

Reed v Concord Nursing Home, Inc.
2022 NY Slip Op 33388(U)
September 23, 2022
Supreme Court, Kings County
Docket Number: Index No. 505769/2019
Judge: Ingrid Joseph
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At an I.A.S. Term, Part 83 of the Supreme Court of the State of New York, held at the County of Kings, 360 Adams Street, Brooklyn, New York, on the 23rd day of September 2022.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
MARY REED, as Administrator of the Estate of CLAUDIE REED, deceased,

Plaintiff,

Index No.: 505769/2019

-against-

DECISION AND ORDER

CONCORD NURSING HOME, INC., CONCORD NURSING HOME, IND. d/b/a CONCORD NURSING AND REHABILITATION CENTER d/b/a CONCORD NURSING AND REHABILITATION CENTER, INC., FSNR SNF, LLC, FSNR SNF, LLC d/b/a FOUR SEASONS NURSING AND REHABILITATION CENTER, RESORT NURSING HOME, BRIENDY MILENCKE AND "JOHN AND/OR JANE DOES 1-4" WHOSE NAMES BEING UNKNOWN AND FICTITIOUS, AS CO-EXECUTORS OF THE ESTATE OF MICHAEL TENENBAUM, AND BROOKLYN HOSPITAL CENTER DOWNTOWN CAMPUS,

Defendants.

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The following e-filed papers considered herein: NYSCEF E-filed doc

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In this matter, Defendants, Brooklyn Hospital Center Downtown Campus ("TBHC") and Concord Nursing Home, Inc. Concord Nursing Home, Inc. d/b/a Concord

Motions #4, 5, 6, and 7

Nursing and Rehabilitation Center (“Concord”), move (Motion Sequences 6 and 7) for leave to reargue their respective motions to dismiss, and upon reargument, for an order pursuant to CPLR § 3211 (a)(7), dismissing and striking any and all claims of recklessness and/or gross negligence from the Verified Amended Complaint and Bill of Particulars filed by Plaintiff, MARY REED, as Administrator of the Estate of CLAUDIE REED, deceased (“Plaintiff”) as to TBHC and Concord, and further, TBHC requests dismissal of Plaintiff’s Twelfth Cause of Action (for gross negligence). TBHC and Concord (referred to collectively as “Defendants”) further request dismissal of Plaintiff’s punitive damages claim and request for attorneys’ fees.

Defendants contend that the court overlooked or misapprehended relevant law, in particular CPLR § 3211[e], when it determined that their prior motions to dismiss pursuant to CPLR § 3211 (a)(7) were untimely, since such motions were filed after responsive pleadings were required. The court finds that CPLR § 3211 [e] provides that a motion based on, among other grounds, paragraph seven of subdivision (a) may be made at any subsequent time or in a later pleading. Since the Defendants sought dismissal pursuant to 3211 (a)(7), for failure to state a cause of action, their motions to dismiss were not subject to denial as untimely. Therefore, the court finds that the Defendants’ motions to reargue are based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motions (*Fein v Fein*, 192 AD3d 1083 [2d Dept 2021]). Thus, the court, in its discretion, grants reargument and upon reargument, the Decision and Order dated September 29, 2021 is vacated.

The court will now address the Defendants' underlying motions to dismiss Plaintiff's reckless and/or gross negligence claims and Twelfth Cause of Action, including Plaintiff's request for punitive damages and attorneys fees.

In addressing the Defendants' applications pursuant to CPLR § 3211(a)(7), it is well understood that the court must afford Plaintiff's pleading a liberal construction, accept the facts 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 (*see Goshen v. Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]; *Leon v. Martinez*, 84 NY2d 83, 87 [1994]). The court is limited to "an examination of the pleadings to determine whether they state a cause of action," and the "plaintiff may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face" (*Dolphine Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2d Dept 2014] quoting *Miglino v. Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]). Stated another way, whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Unlike on a motion for summary judgment, where the court searches the record and assesses the sufficiency of evidence, on a motion to dismiss, the court merely examines the adequacy of the pleadings (*Davis v. Boenheim*, 24 NY3d 262, 268 [2014]). The appropriate test of the sufficiency of a pleading is whether such pleading gives sufficient notice of the transactions, occurrences, or series of 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 its averments (*V. Groppa Pools, Inc. v. Massello*, 106 AD3d 722, 723 [2d Dept 2013]; *Moore v Johnson*, 147 AD2d 621 [2d Dept 1989]). “Charges amplified in a bill of particulars are to be taken into account in considering the sufficiency of the challenged causes of action” (See *Moore v Johnson*, at 621 citing *Nader v General Motors Corp.*, 25 NY2d 560, 565 [1970]). The allegations of a pleading may not be vague and conclusory but must contain sufficiently particularized allegations from which a cognizable cause of action reasonably can be found (*V. Groppa Pools, Inc. v. Massello*, 106 AD3d at 723 [2d Dept 2013] citing *Phillips v Trommel Constr.*, 101 AD3d 1097 [2d Dept 2012] and *Mazzei v Kyriacou*, 98 AD3d 1088 [2d Dept 2012]).

The Court of Appeals has defined gross negligence as conduct that smacks of intentional wrongdoing or evinces a reckless indifference to the rights of others (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992] quoting *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 385 [1983]; *Bennett v State Farm Fire and Casualty Company*, 198 AD3d 857 [2d Dept 2021]). The law also requires that there be some factual predicates to support an allegation that a party failed to show even slight care, or slight diligence (*Goldstein v Carnell Assoc., Inc.*, 74 AD3d at 747 [2d Dept 2010])[providing a further definition of gross negligence], quoting *Food Pageant v Consolidated Edison Co.*, 54 NY2d 167, 172 [1981]; see also *Dalton v Hamilton Hotel Operating Co.*, 242 NY 481, 488 [1926]).

Plaintiff's allegations in the Verified Amended Complaint and Bill of Particulars fail muster when held to the standards for gross negligence and recklessness. In paragraphs 77 through 81 of the Verified Amended Complaint, Plaintiff alleges, in conclusory form, that Concord acted in a careless manner with complete disregard to the safety of others. Plaintiff also alleges without specificity that Concord acted, or failed to act, knowing that their conduct would probably result in injury, that Concord was reckless and failed to act when an act was required and further, that Concord's conduct was willful and grossly negligent. In paragraph 82, Plaintiff asserts the vague allegation that "as a result of the foregoing, Plaintiff's decedent is entitled to punitive damages, attorneys' fees, and costs."

In paragraphs 267 and 269 of the Verified Amended Complaint, Plaintiffs conclusively assert that TBHC rendered medical and/or surgical treatment, services and advice to Plaintiff's decedent in a manner that was negligent, careless, reckless and grossly negligently performed, which departed from good and accepted medical practice and further, that such conduct constituted professional medical malpractice. Additionally, without a scintilla of particularity, under paragraph 269, Plaintiff alleges that TBHC "its agents, servants and/or employees, departed from generally accepted standards of medical care and otherwise negligently, carelessly, recklessly and grossly negligently failed to properly test, diagnose, care for and treat Plaintiff's decedent. Plaintiff reiterates that such conduct adversely affected Plaintiff's decedent's health, well-being and future treatment. However, in a non-particularized manner, Plaintiff alleges, in paragraphs 284

through 288, that TBHC acted in a careless manner, exhibited complete disregard for the rights and safety of others, failed to act knowing that their conduct would probably result in injury or damage, acted in a reckless manner, and with disregard concerning the consequences of their actions. Plaintiff further alleges without distinction of a particular event, that TBHC's conduct was willful and in reckless disregard, and, in paragraph 289, injects a vague request for punitive damages, attorney's fees, and costs.

At page 6 of Plaintiff's Bill of Particulars (as to Concord), Plaintiff alleges in a conclusory manner that the defendant willfully and recklessly denied Plaintiff's decedent her rights as a nursing home resident, and was negligent and grossly negligent by violating a plethora of public health regulations and New York Public Health Laws, including 2801-d, 2803-c and 2803-e, as well as several federal statutes. With equal insistence, in Paragraph 19 of the Bill of Particulars (as to TBHC), Plaintiff includes allegations that TBHC negligently and recklessly denied plaintiff's decedent her patient rights, was negligent and grossly negligent, and sets forth several federal statutes. The court finds that the above referenced allegation in the Bills of Particulars, though amplified in comparison to the assertions in Plaintiff's Verified Amended Complaint, do not state cognizable claims for recklessness or gross negligence under New York law.

Additionally, it is understood that New York State does not recognize an independent cause of action for punitive damages (*Randi A.J. v Long Island Surgi-Ctr.*, 46 AD3d 74, 80 [2d Dept 2007]). A punitive damages claim is parasitic and therefore, such claims possess no viability absent attachment to a substantive cause of action (*Randi*

A.J. v. Long Island Surgi-Ctr., 46 AD3d at 80 [2d Dept 2007] citing *Rocanova v. Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616 [1994]). Consequently, Plaintiff's demand for punitive damages, to the extent that such claim is dependent upon Plaintiff's factually devoid willful or wanton negligence or recklessness claims, is also subject to dismissal (*Id. Citing Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196 [1990][punitive damages generally based on willful or wanton negligence, or recklessness claim]).

Accordingly, the motions of Brooklyn Hospital Center Downtown Campus and Concord Nursing Home, Inc., Concord Nursing Home, Inc. d/b/a Concord Nursing and Rehabilitation Center (Motion Sequences 6 and 7) for leave to reargue are granted, and, upon reargument, it is hereby

ORDERED that the Decision and Order dated September 29, 2021 is vacated, and it is further

ORDERED that the motion of Concord Nursing Home, Inc., Concord Nursing Home, Inc. d/b/a Concord Nursing and Rehabilitation Center (Motion Sequence 4) is granted to the extent of dismissing and striking Plaintiff's potential claim for punitive damages, and any and all claims of recklessness and/or gross negligence in the Verified Amended Complaint and Bill of Particulars, and it is further

ORDERED that the motion of Brooklyn Hospital Center - Downtown Campus (Motion Sequence 5) is granted to the extent of dismissing and striking any and all claims

of recklessness and/or gross negligence from the Verified Amended Complaint and Bill of Particulars, including Plaintiff's Twelfth Cause of Action.

This constitutes the decision and order of the court.

ENTER



HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**