

Demicoli v Townhouse Operating Co., LLC
2009 NY Slip Op 33287(U)
July 20, 2009
Supreme Court, Nassau County
Docket Number: 1549/07
Judge: John M. Galasso
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

ANTHONY DEMICOLI

Plaintiff,

- against -

Index No. 11549/07
Sequence #001 & #002
7/20/2009

TOWNHOUSE OPERATING CO., LLC individually
and d/b/a TOWNHOUSE EXTENDED CARE FACILITY,
Defendants.

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Upon the foregoing papers, Defendant's motion for partial summary judgement pursuant to CPLR §3212 Is determined as follows:

This is an action brought by a patient against Defendant, a residential health care facility, for injuries sustained while undergoing short-term rehabilitation. It is alleged that Plaintiff suffered from sub-standard care during the period from June 8 through October 1, 2006, causing the development of additional and worsening of pre-existing decubitus ulcers, sepsis and gangrene. It includes a cause of action under Public Health Law § 2801-d.

Defendant seeks dismissal of Plaintiff's claims for punitive damages, the third cause of action for gross negligence, the re-classification of the second cause of action as one for medical malpractice and additional relief.

In determining first that portion of Defendant's motion seeking dismissal of the third cause of action for gross negligence, the undersigned notes that Plaintiff seeks not only common law punitive damages under this claim, but also punitive damages pursuant to Public Health Law § 2801-d.

Since punitive damages are inextricably linked to the underlying cause of action (see Pocanova v Equitable Life Assurance Socitey, 83 NY2d 603), damages sought pursuant to Public Health Law § 2801-d, including statutory punitive damages, are more

appropriately linked with the first cause of action. This is also applicable to the second cause of action for common law negligence and compensatory damages.

Nevertheless, with respect to gross negligence and either common law or statutory punitive damages, the evidentiary standard of proof in the Second Department regarding its imposition is "clear and convincing evidence" (Randi A. J. V Long Island Surgi-Center, 46 AD3d 74, declining to follow Greenbaum v Svenska Handelsbanken, 979 F.Supp. 973, Sotomayor, J.).

In support of its motion to dismiss the third cause of action, and all punitive damages, Defendant submits Plaintiff's nursing home and hospital records, thereby providing a highly detailed account of the care he received at the facility, especially with respect to Plaintiff's decubitus ulcers. Consequently, Defendant has met its initial burden of establishing it prima facie right to judgment (see Alvarez v Prospect Hospital, 68 NY2d 320; Everett v Loretto Adult Community, Inc., 32 AD3d 127).

In order to raise an issue of fact, Plaintiff submits an affidavit from Charlotte Sheppard RN-BC, BSN, LHRM, a geriatric nurse and expert in geriatric residential care. Upon reviewing Plaintiff's medical records Nurse Sheppard concluded that Defendant deviated from standards of care and its treatment of Plaintiff was grossly inadequate.

After outlining her opinions stating Plaintiff's treatment was ineffective, insufficient, or lacking for skin care and how it affected Plaintiff's condition, Nurse Sheppard described his treatment as "reckless" and consisting of "outrageous acts and omissions [that] were gross and demonstrated deviation from the expected standard of care ... [and were otherwise a clear violation of Plaintiff's rights under the Public Health Law].

Thus, Plaintiff's expert couches her conclusory terms more in line with the language employed in the statute. However, under common law, gross negligence means a failure to use even slight care, or conduct that is so careless as to show a complete disregard for the rights and safety of others (PJI 2:210A).

The undersigned finds that Defendant's alleged failure to render proper care, while serious, does not in and of itself evince a reckless or complete disregard or conscious indifference to justify punitive damages as defined under the common law. Therefore, Plaintiff's opposition fails to raise an issue of fact regarding the reprehensible degree of conduct necessary to establish gross negligence.

Accordingly, the third cause of action for common law gross negligence and its attendant punitive damages is dismissed.

As to statutory punitive damages under Public Health Law § 2801-d, Plaintiff expert's entire opinion is generated around fulfilling the elements necessary for a cause of action pursuant to Public Health Law § 28091-d (2). However, the factual predicate for statutory punitive damages is less than that imposed under common law.

Consequently, Plaintiff has successfully raised an issue of fact concerning punitive damages under the statute i.e., the first cause of action.

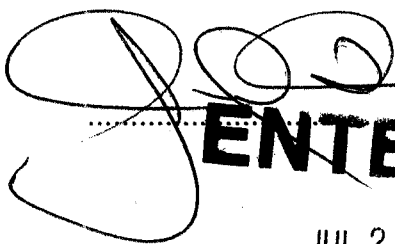
Defendant's application to dismiss that portion of the second cause of action for negligent hiring and training of employees is denied. Unlike Talavera v Arbit, 18 AD3d 738 and other cases cited by Defendant, Plaintiff is not alleging negligent hiring or retention as a separate cause of action. The alleged lack of training to follow protocols, etc. is but one aspect of the over-all negligence claim against Defendant and it is not specifically directed toward one employee.

With regard to Defendant's argument that the second cause of action for negligence be re-classified as medical malpractice and compelling Plaintiff to file a certificate of merit and notice of medical malpractice action (CPLR §§ 3012-a and 3046), that application is likewise denied (see Rey v Park View Nursing Home, Inc. 26 2AD2d 624; see also Weiner v Lenox Hill Hospital, 88 NY2d 784; cf. Mor setter v Terrance Cardinal Cooke Health Care Center, 8 Misc. 3d 506).

Finally, in considering Defendant's motion to dismiss the complaint's fifth and sixth causes of action for breach of contract, that portion of the application being unopposed, is granted.

Plaintiff's application by order to show cause for a trial preference based on Plaintiff's age is granted (Seq. # 002).

Dated: July 20, 2009

  
.....J.S.C.  
**ENTERED**  
JUL 22 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE