Wood v North Shore-Long Is. Jewish Health Sys.
2011 NY Slip Op 31450(U)
May 10, 2011
Sup Ct, Nassau County
Docket Number: 16799/08
Judge: Karen V. Murphy
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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JOSEPHINE WOOD,

Plaintiff(s),

-against-

NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEMS d/b/a GLEN COVE HOSPITAL, and CATHOLIC HOME CARE, a division of CATHOLIC HEALTH SERVICES OF LONG ISLAND,

Defendant(s).

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Index No. 16799/08

Motion Submitted: 4/1/11
Motion Sequence: 001, 002, 003

The following papers read on this motion:

Notice of Motion/Order to Show Cause........................XXX
Answering Papers..XXXX
Reply..XXX
Briefs: Plaintiff's/Petitioner's.......................................
Defendant's/Respondent's.................................X

Motion by Nursing Sisters Home Care d/b/a Catholic Home Care, an entity of Catholic Health Services of L.I., s/h/a Catholic Home Care, a division of Catholic Health Services of Long Island ("Home Care") for judgment pursuant to CPLR §§ 3211 and 3212, dismissing the plaintiff's claims and all cross-claims against it, is determined as follows:

(1) the first cause of action is dismissed for failure to state a cause of action;

(2) the parties have stipulated to discontinue, with prejudice, the second, fourth, fifth, and sixth causes of action in their entirety; and

(3) summary judgment dismissing the original third cause of action for negligence/malpractice, and the proposed first cause of action in the amended complaint, and all cross-claims, is granted.

Home Care's additional requests to amend the caption by deleting its name, and for alternative relief, are both denied as moot.

Motion by defendant North Shore Long Island Jewish Health Systems d/b/a Glen Cove Hospital ("the Hospital") for summary judgment pursuant to CPLR §§ 3212 and 3012-a, dismissing plaintiff's claims against it for negligence, malpractice, and violations of the Public Health Law, and all cross-claims, is determined as follows:

(1) the parties have stipulated to discontinue, with prejudice, the second, fourth, fifth, and sixth causes of action in their entirety;

(2) the first cause of action has been dismissed for failure to state a cause of action;

(3) summary judgment dismissing the original third cause of action for negligence/malpractice, and the proposed first cause of action in the amended complaint, and all cross-claims, is granted.

The Hospital's additional alternative request for an order denying Home Care's motion for summary judgment, so that the Hospital may adequately defend itself at trial and assert its rights under CPLR Article 16, is denied as moot.

Cross-motion by plaintiff for an order pursuant to CPLR §3025, granting her leave to serve an amended complaint is granted as to the proposed first cause of action only for negligence/malpractice against both defendants for the purposes of the summary judgment motions determined herein.

On March 29, 2007, when she was 77 years old, plaintiff Josephine Wood underwent a right hip replacement at the Hospital for Special Surgery. On April 2, 2007, she was transferred to the defendant Hospital for rehabilitation.

Plaintiff's initial admission skin assessment at the Hospital, dated April 2, 2007, contains a notation stating "left butt red," and a drawing shows the area of redness was on the far left side of plaintiff's left buttock. Nurse Lincoln, who performed the initial skin assessment, testified that the redness was caused by plaintiff's placement on her left hip "to stay off the surgical site" during the ambulance trip from the Hospital for Special Surgery. Nurse Lincoln further testified that "as soon as the pressure is relieved, the redness goes away." On April 10, 2007, plaintiff was discharged from the defendant Hospital to her home

with an authorization for skilled nursing care by Home Care one to two times per week for nine weeks.

On April 11, 2007, plaintiff was visited by Nurse Benedict from Home Care. Nurse Benedict determined that plaintiff had a Stage II pressure ulcer, or bed sore, on her left buttock near the coccyx. Nurse Benedict advised plaintiff, *inter alia*, to apply a barrier cream, or "butt paste" to keep the area moist, to keep pressure off the area, and to call her on her cell phone "if anything serious happened." Nurse Benedict advised plaintiff's physician, Dr. Dellavalle of the Stage II pressure ulcer, and her instructions. Dr. Dellavalle did not give any further instructions.

Nurse Benedict's second visit to plaintiff took place six days later, on April 17, 2007. The Stage II pressure ulcer was reddened, warm to the touch, and painful. Nurse Benedict noted that the sore was 2x2x1cm, with a blanchable reddened area around it that was 9x7.5cm, and an area 2x1cm into the coccyx area. Nurse Benedict contacted plaintiff's physician, Dr. Steinberg, who advised that he would see plaintiff on the following morning. Nurse Benedict applied Duoderm to the wound at the coccyx area, and instructed plaintiff on positioning, pain management, and notifying her physician if there was an increase in symptoms or temperature.

On April 18, 2007, Dr. Steinberg referred plaintiff to a surgeon. Plaintiff saw the surgeon, Dr. DePippo, on April 19, 2007. Dr. DePippo admitted plaintiff to St. Francis Hospital for surgery on her left buttock pressure ulcer. On April 27, 2007, plaintiff was discharged from St. Francis Hospital to home, with an authorization for skilled nursing care from Home Care two to three times per week until July 10, 2007.

Plaintiff commenced this action in September, 2008. In her complaint she alleged six causes of action. In her papers herein, plaintiff does not oppose summary judgment dismissing the second cause of action for violation of Public Health Law §2801-d, the fourth cause of action for punitive damages, and the fifth and sixth causes of action for breach of contract. The first cause of action, which is unidentified in the complaint, and the third cause of action for negligence/violations of Public Health Law §2803-c, remain.

Both defendants move at this time for judgment dismissing the entire complaint, and all cross-claims against them. Plaintiff requests leave to amend her complaint, to allege negligence/malpractice against both defendants in the proposed first cause of action, and negligent hiring against the Hospital in the proposed second cause of action.

On a motion to dismiss pursuant to CPLR §3211, the facts as alleged must be accepted as true, the pleader must be accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable theory (***Arnav***

Indus. Inc. Retirement Trust v. Brown Raysman, Millstein, Felder & Steiner*, LLP.**, 96 N.Y.2d 300, 303, 751 N.E.2d 936, 727 N.Y.S.2d 688 (2001); ***Leon v. Martinez, 84 N.Y.2d 83, 87, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]).

The first cause of action in the original complaint contains only jurisdictional information identifying the parties. It does not even purport to allege a claim against either defendant. It is summarily dismissed pursuant to CPLR §3211(a)(7) for failure to state a cause of action.

The third cause of action in the original complaint does state a claim for negligence/malpractice. For the record, as a claim for deprivation of plaintiff's rights enumerated in Public Health Law §2803-c is set forth in the second cause of action in the original complaint, the court considers the language regarding alleged statutory obligations pursuant to the Public Health Law in the third cause of action to be mere surplusage.

Leave to amend a pleading should be freely granted in the absence of prejudice or surprise, or a showing that the proposed amendment is palpably insufficient and devoid of merit on its face (**CPLR §3025(b); *Giunta's Meat Farms, Inc. v. Pina Const. Corp.***, 80 A.D.3d 558, 914 N.Y.S.2d 641 (2d Dept., 2011); ***Post v. County of Suffolk***, 80 A.D.3d 682, 915 N.Y.S.2d 124 (2d Dept., 2011); ***Bogal v. Finger***, 59 A.D.3d 653, 874 N.Y.S.2d 217 [2d Dept., 2009]).

The proposed first cause of action in the amended complaint clarifies plaintiff's claim of negligence/malpractice against the defendants. Defendants can claim no genuine surprise or prejudice; they treated the original negligence claim as one alleging malpractice and their motions anticipated the malpractice claim. The proposed amendment is neither palpably insufficient nor devoid of merit on its face.

Plaintiff's failure to file a Certificate of Merit in compliance with CPLR §3012-a does not mandate dismissal (***Russo v. Pennings***, 46 A.D.3d 795, 797, 848 N.Y.S.2d 678 (2d Dept., 2007); ***Grant v. County of Nassau***, 28 A.D.3d 714, 814 N.Y.S.2d 219 [2d Dept., 2006]), and this omission has been corrected in the proposed amended complaint.

Based on the foregoing, plaintiff's request for leave to amend her complaint to allege the proposed first cause of action for negligence/malpractice in place of the original, and now dismissed, first cause of action is granted.

The proposed second cause of action against the Hospital alleges a claim for negligent hiring. This is a completely new theory of liability, that is not readily discernible from the original complaint. Furthermore, plaintiff does not even mention this cause of action in her cross-moving papers, the affirmation in opposition by her attorney, or even the reply

affirmation by her attorney. The note of issue herein was filed six months before plaintiff requested the subject amendment. Under these circumstances, the Hospital would be prejudiced by this brand new theory of liability at this late date (see ***Morris v. Queens Long Island Medical Group, PC***, 49 A.D.3d 827, 854 N.Y.S.2d 222 [2d Dept., 2008]). Consequently, leave to amend the complaint to allege the proposed second cause of action for negligent hiring is denied.

Summary judgment is the procedural equivalent of a trial (***S.J.Capelin Associates, Inc. v. Globe Mfg. Corp.***, 34 N.Y.2d 338, 341, 313 N.E.2d 776, 357 N.Y.S.2d 478 [1974]). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist (***Matter of Suffolk County Dept. of Social Services on behalf of Michael V. v. James M.***, 83 N.Y.2d 178, 182, 630 N.E.2d 636, 608 N.Y.S.2d 940 [1994]). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law (***Giuffrida v. Citibank Corp.***, 100 N.Y.2d 72, 82, 790 N.E.2d 772, 760 N.Y.S.2d 397 (2003); ***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so (***Zuckerman v. City of New York***, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient (***Zuckerman***). Summary judgment will not be defeated by surmise, conjecture or suspicion (***Shaw v. Time-Life Records***, 38 N.Y.2d 201, 207, 341 N.E.2d 817, 379 N.Y.S.2d 390 [1975]). An expert's opinion that is unsupported or speculative is insufficient to withstand summary judgment (see ***Diaz v. New York Downtown Hosp.***, 99 N.Y.2d 542, 544, 784 N.E.2d 68, 754 N.Y.S.2d 195 [2002]).

Home Care submits the affidavit of Lena Rome, RN, in support of its motion for summary judgment dismissing the claim against it for negligence/malpractice. Nurse Rome describes, in detail, the treatment afforded plaintiff by Nurse Benedict and points out the plaintiff's failure to communicate her worsening condition before Nurse Benedict's second visit. Nurse Rome concludes by opining that there was no deviation from good and accepted practice on the part of Home Care in the care provided to plaintiff, and finally, that there was nothing that Home Care did or did not do that caused injury to the plaintiff. On this record Home Care has presented a *prima facie* case.

In opposition, plaintiff submits a redacted affidavit by an expert later identified as Jeannine Lurie, RN. Nurse Lurie's sole charge against Home Care is that "[T]he progression of a Stage II pressure ulcer to a pressure ulcer that needs surgical intervention does not happen without improper monitoring and treatment of a pressure ulcer." Assuming *arguendo* the truth of this statement, it does not suffice.

Home Care was authorized to provide one to two visits per week, and Nurse Benedict visited plaintiff once per week. She identified the Stage II pressure ulcer on her first visit, advised the application of a barrier cream or "butt paste," called plaintiff's physician on both visits, and gave plaintiff her cell phone number. She was never contacted by plaintiff or any member of plaintiff's family in the period between April 11, 2007, and April 17, 2007. For the record, in that time period between the first and second visits by Nurse Benedict, plaintiff was also seen at her home on two occasions by Ms. Kathy Strobe, a physical therapist. Plaintiff did not recall if she told Ms. Strobe anything about the pressure ulcer. On this record, there is no evidence from plaintiff that an act or omission by Home Care caused the injury to plaintiff.

The record does contain an affidavit from the Hospital's expert, Dr. Vincent Marchello. Dr. Marchello opines, *inter alia*, that the pressure ulcer at issue developed after plaintiff's discharge from the Hospital. As to Home Care's treatment of the plaintiff, Dr. Marchello raises two points. First he states that "a possible wound infection should have been a part of Nurse Benedict's assessment of the plaintiff's wound on April 17, 2007." Second, Dr. Marchello asserts that if the sore was infected "Duoderm would not have been the appropriate treatment on April 17, 2007." He concludes that Home Care's "treatment of the plaintiff on April 17, 2007 may not have been within accepted standards of medical care."

Dr. Marchello does not raise a triable issue of fact as to negligence/malpractice by Home Care. Although Nurse Benedict did not use the word "infection" in her description of the bed sore on April 17, 2007, she documented that the sore was "reddened, warm to touch, painful." These descriptive terms are all signs of possible infection, which Nurse Benedict reported to Dr. Steinberg. Nurse Benedict further clarifies her use of Duoderm. She applied this dressing to the "fragile" wound at the coccyx, not to the larger area of plaintiff's skin that was painful, reddened or warm to the touch. Finally, Dr. Marchello's conclusion that Home Care's treatment of plaintiff on April 17, 2007, may not have been within accepted standards of care, is speculative, and therefore fails to raise a triable issue of fact (***Belak-Redl v. Bollengier***, 74 A.D.3d 1110, 903 N.Y.S.2d 508 (2d Dept., 2010); ***Volovar v. Catholic Health System of Long Island Inc.***, 58 A.D.3d 830, 872 N.Y.S.2d 198 [2d Dept., 2009]).

Based on the foregoing, neither the plaintiff's expert nor Dr. Marchello have raised a triable issue of fact regarding negligence/malpractice by Home Care. Under these circumstances, Home Care is entitled to summary judgment dismissing plaintiff's claim against it for negligence/malpractice and all cross-claims against it.

Regarding plaintiff's claims against the Hospital, Dr. Marchello opines that there were no departures from good and accepted standards of medical care provided by the Hospital, which proximately caused any of plaintiff's injuries. This opinion is based upon Dr. Marchello's conclusion that plaintiff's Stage II pressure ulcer, documented by Nurse

Benedict on April 11, 2007, did not develop while the plaintiff was a patient at the Hospital. This conclusion has several bases.

First, upon admission to the Hospital, plaintiff's skin was assessed and no pressure ulcers were noted. According to the Hospital the notation on the Pressure Ulcer Assessment of "left butt red" with an arrow to the far left side of the left buttock resulted from plaintiff's position in the ambulance during her transfer to the Hospital, and in any event is in a different location than the Stage II pressure ulcer that developed near the coccyx. The Nurse's note in the record dated April 2, 2007, plainly states "Skin intact (L) butt red." During the entirety of plaintiff's stay at the Hospital, no pressure ulcers were noted.

Second, plaintiff was assessed to not be at an increased risk of developing bed sores because she was ambulatory upon admission and received daily physical therapy. By the time she left the Hospital she was able to ambulate "greater than 150 feet x2 with a rolling walker."

Dr. Marchello opined that the Stage II pressure ulcer noted by Nurse Benedict was not "open" and that this type of sore "may develop quickly, within minutes of abrasion of the skin." He concludes that the subject Stage II pressure ulcer developed subsequent to plaintiff's discharge from the Hospital. On this record, the Hospital has made out a *prima facie* case that there was no negligence/malpractice on its part that caused plaintiff's injuries.

In opposition, Nurse Lurie points to the following as departures from accepted standards of care that took place at the Hospital from the time of plaintiff's admission until her discharge: (1) Nurse Lincoln's incorrect calculation of plaintiff's Braden score as 19, when in fact the score was 18; this miscalculation put plaintiff "at risk" and in need of a nursing "plan of care" requiring turning and positioning of a patient every two hours; such a plan was not effectuated; (2) the failure to further document plaintiff's skin condition of "left butt red," which should have been considered to be a Stage I ulcer; (3) the failure of the discharging physician to mention the Stage I redness that was present on plaintiff's admission; and (4) the failure to provide plaintiff with dietary supplements and vitamin C to normalize her low albumin level at 3.0, which put plaintiff "at risk" for pressure sore development.

According to the Hospital, none of these alleged departures have merit. The handwritten miscalculation of plaintiff's Braden score was of no consequence because the correct score was entered into the computer-generated Assessment Summary Sheet. A "plan of care" was not necessary because plaintiff's skin integrity was checked daily and found to be "pink" in color, "warm" in temperature, "intact" in integrity, and "good" in turgor. Further documentation of the condition "left butt red" throughout plaintiff's hospital stay and during discharge was unnecessary because, as Nurse Lincoln testified, the area was "blanchable"

meaning, it had good capillary refill, Nurse Lincoln performed a full skin assessment upon admission. Moreover as Nurse Lincoln noted regarding the redness on the far left side of plaintiff's left buttock, " as soon as the pressure is relieved, the redness goes away." Furthermore, plaintiff was provided with a nutritional consult, and did receive nutritional supplements and vitamin C.

Review of the voluminous record herein has convinced the Court that the "left butt red" notation is a red herring because it refers to an area on the far left side of plaintiff's left buttock, which is not the area where the Stage II pressure ulcer developed. For this reason, the dispute between the parties as to whether redness of the skin constitutes a Stage I pressure ulcer is irrelevant for the purposes of this action.

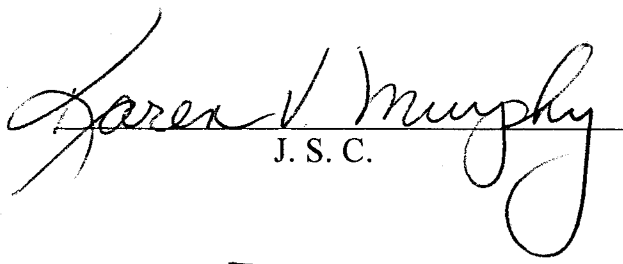
Nurse Lurie's opinions are not supported by the record herein and are conclusory. Finally, while plaintiff testified regarding discomfort in her "back side", and sensitivity in the lower back of her behind "right where the bone is", these complaints alone simply do not rise to the level of raising a triable issue of fact that the Stage II pressure ulcer developed while plaintiff was a patient in the Hospital.

Based on the foregoing, the Hospital's motion for summary judgment dismissing the plaintiff's claim for negligence/malpractice and all cross-claims against it must be granted.

In view of this determination, relief pursuant to CPLR Article 16 is denied as moot.

The foregoing constitutes the Order of this Court.

Dated: May 10, 2011
Mineola, N.Y.



J. S. C.

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