

<b>Goeller v Nyack Manor Nursing Home</b>
2017 NY Slip Op 33481(U)
November 9, 2017
Supreme Court, Rockland County
Docket Number: Index No. 034252/2015
Judge: Thomas E. Walsh II
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
BRENDA GOELLER, as the Administratrix of the Goods,  
Chattels, and Estate of GLORIA MARIE COLARELLI  
*Plaintiff,*

**DECISION AND ORDER  
ON MOTION FOR  
SUMMARY JUDGMENT**

*-against-*

Index No.: 034252/2015

NYACK MANOR NURSING HOME, SYLVESTER  
ALMIRON, M.D. and NYACK HOSPITAL,

Motion # 1 - MD  
Motion # 2 - MD  
Motion #3 - MG  
DC - N  
Adj: 12/6/17

*Defendant.*

-----X  
*Hon. Thomas E. Walsh, J.*

The following papers, numbered 1 to 5, were considered in connection with Defendant SYLVESTER ALMIRON, M.D.'s Notice of Motion (Motion #1) for an Order, pursuant to Civil Practice Law and Rules § 3212, granting summary judgment and dismissing Plaintiff's Complaint; and also considered in connection with Defendant NYACK MANOR NURSING HOME's Notice of Motion (Motion #2) for an Order (a) pursuant to Civil Practice Law and Rules § 3212 granting summary judgment to the defendant NYACK MANOR NURSING HOME, (b) directing entry of judgment in favor of NYACK MANOR NURSING HOME and (c) for such other, further and different relief as this court may deem just and proper; and also considered in connection with Defendant NYACK HOSPITAL's Notice of Motion (Motion #3) for an Order (a) granting summary judgment to NYACK HOSPITAL pursuant to Civil Practice Law and Rules § 3212, (b) granting summary judgment to NYACK HOSPITAL pursuant to Civil Practice Law and Rules § 3212 for the vicarious liability of co-defendant Dr. Sylvester and (c) such other and further relief as

this court deems just and proper:

**PAPERS**

**NUMBERED**

Notice of Motion (Motion #1)/Affirmation of Jonathan Reed, Esq./Exhibits (A-L)	1
Notice of Motion (Motion #2)/Affirmation of John B. Saville, Esq./Exhibits (A-R)	2
Notice of Motion (Motion #3)/Affirmation of Mary C. Mayhwich, Esq./Exhibits (A-P)	3
Affirmation of Valerie J. Crown, Esq. in Opposition to Motions #1, #2 and #3/ Affidavit of Brenda Goeller/Expert Affidavit/Exhibits (A-Q)	4
Reply Affirmation of Jonathan Reed, Esq. on Motion #1	5

After a detailed and careful review of the foregoing papers, the Court now rules as follows:

This case centers on a nursing home and medical malpractice action in which it is alleged that the Defendants were negligent with respect to the nursing and medical care given to Gloria Marie Colarelli (hereinafter “the deceased”) which they provided while the deceased was in the Defendant’s care from August 2010 through July 2012.

The substance of plaintiff’s allegations is, among others, that defendants departed from generally accepted standards of care by failing to keep the deceased patient safe from falls and failed to administer proper wound care. It is alleged that the foregoing failures caused and or permitted the infection in the patient and to progress to the point that the resulting in death which would otherwise not have occurred had there been a more timely diagnosis and medical treatment.

Summary judgment will be granted only if there is no triable issue of fact, issue finding, rather than issue determination, is the key to summary judgment. The papers on the motion should be scrutinized carefully in the light most favorable to the party opposing the relief [*Judice*

v. DeAngelo, 272 AD2d 583 (2d Dept 2000)] and summary judgment is only appropriate where no material issues of fact exist between the parties [Schultz v. Von Voight, 86 NY2d 865 (1995)]. Where material issues of fact exist that cannot be resolved on the papers filed in support of and in opposition to summary judgement the motion must be denied. [Matter of Suffolk County Department of Social Services V. Jams M., 83 NY2d 178 (1993)]. The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. [Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986)]. The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. [Lacagnino v. Gonzalez, 306 A.D.2d 250 (2d Dept. 2003)]. However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. [Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851 (1985)]. Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. [(Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980)].

Conflicting expert affidavits submitted in summary judgment raise triable issues of fact as to credibility and the accuracy of their testimony and are matters within the province of the jury [Halkias v. Otolaryngology-Facial Plastic Surgery, 282 AD2d 650 (2d Dept 2001); Barbuto v Winthrop Univ. Hosp., 305 AD2d 623 (2d Dept 2003); Shields v Baktidy, 11 AD3d 671 (2d Dept 2004)].

Among the proofs submitted in support of this motion are the expert affidavits of Dr. Clement Landanno, M.D., Lawrence Diamon, M.D. and Gisele P. Wolf-Klein, M.D. In opposition plaintiffs have submitted an affidavit of an unnamed expert. The medical opinions of the Defendant's experts conflict with the unnamed Plaintiff expert. The required element of proof in a medical malpractice action is the deviation or departure from accepted practice and evidence that the departure was the proximate cause of injury or damage. [*Anderson v. Lamaute*, 306 AD2d 232, 233 (2d Dept 2003); *Boutin v. Bay Shore Family Health Center*, 59 AD3d 368, 369-370 (2d Dept 2009)]. Defendants made a prima facie showing of entitlement to summary judgment dismissing the action based upon the affidavits of their medical experts which denied that the Defendants departed from good and accepted medical practices. [*Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986)]. Nevertheless, the affidavit of Plaintiff's expert was sufficient to raise a triable issue of fact regarding the steps taken to protect the deceased from formation of pressure ulcers and treatment of pressure ulcers to prevent infection and ultimate septic shock. [*Shields v. Baktidy*, 11 AD3d at 672]. Therefore, there is a triable issue of fact as to the credibility and accuracy of the testimony, which must be determined by a jury.

Of note, Plaintiff in their joint opposition to Motions #1, 2 and 3 indicated that they are not opposing the Motion for Summary Judgment submitted by Defendant NYACK HOSPITAL, as the Plaintiff's expert has determined that the pressure ulcer occurred while the deceased was residing at Defendant NYACK MANOR NURSING HOME. As such Defendant NYACK HOSPITAL's Motion for Summary Judgment (Motion #3) is granted as unopposed by Plaintiff.

Further, Plaintiff indicates that they are withdrawing the cause of action for lack of informed consent as it does not apply to the facts of the instant action. The fifth cause of action for lack of

informed consent will be marked withdrawn from Plaintiff's Complaint at Plaintiff's request.

Defendants have met their summary judgment burden thereby shifting the burden to Plaintiffs. Plaintiffs have met their summary judgment burden by producing evidentiary proof in admissible form sufficient to establish the existence of material issues of fact. Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. [*Shields v. Baktidy*, 11 AD3d at 672; *Zarzana v. Sheepshead Bay Obstetrics and Gynecology, P.C.*, 289 AD2d 570 (2d Dept 2001); *Darwick v. Paternoster*, 56 AD3d 714, 715 (2d Dept 2008)]. Such credibility issues can only be resolved by a jury. [*Bengston v Wang*, 41 AD3d 625 (2d Dept 2007); *Dandrea v. Hertz*, 23 AD3d 332, 333 (2d Dept 2005)].

It is therefore the finding of this Court that the expert testimony of these learned physicians are at variance with each other and frame material issues of fact that preclude summary judgment and require a trial for their resolution. Based on the foregoing Defendants NYACK MANOR NURSING HOME and SYLVESTER ALMIRON, M.D.'s motions (Motions #1 and #2) are denied in their entirety.

Accordingly, it is hereby

**ORDERED** that Defendant SYLVESTER AMIRON, M.D.'s Motion for Summary Judgment (Motion #1) is denied in its entirety; and it is further

**ORDERED** that Defendant NYACK MANOR NURSING HOME's Motion for Summary Judgment (Motion #2) is denied in its entirety; and it is further

**ORDERED** that Defendant NYACK HOSPITAL's Motion for Summary Judgment (Motion #3) is granted as unopposed; and it is further

**ORDERED** that the instant action as to Defendant NYACK HOSPITAL is dismissed; and

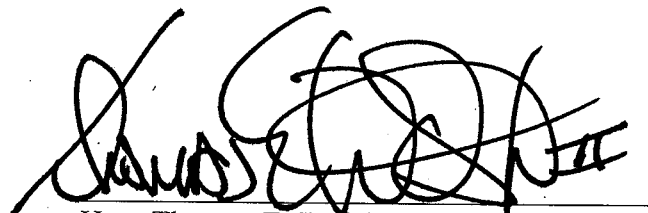
it is further

**ORDERED** that upon application of Plaintiff the Fifth (5th) Cause of Action for lack of informed consent is withdrawn; and it is further

**ORDERED** that the remaining parties are to appear on **WEDNESDAY DECEMBER 6, 2017 at 9:30 a.m. in the TAP Part.**

The foregoing is the Decision and Order of this Court on Motions #1, #2 and #3.

Dated: New City, ~~New~~ York  
November 7, 2017



Hon. Thomas E. Walsh II, J.S.C.

To:

VALERIE J. CROWN, ESQ.  
Attorney for Plaintiff  
(via e-file)

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP  
Attorney for Defendant NYACK HOSPITAL  
(via e-file)

RENDE, RYAN & DOWNES, LLP  
Attorney for Defendant SYLVESTER ALMIRON, M.D.  
(via e-file)

LEWIS, JOHS, AVALLONE, AVILES, LLP  
Attorney for Defendant NYACK MANOR NURSING HOME  
(via e-file)