

Hothan v Mercy Med. Ctr.

2009 NY Slip Op 31486(U)

June 26, 2009

Supreme Court, Nassau County

Docket Number: 14345/06

Judge: Thomas Feinman

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

COLLEEN ANN HOTHAN, as Temporary
Administratrix of the Estate of PHILOMENA
KELLY,

Plaintiff,

- against -

MERCY MEDICAL CENTER and NORTH
SHORE UNIVERSITY HOSPITAL,

Defendants.

TRIAL/IAS PART 18
NASSAU COUNTY

INDEX NO. 14345/06

MOTION SUBMISSION
DATE: 5/1/09

MOTION SEQUENCE
NO. 2

The following papers read on this motion:

Notice of Motion and Affidavits.....	<u> X </u>
Affirmation in Opposition.....	<u> X </u>
Reply Affirmation.....	<u> X </u>

RELIEF REQUESTED

The defendant, North Shore University Hospital, (hereinafter referred to as "North Shore"), moves for an order pursuant to CPLR §3212 granting North Shore summary judgment dismissing the complaint and any cross-claims as and against North Shore on the grounds that there exists no triable issues of fact as to North Shore. The plaintiff submits opposition. The defendant submits a reply affirmation.

BACKGROUND

The plaintiff, Colleen Ann Hothan, Administratrix of the Estate of Philomena Kelly, initiated this action seeking to recover damages for alleged malpractice on behalf of the estate of her late mother, Philomena Kelly, who passed away at Mercy Medical Center on September 10, 2004 at the age of seventy-four. The alleged acts or omissions at North Shore occurred between July 3, 2004 through July 16, 2004. The plaintiff claims, essentially, that North Shore failed to diagnose the existence of the decedent's bedsores, prevent the bedsores from developing, turn the decedent as required, properly monitor the decedent's condition, and failed to properly treat the bedsores such

that they became infected ultimately resulting in infection, sepsis, and the ultimate death of plaintiff's decedent.

The plaintiff's decedent, (hereinafter referred to as the "patient"), was admitted to the orthopedic surgery service at North Shore on July 3, 2004 with a diagnosis of sub capital fracture of the left hip, and was placed on bed rest. The patient was taken to the operating room on July 5, 2004 and underwent a cemented unipolar prosthesis of the left hip. The patient was discharged from North Shore on July 16, 2004, and was taken by ambulance to Mercy Medical Center and admitted thereto on July 16, 2004. The patient was discharged from Mercy Medical Center on September 10, 2004 due to death.

The plaintiff's claim herein as and against the moving defendant, North Shore, is that North Shore failed to provide medical care to the patient with good and accepted medical practice as the staff at North Shore permitted Stage I pressure sores, also known as bedsores, or pressure ulcers, to develop and remain untreated, on both of the patient's heels and on her sacrum, whereby on the date of discharge, July 16, 2004, the sacral pressure ulcer was a Stage II pressure ulcer. The plaintiff claims that the defendant's departure was the proximate cause of the patient's injury and ultimate death.

APPLICABLE LAW

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 165 NYS2d 498). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 413 NYS2d 141). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 200 NYS2d 627. The role of the court is to determine if bonafide issues of fact exists, and not to resolve issues of credibility. (*Gaither v. Saga Corp.*, 203 AD2d 239; *Black v. Chittenden*, 69 NY2d 665).

A movant's failure to make a *prima facie* showing of entitlement to judgment as a matter of law requires the denial of their motion, regardless of the sufficiency of the opposing papers. (*Winegard v. NYU Medical Center*, 64 NY2d 851). The bare conclusory assertions echoed by the three defendants in *Winegard v. NYU Medical Center*, *supra*, with respect to plaintiff's medical malpractice action, did not establish that plaintiff's action has no merit so as to entitle defendants to summary judgment. There, the defendants simply asserted that they did not deviate from good and accepted medical practices, asserting no factual relationship to the alleged injury. (*Id.*) On the other hand, a defendant's deposition testimony, supported by hospital records, which rebutted with factual proof plaintiff's claim of malpractice, was found to be sufficient proof that the defendant physician timely diagnosed plaintiff's condition, and that he did not depart from the accepted standard of care in the medical community. (*Alvarez v. Prospect Hospital*, 68 NY2d 320).

Generally, "[i]n order to establish a *prima facie* case of liability in a medical malpractice action, a plaintiff must prove (1) the standard of care in the locality where the treatment occurred, (2) that the defendant breached the standard of care, and (3) that the breach was the proximate cause of injury". (*Perrone v. Grover*, 272 AD2d 312). "The required elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage". (*Feinberg v. Feit*, 23 AD3d 517).

“General allegations of medical malpractice, merely conclusory in nature and unsupported by competent evidence tending to establish the essential elements of the claim are insufficient to defeat a defendant physician’s entitlement to summary judgment”. (*Holbrook v. United Hospital Medical Center*, 248 AD2d 358, referring to *Alvarez v. Prospect Hospital*, *supra*, and *Toledo v. Ordway*, 208 AD2d 518). A plaintiff’s medical expert’s affidavit which is silent on the essential issue of proximate cause fails to rebut a *prima facie* showing of entitlement to summary judgment. (*Fitz v. Southside Hospital*, 182 AD2d 671; *Ramsay v. Good Samaritan Hospital*, 24 AD3d 645; *Wicksman v. Nassau County Health Care Corporation*, 27 AD3d 644). When an expert fails to state the specific facts upon which he relied upon in formulating his opinion, and merely states that he generally relied upon the entire medical record, the expert’s allegations were found to be conclusory. (*Holbrook v. United Hospital Medical Center*, *supra*).

DISCUSSION

Here, the defendant has met its burden of proof with respect to the instant summary judgment motion. The defendant has demonstrated, through its submission of the defendant’s expert’s affidavit, the deposition testimony, and the hospital records, that the treatment rendered to plaintiff’s decedent conformed to good and acceptable medical practice. The defendant’s expert affirms that the patient was placed on an appropriate diet post-op to the July 5, 2004 operation, and as per nutritional assessment done on July 13, 2004, the patient was placed on Nephro, a liquid nutritional supplement specific for renal patients, two cans per day, as well as a multivitamin and Vitamin C, which the decedent was already on. The defendant’s expert provides that the hospital chart indicates that the nursing staff initiated a Pressure Ulcer Protocol/Plan of Care on July 9, 2004, indicating Stage I pressure ulcer bilateral heels and sacrum, and initiated Dermagram for the treatment of irritated skin to prevent skin breakdown to these sites. The defendant’s expert states that the patient’s pressure ulcers at both heels and the sacrum did not progress past Stage I up to and including the patient’s date of discharge at North Shore on July 16, 2004. The defendant’s expert states that the hospital chart indicates, as per the nursing transfer note dated July 16, 2004, and the skin assessment diagram, that the “left hip incision clean, dry and intact; left elbow dressing with Bacitracin and Kling and left thigh with old blister site open to air and intact”.

The defendant’s expert opines that the patient did not develop any bedsores or skin breakdown while a patient at North Shore, that the nursing staff at North Shore appropriately and timely monitored, assessed and examined the patient’s skin integrity, providing timely and appropriate nursing interventions to prevent the development of skin breakdown and bedsores, that the patient was not principally confined to her bed during her admission to North Shore, and that the staff at North Shore appropriately and timely assessed and monitored the patient’s nutritional status. The defendant points out that the patient’s daughter testified at her deposition that her mother, the deceased, did not have a bed sore at North Shore, and that plaintiff’s daughter testified that she observed her mother eating and drinking nutritional shakes.

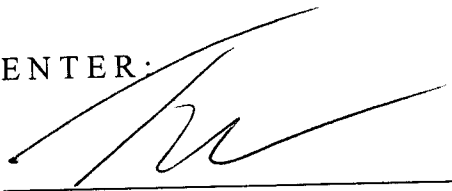
In opposition, the plaintiff has raised a triable issue of fact through the sworn affidavit of plaintiff’s medical expert, the hospital records, and the deposition testimony. Contrary to the defendant’s contention, the plaintiff’s expert’s affidavit is neither conclusory, nor speculative as it established the elements of specific factual references to the care and treatment of the patient. (*Feinberg v. Feit*, *supra*). The plaintiff’s expert specifically refers to the defendant’s hospital records. The plaintiff’s expert submits that the patient was assessed as having no reddened areas or skin

breakdown upon admission to the orthopedic surgery service, and put on skin alert, which was inaccurate as she was more than "slightly limited" in mobile status. The plaintiff's expert provides that a care plan should have been implemented based upon the admission assessment, and yet the hospital chart provides no evidence of such plan of care. The plaintiff's expert points out that there is no evidence that a pressure relieving mattress, utilized to prevent and limit the development of pressure ulcers, was ever provided. Plaintiff's expert asserts that a pressure relieving mattress is essential for such a patient who was principally confined to her bed, as pressure ulcers were on her heels as well as her sacrum.

Plaintiff's expert provides that there is no evidence in the hospital record that the decedent was repositioned hourly when out of bed to the chair, or taught to shift weight every fifteen minutes while in the chair. Plaintiff's expert avers that the "record reveals that turning and positioning was not evident for an 8 hour period within the 24 hours that the Stage I pressure ulcer developed", and opines that the failure to provide plaintiff's decedent with a water cushion was a deviation from good and accepted standards of care. Plaintiff's expert further submits that the defendant's nutritional assessment of July 13, 2004 was "untimely and after the damage was done". Plaintiff's expert states that while the hospital records reveal that the nutrition service recommended Nephro two cans per day, it was never ordered by the physician and there is no evidence that it was given to the patient. Plaintiff's expert refers to missed opportunities of necessary intervention to treat the pressure ulcers, including avoiding the development of a sacral ulcer from positioning from side to side, which evidentiary was not done, to limiting the patient's time out of bed as indicated on the daily nursing flow sheet as "OOB to/chair no longer than 2 hours" - which "was not checked off on July 9, 2004, July 10, 2004, July 11, 2004, July 12, 2004, July 15, 2004 and July 16, 2004". Plaintiff's expert opines that the development of the pressure ulcers proximately caused by the defendant's staff, "was unfortunately the beginning of the end for this patient", and the proximate cause and substantial factor in causing the injuries and ultimate death of plaintiff's decedent.

CONCLUSION

In light of the foregoing, the defendant's motion for summary judgment is denied.

ENTER:


J.S.C.

Dated: June 26, 2009

cc: Donald M. Zolin, Esq.
Montfort, Healy, McGuire & Salley, Esqs.
Fumuso, Kelly, DeVerna, Snyder, Swart & Farrell, LLP

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**