

Austin v Jewish Home & Hosp./Bronx Div.
2015 NY Slip Op 30581(U)
March 12, 2015
Sup Ct, Bronx County
Docket Number: 304196/10
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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REYNOL AUSTIN, as Administrator of the Estate of
LENORA JACKSON, deceased,

Plaintiff(s),

INDEX No.: 304196/10

-against-

THE JEWISH HOME AND HOSPITAL/BRONX DIVISION
HARRY AND JEANETTE WEINBERG CAMPUS,

Defendant(s)

DECISION

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HON. STANLEY GREEN:

The motion by Jewish Home Lifecare, Harry and Jeanette Weinberg Campus, Bronx (Jewish Home Lifecare) s/h/a The Jewish Home and Hospital/Bronx Division, Harry and Jeanette Weinberg Campus, for an order pursuant to CPLR §3212: (1) dismissing all claims of negligence and violation of PHL §2801-d that are time-barred; (2) dismissing all claims for punitive damages asserted pursuant to the common law and PHL § 2801-d; and (3) dismissing all claims for attorneys fees and costs is granted only to the extent that: (1) all claims for personal injuries in the bill of particulars allegedly sustained as a result of falls that occurred prior to May 2007 or otherwise are dismissed and (2) all claims for punitive damages under common law are dismissed.

Plaintiff claims that as a result of defendants' negligent and reckless conduct in the care and treatment of decedent, decedent suffered a fall on August 15, 2009 and fractured her hip, causing her to become immobile and leading to the development of decubitus ulcers, infections

and death.

Decedent was a resident of JHL from January 2004 through August 15, 2009. Decedent did not suffer any falls during the first one and a half years of her admission to JHL, but over the course of the admission, she suffered twelve unwitnessed falls. All of the falls occurred in her room and four of the falls occurred in the eight months prior to the fall on August 15, 2009. Except for the final fall on August 15, 2009, only one other fall (on February 21, 2009) resulted in an injury to decedent and that injury was a "small bump" to the occipital area of her head. Decedent only suffered one decubitus ulcer at JHL (in 2005) and it healed within a few weeks.

Plaintiff alleges that JHL was negligent and violated decedent's nursing home rights under PHL §2801-d and various regulations and, as a result, decedent suffered a fractured hip and became immobile, leading to the formation of decubitus ulcers, infection and death.

In the bill of particulars, plaintiff alleges that JHL was negligent and violated decedent's nursing home rights, not only with regard to the fall on August 15, 2009 but also with regard to falls that occurred on: May 22, 2005, June 4, 2005, June 17, 2005, August 13, 2005, August 19, 2005, April 30, 2006, November 20, 2006 and February 10, 2007.

Plaintiff also claims that as a result of JHL's negligence and willful and reckless disregard for decedent's common law and statutory rights, she is entitled to punitive damages and attorneys' fees.

JHL seeks an order dismissing all claims related to falls that occurred prior to May 24, 2007 on the ground that they are barred by the statute of limitations and dismissal of all claims for punitive damages on the ground that there is no evidence of willful or reckless conduct that

would support an award of punitive damages.

In support of the motion, JHL submits copies of the pleadings, which show that this action was commenced by filing on May 24, 2010, and the affidavit of Marvette Lowrie-Morris, R. N., who is a Licensed Nursing Home Administrator with more than 26 years of experience working in hospitals and skilled nursing facilities. Nurse Lowrie-Morris opines that JHL's care and treatment of decedent was reasonable at all times and that the record is devoid of any proof that JHL intentionally, willfully or recklessly harmed or deprived decedent of her rights as a nursing home resident. Nurse Lowrie-Morris notes that JHL assessed decedent as a fall risk at the time of her initial admission, that her care plan was properly updated on a regular basis and after each unwitnessed fall, and that the care plans included all reasonable and appropriate interventions to reduce the risk of falls. She notes that at the time of decedent's fall on August 15, 2009, a nurse and two CNA's were assigned to decedent's unit and the CNA accountability records document that bed and chair alarms were in place, two half rails were in place and decedent was toileted and assisted to bed rest after dialysis. She opines that JHL provided adequate supervision and assistive devices to decedent and explains that short of impermissible restraints, no restraint has been proven one hundred percent effective in preventing falls.

Nurse Lowrie-Morris opines that decedent's nutritional status was properly addressed throughout her admission and she notes that decedent developed only one decubitus ulcer while residing at JHL, in July 2005, which healed within a few weeks. She opines that there is no evidence that JHL intentionally or recklessly inflicted harm on decedent or acted in willful or reckless disregard of decedent's lawful rights as a nursing home resident.

Plaintiff contends that the facts show that JHL recklessly disregarded decedent's nursing

home rights by failing to provide her with a mattress alarm or floor mats. Plaintiff also contends that JHL has failed to meet its prima facie burden with regard to the claims barred by an applicable statute of limitations, failed to demonstrate that plaintiff is not entitled to statutory or common law punitive damages and that the affidavit of Dr. Dacunha raises triable issues of fact as to plaintiff's entitlement to statutory and/or common law punitive damages.

Dr. Dacunha opines that the interventions taken by JHL in the care and treatment of decedent establish a conscious, willful and complete disregard of her nursing home rights. He notes that decedent was known to have physical and mental conditions and limitations and that the testimony of the LPN and CNA who found decedent on the floor of her room on August 15, 2009 show that decedent was only sometimes cooperative and had dementia and was not always oriented to place and time. He opines that JHL demonstrated a conscious disregard for decedent's right to proper care by failing to provide a mattress pad alarm that would go off when the body weight comes off and by failing to have decedent on the fall precaution list that required visual inspections every 15-30 minutes. He opines that the CNA staffing was also below the state minimum standards as there were not two CNA's assigned to decedent's unit.

With regard to decubitus ulcers, Dr. Dacunha notes that prior to the August 15, 2009 accident, decedent was a low risk for decubitus ulcers, but due to the fall, she became immobile and a high risk for developing decubitus ulcers, which ultimately lead to infection and death at another facility.

Despite plaintiff's contention to the contrary, the evidence presented is sufficient to meet JHL's prima facie burden on the motion. The pleadings annexed to the motion show that plaintiff commenced this action by filing of the summons and complaint on May 24, 2010.

Therefore, any claims for injuries allegedly sustained as a result of falls or incidents prior to May 24, 2007 are barred by the statute of limitations (CPLR §214(5); Zeides v. Hebrew Home for the Aged, 300 AD2d 178). The admissibility of evidence of these other falls at trial is not addressed here.

With regard to common law punitive damages, they are awarded when the conduct of the party being held liable evidences a high degree of moral culpability (Giblin v. Murphy, 73 NY2d 769). They are not intended to compensate a plaintiff, but instead serve to punish the wrongdoer and deter that individual and those in similar situations from engaging in the same behavior in the future (Ross v. Louise Wise Servs., Inc., 8 NY3d 478). To justify the imposition of punitive damages, the conduct must transcend normal negligence or malpractice and must be exceptional, such as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that indicates an improper motive or vindictiveness or with reckless or wanton disregard of safety or rights (Id).

Under the PHL §2801-d, where there has been a finding that a patient has been deprived of a right or benefit and has been injured as a result of that deprivation, unless there is a finding that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient, compensatory damages may be assessed, and where the deprivation of any such right or benefit is found to have been wilful or in reckless disregard of the lawful rights of the patient, punitive damages may be assessed.

Here, the evidence presents a question of fact as to whether, given decedent's history of falls and dementia, JHL violated the patient's rights by failing to have a bed alarm or floor mats which would have prevented her fall on August 15, 2009 or the resulting injuries. There is thus a

question as whether the defendant acted wilfully or recklessly under the Public Health Law with respect to these two issues, entitling plaintiff to punitive damages thereunder. However, there is nothing in this record to support plaintiff's claim for common law punitive damages.

Accordingly, plaintiff's claims for punitive damages under the common law are dismissed as are all claims set forth in the bill of particulars for damages arising out of anything but the fall on August 15, 2009.

Insofar as JHL seeks dismissal of any claims for attorneys' fees and costs, pursuant to PHL2801-d (6), if a judgment is awarded in an action under this section, the court may in its discretion, award attorneys' fee. Therefore, the motion to dismiss the claim for attorneys' fees is left for the trial court to decide.

This constitutes the decision and order of the court.

Dated: March 12, 2015



STANLEY GREEN, J.S.C.