

Sweeney v River Manor, Corp.
2019 NY Slip Op 30900(U)
March 26, 2019
Supreme Court, Kings County
Docket Number: 506186/16
Judge: Edgar G. Walker
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At an IAS Term, Part 90 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of March, 2019.

PRESENT:

HON. EDGAR G. WALKER,
Justice

-----X
SONIA SWEENEY, AS ADMINISTRATRIX OF THE
ESTATE OF JOSEPH SWEENEY, DECEASED

Plaintiff,

- against -

RIVER MANOR, CORP. D/B/A RIVER MANOR
CARE CENTER, INC., ORLANDO B CARPIO M.D.,
AND MICHEL-JOSE CHARLES, M.D.,

Defendants.
-----X

Index No. 506186/13

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The following papers numbered 1 to 6 read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

Papers Numbered

1-3

4-5

6

Defendant Orlando B Carpio M.D. (Dr. Carpio) moves, pursuant to CPLR 3212, for an order granting him summary judgment dismissing the complaint as against him by plaintiff, Sonia Sweeney, as administratrix of the estate of Joseph Sweeney, deceased. Dr. Carpio's summary judgment motion, as more fully explained below, is granted, and the complaint is dismissed as against him.

Background

Plaintiff's decedent (decedent) was a longtime resident in codefendant River Manor Care Center, Inc.'s nursing home (River Manor). Decedent was discharged from Brookdale Hospital in 2006 after receiving treatment for a stroke and then admitted to River Manor. Dr. Carpio was decedent's attending physician at River Manor on and for some time prior to April 12, 2013. Shantel Harper, a licenced practical nurse, working at River Manor found decedent's percutaneous endoscopic gastronomy (PEG) tube dislodged at about 9:00 a.m. on April 12, 2013. Salima Khalikaprasad, a registered nurse also employed at River Manor, telephoned Dr. Carpio about decedent's dislodged PEG tube also at about 9:00 a.m., according to undisputed testimony and River Manor records.

Dr. Carpio, upon learning of the dislodged PEG, ordered all use of the PEG to cease and a consult with a gastroenterologist to repair or replace the PEG tube. According to the testimony, the PEG tube was placed in the hole from where it had been dislodged, pending the gastroenterologist consult, to assure the decedent's stoma would not close before the PEG was repaired or replaced. River Manor records also show an April 12, 2013 11:00 a.m. telephone order from Dr. Carpio for an enema because decedent was constipated.

Defendant Michel-Jose Charles M.D. (Dr. Charles), a gastroenterologist on call for River Manor patients, testified that he saw decedent sometime between 1:00 and 2:00 pm. on April 12, 2013 and reinserted the PEG tube. Thereafter, use of the PEG resumed. A nurse practitioner telephoned Dr. Carpio sometime between 9:00 and 10:00 p.m on April 12,

2013 and informed him that decedent was in respiratory distress. Dr. Carpio then gave a telephone order to transfer decedent to Kingsbrook Jewish Medical Center (KJMC).

Decedent arrived in the KJMC emergency room at 10:48 p.m. on April 12, 2013. On April 13, 2013, decedent was given a CT scan, had an exploratory laparotomy, and was found to have peritonitis and a displaced gastrostomy tube. Decedent died on April 21, 2013. The medical examiner's report states:

“CAUSE OF DEATH:

“Part 1: PERITONITUS DUE TO DISPLACED GASTROSTOMY TUBE

“Part 2: HYPERTENSIVE AND ATHEROSCLERTOTIC CARDIOVASCULAR DISEASE

“MANNER OF DEATH: THERAPEUTIC COMPLICATION”

The Parties' Contentions

Dr. Carpio argues that he is entitled to summary judgment because he committed no medical malpractice in treating decedent in connection with the dislodged PEG tube. All of his decisions as attending doctor, he submits, were medically reasonable. Dr. Carpio notes that he did not administer any treatment to decedent personally and all of his orders, communicated by telephone, were medically sound. Dr. Carpio submits an affirmation of his expert witness, Howard M. Kolodny, M.D., a board-certified internist, who found, within a reasonable degree of medical certainty, that Dr. Carpio did not deviate from standard medical care regarding the treatment and sequella of decedent's dislodged PEG on April 12, 2013. More specifically, Dr. Kolodny states that:

“no action or inaction on behalf of Dr. Carpio was the proximate cause of any of the decedent's claimed injuries, as the GI

consult was ordered within 10 minutes after it was discovered that the tube was dislodged, and Dr. Carpio was not involved with the replacement of the tube or the decision to resume feedings. Once Dr. Carpio learned that the patient was in respiratory distress, he ordered that the patient be taken to the hospital, which was within the standard of care. It is my opinion, to a reasonable degree of medical certainty, that there was no delay in treating this patient on behalf of Dr. Carpio.”

Plaintiff contends through an affirmation of its expert, Perry Starer, M.D. (Dr. Starer), that Dr. Carpio committed medical malpractice because he failed to order monitoring of decedent’s vital signs pending and after the gastroenterologist consult; failed to order monitoring of decedent for bowel sound, tenderness and bowel movements after the gastroenterologist consult; and, as medical director of River Manor, Dr. Carpio was uniquely in a position to order more monitoring in general and for decedent in particular.

Discussion

Summary judgment should be granted to a defendant who demonstrates that the asserted causes of action are devoid of merit and where no triable issues of fact exist (CPLR 3212; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Moreover, a conclusory or merely speculative expert opinion or one unsupported by the evidence will be insufficient to prevail on a summary judgment motion (*see Giacinto v Shapiro*, 151 AD3d 1029, 1031 [2d Dept 2017]; *DeLaurentis v Orange Regional Med. Ctr.-Horton Campus*, 117 AD3d 774, 775 [2d Dept 2014]; *Longtemps v Oliva*, 110 AD3d 1316, 1319 [3d Dept 2013]; *Matos v Schwartzi*, 104 AD3d 650, 652 [2d Dept 2013]; *Volovar v. Catholic Health Sys. of Long Is.*, 58 AD3d 830, 831-832 [2d Dept. 2009]).

“The requisite elements of proof in a medical malpractice action are a deviation or departure from good and accepted practice and evidence that such departure was a proximate cause of injury or damage” (*Rebozo v. Wilen*, 41 AD3d 457, 458 ([2d Dept 2007])). Moreover, mere speculative allegations, unsupported by an evidentiary foundation are insufficient to defeat a summary judgement motion (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Romano v Stanley*, 90 NY2d 444, 452 [1997]; *Levy v Kung Sit Huie*, 54 AD3d 731, 731-732 [2d Dept 2008]; *Moore v New York Med. Group, P.C.*, 44 AD3d 393, 396 [1st Dept 2007], *lv dismissed* 10 NY3d 740 [2008]; *Keevan v Rifkin*, 41 AD3d 661, 662 [2d Dept 2007])).

Here, Dr. Carpio made a prima facie showing of entitlement to summary judgment and thus shifted the burden of proof to plaintiff to raise a triable factual issue. There is no claim that Dr. Carpio provided direct treatment to the decedent regarding his PEG tube or that any of Dr. Carpio’s telephone orders concerning the PEG tube and decedent’s respiratory distress were not medically sound.

Rather, Dr. Starer opines that Dr. Carpio ordered insufficient monitoring of decedent in violation of good medical practice. Dr. Starer claims that Dr. Carpio was responsible for assuring adequate monitoring of decedent because Dr. Carpio was decedent’s attending doctor and a medical director of River Manor. However, decedent was already in a skilled nursing center when his tube was dislodged. Hence, the only way to have assured a greater level of monitoring would have been to admit decedent to a hospital when Dr. Carpio first

learned the tube was dislodged. Any argument that Dr. Carpio abandoned decedent is untenable as decedent was receiving care in a skilled nursing center with nurse practitioners, registered and practical nurses; Dr. Carpio ordered the correct consult regarding decedent's dislodged PEG tube; and such consult was performed in a reasonable time. Moreover, Dr. Carpio was available and made a reasonable, arguably the only correct medical decision, once informed of decedent's respiratory distress.

Additionally, there is no indication Dr. Carpio assumed care of decedent's PEG tube reinsertion. "Although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied on by the patient" (*Burns v. Goyal*, 145 AD3d 952, 954 [2d Dept 2016], *affd* 30 NY3d 956 [2017], *rearg denied* 30 NY3d 1038 [2017] [internal citations omitted]). In addition, "the question of whether a physician owes a duty to the plaintiff is a question for the court, and is 'not an appropriate subject for expert opinion'" (*id.*, quoting *Burtman v Brown*, 97 AD3d 156, 161 [1st Dept 2012]).

Dr. Starer's criticisms about failures to monitor decedent are not chargeable to Dr. Carpio, who neither rendered direct care to decedent regarding his PEG tube nor is sued herein in his capacity as River Manor's medical director. Moreover, Dr. Starer's affirmation is too conclusory to defeat a summary judgment motion. Dr. Starer fails to explain how monitoring decedent more closely would have resulted in a better outcome considering that decedent was in KJMC in the emergency room at 10:48 p.m. on April 12, 2013 and under

hospital monitoring for almost 4 hours before his CT scan was performed and for another 15 hours before the exploratory repair surgery occurred.

Lastly, plaintiff's opposition mentions that ordering the enema on the day decedent's PEG tube was found dislodged was malpractice. However, decedent's injury affected the anterior part of his stomach, an area not implicated in administering an enema. Dr. Kolodny, in this regard, concludes that "to a reasonable degree of medical certainty, that the enema was not contraindicated when it was ordered." The autopsy report also makes no mention of an enema. Hence, plaintiff has failed to raise any triable factual issues about administering the enema or any other aspect of Dr. Carpio's care as decedent's attending physician. Accordingly, it is

ORDERED that Dr. Carpio's summary judgment motion is granted, the complaint is dismissed as against him.

This constitutes the decision and order of the court.

ENTER



J. S. C.

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