a notice of claim was serve on or about September 17, 2007. This action was commenced on or about October 25, 2007. The particulars of her claim are set forth in the decision and order of Justice Lawrence Knipel, dated February 21, 2012, who granted HHC's motion for partial dismissal of the complaint pursuant to General Municipal Law §§ 50-e and 50-i Unconsolidated Laws § 7401(2), thereby dismissing the second, third and sixth causes of action (February 2012 Decision, Aff. of Milad Boddoohi, Esq., Ex. G). In this motion, HHC seeks dismissal of the four remaining causes of action.

As a threshold matter, plaintiff argues that the present motion should be deemed one to reargue the February 2012 Decision and denied as untimely (CPLR 2221[d][3]). On its face, this argument is inaccurate. This motion seeks different relief than the prior motion and it clearly is not for reargument.

The second, third and sixth causes of action sounded in negligence, gross negligence and lack of informed consent (Complaint, Boddoohi Aff., Ex. B). The February 2012 Decision rested on plaintiff's failure to file a notice of claim within ninety days of the last possible medical treatment, i.e., her date of death, and the failure to seek leave to deem the notice of claim timely until after the statute of limitations had expired (February 2012 Decision, at 7 - 8).

The remaining causes of action are for claims under Public Health

Law § 2801-d, wrongful death, negligence and negligent hiring/retention (Complaint). Justice Knipel's decision is the law of this case, and it applies with equal force to all of plaintiff's claims except for the wrongful death claim, for which HHC admits a timely notice of claim was filed by the administrator of decedent's estate. Plaintiff argues that the Public Health Law § 2801-d claim should not be subject to the same notice of claim requirements and statute of limitations as applicable to the negligence claims against HHC. The Appellate Division, Second Department has held that a claim under Public Health Law § 2801-d is barred by a failure to file a timely notice of claim (*Young v A. Holly Patterson Geriatric Ctr.*, 17 AD3d 667, 668 [2d Dept 2005], citing General Municipal Law § 50-e [5] and *Herron v City of New York*, 223 AD2d 676 [2d Dept 1996]). Accordingly, plaintiff's claim under § 2801-d, which arises from the same alleged conduct as the negligence claims, is subject to the notice of claim requirement and statute of limitations as the other claims dismissed by Justice Knipel in the February 2012 Decision, and therefore must be dismissed.

With respect to the wrongful death claim, HHC contends that plaintiff's decedent provided no financial support for the plaintiff, and the claim for funeral expenses in excess of \$6,000 cannot be sustained because plaintiff admits the cost was born by her sister and insurance. Plaintiff contends that she sustained a loss of guidance and support. She submits an affidavit avering that she had regular conversations with her mother, the decedent, and that her mother conferred with her and advised her on personal and family matters up to the time of decedent's death (Aff. of Maria Miller, ¶ 4). Where an adult child can show that her parent actually provided guidance and support services, this constitutes

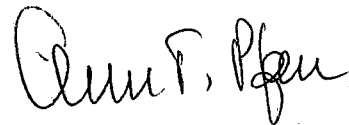
evidence of "pecuniary injuries" within the statutory confines of Estates Powers and Trusts Law § 5-4.3(1), which defines what wrongful death damages are recoverable in New York (*see Gonzalez v NYCHA*, 77 NY2d 663, 669 - 670 [1991]). Therefore, HHC's motion is denied as to plaintiff's wrongful death claim for loss of guidance and support.

Accordingly, it hereby is

ORDERED that HHC's motion for summary judgment is granted in part, and all claims are dismissed except for plaintiff's wrongful death claim for loss of guidance and support; and it further is

ORDERED that the note of issue deadline is extended to June 30, 2014, and counsel shall appear in Part MMESP-2 for a compliance conference on April 24, 2014 at 9:30 AM.

ENTER,



J. S. C.

HON. ANN T. PFAU