

Rosario v New York Westchester Square Med. Ctr.

2015 NY Slip Op 30217(U)

January 15, 2015

Supreme Court, Bronx County

Docket Number: 304119/09

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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MIGUEL ROSARIO as Administrator of the Estate of
ALICE ROSARIO,

Plaintiff(s),

INDEX No.: 304119/09

-against-

NEW YORK WESTCHESTER SQUARE MEDICAL
CENTER, UNITED ODD FELLOW AND REBEKAH
HOME d/b/a REBEKAH REHAB AND EXTENDED
CARE CENTER, and "REBEKAH REHAB AND
EXTENDED CARE CENTER,"

Defendant(s)

DECISION

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HON. STANLEY GREEN:

The motion by United Odd Fellow and Rebekah Home (UOF) for summary judgment dismissing the complaint is denied.

Plaintiff claims that as a result of UOF's staff's failure to provide proper skin care and treatment to decedent from September 22, 2008 through October 17, 2008, a sacral ulcer that formed during decedent's hospitalization at Westchester Square Medical Center (WSMC), from September 6 - 22, 2008, progressively worsened, causing pain and suffering and death.

Decedent, who was first admitted to UOF in April 2001 with diagnoses of dementia and anemia, was transferred to Westchester Square Medical Center (WSMC) on September 6, 2008, due to blood loss, anemia and a urinary tract infection. On September 15, 2008, nurses at WSMC noted that decedent had developed Stage II pressure ulcers of the sacrum and buttocks areas. The ulcers were treated with Hydrogel during the remainder of her hospital stay. The PRI (patient review instrument) prepared by the hospital on September 22, 2008 indicates that

decedent had Stage III pressure ulcers of the sacral and buttocks areas.

Upon readmission to UOF on September 22, 2008, a nursing assessment was performed and pressure ulcers of the sacrum and left and right buttocks were noted. Progress notes dated September 24, 2008 indicate that decedent had a Stage IV pressure ulcer of the sacrum, Stage IV pressure ulcer of the left buttock area and Stage II pressure ulcer of the right buttock area. A physician's note dated September 24, 2008 indicates that decedent had a Stage IV pressure ulcer of the sacrum, a Stage IV pressure ulcer of the left buttocks area and a Stage II pressure ulcer of the right buttocks area.

According to UOF's records, decedent received various nursing skin wound care interventions, including daily skin assessments, turning and positioning, cleansing with normal saline and application of Santyl covering to the sacral and left/right buttocks ulcers along with application of Mycolog cream. Decedent was also seen by VOHRA wound care (an outside independent wound care service) for weekly evaluations during which she underwent skin wound debridement of necrotic tissue along with dressing changes. VOHRA's last wound care assessment, on October 15, 2008, indicates that the Stage IV sacral ulcer and Stage II right buttocks ulcer were noted to be healing, with the Stage IV left buttock ulcer noted to be improved. The UOF chart indicates that the Stage IV sacral ulcer that was 6 x 4 cms on September 24, 2008 was 4.7 x 3.8cms on October 15, 2008, the Stage IV left buttock ulcer that was 4 x 3.8 cms on September 24, 2008 was 3 x 2.5 cms on October 15, 2008, and the Stage II right buttock ulcer that was 6 x 5 cms on September 24, 2008 was .9 x 0.3 cms on October 15, 2008.

On October 17, 2008, decedent was sent emergently to WSMC with an admitting

diagnosis of sepsis and severe anemia. While admitted to WSMC, decedent developed a GI bleed which required multiple blood transfusions. She also underwent a colonoscopic biopsy which revealed moderate differentiated adenocarcinoma. Colon surgery was performed, after which decedent developed post operative complications, including leakage, bleeding and acute renal failure. She died on December 12, 2008. The death certificate lists the immediate cause of death as colon carcinoma, with severe anemia listed as another significant condition.

UOF seeks dismissal of the complaint and all cross-claims on the grounds that the care and treatment rendered to decedent was appropriate and in accordance with good and accepted standards of nursing home care and decedent's death was due to the colon carcinoma and not as a result of the pressure ulcers or any complications stemming from them.

In support of the motion, UOF submits the affirmation of Dr. Capobianco, who is Board Certified in family practice and geriatric medicine, a certified wound specialist physician, and the Medical Director of a long term care facility. Dr. Capobianco opines, based on his review of the records and testimony, that the care and treatment rendered to decedent at UOF from September 22, 2008 through October 15, 2008 was appropriate and within the standards of nursing home care, as evidenced by the fact that decedent did not develop any additional and/or new pressure ulcers during this time period and the fact that the pressure ulcers of the sacral and left and right buttock areas decreased in size and were noted to be healed or improving during this time period.

Dr. Capobianco notes that: (1) UOF's care plans contained various preventative skin wound care interventions, including prompt incontinence care, toileting schedules, wash/dry/lubricate peri-anal area and body prominences after every incontinent episode, turn and position, avoid prolonged sitting, provide adequate nutrition /hydration, assess skin condition

during daily care and keep skin dry and well lubricated; (2) treatment sheets document that decedent received various nursing skin wound care interventions including cleansing with normal saline and application of Santyl covering to the sacral and left/right buttocks ulcers along with the application of Mycolog cream; (3) decedent was seen in consult by VOHRA wound care and underwent skin wound debridement of necrotic tissue along with dressing changes; (4) VOHRA wound care assessment of October 15, 2008 shows that the plan of care as to skin wound interventions proved to be effective as the pressure ulcers, including the sacral ulcer, were healing or improved.

Dr. Capobianco notes that there is a "lack of turning and positioning in United Odd Fellow's nurse's aids records during Fall 2008 following the plaintiff's readmission to the nursing home from Westchester Square Medical Center on September 22, 2008," but opines that this is of no consequence because decedent "had developed ulcers on both the left and right buttocks areas such that turning and positioning of the plaintiff 30 degrees to either side would not have alleviated pressure on her pressure ulcers" and "would not have been an effective pressure relieving intervention under such circumstances." He also opines that "any lack of documentation was of [no] consequence "as the nursing home chart clearly demonstrates that the plaintiff achieved improvement in her sacral and left/right buttocks ulcers which were noted to have both decreased in size and have been healing as a result of the nursing wound care interventions rendered during the course of her final nursing home stay of September 22, 2008 - October 17, 2008." Dr. Capobianco concludes that UOF's skin wound care did not cause or contribute to the development or progression of decedent's pressure ulcers or to her death.

Plaintiff contends that UOF has failed to establish its entitlement to summary judgment as

a matter of law because Dr. Capobianco's opinion that the nursing home care plan indicates that plaintiff received various skin wound interventions including turning and positioning every two hours as required by protocol, is not consistent with the CNA accountability records which show that this was not being done as the section is marked "N/A" for August, September and October and Dr. Capobianco makes no reference to this omission from the UOF chart, concluding that "all of the appropriate care was given." Plaintiff also notes that Dr. Capobianco fails to explain why the sacral ulcer progressed to a necrotic ulcer with exposed bone requiring decedent to be sent emergently to the hospital on October 17, 2008 with sepsis.

In opposition to the motion, plaintiff submits the affidavit of Dr. Khimani, who opines that UOF staff departed from good and accepted nursing home care by failing to properly monitor the sacral pressure ulcer and by failing to turn and reposition decedent. He notes that the turning and positioning section of the Accountability records for August, September and October indicates "N/A" for August, September and October and opines that this indicates that the staff was not aware that decedent needed to be turned and repositioned every two hours as accepted nursing practice and the nursing home's own policy required. He opines that this shows that the nursing home staff was not actually checking and treating decedent's skin, but was simply checking off boxes, in violation of decedent's nursing home rights under the Public Health Law and proximately causing the sacral ulcer to worsen to the point where the coccyx bone became exposed and infected. Dr. Khimani also notes that although VHORA was called in to assess and treat the ulcers, it is the responsibility of nursing home staff to administer daily treatments as ordered and to monitor, track and measure decedent's wounds. He opines that the fact that on October 16, 2008, a physician noted that the coccyx was contaminated with stool, that the

medication records have gaps and do not document that the nurses were assessing decedent for pain or providing Tylenol a half hour prior to any wound dressing changes evidences departures from good and accepted nursing practice by UOF staff that contributed to decedent's claimed injuries.

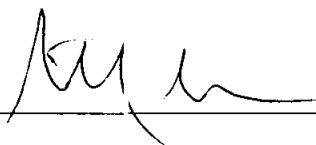
On a motion for summary judgment, it is the burden of the summary judgment proponent to demonstrate, prima facie, that he is entitled to judgment as a matter of law with evidence sufficient to eliminate any material issue of fact; failure to do so requires denial of the motion regardless of the sufficiency 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).

Despite UOF's contention to the contrary, the evidence presented is insufficient to establish its entitlement to judgment as a matter of law. While Dr. Capobianco opines that the care and treatment rendered by UOF staff was within good and accepted standards of nursing home practice, his opinion that the preventative and actual skin wound care rendered to decedent was "entirely appropriate" during the courses of her nursing home stay is based, in part, upon the nursing home care plan, which indicates that decedent received various interventions, including turning and positioning, which is contrary to the CNA Accountability records. Although Dr.

Capobianco addresses this issue later in his affirmation by opinion that “any lack of turning and positioning” was of [no] consequence, because the chart shows that the decedent achieved improvement in her sacral and buttocks ulcers, he does not explain why the change in the sacral ulcer to the point that the bone was exposed and decedent developed osteomyelitis was not a “worsening” of the sacral ulcer causally related to the failure to properly monitor and treat the wound. In any event, the opinion of Dr. Khimani, that the UOF staff departed from the standard of good and accepted nursing home care by failing to properly monitor, assess and treat decedent’s pressure ulcer , coupled with the records which show that the care plan was not followed and that changes were made in the records, raise material issues of fact as to whether UOF staff departed from the standard of care in their treatment of decedent and if so, as to whether those departures were a substantial factor in causing the claimed injuries. Accordingly, UOF’s motion for summary judgment must be denied.

This constitutes the decision and order of the court.

Dated: January 15, 2015



STANLEY GREEN, J.S.C.