

Faussett v New York Ctr. for Rehabilitation & Nursing

2024 NY Slip Op 35198(U)

February 8, 2024

Supreme Court, Queens County

Docket Number: Index No. 713413/2017

Judge: Anna Culley

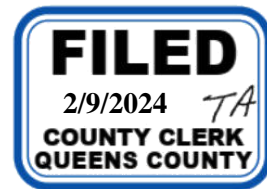
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ANNA CULLEY IA Part 27
Justice



NADINE FAUSSETT, as Administratrix of the Goods,
Chattels and Credits of DOROTHY FAUSSETT,
Deceased,

Index
Number 713413 /2017

Plaintiff,

Motion
Date May 30, 2023

-against-

Mot Seq. No. 5

NEW YORK CENTER FOR REHABILITATION
AND NURSING, NEW YORK REHABILITATION
CARE, MANAGEMENT, LLC D/B/A NEW YORK
CENTER FOR REHABILITATION AND NURSING,

Defendants.

The following numbered papers read on this motion by defendants New York Center for
Rehabilitation and Nursing, New York Rehabilitation Care Management, LLC, and New York
Rehabilitation Care Management, LLC d/b/a New York Center for Rehabilitation and Nursing for
an order granting summary judgment dismissing the complaint and amended complaint, and
dismissing any and all claims in the bill of particulars that fall outside the scope of the complaint and
amended complaint; and the cross-motion by plaintiff for leave to supplement or amend the bill of
particulars pursuant to CPLR 3025 (b) and 3043 (b).

Table with 2 columns: Paper Description and Papers Numbered. Includes entries for Notice of Motion - Affidavits - Exhibits, Notice of Cross Motion - Affidavits - Exhibits, Answering Affidavits - Exhibits, and Reply Affidavits.

Upon the foregoing papers, it is ordered that the motion and cross motion are determined

as follows:

Dorothy Faussett (hereinafter the decedent), then 84 years old, was admitted to nonparty Long Island Jewish Forest Hills Hospital on April 10, 2017, after fracturing her right hip. She was discharged on May 1, 2017, and became a resident of defendant New York Center for Rehabilitation and Nursing (hereinafter NYC RN) for rehabilitation. The decedent was admitted to nonparty Mount Sinai Queens Hospital (hereinafter MSQH) on July 4, 2017, and stayed until August 3, 2017, when she returned to NYC RN. The decedent was discharged to her home on September 22, 2017. On November 18, 2017, the decedent was re-admitted to MSQH. Upon her discharge on December 1, 2017, the decedent became a resident of nonparty Dry Harbor until she passed away on January 20, 2018.

The decedent commenced the instant action on September 26, 2017, against NYC RN and New York Rehabilitation Care, Management, LLC to recover damages for personal injuries. The decedent asserts causes of action for violation of Public Health Law §§ 2801-d and 2803-c; negligence, gross negligence and negligent hiring, training, retention and supervision. In addition to the requests for compensatory damages included in all causes of action, the first cause of action sought punitive damages pursuant to Public Health Law §§ 2801-d (2) and the fourth cause of action sought common-law punitive damages. By amended summons and verified complaint dated January 18, 2018, the decedent asserted the same causes of action against New York Rehabilitation Care, Management, LLC d/b/a New York Center for Rehabilitation and Nursing. By order dated August 7, 2019, Nadine Faussett as the administratrix of the estate of the decedent, was substituted as plaintiff in place and stead of the deceased. The crux of plaintiff's claim is that defendants failed to prevent the decedent's development, and subsequent deterioration, of venous ulcers between May 1, 2017, and July 4, 2017, resulting in personal injuries. Defendants now move for summary judgement, dismissing all claims against them. Plaintiff cross-moves for leave to supplement or amend the bill of particulars pursuant to CPLR 3025 (b) and 3043 (b).

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980].) The moving party's failure to make a prima facie showing of entitlement requires a denial of the motion, regardless of the sufficiency of the opposing papers. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. (*Zuckerman v City of New York*, 49 NY2d at 562.)

The elements of proof with respect to a negligence cause of action are "the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries." (*Rubin v Staten Is. Univ. Hosp.*, 39 AD3d 618 [2d Dept 2007].) Nursing homes and rehabilitation centers providing physical care to patients have a general duty not to depart from acceptable standards of care customarily exercised in similar facilities. (*See generally Kazyeva v*

Temana Assoc., Inc., 206 AD3d 983, 985 [2d Dept 2022]; *Ciccotto v Fulton Commons Care Ctr., Inc.*, 149 AD3d 1030, 1031 [2d Dept 2017].) An employer can be held liable for negligent hiring, training, supervision and retention when the employer had knowledge of or should have foreseen “the employee’s propensity for the conduct that caused an injury.” (*Guarino v ProHEALTH Care Assoc., LLP*, 219 AD3d 467, 468 [2d Dept 2023].)

Here, defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence that their staff did not depart from accepted standards of nursing care with regards to the decedent. (See *Ciccotto v Fulton Commons Care Ctr., Inc.*, 149 AD3d at 1031.) Defendants submitted the affirmations of Dr. Lawrence N. Diamond, a physician licensed to practice in the State of New York and is board certified in geriatric medicine, and Mary R. Brennan, a registered nurse in the State of New York and board certified in ostomy and wound care nursing. Dr. Diamond opined, to a reasonable degree of medical and nursing certainty, that the staff at defendants’ facility was not negligent in the treatment of the decedent from May 1, 2017 to July 4, 2017, and the staff comported with good and accepted nursing practices at all times. Further, “the decedent’s alleged damages were attributable to her longstanding history of documented vascular disease, which was poorly managed, along with other exacerbating comorbidities.” Nurse Brennan similarly opined that defendants’ staff were not negligent in the treatment of the decedent, and they comported with good and accepted nursing practices at all times.

In opposition, plaintiff submitted the affirmation of Martin Grossman, a physician licensed to practice in the State of New York and is board certified in internal medicine and in hospice and palliative medicine. Dr. Grossman opined, to a reasonable degree of medical certainty, that the care provided to the decedent fell below the generally accepted standards of medical and nursing care. He stated that defendants failed to adequately address the decedent’s skin impairment and failed to monitor her substantial weight gain prior to her July 4th discharge. Dr. Grossman further stated that these failures were a substantial factor and competent producing cause of the decedent’s injuries.

In light of the conflicting expert opinions submitted here, summary judgment is not appropriate with respect to the second and third causes of action. (See *Cerrone v N. Shore-Long Is. Jewish Health Sys., Inc.*, 197 AD3d 449, 452 [2d Dept 2021]; *Kovacic v Griffin*, 170 AD3d 1143, 1144-45 [2d Dept 2019].)

Public Health Law article 28 authorizes a private right of action by patients of “residential health care facilities” for the deprivation of rights conferred by statute, regulation and contract, including those enumerated by Public Health Law § 2803-c. (Public Health Law § 2801-d [1]; *Broderick v Amber Ct. Assisted Living*, 200 AD3d 840 [2d Dept 2021]; see *Novick v S. Nassau Communities Hosp.*, 136 AD3d 999, 1001 [2d Dept 2016].) “In addition, Public Health Law § 2801-d (2) permits punitive damages against a medical facility where a deprivation of a patient’s rights is found to be willful or in reckless disregard to the patient’s rights.” (*Valensi v Park Ave. Operating Co., LLC*, 169 AD3d 960, 962 [2d Dept 2019].) “[A] defendant moving for summary judgment dismissing a cause of action alleging deprivation of rights pursuant to Public Health Law § 2801-d meets its prima facie burden by submitting evidence that the plaintiff’s injuries did not

arise through any action or negligence of its employee.” (*Russell v Riv. Manor Corp.*, 216 AD3d 827, 829 [2d Dept 2023]; see *Moore v St. James Health Care Ctr., LLC*, 141 AD3d 701, 703 [2d Dept 2016].)

Here, the affirmations of defendants’ experts established, prima facie, that defendants did not violate any contract, statute, regulation, code or rule, and that the decedent was not injured by any such violation. Dr. Diamond and Nurse Brennan both opined that no act or omission at defendants’ facility caused or contributed to any of the decedent’s alleged damages, and that the medical and nursing care and treatment provided to the decedent was appropriate under the Public Health Law. (See *Van DeVeerdonk v N. Westchester Restorative Therapy and Nursing Ctr.*, - AD3d -, 2024 NY Slip Op 00180 [2d Dept 2024]; *Schwartz v Partridge*, 179 AD3d 963, 965 [2d Dept 2020].)

In opposition, however, plaintiff raised a triable issue of fact as to whether defendants violated 42 CFR 483.20 (b) (1), 42 CFR 483.21 and 10 NYCRR § 415.11. Dr. Grossman opined, to a reasonable degree of medical certainty, that defendants deprived the decedent of her rights as a resident of their facility. He further stated that his review of the decedent’s records revealed that, prior to her discharge on July 4th, proper assessments were not conducted and appropriate care plans were not in place to address the decedent’s edema condition and skin impairment. Construing the evidence in the light most favorable to the nonmovant plaintiff, the existence of material factual issues obviates the granting of summary judgment to defendants with respect to the first cause of action alleging violations of Public Health Law § 2801-d (1). (*Alvarez v Prospect Hosp.*, 68 NY2d at 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853.) However, since plaintiff’s expert failed to address plaintiff’s claim seeking punitive damages for violations of Public Health Law § 2801-d (2), that branch of defendants’ motion is granted. (See *Valensi v Park Ave. Operating Co., LLC*, 169 AD3d at 962.)

With respect to gross negligence, the movant has the initial burden to establish the absence of any conduct that could be viewed as so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others. (*Vissichelli v Glen-Haven Residential Health Care Facility, Inc.*, 136 AD3d 1021, 1023 [2d Dept 2016].)

Here, defendants also established their prima facie entitlement to judgment as a matter of law dismissing the fourth cause of action through the affirmations of their experts as well as the decedent’s records from her residency at NYCRN, which showed “the absence of any conduct that could be viewed as so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others.” (*Gold v Park Ave. Extended Care Ctr. Corp.*, 90 AD3d 833, 834 [2d Dept 2011].)

In opposition, plaintiff failed to raise a triable issue of fact, as her expert failed to address the allegation of gross negligence in his affirmation. (See *Valensi v Park Ave. Operating Co., LLC*, 169 AD3d at 962; see generally *Barnaman v Bishop Hucles Episcopal Nursing Home*, 213 AD3d 896, 899 [2d Dept 2023].)

The court will now turn to plaintiff's cross motion to amend and/or supplement her bill of particulars. "A party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial." (CPLR 3043 [b].) "[N]o new cause of action may be alleged or new injury claimed." (*Id.*) On the other hand, CPLR 3025 (b) permits a party to amend his or her pleading, including a bill of particulars, at any time by leave of court or by stipulation, by setting forth additional or subsequent transactions or occurrences. "Leave shall be freely given" (CPLR 3025 [b]), and "[t]he decision to allow or disallow the amendment is committed to the court's discretion." (*Edenwald Contr. Co., Inc. v City of New York*, 60 NY2d 957, 959 [1983].)

Contrary to defendants' contention, the proposed amended/supplemental verified bill of particulars did not set forth a new injury or legal theory of liability. (*See Alicino v Rochdale Vil., Inc.*, 142 AD3d 937, 939 [2d Dept 2016]; *see generally Pauling v Glickman*, 232 AD2d 465 [2d Dept 1996].) Furthermore, the allegation that defendants "failed to provide adequate and proper care in failing to address the decedent's Edema" merely expands upon the injuries described in the original bill of particulars and the allegation was addressed by defendants' expert in their affirmations. Therefore, plaintiff's cross motion is granted and plaintiff's proposed amended/supplemental verified bill of particulars, as annexed to the moving papers, is deemed served.

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, defendants' motion for summary judgment is granted to the extent the portions of the first cause of action seeking punitive damages for alleged violations of Public Health Law § 2801-d (2) and the fourth cause of action alleging gross negligence are dismissed. The remaining branches of defendants' motion are denied. Plaintiff's cross motion for leave to supplement or amend the bill of particulars is granted and plaintiff's proposed amended/supplemental verified bill of particulars, as annexed to the moving papers, is deemed served.

Movant is not relieved from the applicable provisions of CPLR 2220 and 202.5-b (h) (2) of the Uniform Rules of Supreme and County Courts insofar as it relates to service and notice of entry of the filed document upon all other parties to the action/proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

The foregoing constitutes the decision and order of this court.


ANNA CULLEY, J.S.C.

Dated: February 8, 2024

