

Adjetey v Jewish Home Lifecare

2014 NY Slip Op 32101(U)

July 16, 2014

Sup Ct, Bronx County

Docket Number: 310049/10

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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THEODORA ADJETEY as Administratrix of the goods,
Chattels and credits which were of ALEXANDER
ADJETEY and THEODORA ADJETEY, Individually

Plaintiff,

INDEX No. 310049/10

-against-

JEWISH HOME LIFECARE,

DECISION

Defendant,

-----X
HON. STANLEY GREEN:

The motion made by defendant for an order pursuant to CPLR §3212 granting summary judgment and dismissing the complaint is granted only to the extent that claims for the violation of Public Health Law § 2801-d are dismissed.

Plaintiffs commenced this action on December 6, 2010 to recover damages for medical malpractice, violations of Public Health Law § 2801-d, negligence, and wrongful death in connection to the care and treatment rendered by defendant Jewish Home Center to decedent Alexander Adjetey. Plaintiff Theodora Adjetey claims that the defendant deviated from the good and accepted practice and procedures of nursing home care in its treatment and monitoring of decedent Alexander Adjetey.

On January 14, 2009, the decedent suffered a severe left side thalamic hemorrhagic stroke and was admitted to Montefiore Medical Center. While at Montefiore Medical Center, decedent was ventilated and placed on restraints during intubation due to his pulling at tubes. On January 20, 2009, the decedent was removed from a ventilator and placed on a tracheostomy

(whereby an air passage is created to help patients breathe when their normal breathing route is impaired or obstructed). His restraints were discontinued at this time. The decedent was transferred to Jewish Home Lifecare on February 4, 2009.

Upon arrival at Jewish Home Lifecare, the plaintiff was noted as being lethargic, nonverbal, unable to communicate his needs, unable to follow simple instructions, unable to move his right side, and completely dependent on staff for mobility, feeding, transfers, personal hygiene, bathing and toileting. The attending doctor, Dr. Camargo, ordered tracheostomy care to be performed in accordance with Jewish Home's protocol and suctioning to be performed during each shift and as needed to clear decedent's mucus and secretions. Suctioning was necessary because the decedent was unable clear mucus and secretions on his own. Dr. Camargo also ordered Nebulizer treatments be given every six hours (wherein medication is transformed from a liquid into a mist, which gets inhaled into the lungs).

On February 22, 2009 at around 12:40 a.m., the decedent was found with his tracheostomy tube out, having difficulty breathing. He was immediately treated with an Ambu bag, and both a doctor and 911 were called, CPR was also performed, but, despite these efforts, the decedent was pronounced dead at 1:32 a.m.

In support of the motion for summary judgment, the defendant submitted the expert affirmation of Howard Kolodny M.D., a duly licensed physician, Board Certified in Internal Medicine. Dr. Kolodny opined that the defendant did not deviate from the good and accepted standards of care for nursing homes in the treatment and care rendered to the decedent. Dr. Kolodny opined that following his stroke, decedent's prognosis was poor. He further opined that the care and frequency of care, prescribed by Dr. Camargo, were appropriate for the decedent's condition. Dr. Kolodny asserted that the decedent did not have copious secretions, wherein

sections are made up of a thicker material, containing mucus and require suctioning every 10 to 15 minutes. He also opined that the decedent did not develop a mucus plug, wherein thick secretions dry and build up, creating an obstruction of the airway. Dr. Kolodny further opined that the decedent was properly monitored while at the nursing home. He explained that there was no reason for the decedent to be restrained, and that although the decedent was seen scratching his head, this is not indicative of a controlled movement.

Dr. Kolodny concluded that nothing the defendant did, or did not do, contributed to the death of the decedent. In his opinion, the decedent died from a combination of the original stroke and a second stroke, which the medical examiner found had occurred. He further opined that the hypoxia (wherein the body is deprived of adequate oxygen supply) was not the cause of death and merely shows that there was a deficiency of oxygen reaching the brain that could have been caused by a "myriad of things," including the second stroke.

Dr. Kolodny also opined that the defendant did not violate any New York or Federal statutes applicable to the operation of a nursing home or long term care facility, including Public Health Law § 2801-d.

In opposition to the motion for summary judgment, plaintiff submitted the expert affidavit of a duly licensed physician (name redacted), who is a Board Certified by the American Board of Psychiatry and Neurology. Based on a variety of factors, the expert opined that the decedent's prognosis following his first stroke was not poor. The expert stated that the decedent's condition was improving until his patency oxygenation became inadequate to support life. The expert also opined that decedent's ability to throw and catch a ball, which nonparty witness Janet Addo testified to, and his ability to scratch his own scalp were demonstrations of controlled movements. The expert asserted that decedent's ability to use controlled movements

indicates he had high level cortical functioning. Furthermore, based on review of the records, the expert opined that the decedent had a notable history of attempting to pull out his tubes and this is indicative of an awareness of respiratory compromise and distress because of poor airway patency and maintenance.

The expert further opined that the decedent's death was caused by asphyxia (wherein the body is deprived of oxygen) and consequent anoxemia (wherein a deficiency of oxygen reaches the tissue), which resulted from defendant's failure to meet the good and accepted standard of care. The expert further explained that the second intracerebral hemorrhage (stroke) was secondary to consequences of the asphyxia. The expert opined that the cause of death was an anoxic episode (wherein there is a termination of oxygen supply to an organ's tissue) and its consequences, which were caused by his tracheostomy tube becoming dislodged or blocked.

Upon review of the medical records and testimonies of the Jewish Home Lifecare staff, the expert opined that the decedent was emitting copious secretions. He further contended that the Jewish Home Lifecare was not sufficiently staffed or equipped to provide the type of care decedent's condition required. He opined that the decedent should have had individualized care, instead of being subjected to the rote formula for care which the defendant used. He opined that if defendant had not negligently continued care of the decedent instead of transferring him to a proper facility, his death could have been prevented.

The expert contended that the decedent's wrongful death was the result of defendant's failure to properly monitor, maintain, and suction the tube, defendant's failure to timely replace or clear the tube or decedent's airway, and defendant's failure to timely commence lifesaving measures. The medical expert stated that if the decedent had been properly monitored, defendant would have been able to timely replace or clear the tracheotomy/tracheostomy tube, allowing

adequate oxygenation, which could have prevented the decedent's death. The expert also contended that if the decedent's dislodged or blocked tracheotomy tube had been treated in a timely fashion, the decedent's death could have been avoided.

Plaintiff also submitted the expert affidavit of Olive Brown, a registered nurse, who opined that Jewish Home Lifecare's rules governing the nursing care rendered to the decedent, were inappropriate for a tracheostomy patient. Nurse Thankachan testified that after seven days the nurses are not required to make progress notes in patient's charts. Nurse Brown opined that this is inappropriate for tracheostomy patients, because they require a higher level of care and attention. She further opined that failing to make daily progress notes for these types of patients is a departure from the good and accepted nursing practices. Similarly to plaintiff's medical expert, Nurse Brown opined that care should have been administered according to a schedule titrated to the decedent's specific needs. She also explained that subjecting the decedent to the standard protocol rules of the nursing home was a deviation from the good and accepted standards of nursing. She further opined that the defendant did not monitor the decedent according to the good and proper standard of nursing home care.

Based on review of the records, Nurse Brown opined that the notes taken by the nurses indicate that the decedent had copious secretions. She furthered that there is an absence of notes as to how often the decedent was suctioned. However, those that do exist show that he was suctioned at most once per shift. She contends that this is a deviation from the good and accepted standards of nursing care.

In response to the plaintiff's expert affidavits, defendant contends that neither affirmation should be considered. Defendant contends that because the name of the medical expert is redacted and no signature was provided, the affidavit is insufficient to properly raise any triable

issues of fact. Defendant further contends that, because this medical expert is a neurology expert, plaintiff has the burden of establishing that the expert had sufficient knowledge in the field of medicine at issue, and that plaintiff failed to meet this burden. As to the expert affidavit of Olive Brown, the defendant argues that, because she is a nurse, she is not qualified to render a medical opinion and, therefore, the court should not consider her affidavit at all when assessing this motion for summary judgment.

In medical malpractice actions, “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (Alvarez v. Prospect Hosp., 68 N.Y.2d 320; Winegrad v. New York Univ. Med. Center, 64 NY2d 851; Zuckerman v. City of New York, 49 NY2d 557; Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395). In order to successfully oppose a defendant’s motion for summary judgment, a plaintiff must submit evidentiary facts or materials to rebut defendant’s *prima facie* showing, thus demonstrating a triable issue of fact exists. (Shahid v. NYCHHC, 47 A.D.3d 800, 801; Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324). “A physician's affidavit in opposition to a motion for summary judgment must attest to the defendant's departure from accepted practice, which departure was a competent producing cause of the injury.” (Shahid v. NYCHHC, 47 A.D.3d 800, 801) When a party fails to rebut assertions made in a summary judgment motion, those assertions are deemed admitted by the party. (Kuehne & Nagel, Inc. V. F. W. Baiden, 36 NY2d 539.)

The defendant sufficiently showed *prima facie* entitlement to summary judgment through the affirmation of Dr. Kolodny. The burden then shifted to the plaintiffs to identify triable issues of fact. Plaintiffs’ medical experts failed to address the assertions made by Dr. Kolodny, regarding Public Health Law § 2801-d. Although plaintiff’s counsel addresses these assertions,

she is not qualified to make a competent medical opinion on the matter. (Parese v. Shankman, 300 A.D.2d 1087; Jordan v. Glens Falls., 261 A.D.2d 666,667). Because neither expert refuted these assertions, they are deemed admitted. Therefore plaintiff's claims of violations of Public Health Law § 2801-d are hereby dismissed.

It is noted that the plaintiff's medical expert's name was redacted in the opposition papers. The court properly requested and received the name and signature of the doctor from the plaintiff. Therefore, plaintiff's medical expert affidavit is admissible. Furthermore, defendant's claim that the expert is unqualified, as a neurology expert, to testify to plaintiff's tracheostomy care, is without merit. An expert who offers an opinion outside his specialized field must demonstrate that he possesses sufficient knowledge and expertise to do so. (Kaplan v. Karpfen, 57 A.D.3d 409 410). The expert stated that he is fully familiar with tracheotomy and tracheostomy equipment and the standard of care for treating and rendering care to tracheotomy/tracheostomy patients. He also stated that he is fully familiar with the causes and types of injuries that result from dislodgment or blockage of tracheotomy/tracheostomy tubes in patients who lack the ability to breath without supplementary oxygen, such as the decedent.

Plaintiff's medical expert sufficiently raised issues of fact as to whether defendant deviated from accepted medical practice based on (1) whether the decedent demonstrated controlled movements, (2) whether the decedent's prognosis was poor, (3) whether the decedent had a notable history of pulling tubes out which indicated his he was in respiratory distress due to poor airway patency and maintenance, (4) whether the decedent was monitored appropriately, (5) what the primary cause of decedent's death was, (6) whether the defendant was properly equipped and staffed to care for the plaintiff, and (7) whether the decedent had copious secretions.

It is further noted that both of plaintiff's expert affidavits fail to address the Treatment Administration Records, which show the nurses performing suctioning and tracheostomy care every shift of every day. However, these records still do not identify how many times or at what time during each shift care was administered. There is also a lack of progress notes from February 11, 2009, which plaintiffs' experts opine is a deviation from the accepted standard of nursing home care. Furthermore both of plaintiffs' experts opined that the decedent required individualized care, specific to his needs. They both opine that treating him in accordance with a rote formula of care was a deviation from the good and accepted standards of nursing home care. Nurse Brown further opined that providing suctioning once per shift is a deviation from the accepted standard of nursing care. Furthermore, because there is an issue of fact over whether the decedent had copious secretions, Dr. Kolodny's opinion that copious secretions require suctioning every 10-15 minutes further demonstrates that there is an issue of fact over whether the frequency and standard of care was sufficient for the decedent's condition.

It is also noted that defendant correctly raised the fact that Nurse Brown, as a nurse cannot testify on medical opinions. As defendant pointed out, a nurse does not possess the requisite medical degree to testify as to what constitutes a good and accepted standard of medical care. (Elliot v. Long Island Home, Ltd., 12 A.D.3d 481; Mills v. Moriarty, 302 A.D. 2d 436; LaMarque v. North Shore Univ. Hosp., 227 A.D. 2d 594; Douglass v. Gibson, 208 A.D. 2d 856). However, a registered nurse's testimony regarding the good and accepted standards of nursing care is sufficient to raise triable issues of fact. (Zak v. Brookhaven Memorial Hosp. Medical Center, 54 A.D.3d 852; Abalola v. Flower Hosp., 44 A.D.3d 552; Elliot v. Long Is. Home, Ltd., 12 A.D. 3d at 482; Mills v. Moriarty, 302 A.D. 2d 436; Lyons v. McCauley, 252 A.D. 2d at 517; Glasgow v. Chou, 33 A.D. 3d 959).

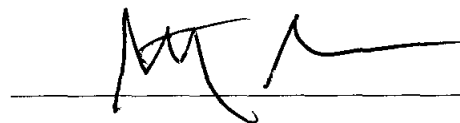
The expert affidavit of Nurse Brown sufficiently raised triable issues of fact regarding whether the defendant deviated from the good and accepted standards of nursing home care as to: (1) whether the decedent was properly monitored, (2) whether the defendant was properly staffed and equipped to care for a patient of the decedent's nature, and (3) whether the notes taken by the nurses deviated from the good and accepted standard of nursing care.

Plaintiff's evidence sufficiently showed issues of fact regarding whether defendant deviated from good and accepted standards of nursing home care. "[S]ummary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. (Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223; Moskowitz v. Garlock, 23 A.D.2d 943, 944).

Based upon the foregoing, it is determined that plaintiff failed to adequately refute defendant's *prima facie* entitlement to summary judgment for claims for violations Public Health Law § 2801-d. Thus defendant's motion pursuant to dismiss all claims relating to Public Health Law § 2801-d is granted. Plaintiffs have demonstrated triable issues of fact, sufficient to withstand summary judgment for the remainder of claims, and thus the defendant's motion is hereby denied on all other claims.

This constitutes the decision and order of the court.

Dated: July 16, 2014



STANLEY GREEN, J.S.C.