Lester v Revival Home Health Care
2024 NY Slip Op 31465(U)
April 22, 2024
Supreme Court, Kings County
Docket Number: Index No. 507587/2020
Judge: Consuelo Mallafre Melendez

At an IAS Term, Part 15 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22nd day of April 2024.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
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WILLIE LESTER,

Plaintiff,

-against-

REVIVAL HOME HEALTH CARE,

Defendant.
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DECISION & ORDER

Index No. 507587/2020
Mo. Seq. 2

HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.
Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: 38 – 40, 41 – 57, 59 – 62, 63

Defendant Revival Home Health Care ("Revival") moves (Seq. No. 2) for an Order, pursuant to CPLR 3212, granting summary judgment against the Plaintiff and dismissing Plaintiff's complaint against Revival in its entirety. Plaintiff opposes the motion.

Plaintiff Willie Lester commenced this action on May 26, 2020, asserting claims of medical malpractice against Revival in connection to evaluation and care rendered between March 27, 2018 and March 30, 2018.

On March 22, 2018, Plaintiff underwent right total hip replacement surgery at NYU Langone Orthopedic Hospital. Prior to his surgery, a social worker placed a referral to Revival for home care services during his recovery. He was discharged from the hospital on March 26 and advised that he would receive a visit and evaluation from Revival the following day.

The next day, on March 27, Plaintiff was visited by nurse Keisha Winford ("RN Winford") from Revival. RN Winford performed an initial home care evaluation. Plaintiff was also given a physical therapy evaluation by Charles Kwok ("PT Kwok") on the same date. Plaintiff's plan of care consisted of skilled nursing visits twice a week, physical therapy visits three times per week, and a home health aide five days per week/four hours per day "pending approval" of his insurance provider (Exhibit L, at 6, 51).

Plaintiff also had some in-home assistance from a friend, Trudy Renelza Duckette ("Ms. Duckette"), in the days after his surgery. She testified that she was typically "present in the home all day," slept there for three or four nights (Ms. Duckette deposition tr, at 37), and that she assisted him walking to and from the bathroom (*id.*, at 43, 47). Ms. Duckette testified that she was present when Plaintiff fell.

Plaintiff received his next visit from RN Winford and PT Kwok on March 29, with no significant changes in his status reported. He was noted to be alert, oriented to place, time, and person, and able to follow multi-step commands. A home health aide was not yet approved or placed. In a note dated March 30, another Revival nurse, Sandra Lopez, recorded that Plaintiff called to inquire about a home health aide, he was informed it was pending insurance approval, and the patient "declined to assume financial liability" before such approval (Exhibit L, at 10).

At approximately 11:30 a.m. on March 30, according to EMS records, Plaintiff lost his balance and fell while trying to ambulate. Ms. Duckette testified that she was in the living room and heard the thud from his bedroom (Ms. Duckette deposition tr, at 52). Plaintiff testified that he was attempting to use elbow crutches from the hospital when he fell (Plaintiff deposition tr, at 70). Plaintiff reported the fall to RN Winford and called 911, but he initially declined to go to a hospital (Exhibit L, at 67; Exhibit N). PT Kwok arrived for his afternoon appointment, and Plaintiff reported his pain and mobility had worsened since the fall. Plaintiff was taken to NYU Langone and diagnosed with a right femoral periprosthetic fracture. He underwent a revision surgery to replace the re-fractured right hip on April 2, 2018.

Plaintiff alleges that Revival, through its agents and employees, departed from good and accepted medical standards by failing to properly assess Plaintiff's post-operative fall risk and provide him with a home health aide, and that these departures were a proximate cause of Plaintiff's fall and the re-fracture of his hip.

A plaintiff in a malpractice action must establish that the health care provider "departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries" (*Hutchinson v. New York City Health and Hosps. Corp.*, 172 AD3d 1037, 1039 [2d Dept. 2019], quoting *Stukas*). "Thus, in moving for summary judgment, a physician defendant must establish, prima facie, 'either that

there was no departure or that any departure was not a proximate cause of the plaintiff's injuries'" (*id.*, quoting *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 AD3d 959, 960 [2d Dept. 2015]). "In order to sustain this prima facie burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars" (*Martinez v Orange Regional Med. Ctr.*, 203 AD3d 910, 912 [2d Dept 2022]). "In opposition, the plaintiff must demonstrate the existence of a triable issue of fact as to the elements on which the defendant has met his or her initial burden" (*Bowe v Brooklyn United Methodist Church Home*, 150 AD3d 1067, 1068 [2d Dept 2017])." "Although summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact" (*Barnaman v Bishop Hucles Episcopal Nursing Home*, 213 AD3d 896, 898-899 [2d Dept 2023] [internal quotation marks and citation omitted]).

In support of this motion, Revival submits an expert affidavit from registered nurse Tjwana Dennis-Jenkins ("RN Dennis-Jenkins"), as well as relevant medical records and deposition transcripts. RN Dennis-Jenkins affirms, inter alia, that she has a MS degree in nursing and several years of experience as a coordinator of care in home health nursing.

Although a registered nurse generally lacks the qualifications to offer a medical opinion as to a physician's standard of care or as to proximate causation, a nurse with the requisite background, education, and experience can opine on the standard of *nursing care* and whether the defendants departed from that standard (*Zak v Brookhaven Mem. Hosp. Med. Ctr.*, 54 AD3d 852, 853 [2d Dept 2008]). Accordingly, RN Dennis-Jenkins has established the qualifications to opine on the standard of care with regard to the risk assessment and other care rendered by Revival's nursing professionals.

Based upon her review of the records and relevant expertise, RN Dennis-Jenkins opines that Revival's evaluation and assessment of Plaintiff, as performed by RN Winford, was appropriate and within good and accepted home nursing standards. According to the expert, Revival's nurse performed a detailed assessment of Plaintiff on March 27, within 24 hours of his discharge from the hospital. RN Winford evaluated "his mental

status, his risk for falls, and . . . an overall head to toe assessment." RN Winford noted that Plaintiff was not neurologically impaired, as he was alert and oriented to person, time, and place, and he had clear comprehension and was able to express complex ideas, feelings, and his needs completely.

At this evaluation, RN Winford deemed Plaintiff "at risk for falling" with a MAHC Fall Risk Assessment of 5, based on his impaired mobility, his use of prescribed medications, and "environmental hazards" in the home (Exhibit L, at 31). She explained these risks to Plaintiff and demonstrated transfer techniques, e.g., from sitting to standing and bed to chair (*id.,* at 36). She also noted that he had "limited ambulation, poor balance" and required assistance "to stand or complete ADLs" (activities of daily living). RN Winford recorded that Plaintiff had a friend and caregiver staying with him at that time, and that he was receiving non-agency caregiver assistance in "transfer/ambulation, bathing, dressing, toileting, eating/feeding" (*id.,* at 35-36). The ADLs that were marked as needing "training/supportive services" were in the categories of household maintenance and medical treatment, e.g., wound dressing and exercises.

In the expert's opinion, the fact a patient is deemed at risk for falls "does not mean that they are not a proper candidate to be at home after surgery," only that they must be instructed about these risks and shown proper transfer techniques, which RN Winford reported doing. The visiting nurse specifically noted that he had a caregiver present to assist with transfers, as confirmed in Ms. Duckette's testimony. The defendant's expert opines that the nursing assessment was proper, and that nothing in that assessment indicated that Plaintiff should not remain at home or that he required more urgent or extensive assistance. Instead, the expert opines that the nurse "appropriately determined that the plaintiff could benefit from physical therapy visits, as well as nursing visits and assistance from a home health aide." The nursing and physical therapy visits began immediately, while the home health aide was authorized by the nurse "pending approval" of the patient's insurance company. RN Dennis-Jenkins opines that this is a standard practice, and that Plaintiff was appropriately offered the option to "pay out of pocket" or wait for the insurer's approval.

According to the expert's opinion, RN Winford also properly treated Plaintiff on her return visit on March 29. There was no record of any falls he experienced in the interim, and Plaintiff did not recall telling RN Winford

about any falls. Plaintiff had no signs of cognitive or neurologic impairment. The expert opines that there was no indication from this visit "that he was having any difficulties being at home" or required additional nursing or physical therapy services.

Finally, the expert opines that RN Winford responded in an appropriate and timely manner to the phone call from Plaintiff on March 30, by advising Plaintiff to go to an emergency department and by informing PT Kwok, who had a scheduled visit with him that day.

The defendant's expert has met the prima facie burden of establishing that throughout the time that Revival provided services to Plaintiff, there was no departure from the standard of care on the part of the medical staff, specifically RN Winford's initial assessment of Plaintiff's fall risk and her recommendation for a home health aide, pending insurance approval.

In opposition, Plaintiff submits an expert affirmation from Patrick R. Stonich, a registered nurse with experience as a CEO and director of home nursing services. Plaintiff's expert addresses only two specific claims of departures from the standard of care. First, RN Stonich opines that Revival was "obligated to provide the plaintiff with a home health aide as soon as the need was identified." Plaintiff argues that if one had been timely placed before the morning of March 30, Plaintiff's fall would have been prevented.

Secondly, RN Stonich opines that PT Kwok failed to properly train Plaintiff on the use of elbow crutches. Plaintiff testified that he decided to try these crutches for the first time on March 30, but he had only been trained to use a walker by PT Kwok (Plaintiff deposition tr, at 71). The expert opines that PT Kwok knew or should have been aware of these crutches because they were visible in Plaintiff's bedroom, and he should have instructed Plaintiff on the proper use of the crutches and "how to transfer from the walker to the crutches." The expert opines that Plaintiff's fall was a result of this lack of training and familiarity with the crutches.

On the first issue, Plaintiff's expert argues in essence that Revival's delay in providing a home health aide constituted malpractice. However, RN Stonich does not specify what would be an acceptable time frame for processing a home health aide request under the standard of care. The records indicate that Plaintiff was discharged from the hospital on March 26 with a referral from NYU Langone for an initial nursing/physical

therapy/home health aide assessment the following afternoon. Revival evaluated Plaintiff the next day and requested the services of a home health aide in addition to nursing visits and physical therapy. Plaintiff's expert's opinion is not only vague as to the acceptable timeframe for placing a home health aide, but also fails to consider that the patient was unwilling or unable to pay out-of-pocket charges or assume financial liability until his insurance approved the request. RN Stonich opines in a speculative and contradictory manner that "a Revival employee should have worked to persuade the plaintiff to go along with the out-of-pocket charges" and "should have contacted the insurance company to obtain immediate authorization."

RN Stonich does not refute the defendant's expert opinion that Plaintiff was appropriately evaluated by his visiting nurse on March 27, that she properly demonstrated transfers and explained fall risks to him, and that there was nothing in Plaintiff's presentation that indicated he was unsafe to be left at home or that he required full-time assistance, only a request for a home health aide on a 5-days-per-week, 4-hours-per-day schedule. Thus, Plaintiff's expert does not address the defendant's prima facie case that the visiting nurse properly evaluated Plaintiff's fall risk, and her assessment did *not* indicate a "need" for immediate or round-the-clock assistance.

Plaintiff's expert also fails to address the fact that the patient was not *solely* relying on the placement of a home health aide for ambulatory assistance, which the Revival nurse accounted for in her assessment and recommendations. In both the pre-surgery records from NYU Langone and the evaluation of RN Winford, it was repeatedly noted that Plaintiff was receiving non-agency-provided assistance from a friend as part of his care management plan. Plaintiff and Ms. Duckette do not dispute that she was helping him around the house and was present when he fell. Plaintiff's expert simply never acknowledges the presence of another caregiver while opining that there was an immediate need for a home health aide regardless of his insurance status.

RN Stonich's arguments about the timeliness and urgency of placing a home health aide, which amount to a purported duty to bypass the insurance approval process or "persuade" Plaintiff to pay for one himself, are therefore conclusory and unsupported by the record. Plaintiff fails to raise a genuine issue of fact as to any departures from good and accepted standards in the assessment, treatment, and care rendered by Revival.

On the second issue, Plaintiff's expert opines that PT Kwok failed to teach Plaintiff to use elbow crutches,

which were not provided to him by Revival and which he never attempted to use prior to his fall. Plaintiff testified that PT Kwok assisted him with a walker during their physical therapy sessions, and the other crutches were "in the room" but he had never discussed them with PT Kwok. As the defendant's counsel argues in reply, this specific allegation of malpractice did not appear in Plaintiff's bill of particulars and cannot be raised for the first time in opposition (*see Townsend v Vaisman*, 203 AD3d 1199, 1203 [2d Dept 2022] ["a plaintiff cannot defeat a summary judgment motion that made out a prima facie case by merely asserting, without more, a new theory of liability for the first time in opposition papers"]. Furthermore, even affording all favorable inferences to Plaintiff, the theory that PT Kwok had a duty to demonstrate these crutches is not supported by any evidence or testimony. Plaintiff testified that the physical therapist trained him to use a walker, and on the morning of the fall, Plaintiff decided on his own to use a different ambulatory device he was given at the hospital. The expert's opinion that PT Kwok may have seen these elbow crutches in the room and failed to properly show Plaintiff how to move from walker to crutches is speculative and not supported by the record.

"Although conflicting expert opinions may raise credibility issues which can only be resolved by a jury, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact" (*Wagner v Parker*, 172 AD3d 954, 955 [2d Dept 2019] [internal citations omitted]). Accordingly, Plaintiff has not raised any triable issues of fact sufficient to defeat Revival's prima facie entitlement to summary judgment. It is hereby:

ORDERED that Defendant Revival Home Health Care's motion (Seq. No. 2) for an Order, pursuant to CPLR 3212, granting summary judgment and dismissing Plaintiff's complaint in its entirety, is **GRANTED**.

The Clerk is directed to enter judgment in favor of Revival Home Health Care.

This constitutes the decision and order of this Court.

ENTER.

Hon. Consuelo Mallafre Melendez, J.S.C.