Daniel v Jewish Home Life Care
2014 NY Slip Op 32638(U)
September 23, 2014
Supreme Court, Bronx County
Docket Number: 301937-11
Judge: Stanley B. Green
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6M

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BARBARA JOHNSON DANIEL, s Administratrix of the Estate of EVA MANNING,

Plaintiff(s),

INDEX No.: 301937-11

- against-

JEWISH HOME LIFE CARE, Individually and d/b/a JEWISH HOME AND HOSPITAL FOR THE AGED,

Defendant(s)

DECISION

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HON. STANLEY GREEN:

The motion by Jewish Home and Hospital s/h/a Jewish Home Life Care, Individually and d/b/a Jewish Home and Hospital for the Aged (JHH) for summary judgment dismissing the complaint is granted.

Plaintiff commenced this action to recover damages for personal injuries and the death of decedent allegedly suffered as a result of JHH's negligent care and treatment and deprivation decedent's rights pursuant to PHL §§2801-d and 2803-c.

Decedent was admitted to JHH from April 4, 2003 through December 10, 2008. She suffered from Progressive Dementia/Alzheimer's and glaucoma. At the time she was admitted and through October 27, 2008, decedent was ambulatory. However, she was deemed at high risk for falls because she was confused and agitated and wandered without rational purpose. A plan of care was implemented to address her falls risk which included keeping her bed at its lowest level, a call light within easy reach and an ankle alarm bracelet at all times. Decedent's stay was essentially uneventful until February 2008, when she began to lose weight.

In February 2008, decedent's weight was 172 lbs. By March, she had lost five pounds and by May she had lost another five pounds. Nurses noted that decedent needed to have

constant supervision to finish her meals and to be hand fed, if possible. In June, decedent was seen by Nutrition for worsening chewing and pocketing of food and an order was issued changing her diet consistency from chopped to puree. Beginning in September, decedent's diet was monitored daily at each meal, including her food and liquid consumption. The records show that her food intake was "good" in September and October, except for some lunches and dinners when her food intake was described as "fair."

On October 27, 2008, at approximately 10:45 p.m., decedent was found lying on the floor next to her bed. She was awake, but unable to explain what had happened. She had no visible injuries. On October 29, nurses noted right leg edema and Medicine was called. Decedent was assessed as having a probable deep vein thrombosis (DVT) and ordered her to be on bed rest with leg elevation. On October 31, 2008, decedent was transferred to Mount Sinai Hospital (MSH) for treatment of the DVT in her right leg. Prior to discharge, nurses noted that decedent had Stage II blisters to both heels.

On admission to MSH, the heel blisters were noted and treatment was administered. MSH records show that by November 1, 2008, decedent's heel blisters were healed. On November 4, 2008, Nutrition at MSH evaluated decedent and noted that decedent's current diet was appropriate and her labs were within normal limits. Decedent remained on a pureed diet throughout her admission to MSH, with good oral intake noted.

On November 10, 2008, decedent was discharged from MSH. Upon readmission to JHH, nurses noted that decedent had bilateral heel blisters with discoloration. Due to her limited mobility and diagnosis of peripheral vascular disease, decedent was assessed at high risk for pressure sores. On November 11, 2008, Medicine was called to evaluate a superficial left

buttock skin ulcer. A skin assessment was performed which revealed five pressure ulcers: (1) on the left buttock, Stage II; (2) on the left buttock below the greater trochanter-Stage II; (3) on the right buttock-Stage II; (4) on the left gluteus-Stage I; and (5) on the right bunion - Stage I). The pressure sores were treated with Silvadene, turning and positioning decedent every two hours, heel pads and a pressure reducing mattress. By November 19th, the left buttock ulcer below greater trochanter was healed. By November 26th, the left buttock, right buttock (site I), left gluteal and right bunion pressure ulcers were healed. On November 12, 2008, Prostat was ordered to promote wound healing and on November 15th, a Care Plan for decedent's nutritional status was prepared which included interventions to provide a therapeutic diet, supplements and snacks, and to adjust diet/liquid consistency as needed. On November 17, 2008, decedent's weight was 135lbs.

On December 1, 2008, decedent had a Stage II pressure ulcer on her mid-sacrum and a Stage II pressure ulcer on the right buttock (site II). These ulcers were treated with Silvadene, a pressure reducing mattress and turning and positioning every two hours. On 12/8/08, pressure ulcers were noted to the left and right heels, the mid-sacrum and the right buttock (site II). On December 10, 2008, decedent exhibited a change in mental status secondary to "not swallowing" her food. Medicine was notified and decedent was transferred to MSH to rule out aspiration pneumonia. At that time, her weight was 136 lbs. Decedent never returned to JHH.

Decedent was admitted to MSH from 12/10/08 - 1/2/09 for dehydration, worsening lethargy and fevers. She had decreased oral intake and shortness of breath. Upon admission to MSH, the pressure ulcer on decedent's right buttock was the same stage and size as when it was first noted and the pressure ulcers to the left and right heels, mid-sacrum and the right buttock

(site II) were the same stage and size, or smaller, than when they were initially appreciated. A urine culture from 12/10/08 grew out E. Coli and gram negative bacilli. Decedent was treated with antibiotics. On 12/14/08, a feeling tube was placed. On December 16, 2008, decedent underwent excision of her heel wounds by plastic surgery and it was noted that her lower extremity was contracted. On 12/23/08, cultures from the central line (initially placed on 12/10/08) grew gram positive cocci. A new line was placed and Vancomycin was given.

On 12/24/08, after a family meeting with palliative care, it was decided to discontinue the feeding tube with a trial of oral feeding. On 12/26/08, palliative care noted that decedent was doing poorly with severe dementia, recurrent bacteremia and enterococcus in her blood and decreased mental status. Decedent's condition was discussed with plaintiff, who indicated that decedent would not want aggressive intervention. By 12/29/08, decedent was receiving only comfort care. On 12/31/08, decedent was receiving Ampicillin for sepsis. On January 2, 2009, decedent was admitted to Schervier Nursing Care Center for terminal care. She was unresponsive and not arousable to verbal or painful stimuli. Three pressure ulcers were noted: a Stage II sacral ulcer, a Stage III right heel ulcer and a Stage I left heel ulcer. A DNR order was executed by plaintiff and only pain control and pressure ulcer care was to be provided. On March 4, 2009, decedent died. No autopsy was performed.

Plaintiff's complaint contains four causes of action. The first cause of action, for "Negligence," alleges that JHH owed a duty to decedent to protect her rights pursuant to PHL §2801-d, as enumerated in PHL §2803-c and common-law and "acted negligently, recklessly and/or in otherwise wrongful manner" in that they allowed decedent to develop decubitus ulcers, failed to properly care for decedent, leading to sepsis, failed to properly hydrate and administer

the proper nutrition to decedent, failed to move decedent on a regular basis to avoid the development of decubitus ulcers and failed to comply with: (1) 42 CFR §482.20 (b)(1), which mandates that a resident's comprehensive assessment include customary routine, physical functioning and structural problems, continence disease diagnoses, dental and nutritional status, skin condition, activity pursuit and special treatments and procedure; (2) 42 CFR§ 483.40©, which mandates that residents be seen by physician at least once every 30 days for first 90 days of admission and at least once every 60 days thereafter; (3)10 NYCRR §415.12, which provides that a resident shall receive necessary care and service to attain or maintain highest practicable physical, mental, and psycho social well being in accordance with the comprehensive assessment and plan of care; (4)10 NYCRR §415.12(a)(1), which requires that a facility ensure that a resident's ADL's do not diminish unless clinical condition demonstrates that diminution was unavoidable; and (5) 10 NYCRR §415.3(a), which mandates resident has right to a dignified existence with respect, consideration and privacy in treatment and care for personal needs. Plaintiff also alleges that JHH failed to timely diagnose decedent's condition, perform timely and proper tests, exams, and treatment, failed to conform to the accepted standards of care and skill in providing nursing, geriatric and nursing home care to decedent, failed to use reasonable care in decedent's medical care, services, diagnosis and other medical services, failed to provide necessary care to reduce risk decedent's risk for urinary tract infections (UTI's), failed to reduce decedent's risk of falling and failed to provide treatment to prevent contractures.

The second cause of action alleges that as a result of JHH's deprivation of decedent's nursing home rights, she was caused to suffer dehydration, malnutrition and bedsores and that in addition to the damages suffered by decedent, plaintiff is entitled to recover punitive damages,

attorneys fees and costs. The third cause of action is for "Gross Negligence" and the fourth cause of action alleges that JHH's negligence and violation of decedent's rights pursuant to the PHL caused decedent to suffer severe bodily injury that led to her death.

JHH seeks dismissal of the complaint on the ground that the care and treatment it rendered to decedent was at all times proper and no negligence, gross negligence or violation of decedent's rights under the Public Health Law caused the claimed injuries or death. JHH also raises the affirmative defense that it undertook all care reasonably necessary to prevent and limit the deprivation and/or injury for which liability is asserted under PHL §2801-d.

In support of the motion, JHH submits the affirmation of Dr. Wolf-Klein, who is board certified in Geriatric Medicine. Dr. Wolf-Klein opines that the care and treatment rendered by JHH to decedent was at all times proper, that JHH and its staff did not depart from the standard of care, breach any duty owed to decedent or violate decedent's rights under any statutes or Public Health Law and that no act or failure to act by JHH caused or contributed to decedent's claimed injuries. She also opines that JHH undertook all care reasonably necessary to prevent and limit the deprivation and/or injuries for which liability is asserted under PHL§ 2801-d and that decedent's pressure sores and other "events at issue" were unavoidable and due to the progression of her dementia/Alzheimer's disease, which caused her overall health to decline.

Dr. Wolf-Klein notes, inter alia, that: (1) throughout decedent's admission and up through 10/27/08, Comprehensive Siderail Assessments and Falls Risk assessments were completed and appropriate interventions were in place to prevent falls, including keeping the bed at its lowest level, keeping the call light within easy reach and an ankle alarm on decedent; (2) throughout decedent's admission, JHH maintained a Weight Track Record and that until September/October,

decedent's weight was within her ideal body weight range (126-154lbs.); (3) throughout decedent's admission, nutritional evaluations were performed and decedent's hydration status was monitored via routine lab tests and skin checks; (4) in 2008, steps were taken to address decedent's nutrition and weight loss issues, including modifying her diet consistency and monitoring her food and liquid intake at every meal; (5) the bilateral heel pressure ulcers developed after decedent had been placed on bed rest for a suspected DVT; (6) the pressure ulcers that subsequently developed were properly treated at JHH and healed by the time decedent was discharged from JHH on December 10, 2008, or were smaller in stage and size than at the time they were initially appreciated; (7) decedent never developed an infection as a result of the pressure sores; (8) urinary tract infections are a common type of infection that can occur for a variety of reasons, without a causative factor; and (9) that an autopsy was never performed and decedent's death was never attributed to the care she received at JHH.

Plaintiff contends that JHH has failed to meet its prima facie burden because her complaint sounds in negligence and violation of decedent's rights under the PHL and JHH's expert addresses only the medical malpractice standard of care. In the event that the court finds that JHH has met its prima facie burden, plaintiff contends that the affidavits of her experts, Nurse Charlotte Sheppard and Dr. Ronald Roth, raise triable issues of fact as to whether JHH and its staff deviated from the standard of care and violated the following regulations: (1) 42 CFR §483.25(I) (j) (requires a facility to ensure that a resident maintains acceptable parameters of nutritional and hydration status); (2) 42 CFR §483.25 (h) (requires that a facility ensure that each resident receives adequate supervision and assistance devices to prevent accidents); (3) 42 CFR §483.25 (c)(1), (requires a facility to ensure that a resident who enters a facility without pressure

sores does not develop them unless the resident's clinical condition demonstrates that they were unavoidable); and (4) 42 CFR§ 483.25 (e)(1) (provides that a facility must ensure that a resident who enters the facility without a limited range of motion does not experience a reduction in range of motion unless the resident's clinical condition demonstrates a reduction in range of motion is unavoidable).

Nurse Sheppard opines that JHH and its staff "deprived or infringed" on decedent's nursing home rights by: (1) failing to properly address decedent's declining nutritional status, such as by revising the care plan, developing a schedule and/or program to assign staff members to provide the necessary level of care; (2) failing to ensure that decedent maintained acceptable parameters of body weight and protein levels by maintaining accurate records of her meal intake; (3) failing to ensure that decedent did not develop pressure sores; and (4) by failing to implement additional interventions to treat pressure sores that were present when decedent returned from MSH, such as a new topical treatment, additional offloading such as increased frequency of use of alternative positioning devices. She opines that the actions of JHH "as discussed above" violated: 42CFR § 483.25 (k)(3) (service provided by facility must meet professional standards of quality; 42 CFR §483.25 (resident must receive and facility must provide the necessary care and services to attain and maintain the highest practicable physical, mental, and psycho social well-being), 42 CFR §483.15(a) (facility must care for resident in manner that promotes maintenance or enhancement of each resident's dignity), 42 CFR §483.15 (facility must care for residents in manner and an environment that promotes maintenance or enhancement of each resident quality of life, and 42 CFR§ 483.30 (facility must have sufficient nursing staff to provide nursing and related services to attain or maintain the highest practicable physical, mental, and

psycho social well being of each resident (10 NYCRR§ 415.13).

Plaintiff also submits the affirmation of Dr. Roth (copy submitted to court is signed and notarized), who is board certified in Internal Medicine. Dr. Roth states that he reviewed the JHH records, MSH Hospice records for the admission of 12/10/08, photos of decedent's decubitus ulcers, the affidavit of Nurse Sheppard and decedent's death certificate. He opines that decedent based on the records he reviewed, decedent "suffered from SEVERE weight loss with no alternate nutritional approaches implemented, no proof that the staff provided the amount of feeding assistance required and inaccurate documentation regarding her meal intake" and that decedent "also suffered from severe dehydration identified on hospital presentation on 12/10/08 with no evidence of any alternative means of hydration implemented." He also notes that on hospital presentation on 12/10/08, decedent's urine was positive for an E. coli UTI with sepsis. He opines that decedent's fall on October 27 "resulted in an observable decline in her function and mobility resulting in right leg DVT with subsequent pressure ulcer development." He opines that "her ulcers caused by the neglect" [of JHH] "continued to progress, contributing to her ultimate death on 3/04/09" and that "All of the aforementioned injuries caused her significant pain and suffering, right up until and including the time of her death." He concedes that a mitigating factor is that decedent suffered from progressive Alzheimer's dementia, which would have eventually caused a decline in her physical, mental and functional mobility. However he opines that failures of the facility caused a premature worsening of her status "regardless of her diagnosis."

On a motion for summary judgment, it is the burden of the summary judgment proponent to demonstrate prima facie entitlement to judgment as a matter of law with evidence sufficient to

eliminate any material issue of fact; failure to do so requires denial of the motion regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hosp., 68 NY2d 320; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851). The burden then shifts to the party opposing the motion to demonstrate by evidentiary proof in admissible form that a triable issue of fact exists (Zuckerman v. City of New York, 49 NY2d 557). A court's task is issue finding rather than issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395) and the court must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact (Boyce v. Vazquez, 249 AD2d 724).

Despite plaintiff's contention to the contrary, the evidence presented is sufficient to establish, prima facie, JHH's entitlement to summary judgment. Dr. Wolf-Klein specifically addresses the allegations of negligence, PHL violations, wrongful death and claimed injuries. She also addresses the allegations in the complaint that JHH failed to conform to good and accepted standards of care in providing treatment, diagnosis and medical services (paragraph "22" (u) and (v)). Thus, the burden shifted to plaintiff to present competent evidence sufficient to demonstrate the existence of a material issue of fact. She has failed to meet this burden. While Nurse Sheppard opines that JHH deprived decedent of various rights under PHL §2801-d, the claims against JHH constitute an integral part of the process of rendering medical care and treatment to decedent. She fails to address the steps that were taken to address decedent's nutrition and hydration needs, the fact that decedent's weight was monitored monthly, that decedent's weight was within her ideal body weight (124-154) or how the treatment she claims should have been rendered would have prevented the claimed injuries. In addition, she is not

competent to render an opinion that the alleged negligence or deprivation of rights caused the claimed injuries and death (Abalola v. Flower Hospital, 44 AD3d 522).

While Dr. Roth is qualified to offer an opinion regarding the care and treatment provided by JHH and the claimed injuries and death, he fails to address the records which show that decedent's weight and nutrition was regularly evaluated during 2008 and the interventions that were implemented to address decedent's declining weight, risk of falls and risk of pressure sores. He also fails to identify specific departures, what other actions should have been taken, and how the results would have been different had such actions been taken (cf. Negron v. St. Barnabas Hospital, 105 AD3d 501). He does not comment on the treatment rendered at MSH from October 31through November 10, 2008 and does not address Dr. Wolf-Klein's opinion that the decubitus ulcers that formed did not become infected or her opinion that they were clinically unavoidable. Dr. Roth failed to review the Schervier records, which indicate that on admission, decedent was unresponsive and not arousable to verbal or painful stimuli. This renders his opinion that the alleged injuries caused decedent pain and suffering up until the time of her death and that the ulcers "caused by the neglect" of JHH continued to progress and contributed to decedent's death, speculative, conclusory and insufficient to raise a triable issue of fact to defeat JHH's motion. Accordingly, JHH is entitled to summary judgment dismissing the complaint.

Movant shall serve a copy of this order with notice of entry on the Clerk of the Court, who shall enter judgment dismissing the complaint.

This constitutes the decision and order of the court.

Dated: September 23, 2014

STANLEY GREEN, J.S.C.