

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

2023 NY Slip Op 30102(U)

January 12, 2023

Supreme Court, New York County

Docket Number: Index No. 153252/2019

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART 11M

Justice

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JEFFREY M TANENBAUM, RAYMOND TANENBAUM

Plaintiff,

- v -

DEWITT REHABILITATION AND NURSING CENTER, INC.
DBA UPPER EAST SIDE REHABILITATION AND
NURSING CENTER,

Defendant.

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INDEX NO. 153252/2019

MOTION DATE 05/06/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 114

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff Jeffrey Tanenbaum, as Executor of the Estate of Raymond Tanenbaum ("Mr. Tanenbaum") brings the instant action alleging numerous Public Health Law violations, negligence, wrongful death and punitive damages as it relates to care and treatment provided to plaintiff Raymond Tanenbaum, intermittently, from September 2, 2017, through November 1, 2017. Defendant, Dewitt Rehabilitation and Nursing Center, Inc. (Dewitt), now moves for summary judgment. Plaintiff opposes the instant motion. For the reasons set forth below defendant's motion is granted in part.

Background

Plaintiff was first admitted to Dewitt on September 1, 2017, for short term rehabilitation following an injury and hip surgery that occurred on August 27, 2017. Plaintiffs claim that Dewitt, in violation of Public Health Law §§ 2801-d, 2803-c ("PHL"), failed to properly assess

Mr. Tanenbaum as a fall risk and institute the appropriate care plans, interventions, and mechanisms to prevent falls and injuries.

Specifically, Mr. Tanenbaum sustained a fall in his room on September 3, 2017, resulting in right hip dislocation with closed reduction on September 4, 2017, and a fall from his wheelchair in the dayroom on October 18, 2017. On October 31, 2017, Mr., Tanenbaum underwent an x-ray of his right hip, which revealed that the hip was again dislocated. On November 1, 2017, Mr. Tenenbaum was transferred to New York Presbyterian Weill Cornell Hospital. *See* NYSCEF Doc. 98, pages stamped 000755-000756.

Plaintiff contends that Mr. Tanenbaum never recovered from the injuries sustained during his time at Dewitt and these injuries continued up until the time Mr. Tanenbaum's death on December 24, 2017. The cause of death listed on the Death Certificate is "complications following surgical repairs of femur fracture due to or as a consequence of blunt force injury of hip." *See* NYSCEF Doc. 110.

Summary Judgment Standard

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Discussion

The Court finds that there is a question of fact with respect to any PHL violations. The Court also notes that notwithstanding this question of fact, defendant has established its entitlement to judgement as a matter of law for any claims of punitive damages, pursuant to PHL, as well as the second cause of action sounding in negligence, and the third cause of action for wrongful death.

The Court finds that the record is devoid of any reckless, willful and malicious conduct to substantiate a cause of action for punitive damages pursuant to the PHL and finds that Dewitt has met its burden to establish the absence of such conduct. *See Vissichelli v Glen-Haven Residential Health Care Facility, Inc.*, 136 AD3d 1021 [2nd Dept 2016].

With respect to dismissal of plaintiff's second and third causes of action, plaintiff has failed to raise a triable issue of fact. Dewitt cites to *Martuscello v Jensen*, for the proposition that where, as here, assessments are made as to patient's risk of falling, medical conditions and the need for assistance, those are medical determinations that sound in medical malpractice (*Martuscello v Jensen*, 134 AD3d 4 [3d Dept 2015]). In opposition, plaintiff just cites Dewitt's responsibility to exercise due care but does not substantially oppose Dewitt's argument that a higher standard of care is applicable in the instant matter. Accordingly, plaintiff's second cause of action for negligence is dismissed.

Similarly, plaintiff has sufficiently failed to oppose Dewitt's motion and *prima facie* showing that the third cause of action for wrongful death should be dismissed. "The elements to establish a cause of action for to recover damages for wrongful death are (1) the death of a human being, (2) the wrongful act, neglect or default of the defendant by which the decedent's death was caused, (3) the survival of distributees who suffered pecuniary loss by reason of the

death of decedent, and (4) the appointment of a personal representative of the decedent” (*Chong v NY City Tr. Auth.*, 83 AD2d 546, 547 [2d Dept 1981]). The evidence is undisputed that Mr. Tanenbaum’s health was already under significant decline prior to his Dewitt admission as well as suffered several illnesses that cannot be attributed to Mr. Tanenbaum’s admission to Dewitt, specifically a diagnosis of Parkinson’s disease, lung cancer and bone cancer, among others. Plaintiff’s opposition and its expert fail to raise an issue of act with respect to this cause of action. Moreover, plaintiff has failed to provide any damages that occurred as a result of this alleged wrongful death.

As to the alleged violations of the PHL, the Court finds that this is the quintessential “battle of the experts”. Dewitt contends that its expert is more qualified as Dr. Tommasulo has over 30 years of experience as a physician practicing Internal and Geriatric Medicine and 25 years of experience as a practicing physician and Medical Director in skilled nursing facilities, while Dr. Mehlman, the expert retained by plaintiff, is not a geriatrics specialist, thus Dewitt contends is not qualified to opine on the subject matter.

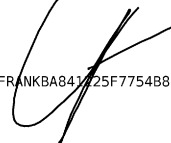
The First Department has held that the status of an expert “does not vitiate validity of expert’s affidavit for purposes of defeating a motion for summary judgment” rather, it presents an issue for consideration by jury in evaluating weight to be accorded expert’s opinion. *Lambos v Weintraub*, 246 AD2d 356, [1st Dept 1998] internal citations omitted. Accordingly, this Court must not credit one expert’s qualifications over the other, as that is a determination is one in the purview of a jury.

In support of its motion, Dewitt’s expert opines that Dewitt did act in accordance with the standard of care in the State of New York for the care residents of long-term care facilities to the

contrary plaintiff's expert opines that Dewitt failed to provide adequate supervision and prevention of falls. Accordingly, it is hereby

ORDERED that plaintiff's second and third causes of action are dismissed; and it is further

ORDERED that all claims seeking punitive damages are dismissed.

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1/12/2023
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE