

Rea v Rockville Nursing Ctr., Inc.

2011 NY Slip Op 31291(U)

May 3, 2011

Sup Ct, Nassau County

Docket Number: 12862/09

Judge: Denise L. Sher

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TERESA REA, as Attorney-in-fact for
ROSA REA,

Plaintiff,

- against -

ROCKVILLE NURSING CENTER, INC.,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 12862/09
Motion Seq. No: 03
Motion Date: 11/18/10
XXX

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion, Affirmations, Affidavit and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>2</u>
<u>Reply Affirmation</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 3212, for an order granting defendant summary judgment and dismissing plaintiff's complaint against it. Plaintiff opposes defendant's motion.

This case involves allegations of nursing home abuse premised on violations of the Public Health Law § 2801-d, as well as negligence. Plaintiff alleges that defendant violated patient Rosa Rea's ("Rea") resident rights and was negligent by failing to provide patient Rea with adequate and appropriate care for the prevention and management of pressure ulcers and cellulitis, for the management of Dilantin anti-seizure therapy and for the management of

nutrition and hydration. Plaintiff also makes allegations that there was inadequate nursing staff at defendant facility.

Plaintiff served a Summons and Verified Complaint on or about July 1, 2009. Issue was joined on or about August 10, 2009.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See CPLR § 3212 (b); Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact

exist. See *Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. See *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. See *Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Defendant argues that plaintiff alleges that patient Rea developed a Stage IV right heel pressure ulcer, but that said condition was clinically unavoidable due to her co-morbidities and immobility. Defendant adds that the aforementioned ulcer was assessed as a fluid filled blister that never progressed to Stage IV at defendant facility. Defendant also argues that plaintiff alleges that patient Rea developed cellulitis of the left third toe, but that said condition was also clinically unavoidable due to her co-morbidities and immobility and that the cellulitis did not develop until after patient Rea's discharge from defendant facility. Defendant additionally argues that plaintiff alleges that patient Rea experienced elevations in her Dilantin serum levels, but that said condition is a well known and reversible side effect of Dilantin therapy. Defendant adds that plaintiff alleges that patient Rea became malnourished and dehydrated, but defendant argues that patient Rea maintained good nutritional status and was provided with sufficient fluids throughout her residency.

Defendant submits that the facts supported by the litigation documents and records, together with the Affidavit of Carol Zinno, R.N. and the Expert Affirmation of Luigi

Capobianco, M.D., unequivocally demonstrate that defendant facility provided adequate and appropriate care and took all reasonable care to prevent deprivation of resident rights of patient Rea, that defendant facility complied with the standard of care in their care of the patient Rea and that patient Rea did not suffer any deprivation of right or any injury as a consequence of inadequate or inappropriate care on the part of defendant facility.

Patient Rea is an eighty-one year old female who was seventy-seven years old when she was admitted to defendant facility. She was a resident of defendant facility from July 14, 2006 through June 30, 2008. She was admitted for long term care due to her medically and physically debilitated condition. Patient Rea was transferred to defendant facility from Mountain View Nursing and Rehabilitation in New Paltz, New York wherein she had been a long term resident. Upon admission into defendant facility, patient Rea was totally dependent upon the staff at said facility for all Activities of Daily Living. She was non-ambulatory. She was not a candidate for restorative rehabilitation, nor swallowing therapy. She was on an extensive prescription regimen. Her medical history was significant for cerebral vascular accident with left hemiparesis (i.e. left side paralysis), congestive heart failure, hypertension, diabetes mellitus, hypothyroidism, seizure disorder, osteoarthritis, thrombocytopenia, anemia, peripheral vascular disease (i.e., deep vein thrombosis and cerebral vascular accident), skin fragility syndrome, gastroesophageal reflux disease (GERD), dementia with delusions and depression. She had a PEG tube for enteral feedings due to dysphagia (i.e. impaired swallowing).

Defendant facility submits that no formal complaints were made against it for inadequate staffing to patient Rea's unit during the period of her residency. Additionally, according to plaintiff, patient Rea never complained to her children about the care she was receiving at defendant facility, nor were there any complaints that patient Rea was not changed out of her

soiled diapers.

Defendant argues that patient Rea did not develop any Stage IV pressure ulcers at defendant facility. Defendant states that upon admittance to defendant facility, based upon patient Rea's impaired sensory perception, bladder and bowel incontinence, impaired mobility, skin fragility syndrome and impaired circulation, she was assessed to be at increased risk for skin breakdown. Patient Rea's skin fragility syndrome was evidenced by her admission into defendant facility with multiple skin conditions including a Stage II pressure ulcer in the sacral fold which resolved in response to the treatment provided by defendant facility. Her skin fragility syndrome was further evidenced by recurrent episodes of skin conditions throughout her residency which included facial rashes, skin rashes, fungal rashes, skin irritation, skin tears, swelling, ulcers, dermatitis, excoriations and blisters which resolved in response to the treatment administered by defendant facility. Defendant facility reassessed patient Rea's risk for skin breakdown at least every three months. It also developed a Comprehensive Care Plan for patient Rea for the implementation of interventions for the prevention of skin breakdown and regularly updated the Comprehensive Care Plan on a quarterly basis. Defendant contends that patient Rea did not develop any pressure ulcers which progressed to Stage IV while she was in residence at defendant facility as alleged in plaintiff's Verified Bill of Particulars.

With respect to the allegation that defendant was negligent in its management of patient Rea's Dilantin anti-seizure therapy, defendant submits that on three occasions in two years, patient Rea's Dilantin level rose above the desired range. However, defendant argues that patient Rea did not suffer any permanent injury as a consequence to the high Dilantin levels. "Although Teresa Rea testified that the elevated Dilantin level caused the plaintiff to sleep for long periods of time in the two (2) or three (3) weeks prior to her discharge from the facility on

June 30, 2008,....,the elevated Dilantin levels were reversed through discontinuation of the Dilantin with no permanent impairment....In fact, Teresa Rea testified that the plaintiff made a full recovery from the high Dilantin level and was back to her baseline status within three (3) weeks.”

With respect to the allegation that defendant was negligent in its management of patient Rea’s nutrition and hydration, defendant facility argues that, upon admission to defendant facility, patient Rea’s nutritional status and risk for dehydration were assessed by a Registered Dietician. Patient Rea’s nutritional status and dehydration risk were also reassessed by a Registered Dietician nine more times from October 2006 through June 2008. Patient Rea maintained a weight in the range of 160-180 pounds throughout her residency which was above her ideal body weight .

Defendant submits that, pursuant to Public Health Law §2801-d, where a defendant residential health care facility demonstrates that they provided all care reasonably necessary to prevent or limit the deprivation of a resident right, the plaintiff’s cause of action under Public Health Law §2801-d fails and must be dismissed. *See* Public Health Law §2801-d.

As previously stated, defendant submitted the affidavit of Nurse Carol Zinno and the expert affirmation of Dr. Luigi Capobianco to rebut all of plaintiff’s claims of negligence and violation of resident rights with specific facts supported in the medical records and deposition testimony and with competent nursing and medical explanation. Defendant argues that Dr. Capobianco’s affirmation, along with the supporting evidence, unequivocally establishes that defendant facility complied with the standard of care in following the physician orders of the attending physicians and in providing adequate and appropriate nursing care with respect to the prevention and management of pressure ulcers, the Dilantin anti-seizure therapy and the

management of nutrition and hydration. "He explains that Rockville Nursing Center nursing staff acted appropriately in providing nursing care and following local wound care orders of the attending physicians for the prevention and management of pain ulcers. He opines that Rockville Nursing Center's nursing staff acted appropriately in following the orders of the physicians for administration of Dilantin, for drawing Dilantin serum levels and for monitoring the plaintiff for signs and symptoms of seizure or side effects to Dilantin. He also opines that Rockville Nursing Center's staff acted appropriately in providing good nutritional and fluid support as ordered. Dr. Capobianco's Affirmation also implicitly establishes that none of the physician's orders were so clearly contradicted because he attests that the physician's orders were all reasonable and appropriate exercises of professional discretion."

Based upon the evidence presented by defendant and the legal argument put forth, the Court finds that defendant has established a *prima facie* showing that there are no material issues of fact tending to establish that defendant violated the resident rights of patient Rea, tending to establish that defendant was negligent in their care of patient Rea or that patient Rea suffered any deprivation of right or injury as a proximate result of any inadequate or inappropriate care on the part of defendant.

As previously stated, if a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra.*

In opposition, plaintiff argues that this action involves defendant's failure to provide patient Rea with adequate supervision and appropriate medical care during the course of her

residency which resulted in patient Rea developing toxic metabolic encephalopathy which resulted in somnolence, stupor, multiple pressure sores, loss of function and quality of life. Plaintiff submits that defendant failed to make a *prima facie* showing of entitlement to summary judgment dismissing the claims in that defendant, either by way of defendant's attorney's affirmation or otherwise, has failed to prove that defendant did not violate any law, rule, regulation or contract pursuant to Public Health Law §2801-d. Plaintiff further submits the expert affidavit of Dr. Richard Dupee who opined that defendant was indeed negligent and failed to exercise reasonable and necessary care to prevent and limit the deprivation of patient Rea's rights and injury. Plaintiff argues that "the burden shifts to defendant facility to plead and prove the affirmative defense that it did everything reasonably necessary to avoid the deprivation and their actions with respect to patient Rea constituted negligence or recklessness." Plaintiff claims that defendant Rea has entirely failed to prove that it did everything reasonably necessary to prevent and limit the deprivation of patient Rea's rights as the injuries suffered as a result. Plaintiff submits that the affidavit of Dr. Richard Dupee establishes the direct opposite. Dr. Dupee opines "to a reasonable degree of medical certainty that the 'defendant Rockville Nursing Center, violated the applicable minimal standards of care, failed to act timely and appropriately when the plaintiff developed Dilantin toxicity, directly resulting in brain malfunction, stupor, further reconditioning, multiple pressure sores, cellulitis of the left third toe, loss of function and loss of quality of life.'" Plaintiff claims that defendant's argument that it exercised all care reasonably necessary to prevent and limit any deprivation or injury to patient Rea is not supported by the documentary evidence. Plaintiff adds that, in any event, it has adequately rebuffed any *prima facie* showing in that Dr. Dupee's affidavit provides a detailed analysis of defendant facility's failure to provide adequate and appropriate care and provides

numerous examples of Public Health Law violations and gross negligence.

Plaintiff further contends that, irrespective of whether or not defendant facility made a *prima facie* showing, summary judgment cannot be granted as questions of fact exist warranting a trial and there is outstanding discovery.

In reply, defendant submits that it met its initial burden on summary judgment because it rebuts each of the plaintiff's claims of negligence and violation of resident rights with factual proof and competent medical and nursing opinions. Defendant contends that Nurse Zinno's affidavit clearly establishes that defendant facility maintained adequate staffing levels to meet the needs of the residents and that Dr. Capobianco's expert affirmation clearly establishes that defendant facility was not negligent and did not violate any resident right with respect to the management of patient Rea's Dilantin therapy, prevention and management of pressure ulcers and cellulitis and management of nutrition and hydration.

Defendant adds that plaintiff failed to establish a triable issue of fact on negligence or violation of resident rights because plaintiff's expert affirmation is conclusory and speculative and does not address the assertions made by Nurse Zinno or Dr. Capobianco. Defendant submits that "[i]t is well settled that an expert affidavit which is conclusory, speculative or fails to address specific assertions made by the defendant's expert, is insufficient to raise a triable issue of fact for purposes of defeating a motion for summary judgment" (citations omitted).

Defendant states that plaintiff's expert affidavit is conclusory and speculative because it is not supported by specific factual reference to the record or competent medical explanation. "Nurse Zinno gave a specific opinion with supporting factual references that Rockville Nursing Center had sufficient nursing staff assigned to the resident's unit to provide nursing and related services to maintain the highest practicable physical, mental and psychosocial well being as determined

by resident assessments and individual plans of care. The plaintiff does not submit a scintilla of evidence or nursing or medical opinion challenging the adequacy of Rockville Nursing Center's nursing staff during the plaintiff's residency. The plaintiff's expert affidavit is completely silent on the issue of the adequacy of nursing staffing....Dr. Capobianco gave a specific opinion with supporting factual reference that Rockville Nursing Center provided appropriate and adequate care to maintain the plaintiff's nutrition and hydration status and took all reasonable care to prevent malnutrition and dehydration. He based this on Rockville Nursing Center's assessments of the plaintiff's risk for malnutrition and dehydration; their assessment of the plaintiff's nutritional and fluid needs, their implementation of nutritional interventions to meet the plaintiff's nutritional and fluid needs; in maintaining the plaintiff's nutritional status; and in preventing dehydration as a consequence of intake fluid. He further opined that the plaintiff did not suffer any malnutrition or dehydration as a consequence of inadequate care on the part of Rockville Nursing Center. He also based this on plaintiff's weight and laboratory results of prealbumin which were consistent with good nutrition and on the BUN levels which were consistent with volume depleting medications and/or concomitant acute illnesses (i.e. vomiting diarrhea). The plaintiff does not submit a scintilla of evidence or medical opinion challenging Rockville Nursing Center's provision of adequate nutrition and hydration."

"Dr. Capobianco provides a specific opinion with factual references that Rockville Nursing Center provided adequate and appropriate care with respect to the management of the plaintiff's Dilantin anti-seizure therapy and took reasonable care to avoid the side effects of Dilantin. He opines that the initiation of Dilantin therapy; the adjustments in the dosage of Dilantin; the timing and frequency of Dilantin serum levels; the neurological consultations; and the substitution of Dilantin with other anti-epileptic drugs as ordered by the attending

physicians, Dr. Chan and Dr. Bazan, all fell within appropriate exercises of professional discretion. He based his opinion on the plaintiff's history of seizure disorder, her history of Dilantin therapy, the absence of seizure activity, and her laboratory values of Dilantin levels. The plaintiff's expert affirmation fails to address or challenge Dr. Capobianco's medical opinions on the medical management of the Dilantin therapy. Dr. Capobianco further opines that Rockville Nursing Center's nursing staff acted appropriately in following the orders of the physicians for the administration of Dilantin; for drawing of Dilantin serum levels; for performance of neurological consultations; for communicating the results of the Dilantin serum levels; and for monitoring the plaintiff for signs and symptoms of seizures or side effects to Dilantin. Dr. Capobianco also opines that the plaintiff's elevated Dilantin level was not a proximate cause of any inadequate or inappropriate care on the part of Rockville Nursing Center. Rather, he opines that the plaintiff's elevated Dilantin levels occurred as a consequence of a well known and recognized side effect. Dr. Capobianco's opinion is supported by a competent medical explanation....Indeed, the plaintiff's expert actually AGREES with Dr. Capobianco on the issue of proximate causation!...In light of the plaintiff expert's concession that the Dilantin serum levels were affected by the plaintiff's varied metabolism of Dilantin - there is absolutely no credence or support for the plaintiff's expert statement that the variations in Dilantin levels were related to the nursing staff's failure to administer the Dilantin according to physician's orders. In fact, this statement is devoid of any specific factual references to the record showing any deficiencies in the nursing staff's administration of the Dilantin."

Defendant further argues that while Dr. Capobianco gave a specific opinion with supporting factual reference that defendant facility provided adequate and appropriate care and took all reasonable care to prevent pressure ulcers and cellulitis, plaintiff's expert opinion with

respect to same in contained in two conclusory statements. Plaintiff's expert's statements are devoid of the specific facts relied upon or any specific acts of negligence on the part of defendant facility that support his opinion. Plaintiff's expert does not submit one single instance that defendant facility acted negligently with respect to their prevention of management of pressure ulcers or cellulitis and also does not provide any competent medical explanation which addresses Dr. Capobianco's opinion that the pressure ulcer and cellulitis were clinically unavoidable. The absence of specific facts or competent medical explanation renders plaintiff's expert's statements conclusory and speculative and insufficient to rebut Dr. Capobianco's expert opinions.

Based upon the opposition submitted by plaintiff, the reply submitted by defendant facility and the legal argument set forth in both, the Court finds that plaintiff has offered no evidence to demonstrate the existence of any material issues of fact. The Court agrees with defendant and finds the affidavit of plaintiff's expert is conclusory and speculative, offering no factual or evidentiary examples to support his conclusions or to rebut the factual and evidentiary examples provides in Dr. Capobianco's affirmation and the affirmation of Nurse Zinno. Plaintiff failed to provide any evidence or specific examples of how defendant facility allegedly departed from the accepted standards of care and that the departure was a proximate cause of patient Rea's alleged injuries. Plaintiff failed to address and rebut the assertions/opinions made by Nurse Zinno and Dr. Capobianco.

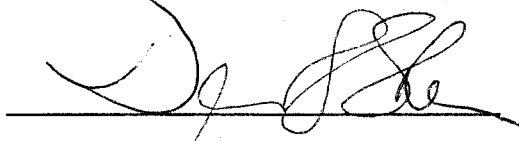
The Court finds that the affidavit of Nurse Zinno and the affirmation of Dr. Capobianco, together with patient Rea's medical records and the party testimony, demonstrate that defendant facility provided adequate and appropriate care, complied with the standard of care and did not violate any resident rights with respect to the prevention and management of pressure ulcers and

cellulitis, the management of Dilantin therapy, the management of nutrition and hydration and with respect to the nursing staffing of said facility. The Court additionally finds that plaintiff's expert affirmation is insufficient to rebut same.

Accordingly, defendant's motion for summary judgment is hereby granted and plaintiff's complaint against it is dismissed.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
May 3, 2011

ENTERED
MAY 05 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE