

**Rivera v Burke Rehabilitation Hosp.**

2014 NY Slip Op 32093(U)

July 1, 2014

Sup Ct, Bronx County

Docket Number: 304094/09

Judge: Stanley B. Green

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: IA-6M

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ROSA RIVERA AND PABLO RIVERA,

INDEX No. 304094/09

Plaintiff(s),

- against-

THE BURKE REHABILITATION HOSPITAL and  
ELLEN GITLER, M.D.,

Defendant(s)

DECISION

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**HON. STANLEY GREEN:**

The motion by The Burke Rehabilitation Hospital (Burke) and Ellen Gitler, M.D. is granted only to the extent that the complaint is dismissed as against Dr. Gitler, provided that within 60 days from the date of this order, plaintiff files and serves on defendants a certificate of authentication in compliance with CPLR §2309©.

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained as a result of defendants' failure to provide proper rehabilitation care and treatment during her admission to Burke, from December 13-21, 2006.

Plaintiff underwent a total right knee replacement with Dr. Rose at Westchester Square Medical Center (WSMC) on December 7, 2006. She was transferred to Burke on December 13, 2006 for rehabilitation. Upon admission to Burke, plaintiff was examined and evaluated by Dr. Gitler, an attending physician employed by Burke. Dr. Gitler formulated a rehabilitation plan that included physical therapy and occupational therapy.

Plaintiff claims that during a physical therapy session on December 19, 2006, a male

physical therapist supervisor forcefully lifted up her ankle and bent her right knee backwards toward the buttocks, causing severe pain in her right knee, right leg, and back (EBT, p. 345). She claims that she complained of pain to the therapist and to the staff member who accompanied her back to her room. She also called Dr. Rose to complain about the pain. That night and the following day, plaintiff was administered Flexeril (a muscle relaxant) for muscle spasms. Plaintiff participated in physical therapy on December 20 and 21, but continued to have pain in her right knee and in her back, above the right buttock (EBT, p. 357). On December 21, 2006, plaintiff was discharged home.

On December 23, 2006, plaintiff presented to WSMC emergency room with complaints of severe low back pain, right sided knee pain and numbness into the right lower extremity. She was diagnosed with lumbar radiculopathy, pain due to "back trauma" and muscle spasms. She was given a lumbar epidural steroid injection through anesthesia and Flexeril for muscle spasms. A CT scan of her lumbosacral spine revealed degenerative spondylosis, a central disc herniation at L5-S1, posterior bulges at L3-4 and L4-5 and a focal right paracentral calcified disc at the T11-12 level. Plaintiff was discharged from WSMC on December 28, 2006.

On January 2, 2007, plaintiff presented to Dr. Rose with complaints of lower back pain. Dr. Rose noted poor quadriceps muscle tone and difficulties with straight leg raising exercises. At a follow up visit on January 16, 2007, Dr. Rose noted that plaintiff had difficulty mounting and dismounting the examining table and was unable to tolerate a sitting position. On January 26, 2007, plaintiff was examined by Dr. Bhatnagar, a neurologist, who diagnosed her with lumbar radiculopathy. He ordered an epidural injection for the low back pain and a six week physical therapy regimen. Plaintiff continued to see Dr. Rose and Dr. Bhatnagar for her back and

right knee complaints. On April 17, 2007, an EMG/NCV study was performed at Montefiore Medical Center which revealed moderate active denervation changes in the right quadriceps and gastrocnemius muscles with chronic reinnervation changes in those muscles. The EMG/NCV report, dated April 17, 2007, indicates that plaintiff reported “an episode in which she was receiving physical therapy and she had worsening leg pain.” On April 24, 2007, plaintiff returned to the offices of Drs. Rose and Bhatnagar and Dr. Bhatnagar ordered an MRI of the lumbar spine and lumbosacral pelvis areas. On May 16, 2007, an MRI of plaintiff’s sacral plexus reportedly revealed a “probable tear of the gluteus maximus muscle at its insertion into the posterior-inferior right pubic ramus.” Dr. Bhatnagar also listed this diagnosis, in addition to the diagnosis of lumbar radiculopathy, in his office note on June 1, 2007. On May 17, 2007, Dr. Rose performed the lysis of adhesions procedure on plaintiff’s right knee. Plaintiff continued to receive treatment for limited range of motion of the right lower extremity and lumbar radiculopathy by Dr. Bhatnagar from June 1, 2007 through April 29, 2009 and by Dr. Rose from May 22, 2007 through August 29, 2009, including two repeat lysis of adhesion procedures of the right knee.

Defendants seek dismissal of the complaint on the ground that the care and treatment they provided to plaintiff was within good and accepted standards of physical medicine and rehabilitation practice and no alleged act or omission by them caused the claimed injuries.

In support of the motion, defendants submit the affirmation of Dr. Malcolm Reid, who opines that the records and testimony show that the care and treatment rendered to plaintiff by Dr. Gitler, Burke and its staff nurses and physical therapists conformed to good and accepted standards of physical medicine and rehabilitation practice between December 13 and 21, 2006.

Dr. Reid explains that Dr. Gitler's role as an attending physician at Burke was to oversee the medical management of plaintiff while she underwent inpatient rehabilitation therapy. She was not responsible for standing over the shoulder of licensed and certified physical therapists or for performing the therapy exercises. Dr. Reid notes that Dr. Gitler examined plaintiff on admission, saw plaintiff on rounds and issued appropriate orders to adjust medications to ensure that plaintiff was kept comfortable, hemodynamically stable and infection free. It is his opinion that Dr. Gitler discharged her duties to plaintiff in accordance with the standards of good and accepted medical practice and that there were no departures from the standard of care by her. He also opines that the injuries claimed in this lawsuit by plaintiff: "a torn gluteal muscle, an avulsion fracture of her pubic ramus and lumbar herniations at the L3-4 and L5-S1 levels" were not caused by the acts or omissions of either Burke or Dr. Gitler."

With respect to the alleged incident on December 19, 2006, Dr. Reid notes that there is no mention of the alleged incident in the records of Burke or WSMC and that plaintiff participated in physical therapy sessions during the two days that followed. He also notes that on December 20, 2006, plaintiff walked 300' with a cane and negotiated three times as many stairs as she had the day before. Dr. Reid opines that even if one were to credit plaintiff's description of the maneuver on December 19, 2006, the mechanics of the muscles involved in such a movement would not, and could not, produce or cause an injury or tear to her gluteal muscle because the gluteal muscle is not involved in that type of maneuver. He explains that a gluteal tear and/or avulsion fracture can occur spontaneously or can occur with trauma and opines that whatever may have occurred during the five months after she was discharged from Burke and the May 17, 2007 MRI study should not be attributed to Burke because as of December 21, 2006, plaintiff

was walking and climbed 12 steps without exacerbation of pain, which is inconsistent with a patient who is suffering from an acute gluteal tear or an avulsion fracture.

Defendants also submit the letter affirmation of Dr. Martin Barschi, an orthopedist who examined plaintiff on December 7, 2011. Dr. Barschi describes plaintiff's prior injuries to her right knee and her course of treatment with Dr. Rose. He notes that there is no mention in Dr. Rose's records of any alleged injury at Burke in December of 2006. He also notes that after her discharge from Burke, Dr. Rose "continued her on aggressive physical therapy and use of a CPM machine." Dr. Barschi opines that "Any necessity for treatment would be related to her injury in 2000, 2002 or June of 2010 and any necessity for neurological treatment relating to complications in her brain would be all unrelated to the alleged injury in physical therapy in December 2006."

Plaintiff contends that defendants have failed to establish prima facie entitlement to summary judgment and that the testimony, medical records and opinion of their expert raise triable issues of fact as to whether plaintiff's injuries were proximately caused by the negligent acts and/or omissions of defendants. Plaintiff notes that defendants do not address the April 17, 2007 report of Dr. Bieri, which indicates that plaintiff reported a physical therapy "episode" while at rehabilitation or the patient plan of care note that revealed a diagnosis of a "back trauma" related motor sensory deficit condition. Plaintiff also notes that Dr. Reid does not offer an opinion regarding the claimed exacerbation and aggravation of her pre-existing disc bulges and herniation or as to the cause of her lumbar radiculopathy. Plaintiff contends that Dr. Barschi's letter affirmation of December 7, 2011 and his opinion that any necessity for treatment of her right knee would be related to her prior injuries cannot be considered because his opinion

is not stated within a reasonable degree of medical certainty.

In the event that this court finds that defendants' met their prima facie burden, plaintiff contends that the motion must still be denied because her testimony describing the incident on December 19, 2006, the medical records which show that she experienced a change in her physical condition after the incident and her expert's opinion raise triable issues of fact as to whether defendants' departures caused the claimed injuries.

In opposition to the motion, plaintiff submits the affidavit of a New Jersey physician (with the name redacted) who opines, based on plaintiff's testimony describing the incident and the medical records which show the subsequent development and worsening of her condition after she was discharged from Burke, that the male physical therapy supervisor used an inappropriate technique and excessive physical force, causing plaintiff to sustain a right gluteus maximus muscle tear, a possible avulsion fracture of the posterior inferior right pubic ramus and exacerbation and aggravation of plaintiff's pre-existing spinal condition. Plaintiff's expert also opines that Dr. Gitler departed from good and accepted standards of practice by prematurely ordering plaintiff's discharge from Burke and by failing to diagnose her "acute abnormal orthopedic signs and symptoms."

Plaintiff's expert notes that Dr. Reid inaccurately indicates that plaintiff's pain assessment at the time of discharge was "2/10" when it was "8/10" and opines that the forceful and improper lifting and bending of the distal portion of the lower extremity toward the buttock area can involve the gluteus maximus muscle. He also opines that the radiologist's diagnosis of the subject muscle tear on May 16, 2007 can medically relate back to the physical therapy incident on December 19, 2006. He disagrees with Dr. Reid's opinion that plaintiff could not

reasonably be expected to ambulate 300 feet with a cane and negotiate 12 steps had she been suffering from an acute gluteal maximus muscle tear or pubic avulsion fracture, explaining that the powerful muscle relaxant drug, Flexeril, which was administered on December 19 and 20, combined with the increased dosage of the pain drug Oxycontin two days earlier, could have masked plaintiff's pain and muscle weakness and enabled her to participate in the physical therapy activities for that limited time period.

On a motion for summary judgment, it is the burden of the summary judgment proponent to demonstrate, prima facie, that he is entitled to judgment as a matter of law with evidence sufficient to eliminate any material issue of fact; failure to do so requires denial of the motion regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hosp., 68 NY2d 320; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851). The burden then shifts to the party opposing the motion to demonstrate by evidentiary proof in admissible form that a triable issue of fact exists (Zuckerman v. City of New York, 49 NY2d 557). A court's task is issue finding rather than issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395) and the court must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact (Boyce v. Vazquez, 249 AD2d 724).

Initially, it is noted that in their reply papers, defendants contended that plaintiff's expert's affidavit should not be considered because it is an unsworn out-of-state affidavit and no certificate of conformance was provided as required pursuant to CPLR §2309. However, plaintiff subsequently provided a signed and notarized copy of her expert's affidavit to the court. Although no certificate of conformance was annexed to the affidavit, the court may permit a

party to secure such certificate and give it nunc pro tunc effect (Moccia v. Carrier Car Rental (40 AD3d 504). Therefore, the expert's affidavit has been considered in deciding this motion, on condition that within 60 days from the date of this order, a certificate of conformance is filed and served on defendants.

While defendants have submitted the affirmation of an expert who opines that there were no departures by Dr. Gitler or Burke staff in the care and treatment they rendered to plaintiff and the letter affirmation of Dr. Barschi, who opines that any necessity for treatment of the right knee would be related to her prior injuries, Dr. Reid completely discounts plaintiff's testimony regarding the alleged incident of December 19, 2006 and neither he nor Dr. Barschi addresses the alleged exacerbation and aggravation of her pre-existing back condition and lumbar radiculopathy. The fact that there were no witnesses to the alleged incident other than plaintiff or that her testimony is considered to be "bizarre" merely raises issues of credibility, which must be decided by the trier of fact. Thus, the evidence presented is insufficient to establish Burke's entitlement to judgment as a matter of law and its motion for summary judgment must be denied, regardless of the sufficiency of the opposing papers (Alvarez, supra). However, even assuming, arguendo, that the evidence were sufficient to meet Burke's prima facie burden, plaintiff's testimony describing the incident, her immediate pain and the course of treatment for her back and leg complaints, the testimony of Dr. Gitler that it is "possible" that undue force in raising a leg while a patient is sitting on the physical therapy table can cause a tear or injury to the gluteus maximus muscle (EBT, p. 114-115), and the opinion of her expert are sufficient to raise triable issues of fact as to whether the acts of the male physical therapist caused plaintiff's claimed injuries, which precludes a grant of summary judgment.

As to Dr. Gitler, however, the evidence presented is sufficient to show that the care and treatment she provided was within the accepted standard of care for an attending physician in a rehabilitation hospital and that no departure by her caused the claimed injuries. While plaintiff's expert opines that Dr. Gitler departed from the standard of care by failing to diagnose the gluteal tear and by prematurely discharging her from Burke, he fails to say how plaintiff's treatment would have differed had she been diagnosed earlier or how the alleged premature discharge from Burke caused the claimed injuries. In addition, the records show that although Dr. Rose saw plaintiff only two days after she was discharged from Burke, neither he nor the staff at WSMC ever made such a diagnosis in the days and months that followed plaintiff's release from Burke. Under the circumstances, plaintiff has failed to demonstrate that Dr. Gitler's treatment was a proximate cause or substantial factor in causing the claimed injuries. Accordingly, Dr. Gitler is entitled to summary judgment dismissing the complaint.

Movant shall serve a copy of this order with notice of entry on the Clerk of the Court who shall enter judgment dismissing the complaint as against Ellen Gitler, M.D.

This constitutes the decision and order of the court.

Dated: July 1, 2014

  
STANLEY GREEN, J.S.C.