

**Moore v St. James Health Care Ctr., LLC**

2014 NY Slip Op 31461(U)

May 22, 2014

Supreme Court, Suffolk County

Docket Number: 06-1272

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 21 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. JEFFREY ARLEN SPINNER  
Justice of the Supreme Court

MOTION DATE 11-25-13  
ADJ. DATE 2-5-14  
Mot. Seq. #012 - MotD; CASEDISP

-----X  
PATRICIA MOORE, as Administratrix for the  
Estate of JOSEPH ZAMIELLO, deceased,  
  
Plaintiff,  
  
- against -  
  
ST. JAMES HEALTH CARE CENTER, LLC,  
  
Defendant.

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-----X  
ST. JAMES HEALTH CARE CENTER, LLC,  
  
Third-Party Plaintiff,  
  
- against -  
  
APEX LABORATORY, INC. and YANG SIENG  
LU, M.D.,  
  
Third-Party Defendants.

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Upon the following papers numbered 1 to 51 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 32 ; Notice of Cross Motion and supporting papers \_\_\_\_\_ ; Answering Affidavits and supporting papers 33 - 37; 38 - 47 ; Replying Affidavits and supporting papers 48 - 49; 50 - 51 ; Other \_\_\_\_\_ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by defendant for summary judgment in its favor is granted as set forth herein, and is otherwise denied.

RR

On June 14, 2003, Joseph Zamiello presented at St. Catherine of Siena Medical Center with complaints of dizziness, weakness in his legs, and falling when trying to stand. Mr. Zamiello, who was 83 years old at the time and had a history of hypertension, was diagnosed by the attending physician as suffering from uncontrolled hypertension, anemia and renal insufficiency, and was admitted to the hospital's telemetry unit. Magnetic resonance imaging (MRI) and computed tomography (CT) scans of Mr. Zamiello's brain revealed a possible infarction (stroke) in the thalamus and brain atrophy consistent with his age, an echocardiogram revealed aortic valve disease, and a sonogram of his kidneys revealed chronic renal disease. During his hospital admission, Mr. Zamiello was prescribed, among other things, the beta-blocker Lopressor to treat high blood pressure, Plavix and aspirin to prevent blood clots, and Zyprexa for symptoms of delirium. He also was assessed as at risk for falling. Believing he was not receiving proper medical care at the hospital, Mr. Zamiello's family, against the advice of the attending physician, had him transferred on June 19, 2003 to a nursing home owned and operated by defendant St. James Health Care Center, LLC.

A comprehensive assessment of Mr. Zamiello's functional capacity performed upon his admission at the nursing home determined, in part, that he was at risk for skin issues, contractures, dehydration, self injury, and falls. It noted that Mr. Zamiello, who required a wheelchair, had a history of falls, was suffering from dementia and agitation, and needed a lap tray restraint. A comprehensive written care plan prepared by the facility's nursing staff indicated Mr. Zamiello required services for various needs, including impaired skin integrity and a high risk of developing pressure ulcers secondary to immobility and incontinence; a high risk for falls due to immobility and psychotropic and cardiovascular medications; chronic confusion due to dementia; and activity intolerance due to cardiac, respiratory, anemia and renal problems. On his first day at the nursing home, a staff member discovered Mr. Zamiello lying on the floor of his room, and his bed pushed over to his roommate's side of the room. Defendant's records show that Mr. Zamiello was suffering from agitation and hallucinations, and was prescribed additional psychotropic medications by the attending physician at the nursing home, Yang Sieng Lu. Mr. Zamiello also was prescribed medication for a bacterial infection detected through a urinalysis. On June 25, 2003, bright red blood was discovered in Mr. Zamiello's stool by a member of defendant's nursing staff, and such information allegedly was conveyed both to Zamiello's family and to Dr. Lu, who ordered a series of occult tests and suppositories for Mr. Zamiello believing he was suffering from hemorrhoids. Over the next week, staff members again observed bright red blood in Mr. Zamiello's stool, charting on June 27 that he was experiencing rectal bleeding, and reported such finding and the findings of the stool sample tests to Dr. Lu.

Mr. Zamiello's condition continued to deteriorate. Dissatisfied with the care he was receiving, Mr. Zamiello's family members advised the staff of St. James Health Care Center that they wanted him to be discharged from the nursing home, and a discharge plan was devised. Meanwhile, on June 30, Mr. Zamiello was treated by Dr. Lu for an abrasion and an infection in his lower leg. Then, on the morning of July 3, after he allegedly was notified again by a member of the nursing staff that the stool sample tests were positive for occult blood, Dr. Lu ordered an immediate complete blood count (CBC) test and instructed the nursing staff to advise the family that Mr. Zamiello needed a gastrointestinal consult. At approximately 11:00 p.m. that same day, a staff nurse observed Mr. Zamiello had rapid, shallow respiration and no palpable blood pressure. The nurse also observed a large amount of blood and black, tarry feces in the adult diaper Mr. Zamiello was wearing. The nurse in charge of Mr. Zamiello's care

that night, Doanna Improte, allegedly contacted Dr. Lu immediately regarding the change in Mr. Zamiello's condition. Dr. Lu directed that an ambulance be called to transport Mr. Zamiello to the emergency department at St. Catherine of Siena Hospital. Nurse Improte also contacted Mr. Zamiello's wife and daughter, who directed that Mr. Zamiello be brought to Stony Brook. Oxygen was administered to Mr. Zamiello until the ambulance arrived at the nursing home and emergency medical technicians took over his care. On July 4, 2003, at approximately 12:15 a.m., Mr. Zamiello was transported by ambulance to Stony Brook University Hospital, where he was admitted through the emergency department with cardiac failure. He was diagnosed at Stony Brook University Hospital as suffering from upper gastrointestinal bleeding, and then multiple organ dysfunction. Medical tests performed at the hospital also revealed that Mr. Zamiello had suffered cerebral artery infarcts. Sadly, Mr. Zamiello passed away on July 10, 2003.

Subsequently, plaintiff Patricia Moore, Mr. Zamiello's daughter and the administratrix of his estate, commenced this action against St. James Health Care Center and Dr. Lu seeking damages for medical malpractice, negligence, gross negligence, and deprivation of rights under Public Health Law § 2801-d. St. James Health Care Center then brought a third-party action against Apex Laboratory, Inc. and Dr. Lu for indemnification and contribution. By order dated July 9, 2007, the undersigned granted summary judgment dismissing the complaint as against both St. James Health Care Center and Dr. Lu. However, by order dated December 10, 2007, the undersigned restored the claims for negligence, gross negligence and violation of Public Health Law § 2801-d against St. James Health Care Center, and amended the caption by removing Dr. Lu as a defendant.

By her bills of particulars, plaintiff alleges, in part, that St. James Health Care Center (hereafter defendant) was negligent, reckless and careless in failing to provide care for Mr. Zamiello "when it was noted [he] had blood in his stool for days and in failing to notify his physician and family of the same"; in failing to provide a proper physical assessment; in failing to properly train and supervise personnel, particularly its CNAs, nursing staff and nursing supervisors; in failing to notify Mr. Zamiello's physician, family and attending physician of the substantial change in his condition; and in "negligently waiting over twenty-four (24) hours to submit a blood sample . . . causing a delay in diagnosis and treatment." Plaintiff further alleges defendant deprived Mr. Zamiello of his rights under Public Health Law § 2801-d by, among other things, failing to comply with 42 CFR § 483.20 (b)(1), which mandates the contents of the comprehensive assessment of a nursing home resident; failing to comply with 42 CFR § 483.25, which provides a resident must receive and a nursing facility must provide "the necessary care and services to maintain the highest practicable physical, mental and psychosocial well-being, in accordance with the comprehensive assessment and plan of care"; failing to comply with 10 NYCRR 415.12, which mandates that each resident shall receive and the facility shall provide the necessary care and service to attain or maintain the highest practicable physical, mental, and psycho social well-being, in accordance with the comprehensive assessment and plan of care subject to the resident's right of self-discrimination; failing to comply with 10 NYCRR 415.12 (a)(1), which provides a facility must ensure that a resident's abilities in activities of daily living do not diminish unless circumstances of the individual's clinical condition demonstrate that diminution was unavoidable; failing to comply with 10 NYCRR 415.12 (c), which requires a resident having pressure sores receive the necessary treatment and services to promote healing; failing to comply with 10 NYCRR 415.3 (a), which provides a resident has a right to a dignified existence with respect, consideration and privacy in treatment and care for personal

needs and communication with and access to persons and services inside and outside the facility; and failing to conform to the accepted standards of care and skill in providing nursing, geriatric, nursing home and health-aide care to Mr. Zamiello “by failing to properly recognize the significance of blood in [his] stool.” In addition, plaintiff alleges defendant was negligent in failing to provide Mr. Zamiello with proper nutrition and hydration, in failing “to understand the clinical analysis, laboratory analysis, history, physical examination, complaints, pains, signs and/or symptoms” so that a proper diagnosis could be made and a proper course of treatment could have been devised, and in failing “to provide any interventions to [Mr. Zamiello] despite his obvious symptoms and delayed [his] transfer to the emergency room as a result of the negligent delays in diagnosis and lab work. ”

Defendant now moves for summary judgment dismissing the complaint, arguing that plaintiff is improperly asserting time-barred medical malpractice claims, such as that defendant failed to diagnose that Mr. Zamiello was suffering from a gastrointestinal bleed, and that it failed to administer the proper medical treatment or medication, in the guise of Public Health Law § 2801-d claims. Defendant further asserts its submissions establish that it provided adequate and appropriate care to Mr. Zamiello, including reasonable actions to meet his nutritional needs and to guard against the assessed risks of dehydration and pressure ulcers, that it properly carried out the orders given by Dr. Lu, and that it appropriately managed Mr. Zamiello’s deteriorating condition on the night he was transported to Stony Brook University Hospital. Defendant’s submissions in support of the motion include copies of the pleadings and the bills of particulars; transcripts of the parties’ and third-party defendants’ deposition testimony; a transcript of the deposition testimony of Robin Izen Mont, a former employee of Apex Laboratory; copies of the medical records of St. Catherine of Siena Medical Center and Stony Brook University Hospital related to the treatment of Mr. Zamiello in June and July 2003; and copies of defendant’s records related to Mr. Zamiello’s stay at St. James Health Care Center. Defendant also submits an affirmation of its medical expert, Dr. Barbara Tommasula, and an affidavit of Donna Improte, a registered nurse who worked at St. James Health Care Center and cared for Mr. Zamiello during his stay, including on the night of July 3, 2003. Alternatively, defendant seeks an order granting summary judgment in its favor on its third-party claims for indemnification and contribution.

Plaintiff opposes the motion, arguing that defendant’s submissions are insufficient to establish its entitlement to judgment in its favor as a matter of law, as questions exist as to whether Mr. Zamiello received adequate supervision and assistance devices to prevent falls, whether the staff implemented a proper dietary plan to maintain hydration, and whether it promptly ordered the CBC test as directed by Dr. Lu. Plaintiff alleges the daily chart maintained at the nursing facility for Mr. Zamiello contains inaccurate notes and, therefore, raises a triable issue as to whether the staff was properly monitoring and managing Mr. Zamiello’s care. Further, plaintiff argues the medical records indicate that, after discovering Mr. Zamiello had rapid shallow breaths and no palpable blood pressure, the staff at the nursing home failed to assess his condition or provide any medical treatment other than call for an ambulance. In opposition to the motion, plaintiff submits an affirmation of Dr. Perry Starer and an affidavit of Olive Brown, who is a registered nurse, as well as copies of defendant’s records for Mr. Zamiello. Third-party defendant Apex Laboratory, Inc., opposes the branch of plaintiff’s motion seeking summary judgment on the third-party complaint.

A party moving for summary judgment must make a prima facie showing of entitlement to

judgment as a matter of law, offering sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Defendant's submissions are sufficient to establish a prima facie case of entitlement to judgment in its favor on the negligence claim asserted against it. To prove a prima facie case of negligence, a plaintiff must 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 (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Solan v Great Neck Union Free School Dist.*, 43 AD3d 1035, 842 NYS2d 52 [2d Dept 2007]; *Engelhart v County of Orange*, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). A hospital or medical facility has a duty to exercise reasonable care and diligence in safeguarding a patient, based in part on the capacity of the patient to provide for his or her own safety (*D'Elia v Menorah Home & Hosp. for the Aged & Infirm*, 51 AD3d 848, 850, 859 NYS2d 224 [2d Dept 2008]; *Papa v Brunswick Gen. Hosp.*, 132 AD2d 601, 603, 517 NYS2d 762 [2d Dept 1987]). "The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can be assessed on the basis of the common everyday experience of the trier of facts (*Miller v Albany Med. Ctr. Hosp.*, 95 AD2d 977, 978, 464 NYS2d 297 [3d Dept 1983]). A claim sounds in medical malpractice when the conduct at issue constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician (*Bleiner v Bodnar*, 65 NY2d 65, 72, 489 NYS2d 885 [1985]; *see Scott v Uljanov*, 74 NY2d 673, 543 NYS2d 369 [1989]; *Spiegel v Goldfarb*, 66 AD3d 873, 889 NYS2d 45 [2d Dept 2009]; *Pacio v Franklin Hosp.*, 63 AD3d 1130, 882 NYS2d 247 [2d Dept 2009]). Conversely, a claim sounds in negligence when "the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the hospital's [or medical facility's] failure in fulfilling a different duty," such as protecting a patient against a risk of falling or adopting proper procedures and regulations (*Bleiner v Bodnar*, 65 NY2d 65, 73, 489 NYS2d 885; *see Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 650 NYS2d 629 [1996]; *D'Elia v Menorah Home & Hosp. for the Aged & Infirm*, 51 AD3d 848, 859 NYS2d 224; *Halas v Parkway Hosp.*, 158 AD2d 516, 551 NYS2d 279 [2d Dept 1990]).

Here, most of the negligent acts alleged by plaintiff against defendant, such as the failure to assess Mr. Zamiello's treatment needs, the failure to inquire about test results, the failure to detect the gastrointestinal bleed, and the failure to recognize the significance of blood in the stool, sound in medical malpractice, as they relate primarily to the nursing home staff's performance of functions that are "an integral part of the process of rendering medical treatment" and diagnosis (*Scott v Uljanov*, 74 NY2d 673, 675, 543 NYS2d 369; *see Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 887 NYS2d 655 [2d Dept 2009]; *Pacio v Franklin Hosp.*, 63 AD3d 1130, 882 NYS2d 247; *D'Elia v Menorah Home &*

*Hosp. for the Aged & Infirm*, 51 AD3d 848, 859 NYS2d 224; *Caso v St. Francis Hosp.*, 34 AD3d 714, 825 NYS2d 127 [2d Dept 2006]; *Gaska v Heller*, 29 AD3d 945, 816 NYS2d 523 [2d Dept 2006). As mentioned earlier, this Court has determined that the medical malpractice claims asserted in this action are time-barred. As to the allegation that defendant was negligent in failing to protect Mr. Zamiello from falling, the affirmation of Dr. Tommasula and the medical records offered by defendant make out a prima facie case that the nursing home staff accurately recognized Mr. Zamiello as being at risk for falling and took appropriate actions to minimize such risk, like using a lap restraint when he was sitting in a lounge chair and positioning his chair near the nurses' station so he could be easily observed. In addition, defendant's submissions show prima facie that although Mr. Zamiello was discovered on the floor of his room the first day he arrived at the facility, he did not sustain any injuries due to such fall.

The burden of proof, therefore, shifted to plaintiff to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923). However, the affirmation of plaintiff's expert, Dr. Starer, fails to raise a triable issue as to a breach of a duty of care owed by defendant. Dr. Stater's affirmation focuses on the alleged failure by the nursing home staff to appropriately assess and closely monitor Mr. Zamiello's gastrointestinal bleeding condition, evidenced by visible blood in his stool, and to intervene or assess his vital signs on the night of July 3 after it was discovered he was experiencing rapid respirations, and opines that, "to a reasonable degree of medical certainty," such failures on the part of the staff "caused Mr. Zamiello to suffer cardiopulmonary dysfunction, anoxic encephalopathy, and, ultimately, his death." Claims that the nursing staff failed to recognize and treat certain conditions and symptoms exhibited by Mr. Zamiello, however, necessarily involve consideration of the staff members' professional skill and knowledge and whether the treatment rendered to him constituted a departure from sound medical practice, and may not be tried in the context of an ordinary negligence action (*see Scott v Uljanov*, 74 NY2d 673, 543 NYS2d 369; *Caso v St. Francis Hosp.*, 34 AD3d 714, 825 NYS2d 127; *DeLeon v Hospital of Albert Einstein Coll. of Medicine*, 164 AD2d 743, 566 NYS2d 213 [1st Dept 1991]). The affidavit of Nurse Brown, which details the alleged violations of various state and federal health care regulations, also is insufficient to raise a triable issue as to defendant's negligence.

Further, the evidence submitted establishes defendant's entitlement to summary judgment dismissing the cause of action for gross negligence. To constitute gross negligence, a party's conduct must "'smack[ ] of intentional wrongdoing'" or "evinced [ ] a reckless indifference to the rights of others" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 554, 583 NYS2d 957 [1992], quoting *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 385, 461 NYS2d 746 [1983]; *see Goldstein v Carnell Assoc., Inc.*, 74 AD3d 745, 906 NYS2d 905 [2d Dept 2010]). "Stated differently, a party is grossly negligent when it fails 'to exercise even slight care' or 'slight diligence'" (*Goldstein v Carnell Assoc., Inc.*, 74 AD3d 745, 747, 906 NYS2d 905). Here, the conduct of defendant's staff cannot be considered so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others (*see Gold v Park Ave. Extended Care Ctr. Corp.*, 90 AD3d 833, 935 NYS2d 597 [2d Dept 2011]; *Everett v Loretto Adult Community, Inc.*, 32 AD3d 1273, 822 NYS2d 681 [4th Dept 2006]; *Anzalone v Long Is. Care Ctr., Inc.*, 26 AD3d 449, 810 NYS2d 514 [2d Dept 2006]). Plaintiff does not oppose defendant's application for judgment in its favor on the claim for gross negligence.

Finally, defendant's submissions make out a prima facie case of entitlement to summary

judgment dismissing the cause of action for deprivation of rights pursuant to Public Health Law § 2801-d. Public Health Law § 2801-d provides, in relevant part, that “[a]ny residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation.” A “right or benefit” of a patient is defined as “any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation . . .” (Public Health Law § 2801-d [1]). The statute further provides that “[n]o person who pleads and proves, as an affirmative defense, that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury for which liability is asserted shall be liable under this section” (Public Health Law § 2801-d [1]). Significantly, the statutory basis for liability under Public Health Law § 2801-d is not a deviation from accepted standards of medical practice or a breach of a duty of care. Rather, the statute “contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule” (*Zeides v Hebrew Home for Aged at Riverdale*, 300 AD3d 178, 179, 753 NYS2d 450 [1st Dept 2002]).

The evidence submitted with the moving papers is sufficient to establish that defendant is not liable under Public Health Law § 2801-d (*see Domoroski v Smithtown Ctr. for Rehabilitation & Nursing Care*, 95 AD3d 1165, 945 NYS2d 345 [2d Dept 2012]; *Gold v Park Ave. Extended Care Ctr. Corp.*, 90 AD3d 833, 935 NYS2d 597; *Shapiro v Gurwin Jewish Geriatric Nursing & Rehabilitation Ctr.*, 84 AD3d 1348, 923 NYS2d 894 [2d Dept 2011]). Dr. Tommasula’s affirmation and the records relating to Mr. Zamiello’s admission in the nursing home, together with the deposition transcripts, demonstrate that defendant did not violate Mr. Zamiello’s rights under 10 NYCRR 415.12 and the analogous federal provision, 42 CFR 483.25. More specifically, the evidence shows, among other things, that defendant’s nursing staff provided appropriate nutrition and hydration to Mr. Zamiello, reduced the risk of accident through the use of devices and supervision to prevent falls, sought medical treatment for his physical, mental, and psychosocial difficulties, and administered oxygen on July 3 when Mr. Zamiello developed shallow breathing. Such evidence further shows defendant exercised due care with respect to Mr. Zamiello’s risk of skin injury and complied with the requirements of 10 NYCRR 415.12 by preventing pressure ulcers and ischemic ulcers from developing on his legs and feet, and that it complied with 10 NYCRR 415.20 by providing blood and laboratory services and placing written reports of such tests in Mr. Zamiello’s file. In addition, defendant established prima facie that its nursing staff exercised reasonable care to protect Mr. Zamiello’s rights under 10 NYCRR 415.3 by timely notifying Dr. Lu and Mr. Zamiello’s family members of changes in Mr. Zamiello’s condition.

Contrary to the assertions by plaintiff’s counsel, the proof submitted in opposition to the motion fails to raise a triable issue as to whether Mr. Zamiello suffered an injury due to a deprivation of his rights resulting from the violation of a federal or state statute, regulation or rule relating to patient care. Initially, the Court notes that as plaintiff failed to demonstrate Nurse Brown is qualified to offer a medical opinion as to, among other things, the causes of Mr. Zamiello’s gastrointestinal bleed or the elevated urea nitrogen and creatinine levels measured in his blood when he was re-admitted to Stony Brook University Hospital on July 4, 2003, or as to the appropriate medical treatment for the symptoms that presented during his stay in the nursing home, her conclusions that defendant departed from accepted medical practice and failed to “timely and appropriately” assess the gastrointestinal bleed are without probative value (*see Makinen v Torelli*, 106 AD3d 782, 965 NYS2d 529 [2d Dept 2013]; *Elliot*

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*v Long Is. Home, Ltd.*, 12 AD3d 481, 784 NYS2d 615 [2d Dept 2004]). Nurse Brown's conclusory assertions that defendant's staff violated 10 NYCRR 415.12 by failing to notify Dr. Lu of changes in Mr. Zamiello's medical condition are insufficient to defeat summary judgment, as the uncontroverted evidence in the record shows Dr. Lu ordered various medical tests after being advised by the nursing staff that blood had been observed in Mr. Zamiello's stool, that Dr. Lu was notified of the results of such tests, that he ordered an immediate CBC after learning test results for occult blood were positive, and that he immediately was notified by a staff member, Nurse Improte, when it was discovered that Mr. Zamiello was experiencing rapid, shallow respiration on the night of July 3. Further, Nurse Brown's statement that the nursing home violated Mr. Zamiello's rights by failing to provide a dietary plan that met his nutritional and hydration is insufficient to raise a triable issue, as her affidavit does not detail any insufficiencies in the nutrition plan devised by the nursing home and ignores, without explanation, the determination of Dr. Tommasula that the elevated urea nitrogen and creatinine levels in his blood were related to renal failure and the gastrointestinal bleed. Likewise, Dr. Starer's conclusory statement that the elevated "BUN" and creatinine levels detected when Mr. Zamiello was admitted to Stony Brook University Hospital on July 4 "indicates that St. James [Health Care Center] failed to provide a proper diet plan to meet show Mr. Zamiello's basic needs" fails to raise a triable issue of fact.

As to her claim defendant violated 10 NYCRR 415.20 by failing to "follow up" on a verbal report received from Apex Laboratory on the evening of July 3 that the findings of the stat CBC test were within the normal ranges, Nurse Brown does not provide a basis for her assertion that the duty to offer blood and laboratory services for patients includes the verification of reports by obtaining a print-out of the CBC findings, and no evidence was presented showing this alleged failure caused injury to Mr. Zamiello. Finally, plaintiff failed to raise a triable issue as to the alleged violation of 20 NYCRR 415.22. While Nurse Brown asserts defendant's nursing staff failed to monitor and accurately document Mr. Zamiello's condition, the records show, among other things, that Mr. Zamiello's vital signs were regularly taken by the staff and reported in the nurses' notes, and that Dr. Lu was notified by the staff that blood had been detected in the stool on June 25 and 27 and that Mr. Zamiello's physical condition had dramatically deteriorated on July 3. Further, even accepting plaintiff's argument that defendant's staff made mistakes in charting Mr. Zamiello's condition in July 2003, the inaccuracies in the progress notes allegedly entered on July 5 and 6 could not have resulted in injury to Mr. Zamiello, who had been transferred to Stony Brook University Hospital two days earlier (see *Shapiro v Gurwin Jewish Geriatric Nursing & Rehabilitation Ctr.*, 84 AD3d 1348, 923 NYS2d 894).

Accordingly, the branch of defendant's motion for summary judgment in its favor on the complaint is granted. The branch of the motion for summary judgment on the third-party complaint is denied, as moot.

Dated:     MAY 22 2014    



**RON. JEFFREY ARLEN SPINNER**

     FINAL DISPOSITION      X   NON-FINAL DISPOSITION