

Gladden v Center for Nursing & Rehabilitation Inc.

2023 NY Slip Op 34789(U)

May 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 502594/19

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of May, 2023.

P R E S E N T:
HON. WAVNY TOUSSAINT,

Justice.

-----X
LENA GLADDEN,

Plaintiff,

Index No. 502594/19

-against-

DECISION AND ORDER

MS #3 & 4

CENTER FOR NURSING & REHABILITATION INC.;
CENTER FOR NURSING & REHABILITATION INC.,
D/B/A CENTER FOR NURSING & REHABILITATION;
CENTER FOR NURSING & REHABILITATION INC.,
D/B/A CENTERLIGHT HEALTH SYSTEM;
CENTERLIGHT HEALTH SYSTEM, INC.;
CENTERLIGHT HEALTH SYSTEM, INC.,
D/B/A CENTERLIGHT HEALTH SYSTEM;
CENTERLIGHT HEALTH SYSTEM, INC.,
D/B/A CENTER FOR NURSING & REHABILITATION;
DOWNTOWN BROOKLYN NURSING &
REHABILITATION CENTER; PROSPECT
ACQUISITION I, LLC; and PROSPECT
ACQUISITION I, LLC, D/B/A DOWNTOWN
BROOKLYN NURSING & REHABILITATION CENTER,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Cross Motion, Affirmations, Memoranda of Law, and Exhibits Annexed _____	<u>57-70; 73-81</u>
Affirmations in Opposition and Exhibits Annexed _____	<u>86-91</u>
Reply Affirmation _____	<u>94</u>

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Upon the foregoing papers, defendants Center for Nursing & Rehabilitation Inc.;
Center for Nursing & Rehabilitation Inc., d/b/a Center for Nursing & Rehabilitation;
Center for Nursing & Rehabilitation Inc., d/b/a Centerlight Health System; Centerlight

Health System, Inc.; Centerlight Health System, Inc., d/b/a Centerlight Health System; and Centerlight Health System, Inc., d/b/a Center for Nursing & Rehabilitation (collectively, “CNR”)¹ move for an order, pursuant to CPLR §3212(e) (and, in effect, CPLR §3211(a)(5)), granting them partial summary judgment: (1) dismissing and striking the portions of plaintiff’s Complaint sounding in negligence, negligent hiring and Public Health Law (“PHL”) §2801-d and §2803-c violations regarding treatment rendered prior to February 5, 2016, as time-barred by the three-year statute of limitations; (2) dismissing plaintiff’s cause of action sounding in gross negligence and (3) dismissing plaintiff’s claim for punitive damages and deleting all references to “willful” or “reckless” conduct (Motion Seq. 03). Plaintiff opposes and cross-moves for an order: (1) pursuant to CPLR §3212, granting her partial summary judgment on the issue of liability as against CNR on her PHL §2801-d cause of action (together with an award of attorney’s fees and statutory punitive damages) and directing a trial on the issue of damages only and (2) pursuant to CPLR §3403(a)(4), granting her a trial preference on the basis of her age (Motion Seq. 04).

BACKGROUND

On December 31, 2014, plaintiff, then 74 years old, was admitted to CNR’s nursing home. Her medical history was significant for diabetes and peripheral vascular disease. Her social history was significant for her life-long smoking. From

¹ Defendants Downtown Brooklyn Nursing & Rehabilitation Center, Prospect Acquisition I, LLC, and Prospect Acquisition I, LLC, d/b/a Downtown Brooklyn Nursing & Rehabilitation Center, were dismissed from this action by stipulation, dated November 6, 2019 (NYSCEF Doc. No. 28).

December 31, 2014 to March 31, 2016, plaintiff intermittently resided at CNR. During plaintiff's residence, CNR allegedly failed to notice or appropriately respond to the progressive deterioration of her right leg. Ultimately, on March 31, 2016, plaintiff was transferred from CNR to nonparty Kingsbrook Medical Center where, on April 4, 2016, she underwent the above-the-knee amputation of her then-gangrenous right leg (the "amputation"). Plaintiff was returned to CNR on April 11, 2016, where she has resided ever since.

PROCEDURAL HISTORY

On February 5, 2019, plaintiff commenced this action against CNR. Plaintiff asserted causes of action based on: (1) violations of PHL §2801-d and §2803-c; (2) negligent hiring/retention; (3) common-law negligence and (4) gross negligence. Plaintiff also sought compensatory, statutory, and punitive damages. CNR, by answer dated April 3, 2019, joined issue, asserting statute of limitations as one of its affirmative defenses. On April 26, 2022, plaintiff filed a note of issue and certificate of readiness. Thereafter, the parties had 60-days within which to move for summary judgment, as per the Court's Part Rules. On June 24, 2022, CNR filed and served the within motion. On September 9, 2022, plaintiff filed and served the within cross motion.

THE PARTIES' SUBMISSIONS

CNR's motion asserts that plaintiff's causes of action alleging PHL §2801-d and §2803-c violations, negligent hiring/retention, and common-law negligence claims, all accrued as of February 5, 2016. Accordingly, CNR argues these claims are barred by the three-year statute of limitations, given that this action was not commenced until February

5, 2019. A second branch of CNR's motion seeks summary judgment dismissing the entirety of plaintiff's gross negligence claim (as well as plaintiff's demand for punitive damages), together with some ancillary relief, arguing that same are unsupported by the record of CNR's care and treatment of plaintiff.

Plaintiff opposes CNR's motion and cross moves for partial summary judgment on the core issue of liability as to her PHL claim, pled in Count I of the Complaint. Plaintiff argues, as part of the opposition and in support of the motion, that her injury was sustained within the applicable three-year statute of limitations and that liability is established based upon the opinion of plaintiff's expert, Dr. Kenneth Steier ("Dr. Steier"). Dr. Steier opines that CNR's failures constitute negligence, recklessness, deviations from the standard of care, and violations of plaintiff's duly cited federal and state rights; and that these failures were a substantial cause of an ulcer developed to plaintiff's right foot, directly resulting in gangrene, amputation, pain, suffering, and loss of quality of life. Plaintiff further argues the documented care records prove CNR's negligence.

In opposition to plaintiff's cross motion and in further support of its motion, CNR argues, generally, that the cross motion is untimely and not substantially identical to its motion and thus should be denied on this basis. CNR further argues the three-year statute of limitations bars plaintiff's claims, in any event, and that the gross negligence and punitive damage claims should be dismissed since plaintiff has failed to show CNR acted with willful, wanton or in reckless disregard of her rights.

DISCUSSION

“A defendant who moves to dismiss a cause of action pursuant to CPLR §3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired” (*Craig v Rutland Nursing Home*, 202 AD3d 1044, 1045 [2d Dept 2022]). “[T]o make a prima facie showing, the defendant must establish, inter alia, when the plaintiff’s cause of action accrued” (*Swift v New York Med. Coll.*, 25 AD3d 686, 687 [2d Dept 2006]). “In general, a cause of action accrues, triggering commencement of the limitations period (*see CPLR 202(a)*), when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief” (*Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 210 [2001]). “In an action to recover for a liability created or imposed by statute, the statutory language determines the elements of the claim which must exist before the action accrues” (*id.*).

Pursuant to the PHL, “[a]ny residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation . . .” (*PHL §2801-[d][1]*). Thus, the basis for liability under Public Health Law §2801-d “is neither deviation from accepted standards of medical practice nor breach of a duty of care. Rather, it contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule” (*Schwartz v Patridge*, 179 AD3d 963, 965 [2d Dept. 2020] *citing Novick v South Nassau Communities Hosp.*, 136 AD3d 999, 1001

[2016], quoting *Zeides v Hebrew Home for Aged at Riverdale*, 300 AD2d 178, 179 [2002]).

Accrual of a PHL cause of action first occurs – and the statute begins to run – when plaintiff has been injured by the aforementioned deprivations. Likewise, “a cause of action for personal injuries, whether sounding in negligence [or negligent hiring/retention], accrues at the time of injury” (*Barrell v Glen Oaks Vil. Owners, Inc.*, 29 AD3d 612, 613 [2d Dept 2006] [internal citations omitted]). Here, CNR contends plaintiff’s causes of action based on violations of the PHL, common-law negligence and negligent hiring/retention, all accrued on or before February 5, 2016, three years prior to the inception of this action. Significantly, however, CNR, in its moving papers, has offered no expert evidence to make a prima facie showing that the amputation, occurring on April 4, 2016 at Kingsbrook Hospital, did not qualify as an injury under the PHL or that same was not sustained within the three years immediately preceding the commencement of this action. CNR did not offer any argument on this issue except to summarily conclude that “plaintiff’s right above-the-knee amputation was inevitable due to her vascular compromise” (Singer Affirmation in Support, NYSCEF Doc. No. 58, at par. 57)

CNR supports its conclusion by citing to the deposition testimony of defense witness, Registered Nurse Dorette Smith, who was employed at CNR from 1985 through 2017. In so doing, CNR states: “RN Dorette Smith was deposed on February 9, 2022. She testified that plaintiff had “issues” with her right leg. Ms. Smith further testified that

both gangrene and amputation of a lower extremity were dependent on the extent of plaintiff's vascular disease." (*id.* at par. 31)

Upon a search of Ms. Smith's February 9, 2022 EBT transcript (NYSCEF Doc. No. 65) however, the Court finds that Ms. Smith was not qualified as an expert. Moreover, the testimony elicited from Ms. Smith on this issue by plaintiff's counsel was contradictory and unavailing at best. A review of her actual testimony related to gangrene and the amputation was as follows:

Q. Ms. Smith, are you saying that, regardless of what treatment is provided to a resident with vascular disease, it has no impact on whether they end up with gangrene?

A. No opinion on that. . . (*id.* at p. 40)

Q. Do you have an opinion as to what the impact of a treatment would have on a patient with vascular disease ending up with an amputation?

A. No.

Q. You have no opinion about that?

A. No.

Q. So the type of treatment provided to a resident has no impact on whether or not a patient with vascular disease ends up with an amputation?

A. No -- (*id.* at p. 41)

Before completing the remainder of her statement, Ms. Smith was interrupted by defense counsel. After a colloquy with plaintiff's counsel, defense counsel then states: "Objection. That's not what she said, . . . She said she had no opinion. Your question now is different. If you want to reword that question, then so be it. But I don't think that's an appropriate question." (*id.*) When the question was read back to Ms. Smith and again,

she was asked: Q: What would impact a resident with vascular disease ending up with gangrene? This time, Ms. Smith answered: “The extent of their disease.” (*id.* at p. 42), a diametrically opposite answer to her initial response that she had “no opinion” on the matter. The conflicting responses raise credibility issues as to Ms. Smith’s testimony.

Plaintiff’s opposition relies in part on Dr. Steier, who opines that the treatment provided by CNR’s employees violated the decedent’s rights and ultimately resulted in the amputation. Dr. Steier’s conclusions, coupled with CNR’s failings on its prima facie case, at the very least, present a question of fact as to whether the amputation was an injury under the PHL (which is not questioned was within the applicable three-year statute of limitations).

The rehabilitative, supporting affirmations of CNR’s experts Dr. Todd Berland and Dr. Sharon Bragman (who both conclude, to varying degrees, the amputation was “inevitable”), first submitted in reply to counter plaintiff’s expert Dr. Steier, cannot be considered (*see Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992]). Accordingly, that branch of CNR’s motion seeking partial summary judgment as to plaintiff’s aforementioned claims on statute of limitations grounds, is denied.

The next branch of CNR’s motion seeks summary judgment dismissing the entirety of plaintiff’s gross negligence claim (as well as her demand for punitive damages), together with some ancillary relief. Of note, CNR has not moved to dismiss, on the statute of limitations grounds, the pre-February 5, 2016 portion of plaintiff’s gross negligence claim in Count IV of her complaint. Rather, CNR seeks dismissal, as a matter of law, of the entirety of plaintiff’s gross negligence claim (along with her demand for

punitive damages) under the summary-judgment standard of CPLR §3212. Nonetheless, as with the afore-cited statute of limitations point, CNR has failed, as part of its moving papers, to submit an affirmation from its medical experts to make a prima facie showing of entitlement to such relief (*Sullivan v. Our Lady of Consolation Geriatric Care Center*, 60 AD3d 663,665 [2d Dept 2009]). The Court also finds CNR's arguments on that branch of its motion seeking dismissal of the negligent hiring/retention claims unavailing. For the foregoing reasons, these branches of CNR's motion for partial summary judgment likewise are denied.

Upon consideration of plaintiff's cross motion for partial summary judgment, the record indicates the note of issue was filed on April 26, 2022. As previously noted, the parties had 60-days therefrom, or until June 27, 2022, to file any summary judgment motions. CNR filed its partial summary judgment motion on June 24, 2022, within the required timeframe for doing so. Plaintiff did not file its cross motion for partial summary judgment until September 9, 2022, 75-days beyond the required timeframe for doing so. Plaintiff's cross motion, as filed, was therefore subject to acceptance by the Court only if same was made "on nearly identical grounds" as CNR's timely served partial summary judgment motion. (*Vitale v Astoria Energy II, LLC*, 138 AD3d 981, 984 [2d Dept 2016]).

Here, the Court does not find plaintiff's cross motion to be based on nearly identical grounds as that of CNR. Plaintiff's cross motion was addressed to her statutory claim under the PHL, whereas CNR's timely served motion was addressed to plaintiff's PHL claim only as to statute of limitations grounds and generally as to the gross

negligence claim. The two claims are not “nearly identical”. In fact, plaintiff asserted the PHL and gross negligence claims under the separately pled Counts I and IV of the Complaint. Accordingly, the Court deems this portion of plaintiff’s cross motion untimely, and therefore denies same.

The remaining branch of plaintiff’s cross motion requests a trial preference on the basis of age, pursuant to CPLR §3403(a)(4). Inasmuch as plaintiff is over 70 years of age, she is entitled to a trial preference (*see Borenstein v City of New York*, 248 AD2d 425 [2d Dept 1998]). Accordingly, that portion of plaintiff’s cross motion seeking a trial preference is granted.

The Court has considered the parties' remaining contentions and finds them to be without merit. All relief not specifically granted herein has been considered and is denied.

Accordingly, it is

ORDERED that CNR’s motion for dismissal and other relief (Motion Seq. No. 03) is denied; and it is further

ORDERED that plaintiff’s cross motion for summary judgment and other relief (Motion Seq. No. 04) is granted to the extent that plaintiff is accorded a trial preference on the basis of her age, and is otherwise denied; and it is further

ORDERED that to reflect the prior stipulated dismissal of defendants Downtown Brooklyn Nursing & Rehabilitation Center, Prospect Acquisition I, LLC, and Prospect

Acquisition I, LLC, d/b/a Downtown Brooklyn Nursing & Rehabilitation Center, from this action, the caption is amended to read in its entirety as follows:

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LENA GLADDEN,

Plaintiff,

-against-

Index No. 502594/19

CENTER FOR NURSING & REHABILITATION INC.;
CENTER FOR NURSING & REHABILITATION INC.,
D/B/A CENTER FOR NURSING & REHABILITATION;
CENTER FOR NURSING & REHABILITATION INC.,
D/B/A CENTERLIGHT HEALTH SYSTEM;
CENTERLIGHT HEALTH SYSTEM, INC.;
CENTERLIGHT HEALTH SYSTEM, INC.,
D/B/A CENTERLIGHT HEALTH SYSTEM; and
CENTERLIGHT HEALTH SYSTEM, INC.,
D/B/A CENTER FOR NURSING & REHABILITATION,

Defendants.

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; and it is further

ORDERED that plaintiff's counsel shall electronically serve a copy of this decision and order with notice of entry on CNR's counsel and shall electronically file an affidavit of service thereof with the Kings County Clerk; and it is further

ORDERED that the matter shall appear in the Jury Coordinating Part for conference on July 14, 2023.

This constitutes the decision and order of the Court.

ENTER



J. S. C.

HON. WAVNY TOUSSAINT
J. S. C.