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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EA 9/4/14 E

PRESENT: GEORGE J. SILVER Justice

PART 10

Index Number : 800337/2011
COONEY, THOMAS
vs.
NEW YORK CITY HEALTH
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

RECEIVED
SEP 03 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

FILED
SEP 04 2014
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: SEP 03 2014

George J. Silver, J.S.C.
GEORGE J. SILVER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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THOMAS COONEY,

Plaintiff,

Index No. 800337-2011

-against-

DECISION/ORDER

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendant.

----------X

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause, Affidavits & Exhibits.....	1, 2
Answering Affirmation, Affidavit(s), Exhibits & Memorandum of Law.....	3, 4
Replying Affirmation, Affidavit(s) & Exhibits.....	

In this medical malpractice action defendant New York City Health and Hospitals Corporation (defendant) moves by notice of motion dated January 15, 2014 for an order granting it summary judgment and dismissing the complaint of plaintiff Thomas Cooney (plaintiff). Plaintiff opposes the motion. Plaintiff alleges in his verified bill of particulars that he was admitted to Bellevue Hospital Center (Bellevue) for an acute spinal infarction but, as a result of defendant's negligence, developed a decubitus sacral ulcer.

In support of the motion, defendant submits an affirmation from Dr. Luigi Capobianco (Capobianco), a physician board certified in family practice, internal medicine and geriatrics. Capobianco is also certified in wound care by the American Board of Healing and a member of the National Pressure Ulcer Advisory Panel. Based upon a review of the hospital records and deposition testimony, Capobianco contends that on June 16, 2010 plaintiff drank several glasses of scotch and also consumed substantial amounts of Ativan and Percocet. Plaintiff thereafter passed out and was not found until the morning of June 18, 2010, at which time an ambulance was called and plaintiff was taken to Bellevue. Upon arrival at Bellevue plaintiff was diagnosed with a spinal infarction that rendered him paralyzed from the upper chest area down. Capobianco further contends that at the time plaintiff presented to Bellevue he was obese, diabetic and had

significant history of chronic alcohol abuse and smoking. According to Capobianco, plaintiff was also suffering from advanced cardiovascular disease and had undergo coronary artery bypass tow months prior to collapsing at home on June 16, 2010. Plaintiff also suffered a complete dehiscence of his wound from the coronary bypass and had to be readmitted to Lenox Hill Hospital for surgical management of that condition.

Capobianco contends that upon admission to Bellevue, plaintiff had an abnormally low total lymphocyte count, low albumen levels, elevated CPK enzymes, low calcium and low platelets. Plaintiff was also diagnosed upon admission with rhabdomyolysis and was in acute renal failure. When plaintiff was discovered in his home on June 16, 2010 he was found lying motionless and, according to Capobianco, the extended amount of time plaintiff was motionless led to the rhabdomyolysis and out plaintiff at greater risk for sacral skin breakdown. Capobianco contends that based upon photographs of plaintiff taken at Bellevue on June 18, 2010, plaintiff had already sustained serious and significant skin breakdown in several areas, including his buttocks and sacrum. Capobianco further contends that these photographs establish that plaintiff had sustained deep tissue injury prior to his admission to Bellevue.

According to Capobianco, when a person suffers an event of the nature that plaintiff suffered at his home and remains in the same position for the length of time plaintiff allegedly did, is obese and has the comorbidities plaintiff had, perfusion, or blood flow, become significantly diminished. The lack of perfusion results in rhabdomyolysis which is characterized by muscle death and significantly damaging alterations in important metabolic regulators such as CPK levels, calcium levels and platelet levels. According to Capobianco, the rhabdomyolysis complex also causes renal failure which in turn has a direct affect on the ability of the skin to withstand the event. Rhabdomyolysis is systemic and when its effects are manifested in skin breakdown, they do not only occur in areas where pressure is exerted on the skin. In sum, Capobianco claims that in this case the trauma sustained by plaintiff that caused him to blackout on June 16, 2010 and to remain in the same position for at least 30 hours resulted in rhabdomyolysis, which in combination with plaintiff's predisposing state of health, caused a widespread lack of perfusion that resulted in a deep tissue injury, the severest type of skin breakdown, and not a pressure ulcer. Capobianco claims that plaintiff sustained deep tissue injury not only in the sacrum area, but also in other areas that where not bearing any weight or pressure while he was motionless, including the inside of his knee, the side of his foot and his tongue. Capobianco also contends that a deep tissue injury cannot be improved or reversed by the kind of wound care the Bellevue staff is alleged to have negligently performed.

Capobianco further opines that even if plaintiff did suffer a pressure ulcer, the pressure ulcer did not develop as a result of a departure by Bellevue from good and accepted medical practices. According to Capobianco, there are three accepted essential methods of treating pressure ulcers: off-loading, wound care and nutrition. Capobianco contends that plaintiff was properly placed in a bed with a specialized air mattress while he was in the ICU and, while he was on a medical floor, in a mattress mechanized for off-loading bed-bound patients. In addition, barrier creams were applied and a dietician was consulted who placed plaintiff on a high protein and high caloric diet with vitamin supplementation and zinc additives, all of which Capobianco argues are optimum for wound healing. When the three essential methods of wound care fail, as Capobianco claims they did here, the condition is termed an "unavoidable ulcer."

In opposition to the motion, plaintiff submits an affidavit from Dr. Alok Gupta (Gupta) who is board certified in vascular surgery and general surgery[1]. In contrast to Capobianco, Gupta contends that the injury to plaintiff's sacral area occurred not during the time plaintiff was laying unconscious, face down in his home but after he arrived at Bellevue. Gupta claims that a pressure ulcer is not distinct from but is a type of deep tissue injury. Gupta also contends that it is nearly impossible for such an injury to develop without pressure. According to Gupta, a deep tissue injury will not form in areas of the body that are not affected by pressure no matter how poor the overall health of the patient may be. Therefore, since plaintiff was found face down in his home there could not have been any pressure placed on his sacral area while he was unconscious and a deep tissue injury or pressure ulcer could not have formed there prior to his admission to Bellevue. Gupta also contends that rhabdomyolysis has no bearing on the formation of deep tissue injuries or pressure sores because it is a process that primarily affects the kidneys. According to Gupta, rhabdomyolysis does not cause lack of perfusion, does not cause spinal infarction and does not cause deep tissue injuries or pressure sores. Gupta also contends that even if plaintiff had developed a sacral wound prior to his arrival at Bellevue, Bellevue's departures from the standard of care were a substantial factor in contributing to plaintiff's injury and made the injury worse[2].

With respect to standard of care, Gupta contends that defendant deviated from good and accepted medical practice by (1) failing to reposition plaintiff every two hours, (2) failing to identify plaintiff as high risk for developing pressure ulcers after plaintiff's paralysis had been discovered, (3) failing to obtain a surgical consultation and to debride the sacral wound once it became necrotic, (4) failing to treat the sacral wound with through the application of the proper topical products once the wound became necrotic, (5) failing to provide an air bed once plaintiff was transferred out of the MIUC unit. Gupta contends that each of these departures was a substantial factor in causing plaintiff's injuries.

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]; *Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562, 404 NE2d 718, 427 NYS2d 595 [1980]; *Silverman v Perlbinder*, 307 AD2d 230 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]). Thus, the motion must

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[1] Gupta is licensed to practice medicine in Indiana and his affidavit was sworn to before a notary in Indiana but is not accompanied by a certificate of conformity as required by CPLR § 2309 [c]. However, the Appellate Division, First Department has held that the certificate of conformity requirement is not a rigid one so long as the oath is duly given and the absence of such a certificate is a mere irregularity not a fatal defect (*Indemnity Ins. Corp. v A 1 Entertainment LLC*, 2013 NY Slip Op 04701; *Matapos Tech. Ltd. v Compania Andian de Comercio Ltda*, 68 AD3d 672 [1st Dept 2009]).

[2] Gupta's speculative assertion that defendant departed from accepted standards of medical care in its treatment of plaintiff because of plaintiff's status as a homosexual was not considered by the court.

be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]).

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212 [b]). Thus, where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717, 497 NE2d 680, 506 NYS2d 313 [1986]; *Zuckerman*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, 49 NY2d at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned, since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686, 465 NE2d 30, 476 N.Y.S.2d 523 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Stewart M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 385 NE2d 1238, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 386 NE2d 258, 413 NYS2d 650 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1st Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*id.*).

A defendant in a medical malpractice action establishes prima facie entitlement to summary judgment when it establishes that in treating the plaintiff it did not depart from good and accepted medical practice or that any such departure was not the proximate cause of the plaintiff's alleged injuries (*Scalisi v Oberlander*, 96 AD3d 106 [1st Dept 2012]). Once a defendant hospital meets its burden, the plaintiff must rebut defendant's prima facie showing via medical evidence attesting that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged (*id.*). Generally, "the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544, 784 NE2d 68, 754 NYS2d 195 [2002]). Additionally, plaintiff's expert's opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 307, 833 NYS2d 89 [2007] [citation omitted]). However, if "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz* at 544). "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice," do not suffice (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 501 NE2d 572, 508 NYS2d 923 [1986]).

The conflicting expert evidence offered by both parties as to whether plaintiff's sacral wound developed prior to his admission to Bellevue and could not be improved or reversed by

the Bellevue staff or, as plaintiff contends, developed upon his admission to Bellevue as a result of departures from accepted care by Bellevue's staff warrant denial of the summary judgment motion. The ultimate assertions of plaintiff's expert, which are not speculative or unsupported by the evidentiary record, are sufficient to raise triable issues of fact in response to defendant's prima facie showing and to preclude a grant of summary judgment in defendant's favor (*Diaz* at 544). "Resolution of issues of credibility of expert witnesses and the accuracy of their testimony are matter within the province of the jury" (*Griffin v Cerabona*, 103 AD3d 420 [1st Dept 2013] *quoting Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 25 [1st Dept 2009]; *Florio v Kosimar*, 79 AD3d 625 [1st Dept 2010]). To grant defendant's motion would require the court to engage in fact-finding, to discount the affidavit of plaintiff's expert and to substitute its own medical judgment, all of which are impermissible (*Scalisi v Oberlander*, 96 AD3d 106 [1st Dept 2012]).

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that the parties are to appear for a status conference on November 15, 2014 at 9:30 am in room 422 of the courthouse located at 60 Centre Street, New York, New York 10007; and it is further

ORDERED that defendant movant is to serve a copy of this order, with notice of entry, upon plaintiff within 20 days of entry.

George J. Silver, J.S.C.

Dated: SEP 0 3 2014
New York County

FILED GEORGE J. SILVER

SEP 04 2014

COUNTY CLERK'S OFFICE
NEW YORK