Dunlop v County of Suffolk
2015 NY Slip Op 31009(U)
May 26, 2015
Supreme Court, Suffolk County
Docket Number: 19612-2008
Judge: James C. Hudson

Short Form Order

Supreme Court of the County of Suffolk
State of New York - Part XL

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

x----------x

JASON DUNLOP as Administrator of the Estate of JEFFREY DUNLOP, Deceased,

Plaintiff,

COUNTY OF SUFFOLK and SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES,

Defendants.

x----------x

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SEQ. NO.: # 001 -MD

DELL LITTLE TROVATO
& VECERE, LLP
Attorneys for Plaintiff
5 Orville Drive, Suite 100
Bohemia, NY 11716

CHRISTINE MALAFI, ESQ.,
Suffolk County Attorney
Attorney for Defendants
By: Christopher A. Jeffreys, Esq.
100 Veterans Memorial Highway
Hauppauge, NY 11788-0099

Upon the following papers numbered 1 to 21 read on this motion for Summary Judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 12-19; Replying Affidavits and supporting papers 20-21; Other Memorandum of Law 22; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendants County of Suffolk and the Suffolk County Department of Social Services for Summary Judgment dismissing the complaint is denied.

The plaintiff Jason Dunlop, as administrator of the estate of his brother, Jeffrey Dunlop, commenced this action on June 9, 2008. The complaint, as amplified by the bill of particulars, alleges that the Suffolk County Adult Protective Services (hereinafter APS) was reckless, careless, negligent and wanton in its disregard of the health and welfare of the

plaintiff's decedent and in its failure to provide protective services, resulting in his death. The defendants have interposed an answer with affirmative defenses. Discovery has been completed, the case certified ready for trial and the note of issue filed.

The defendants now move for summary dismissal of the complaint on the basis that the County of Suffolk and the Department of Social Services are immune from civil liability pursuant to Social Services Law § 473. In support thereof, movants submissions include the pleadings; the verified bill of particulars; a copy of the APS file; and the deposition testimony of plaintiff Jason Dunlop, the decedent's brother, and Nirit Holtz, on behalf of the defendants.

Social Service Law § 473 requires that social services officials provide protective services for individuals who due to mental or physical impairments, are unable to manage their own resources, carry out the activities of daily living, or protect themselves from self neglect, without assistance from others and who have no one available who is willing and able to assist them responsibly. Self neglect is defined as "an adult's inability, due to physical and/or mental impairments to perform tasks essential to caring for oneself, including but not limited to, providing essential food, clothing, shelter and medical care, obtaining goods and services necessary to maintain physical health, mental health, emotional well-being and general safety, or managing financial affairs." (Social Services Law § 473 6 (f)).

Social Services Law § 473 (1) requires that the services provided by the Department of Social include:

> (a) receiving and investigating reports of seriously impaired individuals persons who may be in need of protection;
>
> (b) arranging for medical and psychiatric services to evaluate and whenever possible, to safeguard and improve the circumstances of those with serious impairments; . . .
>
> (d) providing services to assist such individuals to move from situations which are, or are likely to become, hazardous to their health and well-being.

As to the defendants' assertion of immunity from liability, Social Service Law § 473 (3) provides that:

> [a]ny social services official or his designee authorized or required to determine the need for and/or provide or arrange for the provision of protective services to adults in accordance with the provision of this section, shall have immunity from any civil liability that might otherwise result by reason of providing such services, provided such official or his designee was acting in the discharge of his duties and within the scope of his employment, and that such liability did not result from the willful act or gross negligence of such official or his designee.

The immunity from liability provided under Social Services Law § 473 may be defeated by showing that the social services official was guilty of misconduct or gross negligence (*see* ***Rhine v Chase***, 309 AD2d 796, 765 NYS2d 648 [2d Dept 2003]).

The parties' submissions establish that on September 28, 2006, the decedent's stepmother, Virginia Miller, contacted APS, reporting that her 40 year old stepson Jason Dunlop lived alone in an apartment that he had shared with his father, who died in April of 2006. She stated Dunlop was told to find alternative housing, as he was living in a senior citizen housing complex, and his funds were being depleted. She reported that Dunlop weighed in excess of 600 pounds, his legs were black, he had difficulty ambulating, he stayed in bed all day and that his apartment was in a filthy, cluttered condition. Miller asserted that she and Dunlop's siblings were at a loss as to how to help him and requested intervention and assistance from APS in obtaining services.

The APS intake disposition summary of September 28, 2006 indicates that the decedent was physically incapacitated and at a risk of harm due to neglect of his own basic needs, his untreated medical conditions and environmental hazards. The case notes of his caseworker, Geetha Datharti, reflect that at the first visit on October 3, 2006, Dunlop was unclothed except for a blanket covering the lower part of his body, he weighed over 600 pounds and he became emotional when discussing his father. It was also determined that Dunlop had no medical insurance and would not be eligible for Medicare for another four or five months.

In the Protective Services for Adults Assessment/Service Plan, dated December 5, 2006, Datharti noted that Dunlop was physically impaired, acutely ill due to obesity, needed a cane or walker to ambulate and could not wear "full clothes". She also noted that Dunlop was mentally impaired due to severe isolation and that he was unable to act due to a fear or irrational belief. The APS worker documented that Dunlop had a reduced capacity for self care and protection due to self neglect of bed sores and other ulcerated sores. Finally, the

worker documented that he was in danger of serious harm due to accumulated debris. The service plan provided that APS would assist Dunlop with finding proper housing and that medical services would be offered to address his self neglect including bedsores and other ulcerated sores. In addition, Dunlop was to enroll in a bariatric residential program to address his obesity.

The APS record indicates that during the five months of APS involvement with Dunlop, the two successive APS caseworkers assigned to him either visited him at his home or spoke with him by phone on approximately sixteen occasions. The record reflects that Dunlop was given the phone numbers for nurses who could perform a PRI to assess him for possible bariatric surgery. Thereafter, on February 27, 2007, the APS worker assigned to Dunlop advised him that his case was being closed.

After closing the APS case, Nirit Holtz his second APS caseworker noted on March 28, 2007 in the Protective Services for Adults Review/Update Assessment/Services Plan:

> Client ambulates, and drives his own car. He manages to get to his medical appointments by himself, and shops by himself. Client has been given resources, which he has not chosen to avail himself of. Client has friends and family members, who have assisted him with both house and cleaning efforts, and future apartment referrals.

It is undisputed that on March 8, 2007, Dunlop died of congestive heart failure due to cardiomyopathy and morbid obesity.

At her deposition on January 20, 2011, Holtz admitted that although Dunlop was allegedly under the care of a Dr. Madonia, she never offered to contact his doctor regarding his medical condition or the proposed bariatric surgery and she never secured the PRI nursing assessment. She asserted that Dunlop was "lucid and intelligent enough to follow through" as evidenced by his online application for Medicare. Holtz acknowledged that for the entire duration of the APS case through the date on which his case was closed, Dunlop had no health insurance in effect. She stated that they were waiting for Medicare to be in effect to pay for the PRI, psychiatric services and for the treatment of his ulcerated sores by a physician. Although he was without medical insurance for an extended period of time, she never gave Dunlop, who was a Navy veteran, information on the availability of medical benefits through the Veterans Administration. She stated she didn't "feel he was incapable of caring for himself".

At her deposition, Holtz acknowledged that although on occasion, Dunlop sobbed and was depressed about his father's death and that DSS has a mechanism to "bring in" a professional if a caseworker deems an individual needs psychiatric help, she never asked a social worker or other person trained in psychology, psychiatry or from the Department of Social Services to evaluate Dunlop. Notably Holtz admitted that she did not refer Dunlop for psychotherapy until February 27, 2007, the day she closed his APS case, eleven days before he died. Moreover, Holtz conceded that although she asked for the phone numbers of family members, and Dunlop provided her with the numbers for his brother, sister, and a cousin, she never called or spoke with them. When asked why she asked for the phone numbers, Holtz replied "[j]ust for the record." and "[i]ts a matter of what I do. I ask about family and got the names and phone numbers."

Here, the defendants failed to meet their burden of establishing prima facie entitlement to summary dismissal of the complaint on the basis that they were immune from liability. The immunity from liability set forth in Social Services Law § 473 (3) may be defeated by a showing that the social services official was guilty of misconduct or gross negligence (*see* ***Rhine v Chase,*** 309 AD2d 796, 765 NYS2d 648 [2d Dept 2003]). Here, defendants' submissions raise material issues of fact as to whether the APS caseworkers assigned to Dunlop failed to exercise "even slight care" or exhibited a "complete disregard" for his safety and well being (***Carossia v City of New York,*** 39 AD3d 429, 835 NYS2d 102 [1st Dept 2007]), resulting in his ultimate demise. Indeed, the APS case record and the testimony of Dunlop's caseworker raise issues of fact as to whether APS extended any protective services to Dunlop within the meaning of Social Services Law § 473 (1) for the duration of its involvement with him, other than providing a turkey at Christmas, phone numbers for nurses and finally on the day it closed his case, a referral to a mental health agency. In addition, although APS noted, when closing Dunlop's case, that he had family resources available to him, this is belied by the case record which reflects that in the first instance, a lack of family resources was the impetus for the referral to APS by his stepmother, and by the caseworker's admission that she never communicated with any of Dunlop's family members. Finally, the notations in the APS case record that Dunlop was acutely ill due to morbid obesity and open ulcerated bedsores and his caseworker's admission that she never contacted his doctor or sought to assist him in securing medical or psychiatric care, raise triable issues of fact as to whether omissions by APS amounted to misconduct or gross negligence by its alleged failure to exercise "even slight care" or a "complete disregard" for Dunlop's safety and well being, ultimately leading to his demise (*see* ***Carossia v City of New York*** *supra).*

Moreover, the immunity from liability provided in Social Service Law § 473 may be defeated by the existence of a special relationship between the plaintiff's decedent and the

municipality; the elements required to establish a special relationship are: the assumption of an affirmative duty on the part of the municipality to act on behalf of the injured party; knowledge by the municipality's agents that inaction may lead to harm; direct contact between the municipality's agents and the injured party; and the injured party's justifiable reliance on the municipality's affirmative undertaking (***Palaez v Seide,*** 2 NY3d 186, 778 NYS2d 111 [2004]; ***Ranger v County of Suffolk,*** 41 AD3d 813, 839 NYS2d 168 [2d Dept 2007]). Here, movants failed to establish, as a matter of law, the lack of a special relationship with the plaintiff's decedent. Rather, the movants' submissions raise an issue of fact as to whether a special relationship existed and whether APS assumed, through promises or actions, an affirmative duty to act on Dunlop's behalf; whether the caseworker knew that inaction could lead to harm; and whether Dunlop justifiably relied on an affirmative undertaking by APS to assist him with his dire medical and psychological needs. (*see* ***Coleson v City of New York,*** 24 NY3d 476, 999 NYS2d 810 9 [2014]). The issue of whether a special relationship exists is generally a question for the jury (*see,* ***Coleson v City of New York*** *supra;* ***Ranger v County of Suffolk,*** *supra).*

In view of the foregoing, the defendants' motion for summary dismissal of the complaint is denied.

DATED: MAY 26, 2015

HON. JAMES HUDSON, A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION