

Cameron v 150 Riverside Op. LLC

2020 NY Slip Op 30921(U)

April 10, 2020

Supreme Court, New York County

Docket Number: 154077/2019

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

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DEBORAH CAMERON,

Plaintiff,

- v -

150 RIVERSIDE OP. LLC, CARERITE CENTERS LLC

Defendant.

INDEX NO. 154077/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DISMISS

This action arises from the allegedly negligent treatment of decedent Gracie Cameron while she was under care at defendants' nursing home facility from approximately August 14, 2017 to March 7, 2018. Plaintiff's complaint alleges eight causes of action, as follows: (1) Negligence; (2) Conscious pain and suffering; (3) Negligence per se; (4) Violation of Public Health Law § 2801-d; (5) Lack of informed consent; (6) Breach of Implied Warranty; (7) Breach of Contract; and (8) Wrongful death. Defendants now move pursuant to CPLR 3211(a)(7) to dismiss the negligence per se, the breach of implied warranty and the breach of contract causes of action and to conditionally dismiss the entire complaint for failure to serve a certificate of merit pursuant to CPLR 3012-a.

Defendants first argue that the negligence per se claim should be dismissed because it is duplicative of the fourth cause of action for violation of Public Health Law § 2801-d. Public Health Law § 2801-d confers a private right of action on a patient in a nursing home for injuries sustained as a result of the deprivation of the patient's rights. Public Health Law § 2801-d(1); *Zeides v. Hebrew Home for the Aged at Riverdale, Inc.*, 300 A.D.2d 178, 179 (1st Dep't 2002). It

is well settled that a cause of action to recover damages for deprivation of rights under the Public Health Law is separate and distinct and involves considerations different from those that sound in medical malpractice or negligence. *Ward v. Eastchester Health Care Center, LLC*, 34 A.D.3d 247, 248 (1st Dep't 2006); *Zeides*, 300 A.D.2d at 179; *Sullivan v. Our Lady of Consolation Geriatric Care Ctr.*, 60 A.D.3d 663 (2d Dep't 2009). Indeed, the statute explicitly provides that “[t]he remedies provided in this section are in addition to and cumulative with any other remedies available to a patient, at law or in equity or by administrative proceedings, including tort causes of action” Accordingly, this cause of action will not be dismissed as duplicative.

Next, defendants argue that the breach of implied warranty and breach of contract causes of action must be dismissed as legally insufficient because it is redundant of plaintiff's claims sounding in negligence and/or malpractice. In opposition to this argument, plaintiff submits the admissions agreement, wherein defendants agreed to provide certain specified services to plaintiff. Affirmation of Jeffrey Liu dated November 5, 2019, Exh. A. It is well settled that “a cause of action to recover damages for breach of contract to provide medical services will withstand a test to its legal sufficiency only where it is based upon an express special promise to effect a cure or to accomplish some definite result.” *Detringo v. South Island Family Medical, LLC*, 158 A.D.3d 609, 610 (2d Dep't 2018) (internal quotations and citations omitted); *Robins v. Finestone*, 308 N.Y. 543, 546 (1955) (“a doctor and his patient are at liberty to contract for a particular result and, if that result be not attained, a cause of action for breach of contract results which is entirely separate from one for malpractice although both may arise from the same transaction”). Here, the admissions agreement between the parties, which lists specific services that defendants allegedly failed to provide to plaintiff, is sufficient to state causes of action for breach of contract and breach of warranty. *Duquette v. Olivia*, 75 A.D.3d 727, 728 (3d Dep't

2010) (“While [defendant’s] agreement to perform both the breast augmentation and areola reduction procedures, generally, does not allege an express promise to achieve a definite result, the same cannot be said of the alleged agreement to use a smooth implant as opposed to the textured version actually implanted and to increase plaintiff’s breast size to a D cup.”); *Nicoleau v. Brookhaven Memorial Hosp. Center*, 201 A.D.2d 544, 545 (2d Dep’t 1994). Accordingly, these causes of action will not be dismissed.

Finally, defendants argue plaintiff’s claims sound in medical malpractice, rather than negligence, and as such, the complaint should be conditionally dismissed for failure to provide a Certificate of Merit under CPLR 3012-a. However, defendants failed to identify any specific allegations in the complaint where plaintiff alleges a medical malpractice claim as opposed to a claim of ordinary negligence. *Ward*, 34 A.D.3d. at 248; *Zeides*, 300 A.D.2d at 180. A claim based on the alleged negligence of non-physician health care workers is deemed to sound in medical malpractice . . . if the alleged conduct of such worker “bears a substantial relationship to the rendition of medical treatment by a licensed physician” *Bleiler v. Bodnar*, 65 N.Y.2d 65, 72 (1985); *Ward v. Eastchester Health Care Center, LLC*, 2004 WL 5657281 (Sup. Ct. Bronx Cty. 2004), *aff’d*, 34 A.D.3d. 247 (1st Dep’t 2006). Here, based on a review of the verified complaint and the amended verified bill of particulars, it appears that the injuries complained of in this action do not involve specialized expertise, i.e. preventing bed sores and providing appropriate feeding, hydration, dressing and hygiene to decedent. Verified Complaint, ¶ 55. Accordingly, the complaint will not be dismissed on this basis.

Accordingly, it is

ORDERED that the motion is denied.

4/10/20
DATE


PAUL A. GOETZ, J.S.G.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE