

**Duck v Rehab Inst. of N.Y. at Florence
Nightingale Health Ctr.**

2007 NY Slip Op 32155(U)

July 17, 2007

Supreme Court, New York County

Docket Number: 0105690/2005

Judge: Joan B. Carey

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Honorable Joan B. Carey
Justice

PART 40 D

ALICE DUCK,

Plaintiff,

Index No.: 105690/05

MOTION DATE _____

-v-

MOTION SEQ. NO. 3

MOTION CAL. NO. _____

REHAB INSTITUTE OF NEW YORK AT
FLORENCE NIGHTINGALE HEALTH
CENTER and CARNEGIE PARTNERS,

Defendants.

FILED
JUL 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, 1 - 12, were read on this motion by defendants Rehab Institute at Florence Nightingale Health Center and Carnegie Partners for summary judgment dismissing the complaint.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits - Memo of Law	<u>1-9</u>
Answering Affidavits - Exhibits _____	<u>10-11</u>
Replying Affidavits _____	<u>12</u>

Cross-Motion: Yes No

Plaintiff, Alice Duck, was admitted to the Rehab Institute at Florence Nightingale Health Center ("Florence Nightingale") on January 16, 2004, following the surgical replacement of her left hip, which was performed at Beth Israel Hospital. Plaintiff was admitted to the Florence Nightingale for rehabilitation and physical therapy. Upon her admission, plaintiff was diagnosed with a sacral decubitus ulcer, *i.e.*, bedsore. The Florence Nightingale medical records indicate that during a body assessment performed on the day of plaintiff's admission a nurse at the defendant facility assessed plaintiff's bedsore as a stage III ulcer, while a dermal flow sheet completed that same day indicated that the plaintiff's had a stage II bedsore. A comprehensive care plan worksheet contained in plaintiff's medical chart, which was dated January 17, 2004, rated plaintiff's bedsore as a stage IV. Plaintiff was discharged from Florence Nightengale on April 24, 2005. At the time she was discharged from the facility, her sacral decubitus ulcer was classified as stage IV.

Plaintiff commenced the instant action on or about April 14, 2005, to recover damages against defendants. The crux of the plaintiff's complaint is that the defendants were negligent in the manner in which they provided treatment to plaintiff, causing injury to plaintiff. In addition to this common law cause of action relating to the allegedly negligent medical treatment provided to plaintiff, plaintiff's complaint included a cause of action pursuant to Public Health Law §2801-d, as well as a cause of action for gross negligence for which plaintiff seeks punitive damages, and two causes of action for breach of contract.

Defendants presently move for summary judgment pursuant to CPLR §3212, dismissing plaintiff's complaint. "[T]he remedy of summary judgment is a drastic one, which should not be granted when there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court" (Byrnes v. Scott, 175 AD2d 786 [1st Dept. 1991], quoting Gibson v. Am. Export, 125 AD2d 65 [1st Dept. 1987]). Initially, "the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; see also Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). A failure by the movant in demonstrating, *prima facie*, its entitlement to judgment as a matter of law requires the denial of summary judgment, regardless of the sufficiency of the opposing papers (see Alvarez v. Prospect, *supra*; Winegrad v. New York Univ. Med. Center, *supra*). Where a *prima facie* showing of entitlement to judgment as a matter of law has been properly demonstrated, the burden then shifts to the party opposing the motion to produce evidence that establishes the existence of material issues of fact which require a trial in the action (see Alvarez v. Prospect, *supra*; Zuckerman v. City of New York, *supra*).

Defendants seek summary judgment dismissing plaintiff's complaint, arguing that the medical treatment provided to plaintiff while at Florence Nightingale was within good and accepted standards of medical practice. Defendants further contend that there is no causal connection between the alleged negligence of Florence Nightingale and the injuries sustained by plaintiff, arguing that plaintiff was already afflicted with a sacral decubitus ulcer upon her admission to Florence Nightingale, which progressed as a result of plaintiff's non-compliance with treatment directives. In support of their motion defendants rely upon, among other things, the affidavit of a Registered Nurse/Family Nurse Practitioner, who has been qualified as a Wound, Ostomy and Continence Nurse. Based upon a review of plaintiff's Florence Nightingale chart, the expert initially sets forth that plaintiff was suffering from a sacral pressure ulcer upon her admission to Florence Nightingale. She was found to be at low risk for developing further skin breakdown and her physical assessment revealed that she was able to turn side to side independently. A nursing plan addressing pressure ulcer prevention was initiated by the staff of Florence Nightingale, which included the use of skin protectants, turning and positioning, the use of a Medline Pressure Reduction Mattress, as well as physical therapy addressing bed mobility.

According to the expert, "[m]edical interventions addressing pressure ulcer care were appropriately utilized and revised according to the change in the wound status. These treatments included hydrogels and enzymatic debriding agents as well as sharp debridement." Furthermore, plaintiff's nutritional requirements were assessed upon plaintiff's admission to Florence Nightingale and revised appropriately in response to her skin breakdown. In conclusion the expert opined that plaintiff was treated according to an accepted standard of care while at Florence Nightingale. The expert notes that the nursing documentation reveals that plaintiff was non-compliant with repositioning attempts and removed the wound dressing by herself. Nurses and a social worker

at Florence Nightingale met with the plaintiff to address her non-compliance.

It is important to point out that defendants' motion papers do not address plaintiff's cause of action brought pursuant to Public Health Law §2801-d, nor do they address plaintiff's causes of action for gross negligence and breach of contract. Therefore, defendants clearly did not demonstrate, *prima facie*, its entitlement to judgment as a matter of law with respect to these causes of action, and, thus, regardless of the sufficiency of the opposing papers, summary judgment with respect to these causes of action must be denied (see Alvarez v. Prospect, supra; Winegrad v. New York Univ. Med. Center, supra).

In opposition to defendants' motion, in addition to arguing that defendants failed to meet their *prima facie* burden with respect to the Public Health Law cause of action, plaintiff argues that defendants were negligent in the manner in which they provided medical treatment provided to plaintiff while at Florence Nightingale and that such negligence was the cause of the injuries sustained by plaintiff. Plaintiff submits the expert affidavit of Registered Practicing Nurse¹, who, based upon her review of plaintiff's medical records and other documents relating to the instant action, opined that defendants' failure to properly treat plaintiff lead to the development of a stage IV decubitus ulcer that became necrotic and painful, and negatively impacted plaintiff's physical therapy progress. The plaintiff's expert states that despite the opinions of defendants' expert that plaintiff was at low risk for developing further skin breakdown, a patient, such as plaintiff, who had undergone a total hip replacement and who was immobile and incontinent, "is an extremely high risk patient." According to plaintiff's expert, if bedsores do occur in a patient it is imperative to keep the area clean and dry to avoid infection and further progression of the wound. In the instant action, the records indicate that defendants failed to timely change plaintiff's dressings and diapers. Such failure on the part of defendants, according to plaintiff's expert, clearly contributed to the plaintiff's ulcer becoming a necrotic stage IV ulcer. Additionally, throughout her affidavit, plaintiff's expert points out that the medical records relating to plaintiff's care at the defendants' facility do not adequately chart plaintiff's diagnosis, treatment and progress.

Based upon the conflicting expert affidavits submitted by the parties, it appears that issues of fact and credibility exist in connection with whether the medical treatment provided by the defendants deviated from good and accepted nursing practice. Such issues cannot be resolved on this motion for summary judgment (see Bradley v. Soundview Healthcenter, 4 AD3d 194 [1st Dept. 2004]; Morris v Lenox Hill Hosp., 232 AD2d 184 [1996]). Accordingly, defendants Rehab Institute at Florence Nightingale Health Center and Carnegie Partners' motion for summary judgment is denied with respect to plaintiff's common law claim, which sounds in medical malpractice.

Although plaintiff argues that her common law claim is one for ordinary negligence and not one for malpractice, the Court disagrees. "[T]he distinction between medical malpractice and negligence is a subtle one, for medical malpractice is but a species of negligence and 'no rigid analytical line separates the two'" (Weiner v. Lenox Hill Hospital, 88 NY2d 784 [1996], quoting

¹Defendants argue in their reply papers that the court, in its discretion, should decline from considering the affidavit of plaintiff's nursing expert, since this expert was not identified during pretrial disclosure. Notwithstanding, as plaintiff is not required to identify her expert prior to filing of the note of issue, under CPLR § 3101(d), the court will consider the affidavit of plaintiff's nursing expert.

Scott v. Uljanov, 74 NY2d 673 [1989]). As set forth by the Court of Appeals in Bleiler v. Bodnar, 65 NY2d 65 [1985], "not every negligent act of a nurse would be medical malpractice, but a negligent act or omission by a nurse that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician constitutes malpractice." The common law claim herein challenges the medical treatment rendered to plaintiff by the nursing staff at the defendants' facility, *i.e.*, their assessment and treatment of plaintiff's pressure sores, therefore, it sounds in medical malpractice.

Based on the foregoing, it is hereby

ORDERED that motion by defendants Rehab Institute at Florence Nightingale Health Center and Carnegie Partners for summary judgment dismissing the complaint is denied.

Dated: 07/16/2007

A handwritten signature in black ink, appearing to be "J.S.C.", written over a horizontal line. The signature is stylized and somewhat cursive.

Check one: FINAL DISPOSITION

NON- FINAL DISPOSITION

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