Durka v Baiting Hollow Enters., LLC
2016 NY Slip Op 32207(U)
September 16, 2016
Supreme Court, Suffolk County
Docket Number: 25743/2011
Judge: William B. Rebolini

[* 1]

COPY

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Nicholas Durka and Jacqueline Durka,	Index No.: 25743/2011
Plaintiffs,	Attorneys [See Rider Annexed]
-against-	Motion Sequence No.: 008; MG Motion Date: 4/27/16 Submitted: 7/27/16
Baiting Hollow Enterprises, LLC, Baiting Hollow Restaurant Group, LLC., Lobster Roll, Inc., Lobster Roll Northside, Central Suffolk Hospital d/b/a Peconic Bay Skilled Nursing Facility, Devendra Singh, M.D., Bhanumathy Vinayagasundaram, M.D. and Vohra Health Services, PA,	Motion Sequence No.: 009; MG Motion Date: 4/27/16 Submitted: 7/27/16
Defendants.	

Upon the following papers numbered 1 to 44 read upon this motions for summary judgment: Notice of Motion and supporting papers, 1 - 12; 20 - 35; Answering Affidavits and supporting papers, 13 - 16; 36 - 42; Replying Affidavits and supporting papers, 17 - 19; 43 44; it is

ORDERED that motions (008) and (009) are consolidated and decided herein; and it is further

ORDERED that the motion by defendant Devendra Singh, M.D. for summary judgment in his favor dismissing the complaint as asserted against him is granted; and it is further

ORDERED that the motion by defendant Bhanumathy Vinayagasundaram, M.D. for summary judgment in her favor dismissing the complaint as asserted against her is granted.

Plaintiff Nicholas Durka commenced this action to recover damages for personal injuries he allegedly sustained due to defendants' alleged negligence and alleged departures from good and accepted medical practice. He further asserts causes of action for violations of his rights under Public Health Law §§ 2801 (d) and 2803-c, gross negligence, and lack of informed consent. Plaintiff's wife, Jacqueline Durka, also asserts a derivative claim for loss of services. Plaintiff alleges, in relevant part, that defendant Dr. Devendra Singh, a primary care physician at Peconic Bay

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Skilled Nursing Facility, was negligent in allowing him to develop ulcers (also known as bed sores or pressure sores) on his buttocks while a patient at Peconic Bay Skilled Nursing Facility after a sustaining a fracture of his right hip following a fall at a restaurant operated by the defendant Lobster Roll Northside on February 28, 2009. Following surgical repair of his hip and admission to Peconic Bay Nursing Facility on March 4, 2009, plaintiff alleges that wound care specialist defendant Dr. Bhanumathy Vinayagasundaram was negligent and departed from good and accepted medical practice.

Dr. Devendra Singh now moves for summary judgment in his favor dismissing the amended complaint as asserted against him. Alternatively, he seeks partial summary judgment dismissing plaintiffs' claims for punitive damages under Public Health Law §§ 2801 (d) and 2803-c. In support of the motion Dr. Devendra Singh submits, among other things, the pleadings; an expert affirmation of Barbara Malach, M.D.; his own deposition transcript and the deposition transcripts of plaintiff Nicholas Durka and Dr. Bhanumathy Vinayagasundaram; and plaintiff's medical records. In opposition plaintiff submits an expert affirmation of Anna Flattau, M.D., and the deposition transcript of Anna Law, director of nursing at Peconic Bay Medical Center.

Dr. Bhanumathy Vinayagasundaram also moves for summary judgment in her favor dismissing the amended complaint as asserted against her. In support of the motion, Dr. Vinayagasundaram submits an affirmation of expert witness Gary A. Tannenbaum, M.D.; the pleadings; plaintiff's medical records; and her own deposition transcript. In opposition plaintiff submits an expert affirmation of Anna Flattau, M.D.; his own deposition transcript and the deposition transcripts of his wife, Anna Law and Dr. Singh.

To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant must establish through medical records and competent expert affidavits that it did not deviate or depart from accepted medical practice in the treatment of the plaintiff or that it was not the proximate cause of plaintiff's injuries (*see* ***Castro v New York City Health & Hosps. Corp.***, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; ***Deutsch v Chaglassian***, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; ***Plato v Guneratne***, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]; ***Jones v Ricciardelli***, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]; ***Mendez v City of New York***, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). To satisfy this burden, the defendant must present expert opinion testimony that is supported by facts in the record and addresses the essential allegations in the bill of particulars (*see* ***Roques v Noble***, 73 AD3d 204, 899 NYS2d 193 [1st Dept 2010]; ***Ward v Engel***, 33 AD3d 790, 822 NYS2d 608 [2d Dept 2006]). Conclusory statements that do not address the allegations in the pleadings are insufficient to establish entitlement to summary judgment (*see* ***Garbowski v Hudson Val. Hosp. Ctr.***, 85 AD3d 724, 924 NYS2d [2d Dept 2011]). A physician owes a duty of reasonable care to his or her patients and will generally be insulated from liability where there is evidence that he or she conformed to the acceptable standard of care and practice (*see* ***Spensieri v Lasky***, 94 NY2d 231, 701 NYS2d 689 [1999]; ***Barrett v Hudson Valley Cardiovascular Assoc., P.C.***, 91 AD3d 691, 936 NYS2d 304 [2d Dept 2012]; ***Geffner v North Shore Univ. Hosp.***, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]).

Failure to demonstrate a prima facie case requires denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 5088 NYS2d 923 [1986]). Once the defendant makes a prima facie showing, the burden shifts to

the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Kelley v Kingsbrook Jewish Med. Ctr.***, 100 AD3d 600, 953 NYS2d 276 [2d Dept 2012]; ***Fiorentino v TEC Holdings, LLC***, 78 AD3d 911 NYS2d 146 [2d Dept 2010]). Specifically, in a medical malpractice action, a plaintiff opposing a motion for summary judgment need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing (*see* ***Bhim v Dourmashkin***, 123 AD3d 862, 999 NYS2d 471 [2d Dept 2014]; ***Hayden v Gordon***, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; ***Schichman v Yasmer***, 74 AD3d 1316, 904 NYS2d 218 [2d Dept 2010]).

The amended complaint in this action also asserts causes of action for negligence, gross negligence and violations of the Public Health Law and loss of consortium. The statutory cause of action recites that it is brought pursuant to Public Health Law § 2801–d, which confers a private right of action on a patient in a nursing home for injuries sustained as the result of the deprivation of specified rights (Public Health Law § 2801–d [1]). Relief is predicated on Public Health Law § 2803–c (3) (e), specifically deprivation of "the right to receive adequate and appropriate medical care," and the amended complaint alleges that plaintiff essentially developed pressure ulcers due to defendants' improper and inadequate treatment and the failure to institute a proper plan of care for treatment of the pressure ulcers. It is alleged that these failures and negligence caused plaintiff to develop decubitus ulcers requiring prolonged treatment, multiple debridements and wearing of a wound vac.

The medical records and plaintiff's deposition testimony establish that on February 28, 2009, plaintiff, a 76 year-old retired New York City fireman and postal worker, fell walking down a ramp after a meal at the defendant Lobster Roll restaurant. He presented at Peconic Bay Medical Center and was diagnosed with a displaced intertrochanteric right hip fracture. On March 1, 2009, Dr. Peter Sultan performed surgical repair by open reduction internal fixation. Nursing flowsheets from March 1, 2009 indicate that plaintiff could "self-assist" in repositioning himself. On March 4, 2009, plaintiff was discharged from Peconic Bay Medical Center and admitted to Peconic Bay Skilled Nursing Facility. Upon admission, a "turn and position" order was entered. Dr. Singh was assigned as his attending primary care physician. On March 6, 2009, Dr. Singh performed a physical and took plaintiff's admitting history. Plaintiff's admission records show that he had a history of spinal stenosis, weak bilateral lower limbs, left foot drop, diabetes, obesity, degenerative joint disease, gout, dyslipidemia, postoperative pain, and hypertension. The physical exam revealed no ulcerations on his skin. Dr. Singh set at treatment plan for rehabilitation of plaintiff's right hip and medical management of the hypertension and diabetes. He ordered daily wound checks, a gel cushion and heel floaters.

On March 11, 2009, a progress note documents the finding of new stage II pressure ulcers on plaintiff's left and right buttocks. Dr. Singh was notified and ordered Saf-gel with dry protective dressings to be applied daily. He requested a wound care consultation, prealbumin levels to be taken, and for plaintiff to be turned and positioned every two hours. Lab results, dated March 12, 2009, reference a low prealbumin level.

On March 14, 2009, Dr. Bhanumathy Vinayagasundaram, a wound care specialist, conducted a consultation. Her examination revealed a stage II ulcer on plaintiff's right buttock and a larger stage II ulcer on his left buttock. She recommended that the treatment ordered by Dr. Singh be continued, that a complete blood count test be performed, and that plaintiff's prealbumin levels be monitored. Plaintiff was to be turned and repositioned every two hours, and his sitting sessions were to be limited to two hours. On March 19, 2009, a nutritional assessment report notes the two stage II pressure ulcers and a low prealbumin level. The dietician recommended one scoop of Beneprotein three times a day with meals. On March 20, 2009, Dr. Singh ordered cultures be taken of plaintiff's buttock wounds. On March 21, 2009, the wounds advanced to stage III on the plaintiff's right buttock and stage IV on his left buttock. Dr. Vinayagasundaram debrided both sides. Dr. Vinayagasundaram recommended a change to plaintiff's wound care by discontinuing the Saf-gel and applying collagenase twice a day. Dr. Singh followed the recommendation and wrote the order. Between March 28, 2009 and April 3, 2009, progress notes indicate the wounds improved and were healing. The wound care remained the same. On April 2, 2009, plaintiff's prealbumin levels were within the normal range. On April 4, 2009, the right ulcer was stage III and the left ulcer was stage IV. They were again debrided and plaintiff was discharged.

Dr. Singh has demonstrated his entitlement to summary judgment in his favor as to plaintiff's claims for negligence, medical malpractice, gross negligence, and alleged violations of the Public Health Law §§ 2801 (d) and 2803-c. Dr. Malach, his expert, opines that Dr. Singh conformed to accepted standards of practice. A primary care physician, she opines that Dr. Singh timely performed his initial evaluation and physical examination of plaintiff. He recognized that plaintiff was at risk for skin breakdown and ordered preventative measures. He ordered wound checks, a gel cushion and heel floaters. He also wrote orders for the plaintiff to get out of bed. Upon the finding of ulcerations, she opines, Dr. Singh, "acted swiftly and appropriately." He ordered a wound care consultation, and, in the experts opinion, the wound care ordered by Dr. Singh was "clearly adequate." After consultation with Dr. Vinayagasundaram he followed her recommendations. According to Dr. Malach, wound care is not a function of a primary care physician; rather, it is usually managed by a wound care specialist. Dr. Malach further opines that "there was nothing Dr. Singh did or omitted to do which caused the plaintiff to have skin breakdown. It is my opinion that the plaintiff had multiple co-morbidities that would place him at risk of skin breakdown which were acknowledged and addressed by Dr. Singh." Dr. Malach concludes that "within a reasonable degree of medical certainty that Dr. Singh appropriately and competently provided medical treatment to the plaintiff as an acting primary care physician. There is no evidence that Dr. Singh departed from the standard of care in managing the medical needs of the plaintiff."

Dr. Bhanumathy Vinayagasundaram has also demonstrated her entitlement to summary judgment in her favor as to plaintiff's claims for negligence, medical malpractice, gross negligence, and alleged violations of the Public Health Law (*see* Public Health Law §§ 2801 (d) and 2803-c). Dr. Tannenbaum, her expert, opines that Dr. Vinayagasundaram rendered care and treatment to plaintiff in accordance with good and accepted medical practice. Dr. Tannenbaum avers that "nothing Dr. Vinayagasundaram did or failed to do was a competent producing cause of any claimed injury to plaintiff." Dr. Vinayagasundaram's first contact with plaintiff was on March 14, 2009 for a wound care consultation. Plaintiff's pressure sores were documented as existing on March 11, 2009. Accordingly, Dr. Vinayagasundaram cannot be held responsible for the development of plaintiff's pressure sores prior to her involvement in the case. She also testified that she was an

independent contractor, and had no authority to hire, supervise or train Peconic Bay Skilled Nursing Facility employees. Moreover, she testified that it was not within her authority to make orders in regard to the medical care and treatment rendered to plaintiff. Significantly, plaintiff makes no allegation that the debridements preformed were improper, unnecessary or contraindicated. Her expert avers that the debridements performed did not depart from good and accepted medical practices.

Plaintiff's opposition to Dr. Singh's motion has failed to raise a triable issue of fact (*see* ***Bhim v Dourmashkin***, 123 AD3d 862, 999 NYS2d 471 [2d Dept 2014]). Dr. Anna Flattau, plaintiff's expert, opines "[m]y review of the chart revealed several errors of assessment that did not clearly link to inappropriate care, but that do call into question the level of expertise of the staff." While Dr. Flattau is a board certified in family medicine and specializes in wound care, she did not offer an opinion as to Dr. Singh's departures in his role as a primary care physician. Dr. Flattau's affirmation is largely critical of the nursing home staff, but does not contain an opinion as to whether Dr. Singh, as a primary care physician, properly performed that function. Much of Dr. Flattau's affirmation acknowledges insufficient documentation to form an opinion and speculation on her part. Regarding repositioning she argues a patient who requires a Hoyer lift for transfer "could be" at risk for pressure injury. She opines "[i]t is unclear if it was being consistently used." Significantly, plaintiff's expert affirms "I did not have sufficient documentation to assess if repositioning was consistently recorded." With regard to lowering the head of the bed lower than 30 degrees, which defendant's expert contends was not the standard of care in 2009, Dr. Flattau found no evidence of "a nursing strategy" to keep the head of the bed lowered. As to the need for a pressure relief mattress Dr. Flattau opines, "[w]ithout knowing the manufacturer and brand of the mattress, it is not possible to verify if these mattresses were indeed appropriate for prevention of pressure injury." Yet she concludes "the wound consultant deviated from good and accepted medical practice in relation to the lack of recommendation of an adequate pressure redistribution mattress." It is noted that Anna Law testified that plaintiff was on "a pressure reduction mattress" and there is one "in every single room on 55 beds." With regard to nutrition, Dr. Flattau argues that plaintiff, who was obese at 283.2 pounds on March 7, 2009, and 268.2 pounds on March 16, 2009, and 268.0 pounds on March 19, 2009 "appears to" have been suffering from acute malnutrition. Plaintiff's weight loss, however, is explained by Dr. Malach, who states "[a] fifteen pound weight loss is not unusual for an obese patient whose diet is being controlled in a skilled nursing setting," and that it is a "gross exaggeration" to claim plaintiff was malnourished. With regard to plaintiff's low prealbumin level, Dr. Malach opines "once Dr. Singh was advised of the skin breakdown he immediately ordered a prealbumin. That is the standard of care." There would be no reason, according to Dr. Malach, to order such a test prior to the appearance of skin breakdown. She affirms, once it was known that the prealbumin was low, dietary was consulted. The dietician recommended protein supplement and Dr. Singh ordered it. Plaintiff's next prealbumin level returned to normal.

Plaintiff's opposition to Dr. Vinayagasundaram's motion also fails to raise any issues as to his alleged negligence or deviation from good and accepted medical practice. It is undisputed that Dr. Vinayagasundaram entered the case after plaintiff's pressure ulcers were found. Dr. Flattau fails to reference any of the wound care evaluations, debridements or care provided by Dr. Vinayagasundaram after the pressure ulcers had already developed. Dr. Flattau does not opine that Dr. Vinayagasundaram in any way contributed to the development of plaintiff's pressure ulcers because Dr. Vinayagasundaram did not see plaintiff until after they developed. Moreover, as a

wound care consultant, Dr. Vinayagasundaram testified that she only had authority to recommend treatment and not order it. Significantly, Dr. Flattau does not state that Dr. Vinayagasundaram committed any departures in her care and treatment rendered to plaintiff.

The third cause of action alleges negligent hiring and supervision. Both the testimony of Dr. Singh and Dr. Vinayagasundaram establish that Dr. Singh, as a attending primary care physician, and Dr. Vinayagasundaram, as a wound care consultant, did not have the responsibility to supervise the residential health care facility. Moreover, under Public Health Law § 2801-d (2), residential health care facilities are subject to punitive damages "where the deprivation of any such right or benefit is found to have been willful or in reckless disregard of the lawful rights of the patient." Here, no evidence exists that the alleged failure to prevent plaintiff's pressure sores was willful (***Rey v Park View Nursing Home, Inc.***, 262 AD2d 624, 692 NYS2d 686 [2d Dept 1999]). As to the fourth and fifth causes of action, plaintiff concedes that these causes of action were not asserted against Dr. Singh and Dr. Vinayagasundaram; therefore, they are dismissed as to such defendants. The sixth cause of action alleges lack of informed consent and there is no evidence in this record that plaintiff did not consent to any procedure performed. Accordingly, the amended complaint, as asserted against Dr. Singh and Dr. Vinayagasundaram, is dismissed.

Dated: September 16, 2016

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**

RIDER

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