Placide v United Odd Fellow & Rebekah Home
2014 NY Slip Op 31082(U)
March 3, 2014
Sup Ct, Bronx County
Docket Number: 308534/08
Judge: Stanley B. Green
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6M

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MARIE PLACIDE, AS ADMINISTRATRIX OF THE ESTATE OF MARIE PLACIDE, DECEASED,

Plaintiff(s),

- against-

UNITED ODD FELLOW AND REBEKAH HOME, INC., TOWNE NURSING STAFF, INC. and YOLANDA "WAGNER",

Defendant(s)

INDEX No. 308534/08

DECISION

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HON. STANLEY GREEN:

The motion by defendant United Odd Fellow and Rebekah Home, Inc. (UOF) for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint, or in the alternative, dismissing all claims for direct negligence, violation of PHL§ 2801-d, assault and battery, punitive damages and/or granting summary judgment in favor of UOF on its contractual and common law indemnification claims against Towne Nursing Staff, Inc. (Towne) and Yolanda Wadgne s/h/a "Wagner" is granted to the extent that plaintiff's cause of action for assault and battery and claims for punitive damages are dismissed and, if UOF is held liable to plaintiff for injuries sustained as a result of the fall on August 5, 2008 as the result of Wagner's negligence, then Towne shall indemnify UOF for those damages.

The cross-motion by Towne for summary judgment dismissing plaintiff's complaint and UOF's claims for contractual and common law indemnification is granted only to the extent that plaintiff's cause of action for assault and battery and claims for punitive damages are dismissed.

Plaintiff claims that as a result of defendants' failure to provide proper care and treatment to decedent Marie Placide (Placide), Placide suffered a fall that resulted in serious neurological

injuries and decubitus ulcers that could have been avoided.

Placide resided at UOF from March 27, 2005 through August 5, 2008. At the time she was admitted, Placide had dementia, required assistance with all activities of daily living and was incontinent of bowel and bladder. She was classified as at high risk for the development of pressure ulcers and interventions were included in her care plan to address this risk.

In April 2005, Placide was classified as at high risk for falls and interventions were included in her care plan to address this risk, including a low bed, bilateral bed bolsters and bilateral floor mats.

On August 5, 2008, Certified Nurse Assistant (CNA) Wagner, an employee of Towne who was working at UOF pursuant to a staffing agreement between Towne and UOF, entered Placide's room to perform her morning care. She raised the bed and removed one of the floor mats in preparation for performing the morning care. Then, without lowering the bed or replacing the mat, CNA Wagner left Placide's bedside and went into the bathroom (which was a separate room inside Placide's room) to wet a washcloth. When she came out of the bathroom, Placide was on the floor next to the bed, with a laceration to the left upper eye and two open areas to the left upper lip. Placide was taken to Westchester Square Medical Center for evaluation and then transferred to New York Weill-Cornell Medical Center where she was treated for a subdural hematoma.

During her stay at UOF, Placide developed: (1) an open sacral wound that was discovered on September 17, 2006 and was resolved by November 22, 2006; (2) a hand wound that was discovered on October 24, 2007 and was resolved by December 19, 2007; and (3) a stage II sacral wound that was discovered on January 16, 2008 and was resolved by March 5, 2008.

Plaintiff's complaint contains three causes of action. The first cause of action sounds in negligence, including negligent hiring, training and supervision. The second cause of action alleges deprivation of rights under PHL §2801-d based upon violations of 10 NYCRR 415.11 (Resident assessment and care planning), 415.12 (Quality of care), 415.13 (Nursing services), 415.14 (Dietary services), 415.15 (Medical services), 415.19 (Infection control), 415.22 (Complete/accurate clinical records), 415.27 (Quality assurance) and 42 CFR 483.25 (Quality of Care). The third cause of action is for assault and battery on August 5, 2008. Plaintiff seeks compensatory and punitive damages. The original complaint was filed against UOF on October 16, 2008. On September 30, 2009, plaintiff filed an Amended Summons and Complaint, adding Towne and Wagner as party-defendants.

UOF seeks dismissal of the complaint on the grounds that Placide was properly cared for and the fall was an unfortunate and unavoidable event. UOF also contends that plaintiff cannot establish a violation of PHL §2801-d because UOF exercised all care reasonably necessary to prevent and limit pressure sores and falls and there is no evidence to support the claimed violations because UOF performed comprehensive assessments of Placide's condition throughout her stay and there are no allegations that the nurses and nursing staff at UOF were unqualified or staffing insufficient, that her dietary needs were not cared for, that proper records were not kept, or that the facility did not maintain a quality assurance committee for facility-wide quality assurance. UOF also contends that the PHL§2801-d cause of action must be dismissed because it is duplicative of the cause of action for negligence.

UOF contends that there is no evidence in the records to support plaintiff's cause of action for assault and battery or of conduct that would warrant an award of punitive damages.

In Reply papers, UOF contends, for the first time, that any decubitus ulcers that pre-date August 5, 2008 are outside the scope of the complaint and are time-barred because the dates of the ulcers were not previously specified.

In the event that the court is unwilling to find that the actions of CNA Wagner were reasonable as a matter of law, then UOF seeks a grant of summary judgment on its cross-claim against Towne for contractual indemnity pursuant to the terms of the staffing contract dated October 11, 1999.

In support of the motion, UOF submits the affidavit of B. Messina, PhD, RN, who opines that: (1) all care necessary to prevent falls was put in place by UOF and met the standard of care; (2) that all care reasonably necessary to prevent and limit the deprivation of rights and benefits under the PHL was exercised; (3) UOF appropriately trained CNA Wagner in fall and accident prevention, as shown by the training documentation contained in her personnel file; (4) the August 5, 2008 incident was not preventable by any reasonable means because all true fall prevention interventions that were planned for decedent were provided to her; (5) it was appropriate for nursing staff to raise the bed and remove floor mats when providing care and to briefly leave the bedside in furtherance of resident care, as long as the patient is left in a reasonably safe position and is not actively misbehaving or trying to get out of bed at that moment; (6) UOF properly assessed decedent's risk for skin breakdown and instituted appropriate interventions to prevent pressure ulcers; (7) the ulcers that developed were clinically unavoidable, timely detected and properly treated and resolved; and (8) there is no evidence to support any finding of negligence or a violation of nursing home resident rights regarding UOF's nutritional care to decedent, its staffing levels, its charting, the existence of a quality assurance

committee, its performance or assessments and its formulation of care plans.

UOF also submits a copy of its agreement with Towne, dated October 11, 1999, which provides, in pertinent part, that Towne agreed to "provide the services of registered nurses, licensed practical nurses and nurses aids for temporary services," to "maintain professional liability insurance ... covering the individuals represented and assigned by it" and to:

> "hold harmless, defend and indemnify [United Odd Fellow] and its affiliates, directors, officers and employees, agents and representatives from and against all damages, expense, causes of action, suits, claims, penalties, judgements [sic] and/or other liability by reason of any acts of commission or omission directly or indirectly attributable to any of agency promises or obligations arising under this agreement."

Yolanda R. Wagne s/h/a Yolanda "Wagner"opposes UOF's motion for summary judgment "on its contractual and common law indemnification claims against Towne Nursing Staff, Inc. and Yolanda Wagne" on the grounds that she had no contract with UOF and there is no proof that she had any connection to Placide's wound care.

Towne cross-moves for summary judgment dismissing plaintiff's complaint and UOF's cross-claims for contractual and common law indemnification, as well as any cross-claims by Wagner.

Towne contends that plaintiff's cause of action for assault and battery is time-barred because the Amended Summons and Complaint were not filed until more than a year after the August 5, 2008 incident, that PHL §2801-d is inapplicable to it because it is not a "residential health care facility" as defined in PHL §2801-d and that the affidavit of UOF's expert completely exonerates CNA Wagner. Towne also contends that there is no evidence to support any claims against it related to the pressure sores, punitive damages or for negligent hiring or retention.

Towne contends that UOF's cross-claim for contractual and common law indemnification must be dismissed because UOF has not presented any evidence that CNA Wagner was negligent and the indemnification clause in the contract with UOF is void and unenforceable under GOL §5-322 because it provides for the indemnification of UOF for its own negligence. Towne also contends that UOF's motion is untimely because it was filed 122 days after the Note of Issue was filed.

In support of the cross-motion, Towne submits: (1) copies of records which show that CNA Wagner was licensed; (2) correspondence from the NYS Department of Health to CNA Wagner regarding its investigation into the August 5, 2008, which shows that no hearing was held and that no final determination had been made as to whether she violated PHL §2803-d; (3) deposition testimony which shows that CNA Wagner paid a fine and did not lose her license; (4) testimony of Towne, by Nurse Denise Brown, which shows that it was UOF's responsibility to make sure the Towne employees go through nursing home orientation before beginning work; and (5) the testimony of Anna Leon, UOF Director of Nursing, which shows that UOF did not have specific rules that prevented the CNA from going into the adjacent bathroom when providing care to a patient such as decedent and that Wagner's conduct on August 5, 2008 did not constitute a deviation from the care plan.

Plaintiff contends that UOF's motion must be denied because triable issues of fact exist as to whether UOF departed from good and accepted nursing home practice in its care and treatment of Placide and as to whether the alleged departures were a substantial factor in causing the claimed injuries. Plaintiff also contends, citing Zeides v. Hebrew Home (300 AD2d 178), that her PHL §2801-d claim may be maintained even though the action is based on the same

facts as the common law causes of action and that punitive damages should be assessed pursuant to PHL §2801-d(2), in light of plaintiff's fragile condition and UOF's "egregious indifference" to plaintiff's skin care.

In opposition to UOF's motion, plaintiff submits Placide's treatment records, Wagner's testimony, which shows that she did not recall being instructed about not leaving a patient unattended while the bed is in a raised position and that she did not recall reviewing a care plan for any of the residents she cared for and correspondence from the NYS Department of Health to Wagner indicating that there was "sufficient credible evidence" to find that she violated PHL §2803-d by neglecting a resident. Plaintiff also submits the affidavit of Nurse Lowrie-Morris, a registered nurse with over 27 years of nursing experience in clinical and operational administration of nursing homes, who opines that UOF departed from the accepted standards of nursing care by: (a) failing to provide adequate supervision to Placide; (b) failing to adequately train CNA Wagner and by failing to communicate to her that Placide was at high risk for a fall and should not be left unattended with her bed raised and the floor mat removed.

Nurse Lowrie-Morris also opines that UOF departed from the accepted standard of care by failing to take sufficient and expeditious measures to prevent plaintiff from developing pressure ulcers and skin breakdown, including providing a bed that provided alternating pressure redistribution and pressure relief and, after decubitus ulcers were discovered, by failing to timely order protein supplements and wound management consultations, failing to provide an alternating pressure relief mattress and support, such as pads for her elbow and a hand roll.

Plaintiff does not oppose Towne's motion insofar as it seeks dismissal of the cause of action for assault and battery, but contends that the motion must otherwise be denied as untimely

because it was made more than 120 days after the Note of Issue was filed, without good cause shown and it is not a "cross-motion" as defined in CPLR §2211.

Plaintiff contends that even if Towne's motion were considered, it must be denied because Towne was Wagner's employer and did not establish that deviations by Wagner did not cause plaintiff's injuries or that the nurses or nurses aides it supplied to UOF were not involved in plaintiff's wound care. Plaintiff also contends that Towne is not entitled to dismissal of her claim under PHL §2801-d because "Towne, through its employee, Ms. Wagdne, deprived plaintiff of her rights under Public Health Law §2801-d as a nursing home resident."

On a motion for summary judgment, it is the burden of the summary judgment proponent to demonstrate, prima facie, that he is entitled to judgment as a matter of law with evidence sufficient to eliminate any material issue of fact; failure to do so requires denial of the motion regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hosp., 68 NY2d 320; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851). The burden then shifts to the party opposing the motion to demonstrate by evidentiary proof in admissible form that a triable issue of fact exists (Zuckerman v. City of New York, 49 NY2d 557). A court's task is issue finding rather than issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395) and the court must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact (Boyce v. Vazquez, 249 AD2d 724).

Initially, it is noted that despite Towne's contention to the contrary, the motion by UOF is timely because it was "served" within 120 days of the filing of the Note of Issue in accordance with the CPLR and this court's rules (CPLR§2211; CPLR §3212). However, Towne's "cross-

motion" for summary judgment, which was served on May 29, 2013 is untimely because it was served more than 120 days after the Note of Issue was filed, without good cause shown (Brill v. City of New York, 2 NY3d 648). While an untimely but correctly labeled cross motion may be considered as to the issues that are the same in both it and the motion, without needing to show good cause (Palomo v. 175th St. Realty Corp., 101 AD3d 579), allowing non-movants to file untimely mislabeled "cross motions" without good cause shown for the delay is not proper (Brill, supra).

Here, the records, testimony and affidavit of UOF's expert are sufficient to meet its prima facie burden on the motion. However, the opinion of plaintiff's expert that it was a departure for CNA Wagner to leave Placide unsupervised with her bed in a high position and the floor mat removed, for UOF to fail to provide a second person to assist CNA Wagner with Placide's morning care and Wagner's testimony that she did not recall being given instructions about not leaving a patient unattended while the bed is in a raised position or reviewing the care plans for the residents she cared for, raise triable issues of fact as to whether UOF, Towne or CNA Wagner departed from the accepted standard of care.

Plaintiff's expert's affidavit also raises triable issues of fact as to whether UOF violated Placide's nursing home rights under PHL §2801-d, by failing to ensure adequate supervision and assistive devices to prevent accidents (415.12), failing to provide a second person to assist CNA Wagner as per her care plan (415.13); failing to prevent pressure ulcers from developing (415.12 ©); failing to review and revise Placide's plan of care and by failing to timely implement measures to prevent pressure ulcers (415.11); and by failing to ensure that Placide received adequate caloric intake to assist in wound healing.

Insofar as UOF seeks dismissal of PHL§ 2801-d on the ground that it is duplicative of the negligence claims, remedies under the Public Health Law are in addition to and cumulative with any other remedies available at law or in equity (PHL §2801-d(4)) and a plaintiff need not choose between traditional tort causes of action and a PHL §2801-d cause of action, but may pursue both (Zeides v. Hebrew Home for the Aged, 300 AD2d 178). Accordingly, UOF's motion to dismiss plaintiff's second cause of action is denied.

As to the claim for punitive damages, PHL §2801-d(2) provides that where the deprivation of a right or benefit is found to have been willful or in reckless disregard of the lawful rights of the patient, punitive damages may be assessed. In this case the record contains no evidence of the type of conduct that would warrant an award of punitive damages.

Plaintiff's cause of action for assault and battery is dismissed as there is no evidence in the record to support this claim. Accordingly, UOF's motion for summary judgment is granted to the extent that plaintiff's cause of action for assault and battery and her claim for punitive damages are dismissed.

As to UOF's cross-claim for summary judgment on its claim for contractual indemnification,"when the intent is clear, an indemnification agreement will be enforced even if it provides indemnity for one's own or third party's negligence, except where a party exempts itself from gross negligence" (Colnaghi, USA v. Jewelers Protection Services, 81 NY2d 821; Gross v. Sweet, 49 NY2d 102) or where it is prohibited by statute, such as GOL 5-321, 5-322, 5-322.1, 5-322.2, 5-323, 5-324, 5-325, 5-326). Here, the agreement between UOF and Towne evidences a clear intent to indemnify UOF for "acts of commission or omission directly or indirectly attributable to any of agency promises or obligations arising under" the agreement.

CNA Wagner was employed at UOF pursuant to the terms of the agreement. Therefore, if UOF is held liable to plaintiff for injuries suffered as a result of Placide's fall on August 5, 2008, then it is entitled to indemnification by Towne pursuant to the terms of the contract. However, UOF has failed to establish that any nurse or CNA provided by Towne was involved in Placide's wound care. Therefore, UOF is not entitled to indemnity for injuries related to Placide's decubitus ulcers.

It is noted that UOF contends, in Reply papers, that any decubitus ulcers that pre-date August 5, 2008 are outside the scope of the complaint and are time-barred because the dates of decubitus ulcers were not previously specified. However, no motion was made to dismiss theses claims on statute of limitations grounds. Therefore, questions as to whether the claims for pressure ulcers noted by plaintiff are time-barred remain for another time.

There is no contract between UOF and Wagner, therefore, to the extent UOF seeks judgment against Wagner, the motion is denied.

As to Towne's cross-motion, a contract between parties which provides for indemnification will be enforced where the intent that one party indemnifies the other is sufficiently clear and unambiguous , even if it provides indemnify for ones own or third party's negligence (Bradley v. Feiden, 8 NY3d 265). This is true even where an indemnification clause is framed in less precise language than would normally be required when the agreement is negotiated by sophisticated parties as to risk allocation (Id, quoting Gross v. Sweet, 49 NY2d 102). The only exceptions to this rule are where public policy prohibits a party from exempting itself from gross negligence, that is conduct that evinces a reckless disregard for the rights of other or smacks of intentional wrongdoing" (Colnaghi v. Jewelers Protection Services, 81 NY2d

821), or where it is prohibited by statute (Itri Brick & Concrete v. Aetna Casualty & Surety, 89 NY2d 786). Towne has cited no statute which prohibits UOF from exempting itself from its own negligence and the record reveals no conduct that evinces a reckless disregard for the rights of others or smack of intentional wrongdoing. Accordingly, if UOF is held liable to plaintiff for injuries sustained as a result of the fall on August 5, 2008 as the result of Wagner's negligence, then UOF is entitled to contractual indemnification for the damages attributable to the fall.

Therefore, the cross-motion by Towne is granted only to the extent that plaintiff's cause of action for assault and battery and for punitive damages are dismissed. Towne's effort to demonstrate "good cause" for the delay was raised for the first time in its reply papers. Therefore, it is not properly considered (Migdol v. City of New York, 291 AD2d 201). Insofar as Towne seeks to ride on UOF's coat-tails with respect to UOF's motion for summary judgment, the issue is moot.

This constitutes the decision and order of the court.

March 3, 2014

STANLEY GREEN, J.S.C.