

**Lynch v Willoughby Rehabilitation & Health Care  
Ctr. LLC**

2024 NY Slip Op 31719(U)

May 13, 2024

Supreme Court, Kings County

Docket Number: Index No. 518053/2019

Judge: Genine D. Edwards

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 80 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 13<sup>th</sup> day of May 2024.

P R E S E N T:

HON. GENINE EDWARDS

Justice.

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Decision and Order

LORNA LYNCH, as Administratrix of the Estate of WINSTON LYNCH, and LORNA LYNCH, Individually,

Plaintiffs,

-against-

Index No.: 518053/2019

WILLOUGHBY REHABILITATION AND HEALTH CARE CENTER LLC d/b/a SPRING CREEK REHABILITATION AND NURSING CARE CENTER and MOUNT SINAI HOSPITAL,

Defendants.

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The following e-filed papers read herein:

NYSEF Nos.:

Notice of Motion, Affirmation and Exhibits.....	59 -60
Opposing Affirmation.....	61
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In this action asserting causes of action of medical malpractice, negligence, wrongful death and violations of Public Health Laws §2801-d and 2801-c, and 10 NYCRR §415.12, WILLOUGHBY REHABILITATION AND HEALTH CARE CENTER LLC d/b/a SPRING CREEK REHABILITATION AND NURSING CARE CENTER (hereinafter “Spring Creek”) moved to reargue and reconsider that portion of this Court's order of August 16, 2023 that denied its summary judgment motion. Plaintiff opposed the motion.

Spring Creek contends that the Court erred in finding that there were issues of fact precluding summary judgment to it as it did not depart from the reasonable and accepted

standards of care in its treatment of Mr. Lynch. Spring Creek further contends that the Court erred in failing to dismiss causes of action for wrongful death, and those alleging recklessness and seeking punitive damages.

In its motion, Spring Creek reiterates its position that Mr. Lynch's pressure sore wounds "were simply not present during Mr. Lynch's admission at SPRING CREEK." The decision refers to the affirmation of plaintiff's expert who found that "Spring Creek's medical records note "PU: sacral" approximately fourteen (14) times during Mr. Lynch's admission to its facility from November 30, 2016 through March 15, 2017. Defendant did not refute that its records indicate same nor explain the apparent contradiction. This unquestionably raises an issue of fact as to whether Mr. Lynch had pressure ulcers during his stay in Spring Creek, and if so, what treatment was provided and raises issues of fact as to plaintiff's contentions of negligence; malpractice and violation of New York Public Health Law § 2801-d, as codified by 42 C.F.R. §483.25, which states that a nursing home is charged with ensuring that a resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing. Plaintiff's expert opined that Spring Creek's failure to size and treat Mr. Lynch's pressure ulcer violated his rights under the New York Public Health law, and accordingly, was a proximate cause of Mr. Lynch's injuries.

Spring Creek failed to support its contention that the cause of action for wrongful death should be dismissed. Plaintiff's expert opined that Mr. Lynch's pressure ulcers contributed to his injuries that led to his death. Mr. Lynch was transferred and admitted to co-defendant MOUNT SINAI HOSPITAL, on March 15, 2017, at approximately 2:30 am, where both blood and urine cultures were obtained, which revealed a positive result for proteus mirabilis. Specifically, he was noted to present, upon admission to MOUNT SINAI HOSPITAL from Spring Creek, with sepsis due to Escherichia coli (E. coli); unspecified severe protein-calorie malnutrition; and a urinary tract infection.

Spring Creek's expert opined that there were no departures from the reasonable and accepted standards of care in its treatment of Mr. Lynch, without opining as to whether his pressure ulcers (and resulting sepsis) could have caused or contributed to the

injuries that caused Mr. Lynch's death, either in the underlying summary judgment motion or in the affirmation in support of the instant motion. It was not until the reply to plaintiff's opposition to the present motion that Spring Creek claimed that Mr. Lynch passed away due to cardiopulmonary arrest, coronary artery disease with other significant contributing conditions of end stage renal disease, diabetes mellitus and dementia, and that there is no indication that he died as a result of a pressure ulcer or infection. As this contention was not raised in the underlying motion, thus denying plaintiff's expert an opportunity to refute it, nor even raised in the present motion, until the reply, it shall not be considered here. *Castro v. Durban*, 161 A.D.3d 939, 77 N.Y.S.3d 680 (2d Dept. 2018), *Ditech Financial, LLC v. Connors*, 206 A.D.3d 694, 170 N.Y.S.3d 560 (2d Dept. 2022).

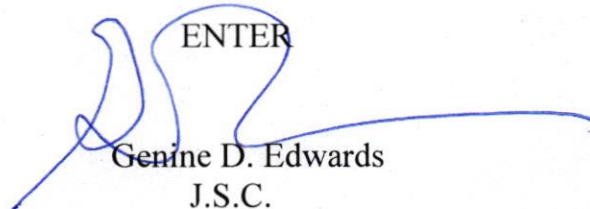
In addition, Spring Creek's contention that the Court should have dismissed causes of action alleging recklessness and seeking punitive damages must be denied as moot, as the complaint does not set forth any such allegations. Moreover, Spring Creek did not identify which allegations in plaintiffs' bill of particulars were allegedly improper, either in the underlying summary judgment motion or in the instant motion to reargue. Spring Creek also did not explain why it failed to move for an amendment of the bill of particulars during discovery.

Furthermore, Spring Creek misstated the law in its motion, contending that Public Health Law § 2801-d cannot be pled in conjunction with negligence when the injuries are identical to those claimed in the negligence cause of action. In support of this contention, Spring Creek cited one case, from Kings County Supreme Court, not the Appellate Division, Second Department, (*Acevedo v Augustana Lutheran Home*, 801 N.Y.S.2d 229 [Sup.Ct. Kings Co. 2004]), which denied plaintiff's application to amend the complaint belatedly, on the eve of trial, after jury selection, where the Public Health Law allegations plaintiff sought to add were identical to the claims already being litigated. There is no appellate authority that states that Public Health Law violations cannot be pled in conjunction with medical malpractice or negligence claims.

Spring Creek also baselessly contended that it was plaintiffs' responsibility to find and depose witnesses who made the chart entries in its records, although it would actually be incumbent upon Spring Creek to do so if the witnesses would support its position that Mr. Lynch did not have pressure ulcers during his residency at the facility.

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions." opinions' *Palagye v. Loulmet*, 203 A.D.3d 729, 160 N.Y.S.3d 662, 663 (2d Dept. 2022); *Cerrone v. North Shore-Long Is. Jewish Health Sys., Inc.*, 197 A.D.3d 449, 152 N.Y.S.3d 147 (2d Dept. 2021).

Spring Creek's motion seeking leave to renew and/or re-argue this Court's decision is denied for failing to demonstrate that the Court misread the applicable law or misconstrued the facts of the case. The Court considered the parties' remaining contentions and found them unavailing. All relief not expressly granted is denied.

ENTER  
  
Genine D. Edwards  
J.S.C.