

Corbett v Campbell Hall Rehabilitation Ctr., Inc.

2019 NY Slip Op 34536(U)

September 30, 2019

Supreme Court, Orange County

Docket Number: Index No. EF009454-2018

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
THOMAS J. CORBETT a/k/a THOMAS CORBETT, Deceased, by and through LINDA CARTER, as Administratrix of the Estate of THOMAS J. CORBETT a/k/a THOMAS CORBETT,

Plaintiff,

**DECISION AND ORDER
INDEX NO.: EF009454-2018
Motion Date: 9/13/19**

Sequence No. 1

-against-

CAMPBELL HALL REHABILITATION CENTER, INC., d/b/a CAMPBELL HALL REHABILITATION CENTER,

Defendants.

-----X
SCIORTINO, J.

The following papers numbered 1 to 7 were considered in connection with the application of defendant for an order pursuant to Civil Practice Law & Rules §3211, dismissing and striking plaintiff's claim for punitive damages and plaintiff's allegations for negligence and gross negligence:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation (Gallagher)/Exhibits A-B	1 - 4
Affirmation in Opposition (Johnson)/	5
Affirmation in Reply (Rifkin)/Exhibit A	6 - 7

For the reasons set forth below, the application is denied as premature.

Background and Procedural History

This is an action sounding in wrongful death; negligence; gross negligence and violations of Public Health Law sections 2801-d and 2803-c, arising out of allegations of nursing home neglect. The action was commenced by the electronic filing of a summons and verified complaint on

September 12, 2018. (Exhibit A to moving papers) The Complaint sets forth allegations that plaintiff's decedent, Corbett, developed pressure ulcers; sepsis; weight loss; pneumonia and dehydration while a resident of defendant Campbell Hall. Corbett died September 23, 2017 at age 79. The first cause of action asserts violations of Public Health Law sections 2801-d and 2803-c, and contains claims that plaintiff is entitled to punitive damages, pursuant to the statutes. (Exhibit A at paragraph 40) The second cause of action sounds in negligence and gross negligence with allegations of grossly negligent, willful, wanton conduct, and reckless disregard and/or failure to act, wholly and solely causing plaintiff's injuries. (Exhibit A at paragraphs 48-51)

The Summons and Complaint were served on defendant on September 14, 2018; however, upon plaintiff's determination that defendant might not have been properly served, plaintiff moved for an order extending the time for service by 120 days. That application was granted by this Court on May 6, 2019. Defendant was thereafter served through the Secretary of State pursuant to Business Corporation Law section 306 on May 13, 2019. An Answer with Affirmative Defenses, together with various discovery demands was electronically filed on July 11, 2019.

Motion to Dismiss

By Notice of Motion electronically filed on August 13, 2019, defendant seeks dismissal of the allegations of gross negligence and the claim for punitive damages arguing that the Complaint fails to allege conduct to support such claims. Acknowledging that, on a motion to dismiss, a pleading is entitled to liberal construction, defendant argues that the complaint must nevertheless contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Factual claims that are inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration. (Citations omitted)

Public Health Law §2801-d(2) provides that punitive damages are available where the deprivation of rights or benefits established for residents of nursing homes is found to be willful or in reckless disregard of the lawful rights of the patient. Defendant states that plaintiff's "bare claim" of entitlement to punitive damages is insufficient to withstand a motion to dismiss, as plaintiff is required to allege conduct that transcends normal negligence. The mere use of words "willful", "wanton" or "reckless" does not save the claim. The complaint fails to set forth any facts which support allegations of reckless conduct or conduct showing a complete disregard for the patient's rights, as would be necessary to support allegations of gross negligence.

For those reasons, defendant argues that the motion to dismiss those allegations and claims must be granted.

Opposition

Plaintiff argues that Civil Practice Law & Rules § 3013 requires statements in a pleading to be "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each." This is not a matter which requires further particularity. Plaintiff points out that the standard for punitive damages relied upon by defendant in its moving papers is that required in actions for medical malpractice, which involve separate and different considerations. The standard for such relief in actions for Public Health Law violations, although high, is less stringent than under the common law. While the conduct of a nursing home staff must be voluntary and intentional, or must have created a substantial and unjustifiable risk of harm, it need not rise to the level of moral turpitude or reprehensible motives. (Citations omitted)

Moreover, plaintiff asserts that the motion to dismiss is premature. There has yet to be any meaningful discovery; neither party has compiled records or documents much less expert affidavits necessary to support the pleading. The Public Health Law provides that punitive damages may be assessed upon a finding that a patient was deprived of a right or benefit as a result of willful or reckless disregard of those rights. No such finding can be made until there has been discovery.

Reply

In reply, defendant reiterates its position that the allegations of the Complaint are general and do not indicate conduct that was willful; wanton; conscious; deliberate or in reckless disregard of decedent Corbett's rights. To avoid punitive damages a moving defendant must only show that it exercised all care reasonably necessary to prevent and limit the deprivation and injury for which liability is claimed. None of the allegations in the Complaint exceed ordinary negligence, nor rise to the level of punitive damages. Defendant concludes that plaintiff has not, and cannot, plead facts to support the allegations, and the simple recitation of "reckless disregard" and "willful" without substantiating facts is insufficient to avoid dismissal. The lack of such supporting facts evidences a lack of good faith pleading requiring the claims to be dismissed.

The Court has fully considered the submissions of the parties.

Discussion

For the reasons which follow, the application of defendant is denied as premature.

On a motion to dismiss pursuant to Civil Practice Law & Rules section 3211(a)(7), the Court must accept the facts as alleged in the complaint to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*Mancuso v. Rubin*, 52 AD3d 580 [2d Dept 2008]) The issue is limited to

whether the pleading states any cause of action, not whether there is evidentiary support for the Complaint. (*Porter v. Forest Hills Care Ctr. LLC*, 2018 NY Slip Op. 33439U [Queens Co. Nov. 28, 2018])

Both parties acknowledge that Public Health Law § 2801-d provides a private cause of action for a nursing home resident who suffers injuries as a result of deprivation of rights or benefits created or established for them by statute, contract, code, rule or regulation. Upon a finding of such deprivation, compensatory damages are assessed, unless there is a finding that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury. In addition, where the deprivation is found to be willful or in reckless disregard of the patient's lawful rights, punitive damages are available. (See, e.g., *Hairston v. Liberty Behavioral Management Corp.*, 138 AD3d 467 [1st Dept 2016])

The difficulty with defendant's application is that it conflates the standards to be applied on a motion to dismiss with those applied on summary judgment motions and conflates the standards applied to medical malpractice and common law negligence with those applied on this statutory violation. The claim for deprivation of rights under the Public Health Law are separate and distinct from those sounding in medical malpractice or negligence. (*Butler v. Shorefront Jewish Geriatric Center*, 33 Misc. 3d 836 [Kings Co. 2011])

In *Butler*, cited by both parties, the defendant nursing home similarly moved to dismiss a claim for punitive damages while, at the same time, moving for summary judgment dismissing the complaint in its entirety. Plaintiff in *Butler* alleged that the nursing home violated decedent's rights by failing to provide wound care and to change the treatment plan to increase treatments, causing Sepsis, respiratory failure and death followed. Defendant's motion was granted upon a *showing* that

the actions taken by defendant were appropriate and consistent with physicians' orders. (*Id.*) The trial court, noting that the standard to recover punitive damages under Public Health Law § 2801-d appears to be less stringent than the standard under malpractice law, reviewed the evidence submitted, including expert affidavits and medical records, and found that the facts did not manifest a willful deprivation or reckless disregard of a right or benefit due to decedent. (*Id.*) The Court thus found that defendant established its right to summary judgment. In opposition, plaintiff demonstrated nothing more than speculation that decedent's infections were caused by a violation by defendant.

No such showing has or can be made here. Rather, defendant asks for an order dismissing the claim for punitive damages on the basis that the complaint does not plead sufficient facts to demonstrate reckless or wanton conduct. The only documents annexed to defendant's papers are the pleadings and one trial-level case in which the court dismissed allegations of gross negligence upon a finding that the complaint failed to allege any facts constituting any behavior beyond ordinary negligence. (*Porter v. Forest Hills Care Ctr. LLC*, 2018 NY Slip Op. 33439U [Queens Co. Nov. 28, 2018])

This Court declines to make such an assessment at this point. Preliminary Conference has not been held and, apparently, there has been no exchange of discovery. The Court finds that it is premature at this stage of the litigation, to dismiss the complaint or to find that the allegations are insufficient to support plaintiff's claim of reckless or wanton behavior. (See, *Demes v. Boro Park*

Center for Rehabilitation and Healthcare, 57 Misc. 3d 1210(A) [Kings Co. 2017]

On the basis of the foregoing, defendant's motion to dismiss is denied

The parties shall appear for Preliminary Conference on October 10, 2019 at 9:00 a.m.

All relief not addressed specifically herein is denied.

This decision shall constitute the order of the Court.

Dated: September 30, 2019
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*