

Russell v River Manor Corp.

2018 NY Slip Op 34482(U)

November 26, 2018

Supreme Court, Nassau County

Docket Number: Index No. 606029/2016

Judge: Sharon M.J. Gianelli

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU – IAS/TRIAL PART 22
Present: HON. SHARON M.J. GIANELLI, J.S.C.**

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**MARILYN RUSSELL, as Temporary Administrator
Of the Estate of GEORGE RUSSELL, deceased,**

Plaintiff,

Index No. 606029/16

-against-

Mot. Seq. No. 001

**RIVER MANOR CORP.,
KINGSBROOK JEWISH MEDICAL CENTER,
ORLANDO B. CARPIO, M.D. and
ORLANDO CARPIO, M.D., P.C.,**

DECISION & ORDER

Defendants.

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Papers submitted on this motion:

Defendant Kingsbrook’s Notice of Motion, Affirmation, Exhibits in Support ___X
Plaintiff’s Affirmation in Opposition _____X
Defendant Reply Affirmation _____X
Defendant Kingsbrook’s Reply Affirmation _____X

Background

Plaintiff Marilyn Russell’s underlying action against Defendant Kingsbrook Jewish Medical Center (hereinafter “KJMC”) is one for alleged negligence, medical malpractice, and wrongful death for failing to prevent and treat Plaintiff’s decedent father’s pressure ulcers during two (2) hospital admissions: August 15 to August 23, 2013 and September 11 to October 1, 2013, allegedly resulting in Plaintiff’s father’s death on May 21, 2014, approximately eight (8) months following his discharge. Plaintiff also seeks punitive damages based on an allegation of gross neglect.

In the instant action before the Court, Defendant KJMC moves for an Order granting Defendant summary judgment as to KJMC pursuant to CPLR section 3212 dismissing Plaintiff's complaint and directing an Entry of Judgment in favor of KJMC.

Plaintiff opposes asserting that Defendant KJMC's expert's affirmation is conclusory and lacking in the requisite specificity to support a summary judgment claim. Further, Plaintiff alleges that facts concerning the care rendered by Defendant KJMC create triable issues of fact which therefore serves as a bar to summary judgment in favor of Defendant KJMC.

The Court heard oral argument on November 15, 2018.

Facts

The decedent, George Russell, was admitted to Defendant River Manor Nursing Home (hereinafter "River Manor") on September 30, 2009 to undergo rehabilitation following a cerebro-vascular accident. The decedent remained at River Manor until he was transferred to KJMC on August 15, 2013 for treatment of a cough and fever. At the time of his admission to KJMC, Mr. Russell was eighty-one (81) years old, and suffered from numerous pre-existing conditions and multiple co-morbidities, including dementia, hypertension, and uncontrolled diabetes. Additionally, he had limited mobility, could not perform daily self-care, and also had several pressure ulcers. Mr. Russell was

discharged from KJMC on August 23, 2013. On September 11, 2013, Mr. Russell was re-admitted to KJMC's intensive care unit from River Manor for the treatment of septicemia. On October 1, 2013, Mr. Russell was discharged to non-party New York Congregational Nursing Home and received no additional treatment at KJMC. During each stay at KJMC, the decedent was under the care of his doctor, Defendant Dr. Orlando Carpio, and the KJMC staff tended to his daily care.

On May 19, 2014, Mr. Russell was admitted to Brooklyn Hospital with a fever and tachycardia. Upon admission, he was found to have several other co-occurring conditions and illnesses. Mr. Russell died at Brooklyn Hospital on May 21, 2014. The Plaintiff, on behalf of the decedent, thereafter commenced this action to recover damages for negligence, medical malpractice, and wrongful death.

Law/Ruling

“In order to establish liability for medical malpractice, a plaintiff must prove that the defendant deviated or departed from accepted community standards of practice and that such departure was a proximate cause of the plaintiff's injuries. On a motion for summary judgment, a defendant has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby.” *Leavy v Merriam*, 133 A.D.3d 636, 637 [2nd Dept. 2015], citing *Salvia v St Catherine of Siena Medical Center*, 84 A.D.3d

1053 [2011]; *Heller v Weinberg*, 77 A.D.3d 622 [2010]. “Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause.” *Lyons v. McCauley*, 252 A.D.2d 516, 517 [1998], citing *Koehler v. Schwartz*, 48 N.Y.2d 807, [1979]. The movant must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985]; see also *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). Once such a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action (see *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986], see also *Zuckerman v. City of New York*, *supra*).

Here, Defendant KJMC made a *prima facie* showing warranting summary judgment by submitting the affirmation of an expert doctor, Dr. Jeffrey Levine, M.D., A.G.S.F., C.W.S.-P, which provided a detailed account of the decedent’s care and treatment while under admission at Defendant KJMC. The affirmation provided a detailed assertion that KJMC did not engage in negligence in the care and treatment of the decedent nor did it depart from accepted standards of care in his treatment, and concluded that the decedent’s age, critical health status, pre-existing conditions (including pressure ulcers), significant co-morbidities,

and declining health prior to his stay at Defendant KJMC were the cumulative cause of the injuries suffered by Mr. Russell which led to his death.

An affirmation in opposition submitted by Plaintiff's expert, Dr. Perry Starer, MD, alleged that Defendant KJMC's expert conclusions lacked required specificity and were conclusory. He further alleged that Defendant KJMC failed to create a care plan for the decedent's pressure ulcers and failed to properly assess the decedent's pressure ulcers and to implement appropriate pressure ulcer interventions, leading to the development of serious pressure ulcers and a worsening of the existing pressure ulcers, which resulted in serious injuries and was a proximate cause of his death.

Plaintiff's expert's assertions concerning the alleged deficiencies in Defendant KJMC's expert affirmation are contradicted by the very content and substance of Defendant KJMC's expert affirmation, which provides a sufficiently detailed account of the care rendered by KJMC to the decedent during his two (2) stays at KJMC. Further, the Court finds that evidence of some missing patient chart information, as well as certain arguably less-detailed chart information pertaining to an aspect of the decedent's care is not material relative to the total body of material and pertinent information kept and maintained by Defendant KJMC concerning the decedent's care. Further, as Plaintiff's expert fixes Defendant KJMC's alleged lack of proper planning and care of Mr. Russell as "a proximate cause" of his death, Plaintiff's expert failed to sufficiently counter

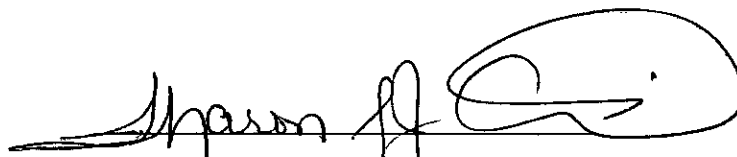
KJMC's expert's assertions that decedent's age, critical health status, pre-existing conditions (including pressure ulcers), significant co-morbidities, and declining health led to his injuries then ultimate death.

Upon hearing oral argument and reviewing the submissions of the parties, and upon consideration of a totality of the facts and circumstances herein, Defendant KJMC's application for an Order awarding summary judgment pursuant to CPLR section 3212 dismissing Plaintiff's complaint and directing an Entry of Judgment in favor of KJMC is **GRANTED**.

All requests not specifically addressed herein are **DENIED**.

This constitutes the Decision and Order of the Court.

DATE: November 26, 2018
Mineola, New York



HON. SHARON M.J. GIANELLI,
Justice of the Supreme Court

ENTERED

DEC 26 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE