

Yakkey v Ascher

2009 NY Slip Op 32512(U)

October 26, 2009

Supreme Court, New York County

Docket Number: 105463/05

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobis
Justice

PART 6

Re: ROBERT B. YAKKEY
George Aschen, ET AL.

INDEX NO. 105463/05
MOTION DATE 8/21/09
MOTION SEQ. NO. 7
MOTION CAL. NO. _____

The following papers, numbered 1 to 27 were read on this motion to/for reargument

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1-15</u>
<u>16-26</u>
<u>27</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion decided in accordance
with accompanying decision and order.

FILED
OCT 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/26/09 _____ *JBL*
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
ROBERT B. YAKKEY, as Administrator of the Estate
of ROBERT E. YAKKEY and ROBERT B. YAKKEY,
individually,

Plaintiff,

Index No. 105463/05

-against-

Decision and Order

GEORGE ASCHER, TILLIE ASCHER, NEW YORK
PRESBYTERIAN HOSPITAL, LONG BEACH
MEDICAL CENTER and THE KOMANOFF CENTER
FOR GERIATRIC AND REHABILITATIVE MEDICINE,

Defendants.

FILED
OCT 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----X
JOAN B. LOBIS, J.S.C.:

Motion Sequence Numbers 007, 008, and 009 are consolidated for disposition. By these motions, defendants The New York and Presbyterian Hospital s/h/a New York Presbyterian Hospital ("NYPH"), Long Beach Memorial Nursing Home, Inc., d/b/a Komanoff Center for Geriatric and Rehabilitative Medicine ("Komanoff"), and Long Beach Medical Center ("LBMC"), respectively, move to reargue that portion of this court's decision and order dated May 4, 2009 (the "May 2009 Decision") and, upon reargument, vacate that portion of the May 2009 Decision which denied summary judgment as against them.¹ In the May 2009 Decision (familiarity with which is presumed), this court dismissed those claims sounding in medical malpractice and wrongful death against all defendants, and dismissed the claim for punitive damages under Pub. Health Law § 2801-d(2) against Komanoff. The court allowed plaintiff's complaint to survive to the extent that it makes out claims sounding in ordinary negligence as to all three defendants, since defendants' motions

¹ Plaintiff's complaint as against George Ascher and Tillie Ascher, the purported owners of the property where Mr. Yakkey fell, was dismissed pursuant to a judgment entered on December 13, 2006.

treated the case at bar solely as a medical malpractice action, and allowed the complaint to survive the extent that it makes out a statutory claim against Komanoff under Pub. Health Law § 2801-d, except as to punitive damages. At the parties' pre-trial conference on May 19, 2009, the court indicated that it would entertain motions to reargue that portion of the May 2009 Decision that allowed plaintiff's complaint to survive as to the claims purportedly sounding in negligence. These motions followed.

Pursuant to C.P.L.R. Rule 2221, a motion for leave to reargue "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." A motion for reargument is "addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.'" William P. Pahl Equip. Corp. v. Kassiss, 182 A.D.2d 22, 27 (1st Dep't 1992) (internal citations omitted). Given that defendants raise an issue as to whether the court properly determined that plaintiff's complaint sounds in both medical malpractice and general negligence, on which determination the court relied in the May 2009 Decision, the court grants reargument as to this issue. The court denies reargument as to the issue of the statutory claim against Komanoff under Pub. Health Law § 2801-d (see pg. 11, infra).

The issue on reargument is whether the court's determination that plaintiff's complaint sounds in both medical malpractice and general negligence was proper. Defendants collectively argue that plaintiff's complaint sounds only in medical malpractice and that the medical

malpractice claims were properly dismissed; defendants' position is that there are no claims remaining on which plaintiff may continue to maintain an action. NYPH maintains that the allegations against it as set forth in the pleadings—that it failed to provide physical therapy, thereby causing plaintiff's decedent to develop bedsores and a host of other medical issues—are allegations that sound in medical malpractice only, and not negligence. NYPH argues that orders for decedent's physical therapy at NYPH were set by his physician and were an integral part of his medical treatment; thus, NYPH claims, the "gravamen of the claim is negligence in furnishing medical treatment" to decedent. Similarly, Komanoff submits that the allegations against it—that it failed to provide competent physical and occupational therapy, and failed to maintain adequate nutrition or hygiene, thereby leading to decedent's development of bedsores—are allegations of wrongdoing that "involve matters of medical science or art requiring 'special skills' not ordinarily possessed by lay persons that cannot be assessed on the basis of common every day experience." LBMC essentially makes the same argument: that allegations relating to its failure to perform physical therapy and prevent decedent's skin breakdown and decubitus ulcers cannot be determined by lay knowledge.

'An action to recover for personal injuries or wrongful death against a medical practitioner or a medical facility or hospital may be based either on negligence principles or on the more particularized medical malpractice standard.' Simple negligence principles are applicable to those cases where the alleged negligent act may be readily determined by the trier of fact based on common knowledge. However, where the directions given or treatment received by the patient is in issue, consideration of the professional skill and judgment of the practitioner or facility is required and the theory of medical malpractice applies.

Friedmann v. New York Hospital-Cornell Med. Ctr., 65 A.D.3d 850, 884 N.Y.S.2d 733, 734 (1st Dep't 2009) (citations omitted). But, as the case law in this area demonstrates, the same event may give rise to claims of medical malpractice and claims for simple negligence. Therefore, it is important for plaintiff to identify the nature of the duty and standard of care that has been breached. For example, in Reardon v. Presbyterian Hosp., 292 A.D.2d 235 (1st Dep't 2002), plaintiff fell while being helped down from an examination table by her physician. In finding that the claim sounded in negligence, and not medical malpractice, the First Department held that the “‘essence of the plaintiff[’s] allegations is the failure to exercise ordinary and reasonable care to insure that no unnecessary harm befell the patient.’” Id. at 237 (brackets in original), quoting Halas v. Parkway Hosp., 158 A.D.2d 516, 517 (2d Dep't 1990). “[T]he decision of defendant doctor to help plaintiff’s decedent off of the examining table by himself, rather than calling over another employee of defendant hospital for assistance, was not the type of decision requiring the input of an expert with medical training who has earned the degree of M.D.” Reardon, supra at 237. Similarly, in Friedmann, supra, 884 N.Y.S.2d at 734, which involved a resident-patient at an extended care facility whose leg ruptured after striking a bed rail, the First Department affirmed the trial court’s decision that this act sounded in negligence, and not medical malpractice, because

a trier of fact can evaluate, without the benefit of expert testimony, whether allegedly permitting the decedent’s leg to strike the bed rail while she was being prepared for dinner constituted a negligent act; whether the alleged failure to respond to her calls for assistance was negligent under the circumstances; and whether the delay, if any, in calling 911 was negligent.

884 N.Y.S.2d at 734.

In 2008, the Second Department reversed the lower court's determination in D'Elia v. Menorah Home & Hosp. for Aged & Infirm, 51 A.D.3d 848 (2d Dep't 2008), finding that plaintiff's cause of action sounding in negligence survived, even though the medical malpractice claims were properly dismissed. In D'Elia, plaintiff's cause of action "based on negligence encompass[ed] allegations of medical malpractice and ordinary negligence." Id. at 851. Plaintiff alleged that defendant facility failed to use restraints to safeguard plaintiff's decedent from falling, and alleged that defendant "failed to use any available safety devices or tools to protect the frail, elderly decedent from the risk of falls." Id. Plaintiff did not submit an expert affidavit, but relied on deposition testimony from a nurse at defendant facility who testified that "a range of tools less invasive than restraints is available to safeguard a patient at risk for falls and can be directed without a physician's approval, but that none had been used to protect the decedent." Id. at 850. The Second Department found that the allegation of failure to use restraints sounded in medical malpractice and was properly dismissed because plaintiff failed to rebut defendant's prima facie showing of entitlement to summary judgment with an expert affidavit. Id. at 851. But, the Second Department—citing the rule that "no unnecessary harm be[fall] the patient,"—found that the allegation relating to failure to use any available safety devices sounded in ordinary negligence and did not involve specialized knowledge, and that plaintiff had submitted evidence, including the nurse's testimony, rebutting defendant's prima facie showing that it "exercised reasonable care in supervising the decedent." Id. at 852. The court concluded that defendant was not entitled to summary judgment on the entire cause of action, but rather, was entitled to summary judgment on only that portion of the cause of action sounding in medical malpractice.

In Cornish v. De Palma, 210 A.D.2d 35 (1st Dep't 1994), the First Department upheld the lower court's denial of summary judgment to defendant physician. The plaintiff in Cornish had developed bedsores at defendant medical center. Plaintiff and his sister both furnished affidavits that, despite the entries in the hospital chart, the treatment regimen ordered by the defendant doctor (an attending physician) was not followed. Id. The court found that

[s]ince the ultimate responsibility for a patient's treatment is borne by his physician, and there is a factual disagreement over what transpired and whether plaintiff was properly ministered to, the Supreme Court appropriately found that the dispute herein does not concern the appropriate medical treatment but exactly what occurred when plaintiff was under [the defendant physician's] care and that this is not a matter where expert testimony is essential. Rather, it is the credibility of the parties' respective witnesses that is crucial.

Id.

Earlier this year, the Second Department decided Pacio v. Franklin Hosp., 63 A.D.3d 1130 (2d Dep't 2009), which involved a plaintiff who had fallen at home and was hospitalized; he acquired bedsores during the first hospitalization, was transferred to nursing home, and was later transferred to a second hospital for shortness of breath and bedsores. The lower court found that plaintiff's allegation that the second hospital failed to follow its own protocol in caring for plaintiff's pressure ulcers sounded in medical malpractice, not negligence, and that expert testimony was required, because the "'conduct complained of . . . constitutes an integral part of the process of rendering medical treatment to the plaintiff.'" Id. at 1132. The Second Department affirmed the lower court, reasserting the principle that

a claim sounds in medical malpractice 'when the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician.' In contrast, a claim sounds in negligence 'when the gravamen of the complaint is

not negligence in furnishing medical treatment to a patient, but the hospital's failure in fulfilling a different duty.'

Id. (citations omitted).

In this case, the allegations plaintiff raises against the three defendants are failure to provide competent physical and occupational therapy; failure to appropriately monitor decedent; failure to appropriately clean decedent's bed pans and/or diapers; and, failure to prevent decedent from developing serious and severe bedsores, leading to sepsis and death.² Having reviewed the relevant case law and having given due consideration to the parties' arguments in the underlying papers, the court is convinced that the allegations relating to physical therapy and the protocol for monitoring, preventing, and treating bedsores sound in medical malpractice. Plaintiff takes issue with the facilities' plan of treatment and instructions to employees regarding the care of plaintiff's decedent, which are claims that sound in medical malpractice. See Friedman, supra ("where the directions given or treatment received by the patient is in issue, consideration of the professional skill and judgment of the practitioner or facility is required and the theory of medical malpractice applies"). The facilities' decisions about decedent's physical therapy regiment and their protocol for monitoring, preventing, and treating bedsores are acts that cannot be said to sound in lay judgment, but in the specialized judgment of medical professionals.

It was incumbent on plaintiff, in opposing defendants' motions, to demonstrate that the plaintiff's allegations do, indeed, sound in negligence. Plaintiff's argument in support of his

² The wrongful death claims were dismissed as against all defendants in the May 2009 Decision.

position that the alleged departures constitute negligence, and not medical malpractice, is, for the most part, unpersuasive.³ He cites to Collins v. New York Hosp., 49 N.Y.2d 965 (1980), for the proposition that failure to carry out a physician's order sounds in negligence. That is not the holding of Collins. Collins involved a review of a jury's finding of medical malpractice against a hospital, where physicians directed the hospital to perform a certain test, and the hospital failed to do so. That portion of Collins to which plaintiff refers sets forth that "[t]he hospital's responsibility did not involve medical judgment; it was simply required to carry out the physicians' order. Failure to do so can, of course, be found to be malpractice." Id. at 967. The Court of Appeals never addressed a distinction between ordinary negligence and medical malpractice as to the hospital's alleged departures in Collins; indeed, a review of the First Department's lower decision reveals that this was a nonissue. See Collins v. New York Hosp., 67 A.D.2d 872 (1st Dep't), modified by Collins, supra, 49 N.Y.2d. Plaintiff also cites to Edson v. Cmty. Gen. Hosp. of Greater Syracuse, 289 A.D.2d 973 (4th Dep't 2001) for the principle that negligence can be the basis of recovery against a hospital preventing a weak and disoriented patient from falling out of bed. In Edson, plaintiff alleged that defendant hospital was negligent in failing to consider plaintiff's fever and confusion in assessing the risk of a fall. The Fourth Department held that "[t]he gravamen of the complaint [was] 'the failure to exercise ordinary and reasonable care to insure that no unnecessary harm befell the patient.'" But, in the instant case, plaintiff alleges failures involving the comprehensive medical care defendant facilities' rendered to plaintiff's decedent over a significant stretch of time; the facts in

³ Plaintiff also includes a new affirmation by his expert, not previously offered in opposition to the prior summary judgment motions underlying the May 2009 Decision. Since these statements were not included in support of the original motion, they cannot be considered in a motion to reargue. HSBC Bank, USA v. Infinity Auto Glass Distributors, Inc., 27 A.D.3d 1094, 1095 (4th Dep't 2006).

Edson are significantly distinguishable, since that case involves an isolated fall, such that the holding is inapplicable here. Finally, plaintiff cites to Parson v. Interfaith Med. Ctr., 267 A.D.2d 367 (2d Dep't 1999); but, the holding in Parson indicates that allegations of failures by nursing staff to "massage the skin, use a sheepskin sheet, and [the] delay in providing a proper mattress to promote healing" in treating bedsores sound in medical malpractice, which are some of the allegations brought by plaintiff in this action.

Plaintiff does raise factual issues regarding one of the allegations of negligence: the facilities' obligation to keep plaintiff's decedent in sanitary conditions, including ensuring that plaintiff's decedent did not sit for long periods of time in soiled diapers. Plaintiff's submissions only raised an issue of fact, however, with regard to one of the defendants, Komanoff. As Komanoff notes in the motion now before the court, plaintiff's complaint and bill of particulars assert that the failure to clean decedent's bed pans and/or diapers resulted in the development of bedsores. A medical facility or nursing home has a duty to ensure that its patients suffer from no unnecessary harm. The alleged negligence of not timely changing decedent's diapers "may be readily determined by the trier of fact based on common knowledge." See Friedman, supra.

The records from Komanoff indicate that plaintiff's decedent, who was in adult diapers, suffered from recurring C. diff infections and diarrhea, incontinence of bowels, and a recurring red rash on his groin and buttocks. He was noted as "chairfast" upon admission to Komanoff and had trouble getting out of bed. Decedent was also noted as at risk for pressure ulcers related to decreased mobility and other concomitant ailments. Plaintiff (decedent's son) and his wife

(decedent's daughter-in-law) testified at their depositions that decedent complained that the staff at Komanoff would leave him for long periods of time without changing his diaper and that decedent sat in his diarrhea. With respect to causation, plaintiff's expert, in plaintiff's original opposition to the summary judgment motions, opined that "had Mr. Yakkey been given more appropriate care with regard to decubitus prevention measures, specifically keeping his diapers sanitary and clean, positioning him appropriately, notwithstanding the use of special mattresses, and being appropriately attended to by nursing personnel, he would not have developed decubitus ulcers."

The court disagrees with Komanoff's assertion that this duty to ensure that its residents remain reasonably clean by preventing diapered, incontinent, chairfast patients from sitting for long periods of time without a diaper change "involve[s] matters of medical science or art requiring 'special skills' not ordinarily possessed by lay persons that cannot be assessed on the basis of common every day experience." While failure to follow proper protocol or failure to adhere to a plan of prevention or treatment of bedsores may fall under the rubric of medical malpractice (see Pacio, supra, 63 A.D.3d at 1132), the allegation of failing to keep plaintiff's decedent in sanitary conditions or allowing him to remain in soiled diapers is an allegation of negligence, and plaintiff has sufficiently rebutted Komanoff's denial of negligence to survive the summary judgment motion. The duty and breach alleged here with respect to allegations of unsanitary conditions do not involve "specialized knowledge." See D'Elia, supra, 51 A.D.3d at 852. The court finds that plaintiff's submissions, including the testimony of decedent's family members, raise factual issues regarding the alleged breach of Komanoff's duty to keep plaintiff's decedent in sanitary conditions. Issues of the credibility of the witnesses are issues for the trier of fact.

Komanoff also seeks reargument and reconsideration of this court's denial of summary judgment in Komanoff's favor regarding the statutory claim against Komanoff under Pub. Health Law § 2801-d. The court found that the existence of issues of fact as to when and where plaintiff's decedent developed the bedsores and to what extent they were treated precluded summary judgment on this issue. Komanoff now argues that the court "erred in determining that issues of fact preclude the granting of summary judgment as to the Public Health Law §2801-d claim." The court declines to grant reargument as to this issue, since the court did not overlook or misapprehend any factual matter in the May 2009 Decision regarding the Public Health Law § 2801-d claim. C.P.L.R. Rule 2221(d)(2); Foley v. Roche, 68 A.D.2d 558, 567-68 (1st Dep't 1979). Nor has Komanoff demonstrated that the court mistakenly arrived at its earlier decision regarding the Public Health Law § 2801-d claim. The court denies reargument and adheres to its original decision, which found that issues of fact exist as to when and where plaintiff's decedent developed the bedsores, and that these issues of fact preclude summary judgment on the Public Health Law § 2801-d claim.

Upon granting reargument as to the issue of whether the claims sound in medical malpractice or negligence, the court has determined that plaintiff has not demonstrated that he has asserted a cause of action for negligence as to The New York and Presbyterian Hospital s/h/a New York Presbyterian Hospital ("NYPH") and Long Beach Medical Center ("LBMC"), but that plaintiff has asserted a limited cause of action sounding in negligence as to Long Beach Memorial Nursing Home, Inc., d/b/a Komanoff Center for Geriatric and Rehabilitative Medicine ("Komanoff"). Accordingly, it is

ORDERED that the complaint against The New York and Presbyterian Hospital s/h/a New York Presbyterian Hospital ("NYPH") and Long Beach Medical Center ("LBMC") is dismissed in its entirety, and the clerk of the court shall enter judgment accordingly; and it is further

ORDERED that plaintiff's claims of negligence as against Komanoff survive, as limited by the above decision.

The remaining parties are directed to appear for a pre-trial conference on November 10, 2009, at 9:30 a.m. This constitutes the decision and order of the court.

Dated: October 26, 2009



JOAN B. LOBIS, J.S.C.

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