

Harari v Shorefront Operating LLC

2024 NY Slip Op 31080(U)

March 18, 2024

Supreme Court, Kings County

Docket Number: Index No. 509711/22

Judge: Heela D. Capell

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, City Part 19 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York.

PRESENT: HON. HEELA D. CAPELL, J.S.C.

-----X

KENNETH HARARI, as Proposed Administrator of the Estate of RAYMOND HARARI, Deceased,

Plaintiff,

-against-

Index No. 509711/22
Mot. Seq. # 2

SHOREFRONT OPERATING LLC D/B/A SEAGATE REHABILITATION AND NURSING CENTER,

DECISION/ORDER

Defendants.

-----X

Recitation, as required by CPLR § 2219(a), of the electronically filed papers considered in the review of defendants' motions for summary judgment, pursuant to CPLR § 3212(b), numbered as they appear on NYSCEF.

Papers	Numbered
Notice of Motion, Affirmations, and Exhibits Annexed	21-36
Opposing Affirmations and Exhibits Annexed	37-56
Reply Affirmations and Exhibits Annexed	59-77

KENNETH HARARI, as Proposed Administrator of the Estate of the Deceased RAYMOND HARARI ("Plaintiff"), commenced this action against Defendant SHOREFRONT OPERATING LLC D/B/A SEAGATE REHABILITATION AND NURSING CENTER ("Defendant") seeking damages for negligence, gross negligence, and wrongful death in violation of Public Health Law § 2801-d. Raymond Harari ("Decedent") was a resident at Defendant's nursing home facility from April 2019 until he passed away from COVID-19 on April 11, 2020. The complaint alleges that Defendant's facility was reckless and grossly negligent in, among other things, its failure to isolate residents from those who were infected

and/or showing signs and symptoms of COVID-19, failure to adequately train its staff in the use of PPE, and failure to provide adequate care to Decedent.

Defendant brings this Motion to Dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), asserting immunity under the Emergency or Disaster Treatment Protection Act ("EDTPA"). EDTPA § 3082(2), however, provides an exception excluding healthcare facilities from immunity for reckless and/or grossly negligent conduct. In support of its motion, Defendant submits documentation of the nursing home facility's policies and protocols in effect at the time of Decedent's death as well as an affidavit from Shea Rubenstein, the facility's then-assistant administrator ("Rubenstein Affidavit"). The Rubenstein Affidavit states that the facility implemented and followed protocols to maintain patient safety such as new COVID-19 policies, staff training programs, suspending communal dining, and disallowing visitors. Defendant argues the Rubenstein Affidavit and accompanying exhibits provide a clear showing that the facility complied with the EDTPA by acting in good faith. Defendant also maintains that Plaintiff fails to allege facts beyond ordinary negligence and beyond conclusory allegations of gross negligence.

Plaintiff asserts that the complaint contains specific allegations of gross negligence and reckless misconduct regarding the facility's COVID-19 infection prevention and control procedures, citing cases where similar factual allegations of gross negligence survived motions to dismiss (*see Espinal v Jackson Heights Care Center, LLC*, Sup Ct, Queens County, Nov. 17, 2022, Ventura, J., index No. 714216/21; *Rago v Skyview Rehabilitation*, Sup Ct, Westchester County, May 10, 2023, Quinn Koba, J., index No. 56854/22; *Dinunzio v. Cobble Hill Health Center, Inc.*, Sup Ct, Kings County, July 26, 2023, Montelione, J., index No. 502563/23).

On a motion to dismiss pursuant to CPLR 3211, the plaintiff's pleading is afforded a liberal construction and the facts alleged in the complaint must be taken as true to accord the plaintiff the benefit of every possible inference (*see Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 901-902 [2d Dept 2014] quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A court may consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7), and if it does, the test becomes whether the proponent of the pleading has a cause of action rather than whether he has stated one (*see Dolphin Holdings, Ltd.*, 122 AD3d at 902; *Sokol v Leader*, 74 AD3d 1180, 1181-1182, [2d Dept 2010]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1997]).

Affidavits submitted by a defendant almost never warrant dismissal under CPLR 3211 unless they conclusively establish that the plaintiff has no cause of action (*see Dolphin Holdings, Ltd.*, 122 AD3d at 902 quoting *Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682, 683 [2d Dept 2012]; *see also Sokol*, 74 AD3d at 1181).

Here, the Rubenstein Affidavit does not establish conclusively that the facility was not grossly negligent in its care and treatment of the Decedent. Specifically, Defendant did not rebut all of Plaintiff's allegations, such as failure to isolate residents from those who were infected and/or showing signs and symptoms of COVID-19, failure to provide appropriate PPE, failure to test staff members for COVID-19 at appropriate intervals, intentional misrepresentation of the number of COVID-19 infections and COVID-19 related deaths, and permitting untrained individuals to treat residents. Therefore, the complaint, taken as true with the benefit of every possible inference, has a sufficient cause of action for gross negligence and/or reckless conduct on the part of Defendant that, if proven, would waive immunity under the EDTPA.

Accordingly, Defendant's motion to dismiss is DENIED.

This constitutes the Decision and Order of the Court.

Dated: Brooklyn, New York
March 19, 2024



HON. HEELA D. CAPELL, J.S.C.

KINGS COUNTY CLERK
FILED
2024 MAR 27 A 10:27