

Maltese-Kojallo v Fairview Nursing Care Ctr., Inc.

2010 NY Slip Op 30144(U)

January 13, 2010

Supreme Court, Queens County

Docket Number: 13830/07

Judge: Peter Joseph Kelly

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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY**
Justice

IAS PART 16

PHYLLIS MALTESE-KOJALLO, ETC.,

INDEX NO. 13830/07

Plaintiffs,

MOTION

DATE SEPTEMBER 22, 2009

- against -

FAIRVIEW NURSING CARE CENTER, INC.,
ETC., ET AL,

MOTION

CAL. NO. 17

Defendants.

MOT. SEQ.

NUMBER 3

The following papers numbered 1 to 16 read on this motion by the defendant, individually and d/b/a Fairview Nursing Care Center for an order granting summary judgment dismissing the complaint.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affirmation-Affidavit-Exhibits....	1 - 7
Opposing Affirmation-Affidavit-Exhibits.....	8 - 12
Reply Affirmation.....	13 - 16

Upon the foregoing papers this motion is determined as follows:

Rose Maltese, age 82, was admitted on April 27, 2006 to Fairview Nursing Care Center (Fairview) for rehabilitation, following a transfer from The New Parkway Hospital (Parkway Hospital) where she had been treated for a fall, having previously fractured her right arm, and was in a cast. Ms. Maltese was discharged to her home on May 25, 2006. Two days later, on May 27, 2006, Ms. Maltese fell in her home and fractured her right hip and was admitted to the emergency room of Parkway Hospital. During her admission, she underwent an open reduction internal fixation of her right hip, and was discharged and transferred to Forest Hills Nursing Home (Forest Hills) on May 31, 2006. On June 24, 2006, Ms. Maltese was transferred from Forest Hills to Parkway Hospital, where she was admitted with a diagnosis of acute renal failure, obstructive uropathy, abdominal pain, lethargy, and a history of vomiting and diarrhea. On July 5, 2006, Ms. Maltese was transferred to Fairview, at which time she had a Foley catheter in place for urine drainage, was anemic, had low albumin

and protein level, and was confined to a wheel chair. Ms. Maltese remained at Fairview until September 13, 2006, when she was transferred to Parkway Hospital, where she was diagnosed with deep vein thrombosis in her bilateral extremities and possibly in her lungs, C-difficile colitis, an elevated white blood count, and sepsis. Ms. Maltese was a patient at Parkway Hospital until September 29, 2009 when she was again transferred to Fairview. Ms. Maltese was a resident at Fairview until October 20, 2006 when she was transferred to Parkway Hospital where she died on October 22, 2006.

Phyllis Maltese-Kojallo, as Administrator of the Estate of Rose Maltese, commenced this action on May 30, 2007, and alleges in her complaint that during the time her mother Rose Maltese was a resident at Fairview and Forest Hills, the defendants failed to take necessary actions to prevent, and then treat, her bed or pressure sores, and failed to provide her with basic nutrition and hydration. The complaint alleges four causes of action: the first cause of action alleges a claim for negligence, and further alleges violations of federal and state regulations governing the provision of health care provided by nursing homes and long term care facilities set forth 42 CFR §§483.20(b)(1), 483.25(c), 483.40(c), 10 NYCRR §§415.12, 415.12(a)(1), (c) and 415.3(a); the second cause of action alleges violations of Public Health Law § 2801-d, and violations of said federal and state regulations; the third cause of action alleges wrongful death; and the fourth cause of action alleges gross negligence.

Defendant Fairview Nursing Care Center Inc., individually and d/b/a Fairview Nursing Care Center(Fairview) seeks summary judgment dismissing the complaint in its entirety and asserts that the facts do not support a claim for either negligence, or medical and/or nursing malpractice; that plaintiff cannot maintain a viable claim under Public Health Law §2801-d, and that the claim sounding in gross negligence is unfounded. Defendant contends that Ms. Maltese's skin condition consistently improved on the three separate occasions she was at Fairview, and that it further deteriorated each time she was transferred back to Parkway Hospital. Fairview further asserts that, given Ms. Maltese's general health, the pressure sores were unavoidable and that it provided treatment and care in accordance with the acceptable standards of care and skill in providing nursing, geriatric, nursing home care and did not cause or contribute to any of Ms. Maltese's injuries, including her death. In support of its motion, Fairview submits the deposition transcripts of Phyllis Maltese-Kojallo, the daughter of the decedent, Lila Naaze, Fairview's Director of Nursing, Marilou Borja, a rehabilitation nurse employed by Fairview; its medical records and that of Parkway Hospital;

decendent's death certificate; and the affidavits of its experts.

Fairview asserts that based upon its records at the time Rose Maltese was first admitted to its facility on April 27, 2006 she was assessed for pressure sore prevention/intervention. Fairview's initial nurse assessment states that Ms. Maltese had a Stage I pressure sore located at the sacrum; a yellowish purple discoloration to the right forearm; multiple (keratosis) skin pigmentation at the abdomen, chest and back; multiple discolorations at both hands, arms and antecubital (in front of the elbow) areas. She was diagnosed at high risk for skin breakdown. The pressure sore was treated with Lantiseptic, and Fairview states that it was healed by May 17, 2006, and that her skin was intact at the time of her discharge on May 25, 2006.

Ms. Maltese was admitted to Fairview for a second time on July 5, 2006, at which time Fairview's records reveal that she had a history of renal failure, obstructive uropathy, pneumonia, abdominal pain, lethargy, and urinary tract infection, and was recovering from hip surgery. She had a Foley catheter in place for urine drainage, was anemic, with low albumin and total protein level, and was wheel chair bound. She had multiple pressure sores and discolorations. The initial nursing assessment identified 13 issues, including pressure sores, surgical scar sites, and edema (swelling) in both arms, both legs and both feet. The following four pressure sores were identified: Stage I pressure sore to the right heel, measuring 2cm by 2cm with no depth; Stage IV pressure sore located on the left outer heel, measuring 3cm by 3cm; Stage II pressure sore on the mid back thoracic, measuring 1cm by 1cm; and Stage I pressure sore on the sacrum, measuring 3cm by 3cm.

The following interventions were noted in Fairview's records: Ms. Maltese was to be turned and positioned every two hours while in bed; that she sit on a gel cushion when in a wheel chair; that she have a special Lumex mattress; that heel pads be placed when she was in bed; that she be assessed for signs and symptoms of improvement or deterioration, weekly measurement and documentation, surgical follow-up as needed, bi-monthly rounds with the surgeon, nutritional consultations, albumin levels tested every three months, and weekly weight checks. Following the nutritional assessment, protein and vitamin supplements were implemented.

During this admission it was alleged that all the pressure sores healed, except for the Stage I pressure sore on the sacrum. Although that pressure sore had decreased in size it had progressed to a Stage II pressure sore. On September 11, 2006 the nursing notes reveal a new area of skin breakdown which was described as "excoriation of the

bilateral gluteal folds." A physician was made aware of this and orders were implemented by the nursing staff to cleanse the area with soap and water, pat dry, and apply Lantiseptic cream every shift. On September 13, 2006 Ms. Maltese was experiencing shortness of breath, her legs were swollen, and she had foul smelling diarrhea, and was transferred to The Parkway Hospital.

Although Ms. Maltese was a resident at Fairview between July 5, 2006 and September 13, 2006, there are no nursing notes for the period of July 12, 2006 to July 19, 2006 at 6:00 P.M.; the next nursing note is for July 25, 2006; between July 25, 2006 and August 5, 2006 there are no nursing notes; and after August 6, 2006, the next nursing note is September 5, 2006.

Parkway Hospital's records reveal that following the September 13, 2006 admission Ms. Maltese was diagnosed with deep vein thrombosis in her bilateral extremities and possibly her lungs, sepsis, C-difficile colitis, and an elevated white blood count. The hospital records reveal that a physician discussed the placing of a inferior vena cava (IVC) filter in connection with the surgical debridement of the sacral wound, with Phyllis Maltese-Kojallo, who was her mother's health care proxy. Ms. Maltese-Kojallo was informed of the risks and benefits of said procedure, and did not give her consent for the placement of the IVC filter. The physician would not perform the surgery without the IVC filter, and the hospital records for September 26, 2006 includes the following note "Daughter still does not wish for procedure. She understands that the wound will not be treated optimally." Ms. Maltese was transferred back to Fairview on September 29, 2006.

At the time of Ms. Maltese's final admission to Fairview on September 29, 2006, she had bilateral deep vein thrombosis, multiple pressure sores, chronic renal failure, and status post C-difficile colitis in her stool, and status post surgery to the left hip. The initial nursing assessment identified 18 skin issues, including the following 10 pressure sores: a Stage IV pressure sore on the right gluteal fold measuring 1cm by 1cm; a Stage IV pressure sore on the left gluteal fold measuring 4cm by 4cm; a Stage IV pressure sore on the left sacrum measuring 8cm by 9cm; a Stage II pressure sore on the left buttock measuring 3cm by 3cm; a Stage II pressure sore on the upper left buttock measuring 2cm by 2cm; a Stage II pressure sore on the right buttock measuring 3cm by 3cm; a Stage I venous insufficiency ulcer on the right heel measuring 3cm by 3cm; a Stage I venous insufficiency on the left heel measuring 3cm by 3cm; a Stage II venous insufficiency sore located on the left knee measuring 1cm by 1cm; and a Stage II ulcer on the left thigh measuring 2cm by 2cm. Fairview's comprehensive care plan included the following: a Lumex

mattress on the bed; a gel cushion on her chair; turning and positioning every two hours if she was unable to reposition herself; a draw sheet to lift and position; heel pads to be worn while in bed; the wounds were to be assessed for signs and symptoms of improvement or deterioration, with weekly assessment and documentation. By October 11, 2006, the pressure sores on the right buttock, left buttock, left knee, and left upper buttock had apparently healed.

Fairview's records of October 18, 2006 reveal that Ms. Maltese had a Stage I venous insufficiency ulcer measuring 2cm by 2cm on her right heel; a Stage I venous insufficiency ulcer measuring 2cm by 2cm on her left heel; a Stage II pressure sore located on the right gluteal fold; a Stage II pressure sore on the left thigh measuring 2cm by 2cm; a Stage IV pressure sore on the right gluteal fold measuring 4cm by 4cm; and a Stage IV pressure sore on the left sacrum measuring 7cm by 7cm.

Fairview recorded that Ms. Maltese had poor appetite, that she only took in fluids and ate very little food, and was given supplements and vitamins. On October 20, 2006, she had a runny nose, coughing, and a low grade fever, and appeared pale, short of breath and was refusing to eat. She was transferred to Parkway Hospital, where she was admitted to the intensive care unit and diagnosed with klebesella (bacterial) pneumonia. She died two days later on October 22, 2006. The death certificate in preprinted language states that she died of "natural causes", without setting forth any specific cause of death.

Fairview's expert Mary Brennan, a registered nurse, who is Board Certified in Wound Care and Ostomy Care, states in her affidavit that her opinion is based upon her review of the pleadings, the hospital's medical records, Fairview's chart of Ms. Maltese's three admissions, Forest Hill's nursing chart, Fairview's Nursing Policy and Procedure, and the deposition testimony of Fairview's witnesses Lila Naaze and Marilou Borja. Ms. Brennan opines within a reasonable degree of nursing certainty that Fairview adhered to acceptable standards of care in providing treatment to Ms. Maltese; that the care provided was in accordance with all statutory guidelines set forth under the applicable rules and regulations; that Fairview did not cause or contribute to her death; that Fairview's Nursing Policies and Procedures with respect to the definition and treatment of pressure ulcers are consistent with the applicable standards as it relates to the diagnosis, treatment and management of pressure ulcers and are compliant with all statutory guidelines; that Fairview's Policies and Procedures defines when a pressure ulcer is unavoidable, and that said definition is identical to that released by the Centers for Medicare and Medicaid; that under certain circumstances pressure

ulcers are unavoidable due to various health conditions; that such risk factors are appropriately defined in Fairview's Policies and Procedures, and include cognitive impairment, fragile skin, immobility, incontinence of bowel/bladder, an altered nutritional state, medication, poor appetite and a serum albumin above 3.4 g/dl, anemia, edema, chronic end stage renal disease, and failure to thrive. Ms. Brennan further opines that these conditions also impede an individual's ability to heal once a pressure ulcer begins to form; that Ms. Maltese presented at Fairview with practically all of these risk factors, and was appropriately assessed as being high risk for skin breakdown; that between each admission to Fairview she was a patient at Parkway Hospital where her skin condition further deteriorated before being transferred back to Fairview; that Fairview provided appropriate care during each admission, and that appropriate interventions were implemented to facilitate healing of her skin, following physician orders and properly reacting to any and all changes in her health status. She states that Ms. Maltese was appropriately cared for at Fairview and that none of her injuries, including death, were caused by the staff at Fairview, and that she was treated within the acceptable standards of medical and nursing care.

Fairview's expert Dr. Frank Ross states that he reviewed the pleadings, the deposition testimony of Lila Naaze and Marilou Borja, the complete Fairview chart, the medical records from Parkway Hospital and the complete nursing chart from Forest Hills and opines, with a reasonable degree of medical certainty, that Fairview provided the appropriate level of care to Ms. Maltese in accordance with the acceptable standards of medical and/or nursing care during each of her three admissions to Fairview; and that Fairview did not cause or contribute to any injury while she was a resident at Fairview, and that her death was not caused by the care or lack of care rendered by the staff of Fairview.

Ms. Maltese-Kojallo testified at her deposition that after her mother fractured her hip and was transferred to Fairview, she did not see her use a walker or sit in a wheelchair; that her mother was always in bed; that she and her husband visited her mother between September 26 and October 20, 2006 once or twice a week and stayed three to four hours per visit; that her mother did not use the toilet and had adult diapers; that although they were asked to leave the room when her mother's dressings or diapers were changed, she could hear her mother screams when touched; that her mother ate very little, and was weak and depressed. She stated that although her mother was given a liquid protein she would not drink it as it had a milk flavor; that her mother did not drink milk which was repeatedly placed on her food trays; and that her mother did not eat

the breakfast cereal as she would not use milk with it. She also stated that her mother complained of pain in the buttocks area, but that she did not inspect her mother's skin at any time prior to her death.

Plaintiff, in opposition to the motion for summary judgment, contends that a cause of action for medical malpractice has not been asserted or is being pursued in this action, and that triable issues of fact exist with respect to each of the defendant's contentions, and therefore summary judgment is not warranted.

Plaintiff's expert Charlotte Sheppard, a Board Certified Geriatric Nurse states in her affidavit that she reviewed Fairview's records, Parkway Hospital's records, and the deposition transcripts of Phyllis Maltese-Kojallo, Lila Naaze and Marilou Borja and opines that Fairview and its staff deprived Ms. Maltese of her resident rights; deviated from the standards of care for a nursing facility; and failed to respond to obvious risk factors for the development and deterioration of her skin status. Ms. Sheppard opines that with respect to the sacrum pressure sore, this wound had been treated with Lantiseptic topical agent for five weeks since her admission on July 5, 2006, that the wound was a Stage II pressure sore, measuring 2cm by 2cm as of September 13, 2006, and that the nursing staff had an obligation to respond to the ineffective treatment and solicit a wound care consultation and/or treatment modification; that the staff continued, "weekly" to evaluate the care plan but did nothing when the data showed that the current treatment regimen was ineffective; that the care plan was not modified to include additional interventions despite the staff's knowledge that the wound was not improving; that during this period Ms. Maltese developed an additional skin "excoriation" to her bilateral gluteal fold; that the last measurement and description of the wound prior to hospitalization was recorded on September 13, 2006, at which time it was a Stage II wound with no necrosis or slough, and that within hours of her admission to Parkway Hospital, there was a change of treatment of the sacral skin sore; that the hospital physician ordered a change of treatment to include "wet to dry sterile dressing"; that such treatment reveals that the pressure sore was more serious than indicated in Fairview's records as a wet to dry dressing is not utilized for an uncomplicated Stage II pressure sore that has no necrosis or slough, and that such treatment is utilized to begin debriding a pressure sore that possess either necrosis or slough. Ms. Sheppard therefore states that the staff at Fairview was untruthful in its recordation of Ms. Maltese's skin condition.

Ms. Sheppard further opines that upon Ms. Maltese's return to Fairview, the sacral pressure sore measured 8cm by 9cm, and possessed

yellow slough and necrosis; that she also had a compromise to her gluteal fold; that the monitoring of her skin status was inconsistent and sporadic at best; that the sacral sore was treated with Lantiseptic topical ointment and by October 18, 2006 was a Stage IV sore measuring 7cm by 7cm; that the gluteal fold ulcer was Stage IV, measuring 5cm by 4cm and was treated with Hydrogel topical ointment; that Parkway Hospital's records indicate that the sacral ulcer was a significant Stage IV pressure ulcer measuring 12cm by 7cm by 1.5cm, that the gluteal fold wound also was Stage IV and measured 7cm by 5cm, that both wounds had purulent foul drainage with inflammation and undermining, and that orders were given to administer wet to dry dressings.

Ms. Sheppard opines that with adequate and appropriate skin care, including appropriate monitoring and response to wound care, wound worsening was avoidable and preventable; and that Ms. Maltese suffered avoidable deterioration while a resident at Fairview, and that the actions of the defendants relating to Ms. Maltese's care violated the federal and state nursing home regulations.

Plaintiff's expert Dr. Joseph Namey, states in his affidavit that he reviewed Ms. Maltese's records from Fairview and Parkway, Hospital and Ms. Sheppard's affidavit, and opines with a reasonable degree of medical certainty that "the skin deterioration Ms. Maltese suffered was a direct and proximate result of inadequate pressure relief and custodial care from the nursing and support staff of the Nursing Home." He further opines that "the inadequate care received by Ms. Maltese was a proximate cause of her death...(as the) pressure sores by the time of her death had become septic. She also developed other serious infections notably osteomyelitis and a urinary tract infection as a result of inadequate care which contributed to her death."

Defendant in its reply papers submits an additional affidavit from its expert Mary Brennan which seeks to address and rebut the statements made by Ms. Sheppard in her affidavit regarding the sacral pressure ulcer and an excoriation of the gluteal fold, and in essence repeats the statements set forth in her primary affidavit.

Plaintiff has not asserted a claim for either medical or nursing malpractice. Therefore, the court will not address defendant's contentions pertaining to the dismissal of plaintiff's claims of malpractice. Rather, plaintiff alleges a claim for common-law negligence and is required to demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (Pulka v Edelman, 40 NY2d 781 [1976]; Rubin v Staten Is. Univ. Hosp.,

39 AD3d 618 [2007]; Coral v State of New York, 29 AD3d 851, 851 [2006]).

A cause of action to recover damages for negligence, is separate and distinct from, and involves considerations different from, a cause of action to recover damages for deprivation of rights pursuant to Public Health Law §2801-d (Sullivan v Our Lady of Consolation Geriatric Care Ctr., 60 AD3d 663 [2009]). Public Health Law §2801-d is a statutory cause of action that may be asserted in conjunction with common law causes of action, such as negligence or medical malpractice, even where the Public Health Law §2801-d cause of action is based upon the same facts as the asserted common law cause[s] of action (See Sullivan v Our Lady of Consolation Geriatric Care Ctr., *supra*; Kash v Jewish Home and Infirmary of Rochester, 61 AD3d 146 [2009] ; Leclaire v Fort Hudson Nursing Home, Inc., 52 AD3d 1101, 1102 [2008]; Zeides v Hebrew Home for the Aged at Riverdale, Inc., 300 AD2d 178, 179 [2002]).

"The statutory basis of liability [under Public Health Law §2801-d] is neither deviation from accepted standards of medical practice nor breach of a duty of care"; "[r]ather, it contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule, subject to the defense that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient." (Zeides v Hebrew Home for the Aged at Riverdale, Inc., 300 AD2d at 179 [quoting Public Health Law §2801-d(1), (2)]). Public Health Law §2801(d) provides a private right of action to nursing home patients injured while in the facility. In particular, the statute provides that a nursing home may be sued for deprivation of any right effected for the well-being of a patient by the terms of any contract, state or federal statute, code, rule, or regulation. One such right is to receive adequate and appropriate medical care (Public Health Law §2803-c(3)(e); Zeides v Hebrew Home for the Aged at Riverdale, Inc., 300 AD2d 178 [2002]).

Both state and federal regulations provide that residential facilities must ensure that a patient who enters without bed sores does not develop them unless, because of the patient's clinical condition the bed sores were unavoidable and the facility made every reasonable effort to prevent them, and if bed sores do develop, the patient must receive the proper treatment to promote healing, prevent infection and prevent further sores from developing (See, 10 NYCRR 415.12[c]; CFR §483.25[a][1]).

The evidence submitted here, including the depositions of the parties and the conflicting affidavits of their experts raise a

triable issue of fact as to whether Ms. Maltese contracted pressure sores at Fairview's facility, or at Parkway Hospital or Forest Hills, and whether adequate treatment for the pressure sores was provided once they developed by the nursing staff at Fairview. Contrary to defendant's assertions, the affidavit by plaintiff's nursing expert specifically refers to the omissions and actions of defendant's nursing staff. Issues of credibility must be determined by the trier of fact not by the court at this juncture.

Plaintiff's third cause of action alleges wrongful death. The essential elements to be pleaded in a wrongful death action are: (1) a death; (2) caused by the wrongful conduct or default of defendant; (3) survival by distributees who have suffered pecuniary loss by reason of the death; and (4) the appointment of personal representative of decedent (EPTL 5-4.1; Chong v New York City Transit Authority, 83 AD2d 546 [1981]). The only damages specified in this cause of action are funeral expenses.

Triable issues of fact exist herein as to whether Ms. Maltese's nutritional needs and hydration were being met, and whether any of these alleged failures were a proximate cause of the sepsis, bacterial pneumonia and other medical conditions, which resulted in Ms. Maltese's death.

Plaintiff's fourth cause of action is for gross negligence and seeks to recover punitive damages. Gross negligence is defined as the failure to use even slight care, or conduct that is so careless as to show complete disregard for the rights and safety of others (see PJI 2:10A; Sommer v Federal Signal Corp., 79 NY2d 540 [1992]; Food Pagent v Consolidated Edison Co., 54 NY2d 167 [1981]).

Based on this record plaintiff has not established that an issue of fact exists to deny defendant Fairview's prima facie showing that any alleged deprivation of decedent's rights was not willful or that Fairview acted in reckless disregard of decedent's rights under the Public Health Law. Nor do the facts before the court constitute gross negligence as defined above (see e.g., Hummel v. Vicaretti, 152 AD 2d 779).

Accordingly, defendant's motion is granted to the extent that plaintiff's action for gross negligence and/or for punitive damages are dismissed. The balance of defendant's motion is denied.

Dated: JANUARY 13, 2010

Peter J. Kelly, J.S.C.