

<b>Porter v Forest Hills Care Ctr. LLC</b>
2018 NY Slip Op 33439(U)
November 28, 2018
Supreme Court, Queens County
Docket Number: 712458/17
Judge: Timothy J. Dufficy
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**ORIGINAL****Short Form Order****NEW YORK SUPREME COURT - QUEENS COUNTY****PRESENT: HON. TIMOTHY J. DUFFICY**  
**Justice****PART 35****DARRYL PORTER,****Plaintiff,****Index No.: 712458/17****-against-****Mot. Date: 10/23/18****Mot. Seq. 1****FOREST HILLS CARE CENTER LLC,****Defendant.**

The following papers were read on this motion by defendant for an order dismissing and striking plaintiff's claim for punitive damages, as plaintiff's Complaint and Bill of Particulars fail to allege facts and conduct to support his claim; and, pursuant to CPLR 3211(a)(7), dismissing the third cause of action for gross negligence as plaintiff's Complaint does not allege conduct to support such a claim.

**PAPERS  
NUMBERED**

Notice of Motion-Affidavits -Exhibits .....	EF 16-20
Affidavits in Opposition-Exhibits.....	EF 21-26
Affidavits in Opposition-Exhibits.....	EF 27
Replying Affidavits.....	EF 29

Upon the foregoing papers, it is ordered that the motion by defendant is granted, as follows:

This action arises out of the nursing care and treatment received by plaintiff Darryl Porter, a resident at defendant Forest Hills Care Center LLC's nursing and rehabilitation facility, from June 2016 to June 2017. Plaintiff asserts causes of action for negligence, gross negligence, and for violation of Public Health Law §2801-d.

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That branch of the motion dismissing the third cause of action for gross negligence, pursuant to CPLR 3211(a)(7), as plaintiff's Complaint does not allege conduct to support such a claim, is granted.

On a motion to dismiss on the ground that the Complaint fails to state a cause of action, the issue is limited to ascertaining whether the pleading states any cause of action, not whether there is evidentiary support for the Complaint. For the purpose of such motions, plaintiff's Complaint is liberally construed in a light most favorable to the plaintiff and all factual allegations are accepted as true (*LoPinto v J.W. Mays, Inc.*, 170 AD2d 582 [2d Dept 1991]).

"Gross negligence is reckless conduct that borders on intentional wrongdoing and is "different in kind as well as degree" from ordinary negligence (*Sutton Park Dev. Corp. Trading Co. v Guerin & Guerin Agency*, 297 AD2d 430, 431; *see e.g. Green v Holmes Protection of N.Y.*, 216 AD2d 178, 178-179 [1st Dept 1995]). It is conduct that "evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Sutton Park Dev. Corp. Trading Co. v Guerin & Guerin Agency, supra*). Gross negligence is defined as conduct of an aggravated character which discloses a failure to exercise even slight diligence (*Civil Service Employees Assn, Inc. v. Public Employment Relations Bd.*, 132 AD2d 430 [3d Dept 1987] *citing* 41 NY Jur, Negligence, § 27, at 39-40 [1965]), and as the "disregard of the consequences which may ensue from the act, and indifference to the rights of others" (*id.* at 40.) Gross negligence "is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. \* \* \* The element of culpability which characterizes all negligence is in gross negligence magnified to a high degree as compared with that present in ordinary negligence" (*Sharick v Marvin*, 1 AD2d 284 [3d Dept 1956]).

In the instant action, the plaintiff fails to allege any facts whatsoever constituting any behavior beyond ordinary negligence. Conclusory allegations of gross negligence will not suffice. As such, the plaintiff cannot be said to have fulfilled the pleading requirements for gross negligence. Thus, this Court finds that plaintiff's Complaint fails to state a cause of action for gross negligence.

That branch of the motion for an order dismissing and striking plaintiff's claim for punitive damages, as plaintiff's Complaint and Bill of Particulars fail to allege facts and conduct to support his claim, is granted.

The standard for an award of punitive damages is that a defendant manifest evil or malicious conduct beyond any breach of professional duty. There must be " 'aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton' " (*see Prozeralik v Capital Cities Communications*, 82 NY2d 466, 479 [1993] quoting Prosser and Keeton, *Torts* §2 at 9-10 [5th ed. 1984]). Furthermore, there must be factual allegations that any breach not only rose to the level of such wanton dishonesty as to imply "a criminal indifference to civil obligations", but was also part of a pattern aimed at the public generally (*see Rocanova v Equitable Life Insurance Soc. Of U.S.*, 83 NY2d 603; *see also, New York University v Continental Ins. Co.*, 87 NY2d 308).

The Court finds that the complaint fails to plead conduct on the part of the defendant that would potentially justify an award of punitive damages (*see Bennett v State Farm Fire & Cas. Co.*, 137 AD3d 731, 732 [2d Dept. 2016]; *Jones v LeFrance Leasing Ltd. Partnership*, 127 AD3d 819, 821 [2d Dept. 2015]). "Plaintiff's demand for punitive damages cannot be sustained, since the allegations do not rise to a level of such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Flomenhaft v Finkelstein*, 127 A.D.3d 634, 639 [1st Dept. 2015])

Accordingly, the plaintiff's claim for punitive damages is dismissed.

Furthermore, to the extent that plaintiff asks for affirmative relief in his "Affirmation in Opposition," e-filed document #21, such relief is not the proper subject for an affirmation in opposition, but rather for a cross-motion. As no proper cross-motion with a proper notice of motion was submitted in the instant matter, the Court cannot grant any requested relief to plaintiff.

Accordingly, it is

**ORDERED** that the motion is granted. That branch of the motion dismissing the third cause of action for gross negligence, pursuant to CPLR 3211(a)(7), is granted and plaintiff's claim for punitive damages is stricken and dismissed.

This constitutes the decision and order of the Court.

**Dated: November 28, 2018**



**TIMOTHY J. DUFFICY, J.S.C.**

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