

Dungee v Parkview Care & Rehabilitation Ctr., Inc.
2025 NY Slip Op 35464(U)
January 29, 2025
Supreme Court, Nassau County
Docket Number: Index No. 608362/2022
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Supreme Court Justice

SONYA DUNGEE and MARSHALL DAVID
ALVARADO, as Co-Administrators of the Estate of
NUBIA ALVARADO,

TRIAL/IAS PART 27
NASSAU COUNTY

Plaintiffs,

Index No.: 608362/2022
Motion Seq. No.: 01
Motion Date: 08/27/2024

-against-

PARKVIEW CARE AND REHABILITATION
CENTER, INC,

Defendant.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits,	
Statement of Undisputed Facts	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiffs' Verified Complaint; or, in the alternative, moves, pursuant to CPLR § 3212(g), for an order granting partial summary judgment dismissing all claims for punitive damages; and moves, pursuant to CPLR § 3212(g), for an order granting partial summary judgment dismissing all claims relating to the development of pressure ulcers; and moves, pursuant to CPLR § 3212(g), for an order granting partial summary judgment dismissing all claims relating to claims of mental anguish, inability to perform activities of

daily life, pain and suffering, loss of dignity and loss of enjoyment of life.

Plaintiffs oppose the motion.

Relevant Facts and Procedural History

Plaintiff decedent Nubia Alvarado commenced the instant action against defendant after she allegedly sustained injuries when she fell from her bed.

On June 18, 2019, plaintiff decedent was admitted to defendant's facility from Long Island Community Hospital for long term care. Plaintiff decedent's discharge diagnosis from Long Island Community Hospital included intractable knee pain, inability to walk and care for herself, UTI, nausea-resolved, hypokalemia and hypothyroidism.

On October 4, 2021, plaintiff decedent fell off her bed while CNA Theresa Little ("CNA Little") was providing care. *See* Defendant's Affirmation in Support Exhibit K. According to the Incident/Accident Report, plaintiff decedent stated that the aide told her to turn to her side, and while turning, plaintiff decedent slid out of the bed. *See id.* Plaintiff decedent sustained a laceration to the top of her head, and she complained of pain to the right leg. Plaintiff decedent was transferred to St. Joseph's Hospital and was diagnosed with a right distal femur fracture. The orthopedic surgery consultation recommended non-operative treatment including a dressing and knee immobilizer. Plaintiff decedent returned to defendant's facility on October 6, 2021.

Plaintiff decedent filed a Summons and Verified Complaint on June 27, 2022. *See* Defendant's Affirmation in Support Exhibit A. Defendant interposed a Verified Answer on July 28, 2022. *See* Defendant's Affirmation in Support Exhibit B. This matter was stayed when plaintiff decedent passed away on June 24, 2023. *See* Defendant's Affirmation in Support Exhibit F. On May 8, 2024, the Surrogate's Court issued a decree granting

Limited Letters of Administration to SONYA DUNGEE and MARSHALL ALVARADO.

See Defendant's Affirmation in Support Exhibit G. On July 25, 2024, all parties stipulated to amend the caption to reflect the appointment of SONYA DUNGEE and

MARSHALL DAVID ALVARADO as Co-Administrators of plaintiff decedent's estate.

On September 3, 2024, the Court So-Ordered and entered the stipulation to amend the caption.

See NYSCEF Document No. 61.

Discussion

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. See *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. See *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. See CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. See *Zuckerman v. City of New York, supra*.

When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp.*, *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

Additionally, “[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” *Kovacik v. Griffin*, 170 A.D.3d 1143, 96 N.Y.S.3d 677 (2d Dept. 2019). “Such conflicting expert opinions will raise credibility issues which can only be resolved by a jury.” *DiGeronimo v. Fuchs*, 101 A.D.3d 933, 957 N.Y.S.2d 167 (2d Dept. 2012).

Defendant moves pursuant to CPLR § 3212 for summary judgment dismissing plaintiffs’ Verified Complaint. In support of its motion, defendant submits, *inter alia*, its medical records, deposition transcripts and the geriatric medicine expert affirmation of

Gisele Wolf-Klein, M.D. ("Dr. Wolf-Klein"). *See* Defendant's Affirmation in Support Exhibits D, E, J, K and M.

Counsel for defendant argues that Dr. Wolf-Klein conclusively establishes that defendant was not negligent in the care provided to plaintiff decedent and that defendant did not violate any resident rights or New York Public Health Law. Dr. Wolf-Klein opines that the procedure of performing a bed bath as explained by CNA Little during her deposition was proper and within the appropriate standard of care, including allowing residents to turn themselves on the bed, if they can, instead of having the nurse physically reposition the resident. Dr. Wolf-Klein opines, contrary to plaintiffs' assertions, that plaintiff decedent's femur fracture was not caused by any negligent care provided by defendant. *See* Defendant's Affirmation in Support Exhibit M.

Dr. Wolf-Klein opines that there is no evidence or documentation in any of the medical records to corroborate that plaintiff decedent developed any pressure ulcers during her four-year admission to defendant. Dr. Wolf-Klein asserts that defendant took all necessary steps and precautions to prevent plaintiff decedent from developing pressure ulcers. Counsel for defendant argues that the documentation within the record indicating a sacral wound is not the same as a pressure ulcer. *See id.*

Counsel for defendant also argues there is no evidence demonstrating that plaintiff decedent suffered any mental anguish, loss of enjoyment of life, pain and suffering, or loss of dignity due to an inability to perform activities of daily living. Dr. Wolf-Klein opines that the record demonstrates that defendant's staff did not cause plaintiff decedent any undue pain and suffering and, upon plaintiff decedent's return to defendant following

the femur fracture, plaintiff decedent was noted to be happy to be home and that she enjoyed independent activities and socializing. *See id.*

Finally, counsel for defendant argues that punitive damages are not warranted. Dr. Wolf-Klein opines that defendant's staff followed the standard of care and plaintiffs have failed to offer any evidence that the care rendered rose to the level of recklessness, willful or wanton conduct to warrant the imposition of punitive damages. *See id.*

In opposition to the motion, counsel for plaintiffs claims that defendant deviated from the accepted standards of care and that the submission of the affirmation of their expert Matthew McNabney, M.D. ("Dr. McNabney") creates a triable issue of fact. *See* Plaintiffs' Affirmation in Opposition Exhibit 1. Counsel for plaintiffs also asserts that defendant deprived plaintiff decedent of numerous rights as a nursing home resident that were afforded to plaintiff decedent under the New York Public Health Law and various state and federal regulations.

Dr. McNabney opines that plaintiff decedent's fall on October 4, 2021 was preventable with appropriate nursing care. Dr. McNabney opines that, based upon CNA Little's deposition testimony describing the incident on October 4, 2021, defendant departed from the standard of care by having plaintiff decedent, while in the middle of her bed, turn towards the edge of the bed without safeguarding her from falling. Dr. McNabney opines that defendant failed to accurately assess plaintiff decedent's risk for falling and failed to provide for adequate interventions for the prevention of falls causing plaintiff decedent's injury. Dr. McNabney opines that the MDS provides that plaintiff decedent required extensive assistance of two (2) persons for bed mobility, transfers, toilet use and bathing. Dr. McNabney states that plaintiff decedent's care plan was violated,

and defendant departed from the standard of care when plaintiff decedent only had one (1) person assisting her with her bed mobility. Dr. McNabney opines that the proper technique should have included having a second person on the other side of the bed to assist the CNA, as well as to have bed side rails up to protect the patient from falling out of the bed. *See* Defendant's Affirmation in Support Exhibits K and M.

Counsel for plaintiffs argues that Dr. Wolf-Klein's assertion that there is no documentation in the record that plaintiff decedent had any pressure ulcers is inaccurate. *See* Defendant's Affirmation in Support Exhibit M. Counsel for plaintiffs argues that the record demonstrates that plaintiff decedent had a sacral wound on April 30, 2021, with a request for a wound care evaluation, as well as the presence of a sacral wound on May 19, 2021. Additionally, counsel for plaintiffs claims that defendant's argument that plaintiff decedent had no undue pain and suffering is equally without merit as plaintiff Sonya Dungee ("Dungee") testified, during her deposition, that plaintiff decedent continued to have right leg pain up until the time of her deposition in March 2023. *See* Defendant's Affirmation in Support Exhibit D. Moreover, plaintiff Dungee also testified that plaintiff decedent had an open wound on her back causing her pain. *See id.*

Dr. McNabney additionally opines that defendant deprived plaintiff decedent of her rights under New York State Public Health Law, 42 CFR § 483 and 10 NYCRR § 415 regarding defendant's failure to supervise plaintiff decedent and defendant's failure to provide services to maintain the highest practicable physical, mental and psychosocial wellbeing. *See* Plaintiffs' Affirmation in Opposition Exhibit 1. Dr. McNabney states that all of the departures, deprivations and failures were substantial factors in causing the right femur fracture that inhibited plaintiff decedent's ability to rehabilitate, resulting in pain,

in a decline in range of motion and a decline in plaintiff decedent's functional status in activities of daily living. Furthermore, Dr. McNabney asserts that the aforementioned departures and deprivations of rights were reckless, grossly negligent and indifferent to patient care placing plaintiff decedent at serious risk of injury from falling. *See id.*

Here, defendant has established, with the support of Dr. Wolf-Klein's expert affirmation, a *prima facie* entitlement to summary judgment. *See* Defendant's Affirmation in Support Exhibit M. However, plaintiffs have demonstrated material questions of fact with the submission of an expert affirmation by Dr. McNabney regarding whether CNA Little properly performed the bed bath, whether defendant violated Public Health Law and whether plaintiff decedent had developed a sacral pressure ulcer that required a wound care evaluation. *See* Plaintiffs' Affirmation in Opposition Exhibit 1. There is also a question of fact regarding any claims related to pain and suffering, mental anguish, inability to perform activities of daily life, loss of dignity and loss of enjoyment of life.

Based on the foregoing, the branches of defendant's motion, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiffs' Verified Complaint; or, in the alternative, pursuant to CPLR § 3212(g), for an order granting partial summary judgment dismissing all claims relating to the development of pressure ulcers; and, pursuant to CPLR § 3212(g), for an order granting partial summary judgment dismissing all claims relating to claims of mental anguish, inability to perform activities of daily life, pain and suffering, loss of dignity and loss of enjoyment of life, are hereby **DENIED**.

"Punitive damages may be assessed where a defendant's actions evinced a high degree of moral culpability which manifested a conscious disregard for the rights of others or conduct so reckless as to amount to such disregard. Such damages may be imposed for wanton or

reckless-disregard for the safety or rights of others where the conduct is sufficiently blameworthy, and the award of punitive damages ... advance[s] a strong public policy of the State by deterring its future violation. The violation of rights must be so flagrant as to transcend mere carelessness. In addition, Public Health Law § 2801--(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 A.D.3d 960, 94 N.Y.S.3d 311 (2d Dept. 2019).

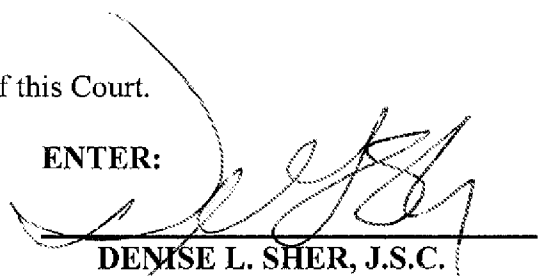
Here, defendant established its *prima facie* entitlement to summary judgment regarding the request for punitive damages under the Public Health Law by demonstrating that its conduct was neither in willful nor reckless disregard of plaintiff decedent's rights. *See Vissichelli v. Glen-Haven Residential Health Care Facility, Inc.*, 136 A.D.3d 1021, 25 N.Y.S.3d 639 (2d Dept. 2016). In opposition, plaintiffs failed to raise a triable issue of fact that defendant consciously disregarded plaintiff decedent's condition.

Based on the foregoing, the branch of defendant's motion, pursuant to CPLR § 3212(g), for an order granting partial summary judgment dismissing all claims for punitive damages, is hereby **GRANTED**. And it is further

ORDERED that the parties shall appear for Trial, in Nassau County Supreme Court, Differentiated Case Management Part (DCM), at 100 Supreme Court Drive, Mineola, New York, on **May 1, 2025, at 9:30 a.m.**

This constitutes the Decision and Order of this Court.

ENTER:


DENISE L. SHER, J.S.C.

ENTERED

Feb 03 2025

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
January 29, 2025