

Savarese v Saint Francis Hosp.

2019 NY Slip Op 33940(U)

August 12, 2019

Supreme Court, Nassau County

Docket Number: 605321/16

Judge: Denise L. Sher

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

ENTERED
IN
COMPUTER
CF

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

HOLLY SAVARESE, Administratrix of the Estate of
CHARLOTTE PEARL FORREST,

TRIAL/IAS PART 32
NASSAU COUNTY

Plaintiff,

Index No.: 605321/16
Motion Seq. Nos.: 05, 06
Motion Dates: 06/05/19
06/05/19

- against -

SAINT FRANCIS HOSPITAL, ROSLYN, NEW YORK,
JIM HILEPO, M.D., "JANE DOE R.N.", NAME
FICTITIOUS TRUE NAME PRESENTLY UNKNOWN
TO PLAINTIFF,

Defendants.

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 05), Affirmation and Exhibits	1
Notice of Cross-Motion (Seq. No. 06), Affirmation and Exhibits	2
Reply Affirmation to Motion (Seq. No. 05) and in Opposition to Cross-Motion (Seq. No. 06)	3

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant, Saint Francis Hospital, Roslyn, New York ("St. Francis") moves (Seq. No. 05), pursuant to CPLR § 3211(a)(7), for an order partially dismissing plaintiff's Complaint as to the claims for punitive damages and gross negligence under common law and attorneys' fees.

Plaintiff opposes the motion and cross-moves (Seq. No. 06), pursuant to 22 NYCRR 130-1.1, for an order granting sanctions for reimbursement of actual expenses reasonably

incurred, as well as reasonable attorney's fees resulting from defendant St. Francis' frivolous conduct with respect to its instant motion to dismiss (Seq. No. 05). Defendant St. Francis opposes the cross-motion.

In support of the motion (Seq. No. 05), counsel for defendant St. Francis submits, in pertinent part, that, "[t]his matter involves allegations of medical malpractice regarding wound care and wound prevention measures provided to the decedent while a patient at St. Francis Hospital. The decedent developed a sacral wound and expired from unrelated causes. St. Francis seeks dismissal of the plaintiff's claims for punitive damages and attorneys' fees. Common law has made clear that punitive damages may only be considered for injuries caused to a patient by acts committed willfully or in reckless disregard or with the intent to cause injury. Here, plaintiff's Complaint completely fails to even allege facts rising to this high bar. Furthermore, plaintiff's Complaint fails to identify any statutory entitlement to attorneys' fees or any contractual obligation for St. Francis Hospital to pay for attorneys' fees with respect to its medical malpractice claims. As such, all claims for punitive damages and attorneys (*sic*) fees must be dismissed as a matter of law as plaintiff has failed to state a cause of action in her Complaint."

Counsel for defendant St. Francis asserts, in pertinent part, that, "[s]imply because the plaintiff claims the defendants acted recklessly does not mean the plaintiff is entitled to punitive damages. Instead, common law and the PHL requires that plaintiff must meet the requisite threshold level of (*sic*) establish that the alleged deprivation was committed willfully or in reckless disregard of the plaintiff decedent's rights or benefits.... Punitive damages are warranted only where the conduct of the party being held liable evidences a high degree of moral culpability

or where the conduct is so flagrant as to transcend mere carelessness, or where the conduct constitutes willful or wanton negligence or recklessness. [citations omitted]. The New York Court of Appeals held that punitive damages are permissible in personal injury cases under very limited circumstances, where a ‘very high threshold of moral culpability is satisfied.’ [citations omitted]. Punitive damages are awarded to punish and deter behavior involving moral turpitude. [citation omitted].... Thus, punitive damages are not available simply because an accident occurred in a nursing home. Rather, the plaintiff must establish the injury to the patient was caused by willful or reckless acts or omissions.... Plaintiff has failed to allege a single fact in the Complaint that evidences willful, wanton, or reckless disregard by St. Francis Hospital, its employees or agents. Plaintiff merely included the word ‘recklessly’ in just Paragraph (*sic*) 34, 35 of the 46 paragraph Complaint.... Plaintiff does not even use the word ‘punitive damages’ in the entire Complaint, until the ‘Wherefore’ clause after Paragraph 46.” *See* Defendant St. Francis’ Affirmation in Support Exhibit A.

Counsel for defendant St. Francis adds, in pertinent part, that, “[s]imply because the plaintiff claims the right to attorneys’ fees does not mean she is entitled to attorneys’ fees. In New York, a litigant is usually responsible for the payment of their own attorneys’ fees and costs in a lawsuit.... In New York, the right to recover attorneys’ fees ‘must be statutory or contractual.’ [citations omitted]. Here, the Complaint only mentions the word in the (*sic*) ‘attorneys’ fees’ in the ‘Wherefore’ clause after the final paragraph in the Complaint.... Plaintiff makes no reference to a statutory provision entitled her to attorneys’ fees or any contract in exist (*sic*) whereby the parties agreed that St. Francis Hospital would be obligated to pay plaintiff attorneys’ fees in the event of an adverse verdict against St. Francis Hospital.... Just like the

claims for punitive damages, plaintiff has failed to plead the facts necessary to establish a claim for attorneys' fees and therefore the claim must be dismissed with prejudice." *See id.*

In opposition to the motion (Seq. No. 05) and in support of the cross-motion (Seq. No. 06), counsel for plaintiff submits, in pertinent part, that, "[o]f note, plaintiff does not oppose that portion of the underlying motion that seeks dismissal of the claim of attorneys' fees made in the Complaint and will withdraw said claim at the direction of the Court. However, affording plaintiff every favorable inference, the Complaint unequivocally contains sufficient facts to support plaintiff's claim of punitive damages. Plaintiff detailed how defendant's wanton disregard for Ms. Forrest's well being resulted in an infectious bedsore that ultimately led to her death. Despite these allegations, defendant brought this motion in a last minute effort to avoid the effects of its failure to conduct any discovery relevant to plaintiff's punitive damages claim. Therefore, the Court should deny defendant's motion and sanction defendant for its frivolous conduct in bringing the motion that is without merit in law. In sanctioning defendant, the Court should award plaintiff attorneys' fees for the expense of defending against the underlying motion."

Counsel for plaintiff further asserts, in pertinent part, that, "[f]rom the outset of litigation, plaintiff has maintained that defendant's conduct was reckless and caused Ms. Forrest's death.... Pursuant to the Court's directives, plaintiff filed a Note of Issue on March 12, 2019.... Thereafter, defendant made a frivolous motion to strike the Note of Issue alleging that plaintiff claimed punitive damages and attorneys' fees for the first time in litigation.... Despite the Complaint clearly detailing both claims from the start of litigation, defendant made the motion at the expense of plaintiff having to opposing (*sic*) it when there was no plausible legal argument to support its claims. Because of the egregious nature of the motion, plaintiff cross-moved for

sanctions and opposed the motion to strike..... Upon receipt of the arguments made in the cross-motion, defendant withdrew the baseless motion after causing plaintiff the expense of opposing the motion.... Now, defendant seeks to dismiss these claims in order to correct its error in failing to notice they were pled originally. As a result, they (*sic*) failed to conduct any discovery in regards to punitive damages and, on the eve of trial, seek to have the claim dismissed to avoid the consequences of not properly pairing (*sic*) to litigate the claim at trial. Consequently, the Court should deny defendant's motion to dismiss because it is not supported by case law and sanction defendant and its counsel in the form of attorneys' fees and costs for plaintiff's expense of having to oppose the underlying frivolous motion." *See* Plaintiff's Affirmation in Opposition and in Support Exhibits A, E and F.

Counsel for plaintiff argues, in pertinent part, that, "[u]nder common-law, punitive damages are warranted in a medical malpractice case where the defendant's conduct is 'wantonly dishonest, grossly indifferent to patient care, or malicious and/or reckless.' [citation omitted]. Further, 'where the evidence can demonstrate that a defendant fails to render medical assistance to a patient in need of emergency treatment, and, in effect, abandons such a patient, punitive damages may be awarded.' [citation omitted]. Additionally, the Public Health Law recommends punitive damages 'where the deprivation of any such right or benefit is found to have been willful or in reckless disregard of the lawful rights of the patient...' [citation omitted]. Affording plaintiff the benefit of every favorable inference, the facts alleged in the Complaint clearly fit within a cognizable legal theory to award punitive damages against SAINT FRANCIS HOSPITAL. Looking at the four corners of the Complaint, plaintiff alleges that while her mother, Ms. Forrest, was within the care of SAINT FRANCIS HOSPITAL (*sic*) abandoned her when she was in need of emergency treatment to prevent bedsores. Indeed, paragraphs 38

through 41 of plaintiff's Complaint set forth in detail the gross indifference that SAINT FRANCIS HOSPITAL staff exhibited in their negligent treatment of Ms. Forrest that resulted in her ultimate demise:... Further, plaintiff clearly states malicious and reckless conduct by the defendant in the Complaint through allegations of SAINT FRANCIS HOSPITAL's failure to prevent Ms. Forrest from urinating on herself, then leaving her to endure the effects of her incontinence including infectious bedsores that led to her death.... Considering these allegations, the Complaint undoubtedly presents a cognizable legal theory for a finding of punitive damages under the common-law and Public Health Law § 2801-d(2). Indeed, plaintiff even stated that defendants' 'reckless' conduct caused her to be sick and die.... As presented in the Complaint, Ms. Forrest was completely immobile and incontinent. Rather than adequately assess plaintiff with necessary apparatus to prevent infection, such as a catheter, air mattress, and regularly being turned in her bed, SAINT FRANCIS HOSPITAL employees and agents left Ms. Forrest to urinate in her bed. Even more egregiously, SAINT FRANCIS employees and agents allowed Ms. Forrest to remain in her own urine for such unreasonable lengths of time that she developed a large ulcerous bed sore wound on her lower back and buttocks. Their reckless indifference towards Ms. Forrest's bed sore allowed an infection (*sic*) set in and led to her ultimate demise. Certainly, these facts, all presented in the Complaint since the inception of the present law suit, fit within a cognizable legal theory for a finding that SAINT FRANCIS HOSPITAL acted in reckless disregard and with gross indifference for Ms. Forrest's care. As such, plaintiff undoubtedly stated a cause of action to warrant punitive damages when considering defendant left Ms. Forrest with no option but to urinate on herself and remain in it indefinitely."

Counsel for plaintiff further asserts, in pertinent part, that, "[s]ince the start of litigation, defendant has been on notice that plaintiff sought an award of punitive damages for defendant's

reckless conduct. As presented above, the Complaint specifically delineates these allegations with facts that support a cognizable legal theory. However, defendant failed to conduct any discovery or question Ms. Savarese at her deposition in regards to this claim of damages. The circumstances under which defendant made this motion support the imposition of sanctions. With the case on the trial calendar, defendant's last minute efforts to have plaintiff's claim for punitive damages dismissed is done solely to prolong the resolution of the case. Furthermore, defendant moves to dismiss this claim because it failed to conduct discovery in this regard and did not realize the claim was pled until after the Note of Issue was filed. Defendant has already forced plaintiff the expense of defending against a frivolous motion to strike the Note of Issue because of the claim of punitive damages. Nevertheless, defendant has had ample time to investigate the legal and factual basis for plaintiff's punitive damages claim, yet defendant still brought the present motion in the face of specific allegations in her (*sic*) Complaint that plaintiff stated a cause of action for punitive damages."

In opposition to the cross-motion (Seq. No. 6) and in further support of the motion (Seq. No. 05), counsel for defendant St. Francis submits, in pertinent part, that, "[p]laintiff's Opposition essentially concedes that this is a routine medical malpractice action. The only passages cited to (*sic*) describe boilerplate allegations of medical malpractice. Although the word 'reckless' is used, the Complaint does not set forth any factual basis with which to support the claim. Of course, simply stating the work 'reckless' is insufficient to state a cause of action for punitive damages. [citations omitted]. The Court is constrained to look only at the four corners of the Complaint and cannot consider plaintiff's elaborate Opposition in determining whether a cause of action for punitive damages was set forth. [citation omitted]."

Counsel for defendant St. Francis adds, in pertinent part, that, “[c]ertainly my conduct has not been frivolous. It is precisely because the claims for punitive damages and attorneys’ fees were not present in the Complaint (the purpose of the instant motion) that I moved to strike the Note of Issue upon seeing such relief requested which I in good faith thought was for the first time. However, prior to serving my motion, I wrote to plaintiff’s counsel asking about the claims for punitive damages and attorneys’ fees and indicating that I would make the motion if no response was given. Plaintiff’s counsel never responded to me. Had a response been provided, the motion to strike the Note of Issue would never have been made and the instant motion would have been the only one ever before the Court. Once plaintiff’s counsel made me aware of the punitive damages and attorneys’ fees ‘claims’ found within the ‘Wherefore’ clause, the motion to strike the Note of Issue was immediately withdrawn. Plaintiff’s Cross-Motion for costs and sanctions is frivolous.”

“In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), “the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) quoting *Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) quoting *Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys “R” Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiff can succeed

on any reasonable view of facts stated. *See Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiff can ultimately establish the truth of the allegations. *See 219 Broadway Corp. v. Alexander's Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). However, bare legal conclusions are not presumed to be true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013). “In assessing a motion to dismiss under 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint.” *Leon v. Martinez, supra* at 88.

To constitute gross negligence, a party's conduct must smack of intentional wrongdoing or evince a reckless indifference to the rights of others; stated differently, a party is grossly negligent when it fails to exercise even slight care or slight diligence. *See Ryan v. IM Kapco, Inc.*, 88 A.D.3d 682, 930 N.Y.S.2d 627 (2d Dept. 2011).

In the instant matter, plaintiff has failed to allege any facts constituting willful misconduct or gross negligence on the part of defendant St. Francis. *See J. Petrocelli Contracting, Inc. v. Morganti Group, Inc.*, 137 A.D.3d 1082, 27 N.Y.S.3d 646 (2d Dept. 2016).

In a medical malpractice case, punitive damages will only be awarded if the wrongful actions of the defendant go beyond the negligence required for a finding of malpractice. The

plaintiff must show that the defendant's actions were grossly negligent or wanton. *See Vissichelli v. Glen-Haven Residential Health Care Facility, Inc.*, 136 A.D.3d 1021, 25 N.Y.S.3d 639 (2d Dept. 2016); *Figueroa v. Flatbush Women's Services, Inc.*, 201 A.D.2d 613, 608 N.Y.S.2d 235 (2d Dept. 1994); *Valensi v. Park Avenue Operating Co., LLC*, 169 A.D.3d 960, 94 N.Y.S.3d 311 (2d Dept. 2019).

When viewing plaintiff's Complaint in light of the criteria set forth above, the Court finds that plaintiff has failed to state causes of action that fall within cognizable legal theories for her claims of punitive damages and gross negligence.

Accordingly, based upon the above, defendant St. Francis' motion (Seq. No. 05), pursuant to CPLR § 3211(a)(7), for an order partially dismissing plaintiff's Complaint as to claims for punitive damages and gross negligence under common law and attorneys' fees, is hereby **GRANTED**.

22 NYCRR 130-1.1 deals with Costs and Sanctions. It reads, in pertinent part,

“(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart....

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both....

(c) For purposes of this Part, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false. Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.”

“Pursuant to 22 NYCRR 130–1.1, sanctions may be imposed against a party or the party’s attorney for frivolous conduct.” *Keyspan Generation, LLC v. Nassau County*, 118 A.D.3d 949, 991 N.Y.S.2d 46 (2d Dept. 2014). “Conduct during litigation, ... is frivolous and subject to sanction and/or the award of costs when it is completely without merit in law or fact and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing law; it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or it asserts material factual statements that are false.” *Id. quoting Mascia v. Maresco*, 39 A.D.3d 504, 833 N.Y.S.2d 207 (2d Dept. 2007). “The decision of whether to award sanctions and the amount or nature of those sanctions is generally entrusted to the trial court’s sound discretion.” *Matter of Khan-Soleil v. Rashad*, 111 A.D.3d 727, 974 N.Y.S.2d 798 (2d Dept. 2013). The Court has carefully reviewed the record before it and guided by the foregoing precepts hereby declines to award costs and sanctions. *See id.*

Accordingly, plaintiff’s cross-motion (Seq. No. 06), pursuant to 22 NYCRR 130-1.1, for an order granting sanctions for reimbursement of actual expenses reasonably incurred, as well as reasonable attorney’s fees resulting from defendant St. Francis’ frivolous conduct with respect to its instant motion to dismiss (Seq. No. 05), is hereby **DENIED**.

All parties shall appear for Trial, in Nassau County Supreme Court, Differentiated Case Management Part (DCM), at 100 Supreme Court Drive, Mineola, New York, on September 3, 2019, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
August 12, 2019

ENTERED

AUG 15 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE