

Wilson v Mount Sinai Hosp.

2009 NY Slip Op 32983(U)

December 16, 2009

Supreme Court, New York County

Docket Number: 103876/07

Judge: Joan B. Carey

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

PRESENT: Hon Joan B Carey

PART 29

Index Number : 103876/2007

WILSON, DAVID S.

vs
MOUNT SINAI HOSPITAL

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-19

20-23

24-27

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is denied as per the attached decision.

All parties are directed to appear for a Pre-Trial Conference on 1/21/10 @ 9.30 a.m

FILED

DEC 21 2009

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/16/09

Joan B Carey
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
COUNTY OF NEW YORK: IAS PART 29

-----X
DAVID S. WILSON, Both individually and as Executor
of the Estate of DOROTHY WILSON, Deceased,
Plaintiff,

Index No. 103876/07

-against-

THE MOUNT SINAI HOSPITAL,
Defendant.

-----X
JOAN B. CAREY, J.:

This is an action by plaintiff David S. Wilson against defendant Mt. Sinai Hospital (Mt. Sinai) for medical malpractice, to recover damages for pain and suffering and wrongful death as a consequence of Mt. Sinai's alleged negligent medical care and treatment of the plaintiff's decedent, Dorothy Wilson (Wilson), commencing in or about April 19, 2005, until her discharge from the hospital on May 10, 2005. Presently before this Court is a motion by Mt. Sinai for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint on the ground that no genuine triable issues of fact exist. It is Mt. Sinai's position that Wilson received appropriate care during her admission to Mt. Sinai, and that Wilson's death, 22 days after her discharge from Mt. Sinai, was for reasons unrelated to her care.

BACKGROUND

Wilson was an 82-year old woman in progressively declining health when she presented to Mt. Sinai emergency department on April 19, 2005 with an altered mental status. Her medical history included severe chronic obstructive pulmonary disease (COPD), cardiac disease, vascular disease and chronic pancreatitis, as well as a non-healing ankle ulcer. She was scheduled

to have an angiogram a day earlier in order to evaluate her stability for the revascularization of her leg (required due the non-healing ankle ulcer), but the angiogram was canceled for medical reasons, which included her altered mental status.

Two days after her admission to Mt. Sinai, Wilson experienced respiratory difficulties, requiring intubation and transfer to the Intensive Care Unit. She was extubated two days later. On April 25, 2005, Wilson was stable and was transferred out of the Intensive Care Unit to a cardiac telemetry floor, where she received care from multiple specialties for her various medical conditions. Her mental status remained altered. According to Mt. Sinai, Wilson's evaluation on the date of her transfer out of the Intensive Care Unit noted a stage I sacral decubiti (i.e., bed sore), including a redness of skin at the sacral/sacrum area.

According to Mt. Sinai, the nursing flow sheets in the hospital record indicate that in the days following Wilson's transfer out of the Intensive Care unit she was turned and positioned every two hours, she was cleaned daily, her dressing was changed, as needed, and she was regularly monitored for signs and symptoms of discomfort. Notwithstanding, on April 30, 2005, the nursing notes describe the decubitus ulcer, stage II. Additionally, the non-healing ankle sore that pre-existed Wilson's hospitalization was monitored daily, but continued to progress. Apparently, Wilson also had bilateral heel wounds that were monitored and treated, but likewise progressed.

On May 6, 2005, Wilson was transferred to a regular floor at Mt. Sinai. She remained there until her discharge on May 10, 2005. During this time period, Wilson was placed on a Hill-Rom Prime ARS Pressure Relief Mattress, and was seen by pulmonary, cardiology, rehabilitation, plastic surgery, and geriatric nurse specialists. According to the records, Wilson was turned, positioned and bathed regularly, the sacral decubitus ulcer, as well as the her other wounds, were

dressed, cleaned and monitored regularly. Wilson was seen by the geriatric nurse specialist on May 9th, who noted that the sacral ulcer and heel wounds were necrotic and that Wilson was incontinent of bowel and bladder. A plastic surgery consultant, on May 9th, noted that Wilson was "an 82 year old deconditioned woman with sacral decubitus ulcer, not a good candidate for myocutaneous flap." He recommended dressing changes and frequent turning. The measurement of the sacral ulcer at this point was approximately 10 x 20 cm.

According to Mt. Sinai, Wilson continued to suffer delirium, the cause of which was not definitive, but after neurologic input, including CT scans and other tests, it was felt to be dementia. Wilson was medically stable, but given her continued altered mental status and inability to care for herself, it was recommended that she be transferred to a subacute facility. Wilson's husband opted to bring his wife home and arranged for round-the-clock care for her. On May 10th, Wilson was discharged home to the care of her husband.

On May 15th, Wilson was admitted to North Shore University Hospital (North Shore) with shortness of breath. From May 15th through May 27th, while at North Shore, she was treated by cardiology, pulmonary, infectious diseases, neurology, internal medicine, gastroenterology and plastic surgery specialists. A plastic surgery consultant examined Wilson on May 16th. He noted a pressure sore involving the right buttock, stage III, and recommended pressure relief as well as dressing changes three times daily. Care for the right leg and heel ulcers was also prescribed. The consultant further noted that Wilson was not a candidate for surgery.

Examination by an infectious disease specialist the same day reflected that the decubiti were not infected, but rather, that there was a left mid-lung filled infiltrate which required treatment, and also the likelihood of a urinary tract infection. Wilson was treated with Cipro for the

pneumonia, Vancomycin for the urinary tract infection, and Flagyl for c. difficile colitis. A CT scan of the brain also revealed brain atrophy. Mt. Sinai submits that, according to North Shore's records, during Wilson's admission, there was no evidence that the sacral wounds were infected. The cultures performed all were normal. Wilson was discharged on May 27, 2005 to hospice care. She died on June 1, 2005.

Plaintiff commenced this action on or about March 20, 2007 claiming, inter alia, that Mt. Sinai was negligent in the manner in which it provided treatment to Wilson, causing her injury, and ultimately, her death. In the complaint, plaintiff focuses on the sacral decubiti that developed during Wilson's stay at Mt. Sinai, and claims that this ulcer was attributable to Mt. Sinai's negligent care, and that Wilson's death 22 days later was causally related to the ulcers.¹

DISCUSSION

In support of summary judgment, Mt. Sinai argues, inter alia, that: (a) Wilson was predisposed to a sacral ulcer; (b) Wilson developed a sacral ulcer absent any negligence by Mt. Sinai; (c) Wilson's sacral ulcer never became infected; and (d) Wilson's sacral ulcer was not a substantial contributing factor in her death.

“[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, 786 [1st Dept 1991], quoting *Gibson v American Export Isbrandtsen Lines, Inc.*, 125 AD2d 65, 74 [1st Dept 1987]). Initially, “the proponent of a summary judgment motion must make a prima facie showing of

¹Prior to the filing of this motion, plaintiff discontinued the action as to defendants Nguyen and Kannry, and the caption was amended to reflect this.

entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [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 Hosp.*, 68 NY2d 320, *supra*; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, *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 Hosp.*, 68 NY2d 320, *supra*; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, *supra*).

Mt. Sinai seeks summary judgment, arguing that the medical treatment provided to Wilson while at Mt. Sinai was within good and accepted standards of medical practice. Mt. Sinai relies upon, inter alia, the expert affirmation of a physician, Philip Marcus, M.D., M.P.H., who is board certified in internal medicine, pulmonary medicine and critical care medicine, and the affidavit of a registered nurse, Leslie Felson, R.N. Mt. Sinai contends that its medical experts’ submissions reflect precisely why, despite appropriate care, Wilson still developed sacral ulcers. Mt. Sinai further maintains that there is no causal connection between its alleged negligence and the injuries sustained by Wilson (*see Mertsaris v 73rd Corp.*, 105 AD2d 67, 76-77 [2d Dept 1984]). Mt. Sinai concludes that, although plaintiff claims that the sacral ulcers Wilson developed at Mt. Sinai caused her demise, the medical records and expert affidavit and affirmation submitted by Mt. Sinai demonstrate that Wilson died of causes related to her multiple medical problems and advanced age, that the sacral

ulcers were never infected, and that there is no evidence that her death had any relationship to the sacral ulcer.

In opposition to the motion, plaintiff submits the expert affirmation of a physician, who is board certified in internal medicine (whom plaintiff refers to as plaintiff's first medical expert), and the affidavit of a registered nurse (whom plaintiff refers to as plaintiff's second medical expert). Plaintiff's first medical expert opines that Mt. Sinai failed to timely and properly diagnose and treat normal pressure hydrocephalus, and that this was the root cause of all of Wilson's subsequent ailments, as it greatly impaired her ability to ambulate, impaired her mobility in general, impaired her cognitive capabilities, caused her to require prolonged use of restraints, caused her to have an increased risk of falls, caused persistent urinary incontinence, and otherwise increased her risk of developing a pressure ulcer and decreased her ability to recover from it. Plaintiff's first medical expert further opines that the sequella of normal pressure hydrocephalus led to development of Wilson's sacral ulcer, worsening of the heel ulcer, development of urinary tract infections, pneumonia, impaired mobility, fecal incontinence, progressive weight loss, chronic pain and persistent "unexplained" delirium.

This expert also opines that Mt. Sinai deviated from the standard of care by both failing to prevent and failing to properly and competently treat Wilson's ulcers. The expert notes that, despite Mt. Sinai's contentions to the contrary, there is no documentation that Wilson was actually turned on the dates indicated in the hospital records, and opines that Mt. Sinai otherwise failed to manage and treat Wilson's ulcers. The first expert claims that a causal relationship exists with respect to the deviations by Mt. Sinai from the standard of care and Wilson's pain and suffering from the time she was admitted to Mt. Sinai and her death. In the closing paragraph of his

affirmation, he concludes that it is his “opinion within a reasonable degree of medical probability that decedent’s pain and suffering and subsequent death were directly and causally related to the decedent’s sacral ulcer and resultant multiple infections.”

Wilson’s second medical expert, a registered nurse, opines that at the time of Wilson’s admission to Mt. Sinai, she was at risk for skin breakdown, but that the nursing staff at Mt. Sinai failed to plan or implement a comprehensive care plan for the prevention of skin breakdown, and, thereafter, when a skin breakdown did in fact occur, the nursing staff at Mt. Sinai failed to provide proper care as necessary for Wilson in order to properly assess, treat, and prevent progression of the sacral ulcer. The second expert questions whether Mt. Sinai in fact gave the care it claims it gave to Wilson, such as turning and repositioning the patient, and dressing the wounds, and speculates that such a purported failure to do same would constitute a deviation from the standard of care. She also states that a causal relationship exists with respect to the alleged deviations by the nursing staff and employees of Mt. Sinai from the standard of care with Wilson’s sacral ulcer, resulting in multiple infections, pain and suffering and Wilson’s subsequent death. Plaintiff submits that, based on the evidence presented, summary judgment must be denied because Mt. Sinai has failed to make a prima facie showing of its entitlement to same, or, if such a prima facie showing has been made, that plaintiff has come forward with sufficient evidence to demonstrate material triable issues of fact.

Mt. Sinai, in its reply, submits that Wilson’s medical expert asserted a new theory, not previously asserted by plaintiff, to wit, that Mt. Sinai failed to diagnose Wilson with normal pressure hydrocephalus, and that the failure to diagnose and treat normal pressure hydrocephalus was “the root cause of Mrs. Wilson’s subsequent ailments . . . [leading] to the sacral ulcer, worsening of

heel ulcer, development of new heel ulcer, falls, urinary tract infections, pneumonia, impaired mobility, fecal incontinence, progressive weight loss, chronic pain and persistent 'unexplained' delirium." A review of the record confirms Mt. Sinai's position that plaintiff's claim that Mt. Sinai's alleged failure to diagnose and treat normal pressure hydrocephalus is an entirely new theory. Equally new is plaintiff's corresponding claim that, if Mt. Sinai had arrived at this "correct" diagnosis, Wilson would not have suffered the claimed sacral ulcers and various additional injuries that are not claimed in this lawsuit, and, ultimately, that Wilson would not have died.

It is well settled that a new theory of liability, asserted for the first time in opposition to a summary judgment motion regarding treatment of a plaintiff, or, as in the instant case, the treatment of plaintiff's decedent, that was not set forth in the complaint or in the bill of particulars, is improper and cannot defeat an otherwise proper motion for summary judgment (*Abalola v Flower Hosp.*, 44 AD3d 522 [1st Dept 2007]; see also *People v Grasso*, 54 AD3d 180, 212-213 [1st Dept 2008]).

As a result, the affirmation of plaintiff's expert in internal medicine is rejected to the extent that it is premised upon a newly articulated theory of liability - normal pressure hydrocephalus. Notwithstanding, the remaining aspects of plaintiff's expert submissions, including the physician's affirmation and the registered nurse's affidavit, which address Mt. Sinai's care and treatment of Wilson relative to the sacral ulcer and the progression thereof, as well as causation of Wilson's injuries, and ultimately, her death, directly conflict with Mt. Sinai's submissions. Based upon the conflicting expert submissions, this court finds that issues of fact and credibility exist in connection with whether the medical treatment provided by Mt. Sinai to Wilson departed from good and accepted medical practice, and whether such alleged departures were the proximate cause of her

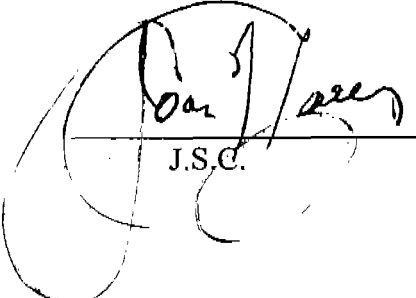
death. Such issues cannot be resolved on this motion for summary judgment (*see Bradley v Soundview Healthcenter*, 4 AD3d 194 [1st Dept 2004]; *see also Morris v Lenox Hill Hosp.*, 232 AD2d 184 [1st Dept 1996], *affd* 90 NY2d 953 [1997]).²

CONCLUSION

It is ORDERED that the motion by defendant Mount Sinai Hospital for summary judgment is denied, except that plaintiff's opposition, to the extent that it is premised on a newly articulated theory of liability - normal pressure hydrocephalus - is rejected. This constitutes the decision and the order of the court.

Dated: December ~~16~~, 2009

ENTER:


J.S.C.

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² Plaintiff's claim that this motion was not timely made is unsupported, and is therefore rejected.