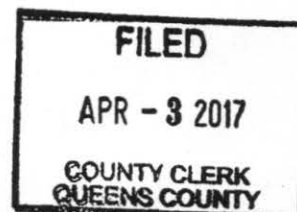


Eskenazi v Long Beach Med. Ctr.
2017 NY Slip Op 31287(U)
March 27, 2017
Supreme Court, Queens County
Docket Number: 20790/2011
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

NORMAN ESKENAZI as executor of the estate
of CELIA ESKENAZI,
Plaintiff,

Index
No. 20790 2011

- against -

Motion
Date February 2, 2017

LONG BEACH MEDICAL CENTER d/b/a THE
THE KAMANOFF CENTER FOR GERIATRIC
AND REHABILITATIVE MEDICINE,
Defendants.

Motion
Cal. No. 50

Motion
Seq. No. 2

The following papers numbered 1 to 3 read on this motion by defendant Long Beach Memorial Nursing Home, Inc. d/b/a Komanoff Center for Geriatric and Rehabilitative Medicine, s/h/a Long Beach Medical Center d/b/a The Kamanoff Center for Geriatric and Rehabilitative Medicine, for an order granting it summary judgment dismissing the complaint against it.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1
Answering Affidavits - Exhibits.....	2
Reply Affidavits.....	3
Memoranda of Law	

Upon the foregoing papers it is ordered that the motion is granted.

I. The Facts

On November 14, 2008, after a hospitalization at Mercy Medical Center, the late Celia Eskenazi, then 84 years old, entered The Komanoff Center for Geriatric and Rehabilitative Medicine, suffering from, among other things, lung cancer and mild dementia. On that date, she entered into an "Admission Agreement" with the Komanoff Center which obligated the

latter to provide her with, inter alia, board, lodging, and “[s]upervision and assistance when necessary, with the activities of daily living.” The defendant’s records described Eskenazi as having “mobility/transfer [e.g. bed to chair and vice versa] problems” and identified her as at “high risk for accidents.” Upon her admission, a comprehensive care plan, which included minimizing the risk of falling, was devised and implemented. On November 17, 2008, a bed alarm was initiated. On December 27, 2008, Eskenazi fell in her room, but she did not injure herself. Although she did not subsequently fall until October 20, 2009, she had a history of making unassisted transfers and of wandering around without help.

During the overnight shift on October 20, 2009, Eskenazi sat by herself in a wheelchair watching television in the second floor West Wing sitting area/hallway of the Komanoff Center. The West and East Wings of the second floor each have a sitting area, where a television, fixed to a wall and placed on top of a shelf, can be watched. On October 20, 2009, at around 1:30 a.m., Eskenazi told Eloner Baksh, Certified Nursing Assistant, that she could not sleep, wanted a snack, and wanted to leave her room. Baksh helped Eskenazi get out of her bed and into her wheelchair, which she then pushed in front of the television in the sitting area. Staff at a nurse’s station could keep Eskenazi under observation. Baksh placed Eskenazi’s wheelchair four feet away from the television, turned the set on, and then left her there alone. While Baksh was at the nurse’s station, the resident in Room 280 activated his call bell, and Baksh left the nurse’s station to go the room. When she left the nurse’s station at around 2:20 a.m., she saw that Eskenazi was still sitting in her wheelchair in front of the television.

Approximately five minutes later, at about 2:25 a.m., Eskenazi, who did not have a remote, got up from her wheelchair for the purpose of changing the channel. The wheelchair did not have an alarm which would have alerted the staff that Eskenazi had risen from the wheelchair. Eskenazi fell and fractured her hip. She called out for help, and Baksh looked out of Room 280 into the hallway, where she saw Eskenazi lying on the floor. Baksh recorded in the “Accident/Incident Investigative Form– Certified Nursing Assistant” dated October 20, 2009 that at 2:20 a.m., “I passed the resident in the corridor sitting in her chair. I was assisting patient in Room 280 when I heard the resident call out. When I looked out the room, patient was on the floor.”

Although she was taken to the adjacent hospital, doctors ruled out surgery because of her age and medical problems, and on October 22, 2009, Eskenazi returned to the Komanoff Center as a hospice patient. She died four days later on October 26, 2009 from respiratory failure secondary to a fractured right hip.

II. Procedural History

Norman Eskenazi, the administrator of the decedent's estate, began this action by the filing of a summons and a complaint on or about September 6, 2011. The complaint asserted causes of action for negligence, the violation of Public Health Law § 2801-d (1), and wrongful death. Public Health Law § 2801-d, "Private actions by patients of residential health care facilities," establishes a private right of action for a patient in a nursing home for injuries sustained as the result of the deprivation of specified rights (*see Zeides v Hebrew Home for the Aged at Riverdale*, 300 AD2d 178 [1st Dept 2002]).

The plaintiff alleged in his first bill of particulars, dated March 19, 2012, that the Komanoff Center staff did not adequately monitor and supervise the decedent, failed to respond to her calls for assistance, and failed to take "reasonable measures to prevent [her] from falling while trying to reach change [sic] the channel on the television." The plaintiff's supplemental bill of particulars, dated August 7, 2012, alleged that the defendant had "fail[ed] to place the television at an easily accessible height" and had "fail[ed] to provide a television remote control in proper working order." The plaintiff's second supplemental bill of particulars, dated September 30, 2016, alleged that the decedent's injuries also occurred because of an absence of a wheelchair alarm.

III. Discussion

"[T]he 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 NY2d 320, 324 [1986]). Defendant Komanoff Center successfully carried this burden through the submission of an affirmation from Barbara Tommasulo, MD, who, in addition to her other credentials, is the Administrator at the Northwell Health Orzac Center for Rehabilitation and an Assistant Professor of Medicine at Hofstra Northwell School of Medicine. She states, among other things:

"The determination of the particular fall preventions to be used in the nursing home setting . . . involves a multi-factorial assessment of the resident, including their history of falls, underlying illnesses and medical problems, medications, functional status, sensory status, psychological status, toileting needs and the status of their surrounding environment. . . .

"The Record reveals that upon Ms. Eskenazi's presentation to the Komanoff Center on November 14, 2008, inter-disciplinary assessments of her

risk for falls were undertaken, . . . which resulted in the creation of a Care Plan to address her risk for falls and that these interventions were implemented. . . .

“As revealed by the ‘Evaluation of Comprehensive Care Plan’ page of her Falls Care Plan, Ms. Eskenazi’s Care Plan was re-evaluated monthly

“As revealed by the pertinent deposition testimony and Accident/Incident materials, Ms. Eskenazi was last seen before the accident by Eloner Baksh, CNA, her assigned nurse’s aide, as well as Darnell Campbell, CNA between two to five minutes before the accident. . . .

“There is no evidence in the record suggesting that [Ms. Eskenazi] engaged in similar behaviors, i.e., arising from her wheelchair without staff assistance or prior falls while using her wheelchair, that would have warranted closer observation of Ms. Eskenazi.”

Tommasulo concludes: “[I]t is my opinion, within a reasonable degree of medical certainty, there were no departures in the care and treatment rendered by the Komanoff Center . . . in connection with its treatment of Celia Eskenazi that proximately caused and/or contributed to her fall on October 20, 2009 and the injuries alleged. . . . [I]t is my opinion within a reasonable degree of medical certainty that Plaintiff’s Public Health Law § 2801-d claim, predicated upon purported contractual violations . . . must be dismissed, as the record is devoid of any evidence that Ms. Eskenazi sustained any injuries or damages proximately that were caused by any such violations.”

“To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom” (*Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]; see *Montanez v N.Y. State Elec. & Gas*, 144 AD3d 1241 [3d Dept 2016]; *Murray v New York City Housing Authority*, 269 AD2d 288 [1st Dept 2000]). In the case at bar, the defendant established its prima facie entitlement to summary judgment dismissing the causes of action for negligence and wrongful death by submitting the sixteen-page affirmation of its expert, which: (1) addressed the departures from proper care alleged in the bills of particulars; (2) demonstrated that the nursing home did not depart from the accepted standard of care in its treatment of the decedent; and (3) showed that, in any event, any alleged departure from accepted care was not a proximate cause of Eskenazi’s death (see *Henry v Sunrise Manor Ctr. for Nursing & Rehab.*, 147 AD3d 739 [2d Dept 2017]). In regard to Public Health Law § 2801-d, “[t]he basis for liability under the statute ‘is neither deviation from accepted standards of medical practice nor breach of a duty of care. Rather, it contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code

or rule' ” (*Novick v S. Nassau Communities Hosp.*, 136 AD3d 999, 1001 [2016], quoting *Zeides v Hebrew Home for Aged at Riverdale*, 300 AD2d 178, 179 [1st Dept 2002]; see *Henry v Sunrise Manor Ctr. for Nursing & Rehab.*, *supra*). In the case at bar, the affirmation of the defendant's expert established, *prima facie*, that the Komanoff Center did not violate any contract, statute, regulation, code, or rule and that no such violation was a proximate cause of Eskenazi's injury (see *Novick v S. Nassau Communities Hosp.*, *supra*).

The burden on this motion shifted to the plaintiff, requiring him to submit evidence sufficient to show that there is a genuine issue of fact which must be tried (see *Alvarez v Prospect Hospital*, *supra*; *D'Elia v Menorah Home & Hosp. for Aged & Infirm*, 51 AD3d 848 [2d Dept 2008] [genuine issue of material fact raised concerning whether nursing home negligently failed to take suitable measures to protect patient from foreseeable risk of falling]). The plaintiff attempted to carry this burden through the submission of an affidavit from Kaitlyn Wickman, RN,¹ who asserts that the defendant departed from good and accepted practices of nursing care by, *inter alia*, not providing Eskenazi with a wheelchair alarm, adequate supervision, a remote control for the television, and any means of alerting the staff that she needed assistance. The court finds that the plaintiff failed to raise a genuine issue of fact concerning adequate supervision since the tv area could be seen from the nurses' station, a CNA saw Eskenazi minutes before the accident, the Komanoff Center did not have a duty to provide Eskenazi with one-on-one supervision, and the level of staff provided (one nurse and three CNAs for Eskenazi's fifty bed unit during the night shift) was reasonable under all of the circumstances of this case. The plaintiff also failed to raise a genuine issue of fact concerning the use of a remote control since the defendant did not provide one in order to prevent squabbling among the residents. The plaintiff failed to raise a genuine issue of fact concerning the provision of a means to alert staff of the need for assistance since CNAs at the nurse's station were within voice range. The plaintiff failed to raise a genuine issue of fact concerning whether the Komanoff Center departed from accepted nursing home practices in any other manner.

1. The court notes that defendant, in reply to plaintiff's showing, points out that the Wickman affidavit is not in admissible form and, thus, should not be considered. By correspondence dated March 17, 2017, plaintiff attempted to correct this deficiency by submitting a properly executed affidavit, to which defendant objected by correspondence dated March 23, 2017. Inasmuch as plaintiff's omission could have properly been the subject of a renewal motion (see *e.g. Defina v Daniel*, 140 AD3d 825 [2d Dept 2016]; *Brightly v Dong Liu*, 77 AD3d 874 [2d Dept 2010]), and so as to avoid wasting judicial resources, the technical deficiency with which the court was originally presented was overlooked. In any event, a substantive consideration of the affidavit was insufficient to raise a triable issue of fact, discussed, *infra*.

Although the lack of a wheelchair alarm may have been problematic, the court also finds that the plaintiff failed to raise a genuine issue of fact concerning whether same was a proximate cause of Eskenazi's accident. Tommasulo states: "Wheelchair alarms do not prevent residents from falls, but rather, activate to alert staff when nursing home residents have arisen and/or fallen from their wheelchairs. There is no evidence the Komanoff Center staff would have had enough time to prevent Ms. Eskenazi from falling to the floor after she arose from and/or fell from her wheelchair if a wheelchair alarm had been in place. Since Ms. Eskenazi's fall was unwitnessed, the time differential between when she arose and/or fell from the wheelchair and when she precipitated to the ground is unknown. Likewise, it is unknown as to whether there would have been a reasonable amount of time for the staff to attend to Ms. Eskenazi before she fell to the ground in response to the activation of a wheelchair alarm." Under all of the circumstances of this case, including the fact that Eskenazi's wheelchair was just four feet from the television, a finding of proximate cause would be impermissibly based on mere speculation (*see Acton v 1906 Rest., Corp.*, 147 AD3d 1277 [3d Dept 2017] ["defendants are not liable if the conclusion that defendants' negligence was the proximate cause of decedent's fall would be based on pure speculation"]; *Pascucci v MPM Real Estate, LLC*, 128 AD3d 1206 [3d Dept 2015]; *Ash v City of New York*, 109 AD3d 854 [2d Dept 2013] [pedestrian could not identify the cause of her fall without engaging in speculation]).

Accordingly, the motion is granted. The complaint is dismissed.

Dated: March 27, 2017



J.S.C.

