

**Delfi v Association for the Help of Retarded Children
(AHRC)**

2015 NY Slip Op 32186(U)

October 22, 2015

Supreme Court, Bronx County

Docket Number: 350372/2010

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

JUAN DELFI, by his Mother and Natural Guardian,
EDDIE ESTHER PERALES MERCADO and
EDDIE ESTHER PERALES MERCADO,
Individually,

INDEX NUMBER: 350372/2010

Plaintiffs,

-against-

ASSOCIATION FOR THE HELP OF RETARDED
CHILDREN (AHRC) d/b/a ACCESS COMMUNITY
HEALTH CENTER, NEW YORK AMBULETTE
TRANSPORT, INC.,

Present:
HON. ALISON Y. TUITT
Justice

Defendants.

The following papers numbered 1 to 4,

Read on this Defendants' Motion and Plaintiff's Cross-Motion for Summary Judgment

On Calendar of 8/10/15

Notices of Motion- Exhibits, Affirmations 1, 2

Affirmation in Opposition 3

Upon the foregoing papers, defendant Association for the Help of Retarded Children's (hereinafter "AHRC") motion and plaintiffs' cross-motion for summary judgment are consolidated for purposes of this decision.

The within action involves plaintiffs' claim that Juan Delfi was caused to suffer personal injuries as a result of defendant's negligent supervision of him. Plaintiff is mentally retarded and has been diagnosed with progressive dementia. AHRC is a federally qualified health care center which serves the acute and chronic health care needs of community members, including indigent adults and children with and without developmental disabilities. One of its specialties is health care and dental care for people with intellectual and developmental disabilities. Juan Delfi was a patient of AHRC and received medical services from defendant for

over five years prior to the date of the incident. On March 18, 2010, the plaintiff wandered off from defendant's facility and was not found until days later. Plaintiffs allege that the defendant's employee left the plaintiff alone and unsupervised, outside of defendant's facility, for half an hour while defendant's receptionist went to lunch. It was during this time that the plaintiff wandered off.

Eddie Esther Perales Mercado, Juan Delfi's mother, testified at her deposition that she had always accompanied her son to defendant's facility until about three months prior to the date of the incident at which time she could no longer go with him due to health problems. She thereafter permitted her son to go to the facility by ambulette which would pick him up and take him to the clinic, and then return him home. Plaintiff testified that she had informed the receptionist at AHRC, either Penny or Vanessa, that she was unable to continue to accompany her son to the facility and asked them to watch her son until he got into the ambulette. This was also the understanding she had with the ambulette driver, that he would pick up Juan inside the clinic and take him home where she would be waiting to meet the ambulette. Plaintiff testified that her son was mentally retarded and had been receiving related services since he was 11 years old. He could only dress with help and could not go to the store by himself, take public transportation or even count money.

On the date of the incident, Juan Delfi arrived at defendant's facility by ambulette by himself for an appointment which ended around 10:45 a.m. The receptionist, Vanessa Figueroa, testified that she told the plaintiff to have a seat and wait for the ambulette which arrived at approximately 11:30 a.m. The plaintiff was in the bathroom at the time, and after waiting a few minutes, the driver left the facility to pick up another patient and told her that he would be back. When the plaintiff came out of the bathroom, she told him the ambulette would return for him and plaintiff then waited outside in front of the main entrance door. Ms. Figueroa went to lunch and Flor Cardoa took over the reception desk. When Ms. Figueroa went to lunch, plaintiff was still waiting outside. Sometime between the time Ms. Figueroa left and returned from lunch, plaintiff was no longer at the facility. Juan Delfi had wandered off the premises and his mother testified that he was missing for three days, until he was found by a taxi driver laying on the ground bleeding and was taken to the hospital.

Defendant argues that it should be granted summary judgment because it was not responsible for supervising the plaintiff. Additionally, defendant argues that plaintiff had never wandered off prior to the date of the incident and no one from the facility had ever been advised that plaintiff had a history of wandering off if he was to be left unsupervised. Defendant claims that Ms. Mercado had been advised by AHRC staff that they were not responsible for supervising or monitoring plaintiff while he waited for the ambulette.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof

in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the “burden of production” (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

In D.T. v. Rich, 24 N.Y.3d 1103 (2014), the Court of Appeals set forth the standard for an institution caring for a minor as “a duty to provide the degree of care and supervision that a reasonable parent would provide”. In, D.T., the infant plaintiff, “a neglected 13-year-old child” at a residential facility operated by defendant left the facility without permission and was injured when struck by a motor vehicle. The Court held that it is up to the jury to decide if a parent of ordinary prudence in similar circumstances would have necessarily employed different means to protect plaintiff under the facts of that case. In the instant matter, given that plaintiff is mentally incapacitated, the same duty applies. In Martinez v. Moroldo, 553 N.Y.S.2d 751 (1st Dept. 1990), a seven year old severely retarded boy was injured when the van which had been engaged to transport him from school to home dropped him off at the front of his residence and no one there to meet him. The bus driver, not complying with specified procedures, merely watched him walk into the lobby of the building and drove off. The plaintiff wandered back out to the street and was struck by a vehicle. The First Department held that the infant plaintiff’s mother’s testimony denying that she ever provided permission to the bus company to deliver her son in the absence of another person being on the scene was sufficient to raise a triable issue of fact. In Dawn VV v. State, 850 N.Y.S.2d 246 (3d Dept. 2008), the Court held that a retarded patient was entitled to judgment on liability against the defendant facility as

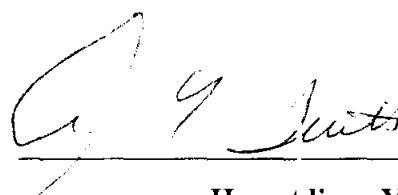
Defendant was under a duty to exercise reasonable care to protect mentally disabled patients at its facilities and prevent them from being harmed (see Harris v. State of New York, 117 A.D.2d 298, 303, 502 N.Y.S.2d 760 [1986]). Operators of medical and residential facilities have a duty to safeguard patients and residents, even from injuries inflicted by third parties, “measured by the capacity of the patient [or resident] to provide for his or her own safety” (N.X. v. Cabrini Med. Ctr., 97 N.Y.2d 247, 252, 739 N.Y.S.2d 348, 765 N.E.2d 844 [2002]). The degree of reasonable care owed to such individuals “is measured by the patient's physical and mental ailments as known to the hospital [or facility] officials, physicians and employees”.

The duty of care owed to the plaintiff herein is akin to the standard of care that "... a teacher owes it to his charges to exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances." Mirand v. City of New York, 84 N.Y.2d 44 (1994) quoting Hoose v. Drumm, 281 N.Y. 54 (1939). The duty "... derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians." Id. at 49; Shante D. v. City of New York, 598 N.Y.S.2d 475 (1st Dept.1993). Generally, whether the school's actions were adequate and reasonable and, if they were not, whether the negligence was the proximate cause of plaintiff's injuries, are questions of fact for a jury. Garcia v. City of New York, 646 N.Y.S.2d 508 (1st Dept.1996). This heightened standard of care, that of the reasonably prudent parent, should also be applied to AHRC with respect to plaintiff Juan Delfi as it was aware of his cognitive defects and diagnosis of mental retardation.

In the instant matter, there are questions of fact that preclude summary judgment. The evidence shows that defendant was aware that plaintiff was diagnosed with "Moderate Mental Retardation" since "early childhood" and that he had a propensity to wander as its own report dated August 6, 2009 provides that "Juan is not able to travel independently and has to be monitored because he will wander away". In a report dated December 16, 2005, AHRC notes that "Juan did not pass the travel safety course because he was easily coaxed into traveling off his route with a stranger during travel training." A further AHRC report dated January 8, 2002 notes that plaintiff is "unable to travel independently". These records raise an issue of fact as to whether defendant was aware that plaintiff would wander off if not supervised. Moreover, Ms. Mercado's testimony that she had informed AHRC's receptionist that her son needed to be supervised until he got into the ambulette raises further issues of fact. In this case there certainly was "evidence of a potential for harm" sufficient to raise a question of fact for a jury. Shante D., *supra*. This court cannot, however, determine AHRC'S liability as a matter of law. Accordingly, the motion and cross-motion for summary judgment are denied.

This constitutes the decision and Order of this Court.

Dated: 10/22/15



Hon. Alison Y. Tuitt