Batista v Kateri Residence

2011 NY Slip Op 32891(U)

October 28, 2011

Sup Ct, NY County

Docket Number: 112461/07

Judge: Alice Schlesinger

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SCANNED ON 11/1/2011

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

PRESENT: ALICE SCHLESINGER, Justice

PART IA PART 16

Index Number : 112461/2007
BATISTA, MARIA
VS.
KATERI RESIDENCE
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant St. Luke's-Roosevelt Hospital Center is denied in accordance with the accompanying memorandum decision.

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

FILED
NOV 01 2011
NEW YORK COUNTY CLERK'S OFFICE

Dated: OCT 28 2011

ALICE SCHLESINGER, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
--X
MARIA BATISTA and YASMINE BATISTA, as co-guardians of MAURICIO BATISTA, and MARIA BATISTA individually,

Plaintiffs,

Index No. 112461/07
Motion Seq. No. 004

-against-

KATERI RESIDENCE and ST. LUKE'S-ROOSEVELT HOSPITAL CENTER,

Defendants.
--X

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COUNTY CLERK'S OFFICE

SCHLESINGER, J.:

Defendant St. Luke's-Roosevelt Hospital Center ("Hospital") has moved for summary judgment on the basis of its own records and the affidavit of Dr. Bruce Hirsch. Dr. Hirsch is board certified in Internal Medicine with sub-specialties in Geriatric Medicine and Infectious Disease. He opined that the Hospital had at all times acted properly.

At oral argument, it was revealed that defense counsel had not turned over Mr. Batista's complete medical chart to Mr. Batista's attorney. The omitted papers were described as Prism records. I therefore directed that these records in their entirety be provided. Both sides were then given an opportunity to submit supplemental papers and appear for further argument.

Despite the fact that Mr. Batista had several admissions to this Hospital, the only one based on which the plaintiff had claimed malpractice was the one from June 4, 2006 through June 28, 2006. Further, the subject of those claims had to do with the care and treatment of Mr. Batista's decubitus ulcer in the area of his buttocks and sacrum. The previous September (2005), he had suffered a severe stroke which had left him

hemiplegic, intubated with a PEG feeding tube, and incontinent of bladder and bowel.

On June 4, 2006 the plaintiff was transferred from Kateri Residence (a co-defendant here) to the Hospital's Emergency Department. According to Dr. Hirsch's relatively brief affidavit which supports the motion, "the care rendered to the plaintiff by St. Luke's Roosevelt Hospital Center, Inc., was appropriate and proper, and at no point did the care of the plaintiff by this institution or the individuals at this institution deviate from accepted standards of medical practice" (¶3 in March 24, 2011 affidavit). Dr. Hirsch then explained how it is that decubitus ulcers develop and progress. According to him, this often occurs in the presence of co-morbidities and organ failures, both of which Mr. Batista had. In other words, ulcers can appear without any deviation by the Hospital from proper medical care. This is Dr. Hirsch's opinion as to what happened here.

The Court has been very general in referring to Dr. Hirsch's opinions because, in the first instance, Dr. Hirsch's opinions are very general in nature. In ¶¶'s18 and 19, he concludes by saying that the treatment and continued development of the ulcer was related to the patient's acute illness. But despite these co-morbidities, the Hospital still was able to achieve a level of healing well within the standard of care and, according to Dr. Hirsch, all reasonable preventative measures and treatments were taken.

The opposing plaintiff, via the affirmation of Dr. Ira Mehlman, who is board certified in Internal Medicine and Emergency Medicine, presents a completely different view, while also relying on the Hospital's records. He details multiple deviations from the standards of proper treatment for decubitus ulcers, such as the one Mr. Batista had in his sacral area.

In his affirmation, Dr. Mehlman talks about the lack of proper assessments and staging of the ulcer. All agree that a Braden scale is universally used to stage the

seriousness of decubitus ulcers or pressure sores. The range is from one to four, with four being the most serious. Each stage has particular characteristics which distinguish that stage. Dr. Mehlman says there is an absence in the Hospital records of any staging category for many days, which he specifies, and also there is confusing data about the staging. For example, according to this physician, an ulcer can never go down in stage, such as from a IV to a III or to a II. Rather, a nurse or doctor would and should write a "healing IV" to give an accurate picture of the ulcer's history as well as its current status.

Dr. Mehlman also talks about other instances where there is a lack of proper documentation and also a lack of a care plan. As another departure from proper care, he points out that Mr. Batista was not sufficiently turned or properly positioned. The standard for a patient with a decubitus ulcer is to be turned no less than every two hours. But here, the chart shows turning every three or four hours, and this infrequent turning caused the ulcer to grow and get worse, according to Dr. Mehlman.

In defendant Hospital's original Reply, counsel emphasized Dr. Mehlman's failure to note and discuss the Prism records and argued that this failure diminished the value of the expert opinions. But it was not until oral argument that it was revealed that these Prism records had not been exchanged. Therefore, Dr. Mehlman's "failure" was in fact the moving defendant's failure, one to properly deliver a full and complete record. Thus, as noted earlier, I directed this to be done and over the objection of plaintiff, who had asked me to simply deny defendant's motion, I requested additional papers from both sides and scheduled a second argument.

Dr. Mehlman, in his supplemental affirmation, does discuss the Prism records, but he emphasizes that their consideration in no way changes his opinions regarding the

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deficient care by the Hospital. He points out that upon admission, Mr. Batista's ulcer was staged both as a Stage II and Stage III. The word "healing" was never used. He points out that from June 13, 2006 through June 19, 2006 and from June 22, 2006 through June 24, 2006, the ulcer was unstaged; i.e., no grade was given, for no good reason because the sore was not covered by a bandage.

He points out that on June 14, there seemed to have been a debridement. But up until that date, proper care was clearly not given as can be shown from the worsening of the ulcer to a Stage IV which was documented as such on June 14. The dimensions of the ulcer on that date were 13x14.5x0, significantly larger than when first noted.

Finally, with regard to turning the patient, Dr. Mehlman points out that beginning on June 13, the day before the debridement when the ulcer began to deteriorate, the patient was turned only every three or four hours. This was a departure that caused further deterioration of the ulcer.

In a final reply, Dr. Hirsch characterizes Dr. Mehlman's opinions as speculative. He repeats, again in conclusory terms, that the care rendered to the patient by the Hospital was appropriate and proper. He opines that there was proper documentation of Mr. Batista's ulcer in the emergency room and the fact that it was graded both as a II and a III merely signifies that caregivers see things differently. But he adds that this difference does not affect the quality of care the patient received.

With regard to the failure to stage at all, again Dr. Hirsch says that this is not relevant as long as the ulcer was duly measured and continually assessed. He points to documentation in the records of the progression of the sore. He also shows that Mr. Batista was constantly measured for sensory perception, moisture, mobility, etc.

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As to the subject of turning and positioning, the three and four hour directions were given, he says, at a time when the wound was improving. He insists that the records show no causal connection between the frequency of turning and deterioration of the ulcer. Finally, in ¶13, Dr. Hirsch says "at no point did the hospital put plaintiff in a position whereby his ulcer and skin integrity were compromised by a lack of medical care."

However, the chart, including the Prism records, of this admission does not support Dr. Hirsch's opinions. When Mr. Batista was transferred to St. Luke's on June 4, 2006, the record sized the ulcer as 0.4x1. The chart says "protocol implemented". Then, on June 5, 2006, whether the ulcer was a stage II or III (both are recorded) it was sized at 3 x4x0. That was the day the patient was admitted to the hospital from the Emergency Department.

There is no measurement taken then, or at least recorded until June 7, 2006 when the ulcer was now sized at 5x4x0. The stage was recorded as II. Following this, there is no recorded staging or measurement until June 9, 2006. On that day, the staging is still II and the measurement is shown as unchanged at 5x4x0. On June 10, this same measurement was given. No staging or measurement was done on June 11. But by June 12, the first measurement of the ulcer showed 8x10 but then later in the day, a measurement showed 10x8x0. The staging was II. By June 13, 2006, the ulcer was "unstaged" (no reason provided) but it had now grown to 12x18x0.

This then finally provoked a consultation for the patient's "skin/wound". The words "skin protocol" were written and "protect body prominences from pressure dressing daily". But by June 14, as earlier noted, the ulcer was now a Stage IV, the most serious stage, and it measured 13x14.5x0! This is when the debridement occurred. So contrary to Dr. Hirsch's statement, the ulcer was growing and worsening.

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The day after the debridement, on June 15, the ulcer was unstaged (no reason given) but still measured at 13x14.5x0. From June 16 through June 24, the ulcer was continually unstaged without explanation, and when it was measured on June 20 and June 21 it shows at all times a measurement of 13x14.5x0. On June 25, 2006, it is once again staged at II but the measurement remains at 13 x14.5x0. On June 27, the day before Mr. Batista's discharge, it is again staged as II. But inexplicably of the three measurements recorded that day, two show 8x8x0 and the final measurement of the entire admission shows, once again, 13x14.5x0.

Dr. Hirsch does not discuss these numbers, but they belie his statements that the ulcer was improving pursuant to good care and that the turning every three or four hours, less frequent than the recognized standard of two hours, made no difference.

The Hospital, as the moving defendant, has the burden to show that no deviations of proper care occurred causative of injury. Dr. Mehlman says clearly there were such deviations that did cause the ulcer to worsen. Dr. Hirsch dismisses this as nonsense and in one conclusory statement after another, he says all went well. But clearly, it did not. The Hospital records show that. The motion must be denied. The defendant has failed to meet its burden and the plaintiff is therefore entitled to his day in court with regard to this admission, June 4 through June 28, 2006.

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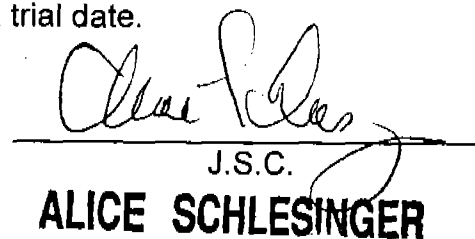
Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant St. Luke's Roosevelt Hospital Center is denied. Counsel shall appear for a pre-trial conference on November 30, 2011 at 9:30 a.m. prepared to select a trial date.

Dated: October 28, 2011 OCT 28 2011

OCT 28 2011



J.S.C.

ALICE SCHLESINGER