

**Tanenbaum v Dewitt Rehabilitation & Nursing Ctr.,
Inc.**

2020 NY Slip Op 30981(U)

April 21, 2020

Supreme Court, New York County

Docket Number: 153252/2019

Judge: Kathryn E. Freed

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.

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

PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

Justice

-----X

INDEX NO. 153252/2019

JEFFREY M. TANENBAUM, As Executor of the Estate of
RAYMOND TANENBAUM, Deceased,

Plaintiff,

MOTION SEQ. NO. 001

- v -

DEWITT REHABILITATION AND NURSING CENTER, INC.
d/b/a UPPER EAST SIDE REHABILITATION AND
NURSING CENTER,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for DISMISS.

Plaintiff Jeffrey Tanenbaum, as Executor of the Estate of Raymond Tanenbaum (“the decedent”), alleges claims of negligence, wrongful death, and violations of Public Health Law (“PHL”) sections 2801-d and 2803-c against defendant Dewitt Rehabilitation and Nursing Center, Inc. d/b/a Upper East Side Rehabilitation and Nursing Center. Defendant moves, in effect, pursuant to CPLR 3211(a)(7), seeking to dismiss “plaintiff’s claim for punitive damages under the [PHL], as plaintiff’s [c]omplaint does not allege conduct to support such a claim.” Doc. 25. After a review of the motion papers and the relevant statutes and case law the motion, which is opposed by plaintiff, is granted.

On March 28, 2019, plaintiff, the decedent’s son, commenced the captioned action by filing a summons and verified complaint. Doc. 1; Doc. 30 at par. 23. As a first cause of action, plaintiff alleged that defendant was a “residential health care facility” (“the facility”), as defined

in PHL 2801(3), and that it was thus subject to the provisions of PHL 2803-c, which sets forth a litany of rights to which a resident of such a facility is entitled. The decedent was allegedly admitted to the defendant's New York County facility in September of 2017 and resided there "intermittently" until November 1, 2017. Doc. 1 at par. 26. As a result of his care at the facility, the decedent allegedly sustained numerous physical injuries, as well as pain and suffering and death at the age of 86.¹ Doc. 30 at par. 20. Plaintiff claims that, as a patient at the facility, the decedent was entitled to the rights set forth in PHL 2803-c and that, since the decedent was deprived of such rights, plaintiff is entitled to recover compensatory damages (Doc. 1 at par. 42), as well as punitive damages pursuant to PHL 2801-d(2). Doc. 1 at par. 35.

As second and third causes of action, plaintiff alleges negligence and wrongful death, respectively. Doc. 1.

Defendant joined issue by its verified answer filed June 27, 2019. Doc. 6. In its answer, defendant denied all substantive allegations of wrongdoing and imposed several affirmative defenses. Doc. 6. It also demanded, inter alia, that plaintiff provide a bill of particulars. Doc. 7.

In his bill of particulars, plaintiff claimed that defendant's treatment of the decedent was negligent in numerous respects. Doc. 30 at pars. 3, 4 and 6. Plaintiff further alleged that the facility "acted with reckless disregard for the safety of others" by failing to have "sufficient nursing staff to meet the everyday needs of its residents, including the plaintiff." Doc. 30 at pars. 27, 28.

Defendant now moves, in effect, pursuant to CPLR 3211(a)(7), to dismiss plaintiff's claim for punitive damages pursuant to PHL 2801-d(2).

¹ Although the complaint alleges that defendant caused the decedent's death, there is no indication in the complaint that the decedent lived in the facility between November 1, 2017 and December 24, 2017, when he passed away. However, the bill of particulars does reflect that the decedent was a patient at Weill Cornell Medical Center intermittently from August 28, 2017 through December 24, 2017. Doc. 30 at par. 9.

It is well-established that, on a motion to dismiss pursuant to CPLR 3211(a)(7), the Court must “accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Doe v Bloomberg, L.P.*, 178 AD3d 44, 47 (1st Dept 2019) (internal brackets omitted), quoting *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); see *Edwards v Nicolai*, 153 AD3d 440, 440 (1st Dept 2017).

In his complaint, plaintiff does not allege any specific conduct which gives rise to punitive damages pursuant to PHL 2801-d(2), which statute allows for an award of punitive damages against a residential health care facility “where the deprivation of any ... right or benefit is found to have been willful or in reckless disregard of the lawful rights of the patient.” Rather, plaintiff merely alleges that he is entitled to punitive damages pursuant to that section. Doc. 1 at par. 35. Plaintiff’s sole factual allegation in support of his claim for an award of punitive damages based on PHL 2801-d(2) is set forth in the bill of particulars, in which he claims that the defendant facility “acted with reckless disregard for the safety of others” by failing to have “sufficient nursing staff to meet the everyday needs of its residents, including the plaintiff.” Doc. 30 at pars. 27, 28. Viewing the facts in the light most favorable to plaintiff, assuming the truth of the allegation of inadequate staffing, and considering that this Court has held that PHL 2801-d(2) “would appear to [impose] a less stringent standard than that under the law governing medical malpractice” (*Osborne v Rivington House-Nicholas A. Rango Health Care Facility*, 19 Misc3d 1132([A] [Sup Ct New York County 2008]), plaintiff may be able to establish that punitive damages are awardable under the statute. However, given that discovery is still being conducted, it is premature to dismiss the claim for punitive damages at this time. See *Schneider v Daleview Care Center*, Queens County Index Number 718653/18 (Sup Ct

Queens County 3/4/19); *Osborne v Rivington House-Nicholas A. Rango Health Care Facility*, *supra*.

Therefore, in light of the foregoing, it is hereby:


ORDERED that the motion by defendant Dewitt Rehabilitation and Nursing Center, Inc. d/b/a Upper East Side Rehabilitation and Nursing Center seeking to dismiss the claim by plaintiff Jeffrey Tanenbaum, as Executor of the Estate of Raymond Tanenbaum, for punitive damages pursuant to Public Health Law section 2801-d is denied without prejudice to renew at the close of discovery; and it is further

ORDERED that the parties are directed to appear for a previously scheduled compliance conference on July 21, 2020 at 2:15 p.m. at 80 Centre Street, Room 280, if it is necessary to change that date we will contact you; and it is further

ORDERED that this constitutes the decision and order of the court.

4/21/2020

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: