

Giglio v MMR Care Corp
2019 NY Slip Op 31566(U)
April 22, 2019
Supreme Court, Queens County
Docket Number: 708063/2016
Judge: Leslie J. Purificacion
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LESLIE J. PURIFICACION IA Part 39
Justice

THERESA GIGLIO, As Administratrix Of x
the Estate Of THERESA ARCHIPOLO,
deceased,

Index
Number 708063 2016

Plaintiff,

Motion
Date December 6, 2018

-against-

Motion Seq. No. 5

MMR CARE CORP d/b/a DALEVIEW CARE
CENTER, JDS HEALTH MANAGEMENT
LLC, and ROBERT OSTREICHER,

Defendants.

FILED
APR 30 2019
COUNTY CLERK
QUEENS COUNTY

The following papers EF numbered below read on this motion by the defendants for summary judgment dismissing the complaint against them and on this cross motion by the plaintiff for summary judgment on her complaint

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	65-86
Notice of Cross Motion - Affidavits- Exhibits	90-94
Answering Affidavits - Exhibits	95-98, 100
Reply Affidavits	101-105

Upon the foregoing papers it is ordered that the motion is denied and the cross motion is denied.

I. Background

The plaintiff, Theresa Giglio, as the administratrix of the estate of Theresa Archipolo, brought the instant action asserting claims for breach of contract, negligence, and violations of the Public Health Law arising from the care and treatment received by Archipolo while a resident at defendant Daleview Care Center in 2015 (Daleview).

The plaintiff began this action by the filing of a summons and a complaint on July 11, 2016. The plaintiff filed a note of issue on April 27, 2018, but discovery has continued while the case is on the trial calendar. The case will be in the Trial Scheduling Part on June 5, 2019.

II. The Facts

According to records of the Amityville Heart Center dated April, 2011, Archipolo stated that she had been smoking three packs of cigarettes a day for sixty years. She was admitted to St. Joseph's Hospital in February, 2014 suffering from respiratory failure. While at Winthrop University Hospital in March, 2014, Archipolo's diagnoses included congestive heart failure, hypoxemia, chronic airway obstruction, cirrhosis of the liver, diabetes mellitus, afib, and septic shock. Entries in Winthrop's records mentioned Archipolo's refusal to cooperate in bipap oxygenation. (Biilevel positive airway pressure, commonly known as "bipap" or "bpap," is a type of ventilator—a device that helps with breathing. The patient wears a mask or nasal plugs through which the machine supplies pressurized air into his or her airways.) In May and June 2015, St. Joseph's Hospital again admitted her for, inter alia, respiratory problems. On or about August 21, 2015, approximately one week prior to her admission to defendant Daleview, Archipolo received treatment again at St. Joseph's Hospital where she was assessed with dementia, confusion, shortness of breath, increased fluid retention, and fecal incontinence,

Archipolo's family placed her in defendant Daleview where she resided from August 27, 2015 through October 10, 2015, a period of 45 days. Beginning in or about late September, 2015, the staff reported that Archipolo had become non-compliant, refused to use a call bell for bathroom assistance, and refused the use of a bipap mask. On September 1, 2015, Dr. Yuri Fink examined Archipolo and then discussed her poor prognosis with her family. On October 10, 2015, the day that Archipolo died, the nurse's progress notes indicated that she was alert and responsive at 6:00 AM. But at approximately 6:25 AM, the staff found Archipolo to be unresponsive, and they immediately notified supervisors and a physician. The nurse's notations on October 10, 2015 indicated that Archipolo was in no apparent distress, was alert, responsive, and the bipap mask on her face.

Archipolo died at Daleview at or around the age of 85 as a result of atherosclerotic heart disease and chronic obstructive pulmonary disease according to the death certificate issued by Dr. Fink.

III. The Legal Framework

Public Health Law § 2801-d, “Private actions by patients of residential health care facilities,” provides in relevant part: “ 1. Any residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation, except as hereinafter provided. For purposes of this section a “right or benefit” of a patient of a residential health care facility shall mean any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation, where noncompliance by said facility with such statute, code, rule or regulation has not been expressly authorized by the appropriate governmental authority. No person who pleads and proves, as an affirmative defense, that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury for which liability is asserted shall be liable under this section. For the purposes of this section, “injury” shall include, but not be limited to, physical harm to a patient; emotional harm to a patient; death of a patient; and financial loss to a patient.”

Pub. Health Law § 2803-c, “Rights of patients in certain medical facilities,” provides in relevant part: “e. Every patient shall have the right to receive adequate and appropriate medical care, to be fully informed of his or her medical condition and proposed treatment unless medically contraindicated, and to refuse medication and treatment after being fully informed of and understanding the consequences of such actions.”

Public Health Law § 2801-d, expands the existing remedies for the violations of important rights which do not cause damages of sufficient monetary value to make litigation worthwhile. (*See, Doe v. Westfall Health Care Ctr., Inc.*, 303 AD2d 102, [4th Dept 2002].) “Liability under Public Health Law § 2801–d is not based on a deviation from accepted standards of medical practice or a breach of a duty of care . Rather, liability under the statute contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule, subject to the defense that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient.” (*Cornell v. Cty. of Monroe*, 158 AD3d 1151, 1152 [4th Dept. 2018].)

The remedies provided by PHL§ 2301–d are supplemental to any other remedies available to a patient by law or regulation. (*See, Kash v. Jewish Home & Infirmary of Rochester, N.Y., Inc.*, 61 AD3d 146 94th Dept 2009].) “ A plaintiff need not choose

between traditional tort causes of action and a section 2801–d cause of action but, rather, may pursue both ***.” (*Kash v. Jewish Home & Infirmary of Rochester, N.Y., Inc., supra*, 146.)

IV. The Affirmation of Cameron Hernandez, MD (The Plaintiff’s Expert)

Hernandez states: “ It is my opinion, within a reasonable degree of medical certainty, that the registered nurses, the staff nurses and nurse’s aides, as well as the administration, directly violated the rights guaranteed to nursing home residents of long term care facilities under the Federal and State laws, known in the vernacular as the nursing home statutes.” (¶ 3.)

According to Hernandez, Daleview’s own records show that on admission Archipolo required oxygen therapy “24/7.” However, the defendants failed to provide necessary respiratory therapy to improve cardiac function. Daleview’s “Respiratory Assessment Flow Sheets ” show that she did not adequately receive overnight bipap. The staff was not diligent in seeing that she got overnight bipap. “The result was the contribution of untreated respiratory distress, both acute and chronic in this patient, to a cardiopulmonary arrest.” (¶8.) Although Daleview’s notes indicate Archipolo’s non-compliance with respiratory therapy, this does not excuse the nursing staff’s failure to take into account the patient’s dementia and failure to contact the doctor when difficulties were encountered. Daleview also violated the nursing home statutes by failing to have a respiratory therapist on its staff.

The nursing home did not properly care for Archipolo in her diabetic conditon. There was a violation of Archipolo’s right to recive appropriate nutrition. Daleview violated the nursing home statutes by not providing her with a nutrition assessment or an endocrinology assessment which the family had requested and which was ordered after she had suffered multiple episodes of hypoglycemia and hyperglycemia while in the nursing home. “Moreover, the inappropriate provision of sugared foods by Daleview specifically violated Mrs. Archipolo’s right to receive adequate and appropriate medical care for the failure to follow the physician orders for the control of blood sugar levels in a known brittle diabetic.” (¶ 15.) “Dr. Fink admitted at the time of his deposition that he prescribed Ensure pudding as supplements, yet he did not even know whether these supplements contained sugar.” (¶16.) Archipolo received cookies and desserts containing sugar on a daily basis.

The nursing staff just doubled and tripled Archipolo’s diapers, rather than changing them as required or getting her out of bed as ordered by a physician. The staff failed to respond to the call bell 95% of the time, and failed to bathe the patient. She went ten days without a bath after admission, and she received no baths during the last ten days of her life.

According to Theresa Giglio, her mother developed a raw, red rash that extended from her lower back to the top of her buttocks, which Hernandez states “is the very definition of stage II sacral ulcer— no skin break, but raw redness to the skin.” (§18.) There was a failure to perform skin assessments and to provide needed care for the skin ulcer.

V. The Affirmation of Michael M. Fishkin, DO (The Defendants’ Expert)

Fishkin states: “It is my opinion that the practices and protocols utilized by defendants MMR Care Corp. d/b/a Daleview Care Center, JDS Health Management LLC and Robert Ostreicher at all times conformed to accepted medical and nursing home practice, and nothing the facility did, or failed to do, was a proximate cause of any injury sustained by plaintiff decedent Theresa Archipolo, or her ultimate death.” (§15) The documentation of the nursing staff and rehabilitation staff supports the conclusion that Daleview conformed to accepted practices at all times and that the staff did not cause or contribute to the injury and death of the resident. Nothing the defendants did or failed to do was a proximate cause of any of the injuries alleged in the bill of particulars. Archipolo received proper care, treatment, and rehabilitation while at Daleview, but “she had entered the end stages of life due to her severe COPD, atherosclerosis and congestive heart failure— among other comorbidities.” (§17)

Fishkin states that it is his opinion within a reasonable degree of medical certainty that “the decedent’s continued tobacco use, severe co-morbidities, and documented non-compliance accounted for her compromised state of health and deteriorating condition by the time she was admitted to defendant Daleview Care Center.” (§16) “[Nothing] in the Daleview records reflects medical issues that were not already diagnosed at the time of her prior hospital admissions (§131)

The medical documentation establishes that Archipolo refused to cooperate in bipap oxygenation. “Specifically, the entries [in Winthrop progress notes] indicate that a doctor was notified to intervene, but that the decedent continued to refuse the use of the bipap despite the doctor’s orders.” (§10)

Daleview’s nursing staff reported that Archipolo was non-compliant and refused to use a call bell for bathroom assistance.

Daleview took “treatment measures” to prevent pressure ulcers from developing, and Archipolo did not develop pressure ulcers while at Daleview. She also did not develop any infections.

VI. Discussion

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ***.” (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986].) In the case at bar, both the plaintiff and the defendants have shown that they are capable of proving a prima facie case. But, on the entire record, both sides are incapable of eliminating the factual issues of this case.

A nursing home can establish its prima facie entitlement to judgment as a matter of law dismissing a cause of action based on the deprivation of rights set forth by Public Health Law § 2801-d by producing evidence that the patient’s alleged injuries did not arise through any action or negligence of its employees. (*See, Ciccotto v. Fulton Commons Care Ctr., Inc.*, 149 AD3d 1030 [2nd Dept 2017].) In the case at bar, the defendant nursing home made a prima facie showing of its entitlement to summary judgment by submitting, among other things, its expert affirmation and medical records. (*See, Pichardo v. St. Barnabas Nursing Home, Inc.*, 134 AD3d 421 [1st Dept. 2015]; *Craig v. St. Barnabas Nursing Home*, 129 AD3d 643 [1st Dept. 2015].) The defendants offered proof that the decedent's problems were caused by pre-existing conditions. (*See, Craig v. St. Barnabas Nursing Home*, *supra* [nursing home not liable for negligence, medical malpractice, wrongful death and for violation of Public Health Law, for the death of nursing home resident, where her skin ulcers and other complications were unavoidable and the result of preexisting conditions and other risk factors].) The defendants made a prima facie showing that the care given to Archipolo was within the accepted standards of medical and nursing home care. (*see, Feliciano v. St. Vincent De Paul Residence*, 139 AD3d 463 [1st Dept. 2016]), and the defendants submitted the affirmation of its expert physician, who opined that the defendant did not violate the various federal and state regulations set forth in the plaintiff's bill of particulars as the basis for the cause of action based on Public Health Law §2801-d, and that “nothing the facility did, or failed to do, was a proximate cause of any injury sustained by ***[Theresa Archipolo], or her ultimate death.” (*See, Gold v. Park Ave. Extended Care Ctr. Corp.*, 90 AD3d 833, 834 [2nd Dept 2011].)

On the other hand, the plaintiff also made a prima facie showing of its entitlement to judgment as a matter of law by submitting, among other things, its expert affirmation and medical records.

Summary judgment is not warranted when there is an issue of fact which must be tried. (*See, Alvarez v. Prospect Hospital, supra.*) In this nursing home case, summary

judgment for either side is precluded by conflicting evidence in the record concerning whether the defendants exercised all care reasonably necessary to prevent the deprivation of Archipolo’s rights and her alleged injuries. (*See, e.g., Cornell v. Cty. of Monroe*, 158 AD3d 1151, 1152–53 [4th Dept. 2018]; *Vissichelli v. Glen-Haven Residential Health Care Facility, Inc.*, 136 AD3d 1021 [2nd Dept. 2016]; *Pichardo v. St. Barnabas Nursing Home, Inc, supra.*) As in a case for medical malpractice, the conflicting affidavits of the medical experts in this nursing home case preclude summary judgment for either side.. (*See, Pichardo v. St. Barnabas Nursing Home, Inc, supra; Haas v. F.F. Thompson Hosp., Inc.*, 86 AD3d 913 [4th Dept 2011]; *Florio v. Kosimar*, 79 AD3d 625 [1st Dept 2010]; *Barbuto v. Winthrop University Hosp.*, 305 AD2d 623 [2nd Dept 2003];.) The conflicting opinions of the experts for the parties with respect to the nursing home’s alleged deviations from the accepted standard of nursing home care and whether those alleged deviations caused the injuries sustained by the nursing home resident raised credibility issues that cannot be resolved on a motion for summary judgment. (*See, Haas v. F.F. Thompson Hosp., Inc., supra.*)

Dated: **APR 22 2019**



Hon. Leslie J. Purificacion, J.S.C.

FILED
APR 30 2019
 COUNTY CLERK
 QUEENS COUNTY