SHORT FORM ORDER

INDEX No. 03-6201
CAL. No. 06-02048-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 2-8-07
ADJ. DATE 4-5-07
Mot. Seq. # 004 - MD

GLEN WILLIAMS, as Executor of the Estate of GEORGE P. WILLIAMS, and MILDRED J. WILLIAMS,	MICHAEL J. REGAN, ESQ. Attorney for Plaintiff 200 Railroad Avenue Sayville, New York 11782
Plaintiff,	GEISLER & GABRIELE, LLP Attorneys for Defendant Roche
- against -	100 Quentin Roosevelt Blvd., P.O. Box 8022 Garden City, New York 11530
BROOKHAVEN MEMORIAL HOSPITAL MEDICAL CENTER, INC. and ROBERT ROCHE, M.D.,	HOFFMAN & ROTH, LLP Attorneys for Defendant Brookhaven Mem. 325 Broadway, Suite 502
Defendants.	New York, New York 10007

Upon the following papers numbered 1 to 32 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-21; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 22-30; Replying Affidavits and supporting papers 31-32; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by defendant Robert Roche, M.D. pursuant to CPLR 3212 for summary judgment dismissing the complaint against him is denied.

This is an action sounding in medical malpractice arising out of the care and treatment rendered to plaintiff's decedent, George P. Williams, by defendants. The complaint of this action sets forth causes of action sounding in medical malpractice/negligence as against defendants Robert Roche, M.D. and Brookhaven Memorial Hospital, with a derivative cause of action on behalf of decedent's wife, Mildred J. Williams.

As to defendant Roche, the verified bill of particulars alleges defendant Roche prescribed Ambien (a known hypnotic agent) for George Williams when Williams had already been identified as a fall risk by the hospital nursing staff, and that defendant Roche failed to order a fall risk prevention program in conjunction with the administration of Ambien to protect decedent from harm. It is further alleged that

the dosage of the Ambien prescribed for Mr. Williams exceeded the recommended dosage for elderly patients, and that it should not have been prescribed with Mr. Williams' history of depression. It is further alleged that as a result of defendant's negligence, Mr. Williams was caused to fall out of bed on January 28, 2002, suffering a right temporal lobe subdural hematoma with a midline shift. On February 19, 2002, Mr. Williams was transferred to Bellhaven Nursing Center and later discharged home on April 12, 2002. Mr Williams subsequently died on May 21, 2004.

Defendant Robert Roche, M.D. seeks summary judgment, asserting, inter alia, he did not depart from good and accepted medical standards in his treatment of Mr. Williams, that the dosage of Ambien prescribed for Mr. Williams was not excessive nor negligent

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [2nd Dept 1979]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Holton v Sprain Brook Manor Nursing Home et al***, 253 AD2d 852, 678 NYS2d 503 [2nd Dept 1998]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see,* ***Derdiarian v Felix Contracting Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Prete v Rafla-Demetrious,*** 221 AD2d 674, 638 NYS2d 700 [2nd Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see,* ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [3rd Dept 1985]; ***Lyons v McCauley,*** 252 AD2d 516, 517, 675 NYS2d 375, *app denied* 92 NY2d 814, 681 NYS2d 475 [2nd Dept 1998]; ***Bloom v City of New York,*** 202 AD2d 465, 465, 609 NYS2d 45 [2nd Dept 1994]).

In support of this application, the moving defendant has submitted, inter alia, copies of the pleadings, the answer of the moving defendant, verified bill of particulars; uncertified copy of plaintiff's

admission records to Brookhaven Memorial Hospital; uncertified copy of the Brookhaven Memorial Hospital Fal Prevention Policy; copies of the transcripts of the examinations before trial of defendant Roche, Ms. Loretta Hill-Civil, an employee of Brookhaven Memorial Hospital, and plaintiff Mildred Williams; various medical records, and the affirmation of Howard Kolodny, M.D., defendant's expert.

Dr. Kolodny states he is a physician licensed to practice medicine in the State of New York and is board certified in Internal Medicine with a sub-specialty in Endocrinology and Metabolism. It is his opinion within a reasonable degree of medical certainty that Dr. Robert Roche did not depart from accepted standards of medical practice during his care and treatment of plaintiff's decedent.

Dr. Kolodny states Mr. Williams was initially admitted to Brookhaven Memorial Hospital on January 23, 2002 with complaints of abdominal pain. He was also found to have peripheral edema and dyspnea. The nurse's assessment sheet notes that Mr. Williams drives a car and is in good physical condition and was alert and ambulatory.

Dr. Kolodny states Dr. Roche ordered Ambien 10 mg. on January 26, 2002 at the time of sleep as needed. A single dose of Ambien was administered on January 27, 2002 at 11:00 p.m. Mr. Williams was found on the floor on January 28, 2002 at 12:10 a.m. It is Dr. Kolodny's opinion within a reasonable degree of medical certainty that the 10 mg. dosage of Ambien was proper and in accordance with a reasonable degree of medical certainty, and that the 10 mg. dosage is commonly administered to elderly patients and is neither excessive nor negligent.

Dr. Kolodny opines that Mr. Williams may have had other reasons for falling, such as his pacemaker may have misfired, he was given diuretics and may have had an episode of syncope. He also states that Mr. Williams fell a second time on February 10, 2002 while at Brookhaven Memorial Hospital and had not been administered Ambien at the time. It is Dr. Kolodny's further opinion that the treatment rendered by Dr. Roche was not the proximate cause of the damages claimed in the bill of particulars.

Dr. Robert Roche testified at his examination before trial that he saw Mr. Williams from March 1998 and was his primary care physician. He stated Mr. Williams had a cardiac history and would see him for cardiac checkups as he had a history of congestive heart failure, non-insulin dependent diabetes, hypertension and stasis edema in his lower body.

He stated Mr. Williams had been at his gastroenterologist's office on January 23, 2002 for a GI exam and became very short of breath and was sent to the emergency room at Brookhaven Memorial Hospital. Dr. Roche stated that he was notified of the admission to the emergency room and admitted him to the hospital. Dr. Roche's admitting note indicates Mr. Williams is a sixty-nine year old male with a history of hypertension, CHF, renal lithiasis and gastro reflux disease who noted an increased stasis edema and dyspnea on exertion, but experienced no chest pain. The note indicates Mr. Williams was fagtigued and depressed but did not have a history of depression. He was alert, oriented by three, and ambulatory with edema. His admitting diagnosis was congestive heart failure, rule out ischemic heart disease and hypothyroidism, gastro reflux disease, hypertension, status post permanent pacemaker 1996, and non-insulin dependent diabestes mellitus. Dr. Roche testified he ordered a psychiatric examination.

Dr. Roche testified he was aware of Brookhaven Memorial Hospital's fall risk prevention program. He reviewed a section of the hospital admission chart entitled Medical/Surgical Nursing Patient Assessment/Action Flow Records dated January 24, 2002, 7 p.m., and indicated Mr. Williams was identified as a fall risk. He stated that usually if there's an increase in fall risk, the nurse will contact him, advise him of the same, and ask for chemical or physical restraints. He states he was not called by the nursing staff. The physician then signs a form that is kept in the chart. Dr Roche testified that to his knowledge, no one prior to January 28, 2002 ever asked him the prescribe either chemical or physical restraints for Mr. Williams.

Dr. Roche testified on January 26, 2002 he ordered Ambien 10 mg. p.o., H.S., prn for sleep. He left it to the nursing staff to determine whether or not to give Mr. Williams Ambien. He was not aware Mr. Williams had been identified as a fall risk. He further testified that if he knew Mr. Williams was a fall risk, he would have probably started him on a lower dose and raised it gradually to help his insomnia. He testified that he saw Mr. Williams after he had his initial fall on January 28, 2002, that he sustained a subdural hematoma, was intubated for two or three days then weaned off the respirator. Thereafter, Dr. Roche testified, Mr. Williams returned to his previous physical condition after rehab, and slowly improved mentally.

Loretta Hill-Civil testified at her examination before trial that she is a Registered Nurse and performed the Patient Assessment/Action Flow Sheet on Mr. Williams on January 26, 2002. She testified that at the time of the assessment, Mr. Williams was alert and oriented to time, place and person. His verbalizations were clear and behavior appropriate. He denied pain. He was moving his extremities within his range of motion. He was lying in bed at the time of the assessment, was on complete bed rest, had bathroom privileges and could dangle. She noted under the "Safety" section of the assessment that his score on the patient fall assessment is greater than three, placed on fall prevention for score three or higher, which meant he was to be observed as closely as possible. He was assessed a 3 in that he had swelling of his lower extremity, his age was over 65, he was taking antihypertensive medication, and she thought he had an unsteady gait. The fall risk prevention program implemented for Mr. Williams was keeping the call bell within reach so he can call for assistance and remain in bed. His bed was kept in low position, his side rails were up and the head of his side rails were to be kept up. This is a nursing practice and did not need a doctor's order. This program is discussed verbally in the nurse to nurse report in the morning. Neither she nor any other nurse requested a one-to-one situation to have a staff member sit with Mr. Williams. She did not ask that Mr. Williams be closely observed.

On January 27, 2002 between 7 p.m and 12 midnight, Ms. Hill-Civil testified she did another assessment of Mr. Williams and found him to be alert and oriented to time, place, and person. His verbalization was noted to be clear and his behavior appropriate to the situation. She found his gait steady without assistance and found his extremities movable within the patient's range of motion. He was out of bed with bathroom privileges. He had walked to the bathroom holding her arm. She signed her signature to a patient fall assessment as greater than three. She testified the medication nurse gave him Catapril for his blood pressure at 10 p.m., and Ambien 10 mg. at 11 p.m. She was unsure if the medication nurse told her she gave Mr. Williams the sleeping pill. She testified that the record did not reveal he had the Ambien any other evening before January 27, 2002. Ms. Hill-Civil also testified that when the doctor wrote the order for Ambien on January 26, 2002, he would have had the patient assessment available, and would have been just outside the door.

She also testified that when she heard a loud thud sound at 12:10 a.m. on January 28, 2002, when Mr. Williams fell, the side rails were up on Mr. Williams' bed which was in low position. She did not remember if the call bell was within his reach.

Based upon defendant's submissions, it is determined that defendant Robert Roche, M.D. has not demonstrated prima facie entitlement to summary judgment as factual issues have not been eliminated by the same.

Dr. Roche testified he was not aware Mr. Williams had been identified as a fall risk. He further testified that if he knew Mr. Williams was a fall risk, he would have probably started him on a lower dose and raise it gradually to help his insomnia. Nurse Hill-Civil testified the Fall Assessment record was available for the physician to review. Dr. Kolodny does not opine on whether or not Dr. Roche should have availed himself to Mr. Williams' fall assessment sheet to determine the dosage of Ambien Mr. Williams should have been started on. Therefore, there is a factual issue concerning whether or not Dr. Roche reviewed or should have reviewed Mr. Williams' medical record or the fall risk assessment prior to prescribing Ambien to determine the dosage of Ambien to prescribe to Mr. Williams. Although Dr. Kolodny opines that Mr. Williams may have had other reasons for falling, such as his pacemaker may have misfired, he was given diuretics and may have had an episode of syncope, he has not set forth a medical basis for this opinion.

Since defendants failed to establish their entitlement to judgment as a matter of law as set forth above, the burden has not shifted to plaintiff to establish that there are issues of fact to preclude an order granting summary judgment (CPLR 3212[b]; ***Zuckerman v City of New York***, *supra*), and it is unnecessary to reach the question of whether or not plaintiff has raised a triable issue of fact (***Krayn v Torella,*** 833 NYS2d 406, NY Slip Op 03885 [2nd Dept 2007]).

Accordingly, motion (004) for summary judgment is denied.

Dated: AUG 0 6 2007

J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**