

Rosenzwaig v Sound Shore Med. Ctr.

2019 NY Slip Op 33987(U)

April 2, 2019

Supreme Court, Westchester County

Docket Number: 53917/2013

Judge: William J. Giacomo

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

----- X
JAVIER ROSENZWAIG, as Administrator of the Estate of
MAXIMO ROSENZWAIG, and JAVIER ROSENZWAIG,
Individually,

Plaintiffs,

Index No. 53917/2013

– against –

DECISION & ORDER

SOUND SHORE MEDICAL CENTER, MS ACQUISITION
I, LLC d/b/a WESTCHESTER CENTER FOR
REHABILITATION & NURSING, VANESSA G.
COMPLETO BUOT, M.D., CHRISTOPHER O. ADUBOR,
M.D., STEPHEN H. JESMAJIAN, M.D. and DANIEL H.
POMERANTZ, M.D.,

Defendant.

----- X
In an action to recover damages for medical malpractice, the defendants (1) Vanessa G. Completo Buot, M.D. and Christopher O. Adubor, M.D. (motion sequence 2); (2) MS Acquisition I, LLC d/b/a Westchester Center for Rehabilitation & Nursing (motion sequence 3); and (3) Sound Shore Medical Center, Stephen H. Jesmajian, M.D. and Daniel H. Pomerantz, M.D. (motion sequence 4), separately move for summary judgment dismissing the complaint insofar as asserted against them, pursuant to CPLR 3212:

Papers Considered

1. Notice of Motion (motion sequence 2)/Affirmation of David N. Schreiber, Esq./Exhibits A-J;
2. Affirmation of Jeremy M. Weg, Esq. in Opposition/Exhibits 1-4;
3. Reply Affirmation of David N. Schreiber, Esq./Exhibit AA;
4. Notice of Motion (motion sequence 3)/Affirmation of Roland T. Koke, Esq./Exhibits A-J;
5. Affirmation of Jeremy M. Weg, Esq. in Opposition/Exhibits 1-3;
6. Reply Affirmation of Roland T. Koke, Esq./Exhibit A;
7. Notice of Motion (motion sequence 4)/Affirmation of Todd E. Gilbert, Esq./Exhibits A-O;
8. Affirmation of Jeremy M. Weg, Esq. in Opposition/Exhibits 1-4;
9. Reply Affirmation of Todd E. Gilbert, Esq./Exhibits A-C.

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Factual and Procedural Background

On April 24, 2012, the plaintiff's decedent Maximo Rosenzwai, 79 years old, was admitted to Sound Shore Medical Center with a complaint of agitation, altered mental status, and a history of vascular dementia. His family reported that he had been under the care of a neurologist for four years and had been experiencing a rapid decline in the past three months.

On May 9, 2012, the decedent was transferred from Sound Shore and admitted to Westchester Center for Rehabilitation & Nursing for long term care. The decedent was receiving palliative care and his family had signed a DNR (do not resuscitate) and a DNI (do not intubate). He was admitted to Westchester Center where he was treated by Dr. Vanessa G. Completo Buot.

On June 3, 2012, the decedent was transferred back to Sound Shore where he was treated for saladenitis, which is an infection of the salivary glands. On June 9, 2012, while at Sound Shore, the decedent was pronounced dead from cardio-respiratory arrest.

Plaintiff commenced this action for medical malpractice and wrongful death against Sound Shore Medical Center, MS Acquisition I, LLC d/b/a Westchester Center For Rehabilitation & Nursing, Vanessa G. Completo Buot, M.D., Christopher O. Adubor, M.D., Stephen H. Jesmajian, M.D., and Daniel H. Pomerantz, M.D.

Dr. Completo Buot and Dr. Adubor's Motion For Summary Judgment and Westchester Center's Motion for Summary Judgment

Dr. Completo Buot moves for summary judgment dismissing the complaint arguing that there is no evidence that she deviated from the acceptable standards of medical practice and did not contribute to decedent's injuries.

Dr. Completo Buot submits an expert affirmation of Lawrence Diamond, M.D., board certified by the American Board of Family Practice and in geriatric medicine. Dr. Diamond avers with a reasonable degree of medical certainty, that Dr. Buot acted within the standard of care and did not cause or contribute to decedent's injuries.

Dr. Diamond notes that the decedent was on palliative care upon his admission to Westchester Center on May 9, 2012, and was in deteriorating health due to his end stage dementia. The decedent was limited in his oral intake and a plan was in place to encourage intake which was done repeatedly. The family instructed the staff not to provide PEG tube for food and there was a DNI and DNR in place.

Dr. Buot had the decedent evaluated for swallowing and speech on June 1, 2012, and spoke with the family about the results the following day. According to Dr. Diamond's review of the records, Dr. Buot explained her concerns of oral intake and suggested an IV for hydration and a PEG tube as an alternative course of treatment. However, the family refused this treatment. On June 3, 2012, the decedent had swelling to the neck and complained of pain and was admitted back to Sound Shore.

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Dr. Diamond avers that Dr. Buot's plan of care was well within the standard of care. The nursing staff continued to encourage oral intake and hydration throughout his stay at Westchester Center. Dr. Buot was informed of all significant developments and immediately had the decedent transferred to a hospital when his condition changed.

Dr. Diamond notes that the decedent was terminally ill with end stage dementia. The lack of IV hydration, which was upon request from the family, though a contributing factor to his dehydration and cardiopulmonary arrest, was not a substantial cause of death. The decedent's death was the result of an expected decline to his terminal stage dementia consistent with his progression of eating habits three weeks before admission to Sound Shore. Dr. Diamond opines that to a reasonable degree of medical certainty, Dr. Buot could not have done more to increase the decedent's oral intake or hydration without violating the advanced directives. Moreover, although the decedent suffered a fall at Westchester Center, there were no noted injuries.

Dr. Adubor moves to have this Court "so-order" a stipulation of discontinuance against him signed by counsel for all parties except Westchester Center.

Westchester Center moves for summary judgment dismissing the complaint arguing that there is no evidence that it departed from the standard of care.

Westchester Center submits an affirmation of Gisele P. Wolf-Klein, M.D., board certified in internal and geriatric medicine. Dr. Wolf-Klein opined that the Westchester Center acted in accordance with its duty to provide care to the decedent, did not depart from the accepted standard, and the decedent's injuries were not proximately caused by any negligence on the part of Westchester Center. On each of the dates of care, the treatment and recommendations were proper. The family repeatedly rejected the suggestion of a feeding tube to address the decedent's poor nutrition and hydration which made it impossible for the condition to improve and made his continued deterioration and ultimate death inevitable.

In opposition, plaintiff submits an expert affirmation of a doctor board certified internal and geriatric medicine. Based upon a review of the records, the expert opines, with a reasonable degree of medical certainty, that Westchester Center and Dr. Buot's care and treatment of the decedent deviated from accepted medical practice and that such departures were a proximate cause of his injuries.

Plaintiff's expert opines that the defendants improperly withheld IV fluids from the decedent. The expert notes that the medical records from Westchester Center do not contain any refusal of treatment form specific to IV fluids signed by the family. The defendants failed to document the entirety of any conversation with the family related to refusal of treatment. The expert also opines that the defendants could have done more to increase the decedent's hydration by providing him with IV fluids, which are considered comfort care. The expert notes that this would not have violated the healthcare proxy because there was no proxy related to IV fluids in the medical records. Moreover, Dr. Buot should have discussed with the family various alternative treatments to increase the

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decedent's fluids immediately after his first poor intake. The expert opines that the failure to provide the decedent with proper hydration was a substantial cause in his injuries and death.

Plaintiff's expert further opines that the defendants could have done more to increase the decedent's oral intake and failed to order a necessary swallowing evaluation until June 1, 2012. Defendants failed to order dietary supplements and institute a calorie count until May 29, 2012. The expert opined that the failure to increase the decedent's oral intake was a deviation from accepted medical practice and a proximate cause of his injuries.

Plaintiff's expert concludes that the decedent's injuries were preventable and that the decedent's family was not apprised of the foreseeable risks and benefits of alternatives to the treatment proposed and rendered by defendants.

In reply, Dr. Buot and Westchester Center submit a copy of a health care proxy executed by the decedent on May 11, 2012, instructing his agent of a DNR, no feeding tube, and no artificial means to sustain life.

Sound Shore, Dr. Jesmajian, and Dr. Pomerantz' Motion for Summary Judgment

Sound Shore, Dr. Jesmajian, and Dr. Pomerantz also move for summary judgment dismissing the complaint on the grounds that there is no evidence of a departure from accepted standards of medical care.

Dr. Pomerantz, board certified in internal medicine and palliative care, attests that the care and treatment rendered to the decedent while at Sound Shore was in accordance with accepted medical practices. He avers that the medical records are replete with references to attempts to improve the decedent's intake by mouth which were unsuccessful. The decedent's life expectancy was limited upon his admission regardless of the measures instituted. The family was offered the opportunity to artificially feed the decedent, however, the family only wanted comfort measures to be instituted. Dr. Pomerantz avers that the decedent was able to eat and digest meals, however, at times, he would spit out medications and food. Dr. Pomerantz opines, with a reasonable degree of medical certainty, that the performance of a speech and swallow study prior to May 9th would not have prevented the development of sialadenitis and other injuries. Also, any alteration to the decedent's diet would not have prevented his injuries.

Dr. Pomerantz states that the family was continually apprised of the foreseeable risks and benefits of the treatment proposed and rendered and alternatives. He states that there was no way for any medical providers to prevent the decedent's deterioration.

Dr. Jesmajian, board certified in internal medicine, attests that he was the Chief of Medicine at Sound Shore between April and June 2012. His name is listed on the decedent's medical charts as the admitting or attending physician for the April 24, 2012 through May 9, 2012 admission. Dr. Jesmajian states that he was not the decedent's attending physician and that Sound Shore would often place his name in the chart of a

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patient who did not have an assigned doctor. Dr. Frank Tamarin was the decedent's attending physician. Dr. Jesmajian did not author any notes documenting any care or treatment provided to decedent and has no recollection of treating him during either admission to Sound Shore. He had no recollection of ever discussing the decedent's care and treatment with any staff, the decedent, or the decedent's family.

As the Chief of Medicine, Dr. Jesmajian had the responsibility to ensure that patients had an attending physician assigned to their case. He did not have any independent duties to care and treat the decedent. Dr. Jesmajian avers that he properly fulfilled his duty as the Chief of Medicine.

In opposition, plaintiff's expert opined that despite the decedent's co-morbidities, he did not present to Sound Shore on April 24, 2012, with sialadenitis, sepsis, or dehydration. The expert opines that the defendants' failure to treat the decedent exacerbated his co-morbidities and was the proximate cause of his development of the aforesaid conditions. Defendants failed to keep the decedent hydrated with sufficient fluids or dietary supplements. The expert opines that the defendants improperly withheld IV fluids from the decedent and they could have measured and tracked his urine output, weight levels, or listened to his lungs to determine whether fluids were present. In the expert's opinion, this deviation was the proximate cause of the decedent's injuries. Plaintiff's expert states that the decedent's family was not apprised of the foreseeable risks and benefits of and alternatives to the treatment proposed and rendered.

Plaintiff's expert further opines that as the Chief of Medicine, Dr. Jesmajian was responsible for all medical matters that occurred within Sound Shore including the day-to-day patient care and treatment of all patients in the facility and overseeing all physicians on staff. Plaintiff's expert opines that Dr. Jesmajian's failure to fulfill his duties as Chief of Medicine including his failure to participate in the decedent's care and treatment and failure to ensure that the decedent received a high quality of care and treatment while at Sound Shore deviated from accepted standards and was a proximate cause of the decedent's injuries.

Discussion

"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" (*Leavy v Merriam*, 133 AD3d 636, 637 [2d Dep't 2015]). A physician moving for summary judgment in a medical malpractice action must establish, prima facie, either that there was no departure from accepted community standards of medical practice, or that any alleged departure was not a proximate cause of the plaintiff's injuries (see *Aronov v Soukkary*, 104 AD3d 623, 624 [2d Dep't 2013]; *DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2d Dep't 2012]). Once a defendant has made such a showing, the burden shifts to the plaintiff to "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

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"A plaintiff cannot rebut a defendant physician's showing that he or she was not negligent and defeat a motion for summary judgment by offering an expert's affidavit containing general allegations of medical malpractice which are conclusory in nature and unsupported by competent evidence tending to establish the elements of medical malpractice" (*Shectman v Wilson*, 68 AD3d 848, 849 [2d Dept 2009]; see also *Alvarez v Prospect Hosp.*, 68 NY2d at 324-325; *Shahid v New York City Health & Hosps. Corp.*, 47 AD3d 800, 801 [2d Dept 2008]).

Summary judgment may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts (see *McKenzie v Clarke*, 77 AD3d 637, 638 [2d Dept 2010]; *Shields v Baktidy*, 11 AD3d 671, 672 [2d Dept 2004]; *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624 [2d Dept 2003]).

Here, the defendants made a prima facie showing of entitlement to summary judgment by demonstrating through their separate expert opinions that they did not deviate from the accepted standards of medical practice or that any alleged departure was not a proximate cause of the decedent's injuries (see *Alvarez v Prospect Hosp.*, 68 NY2d 320; *Reustle v Petraco*, 155 AD3d 658 [2d Dept 2017]). However, in opposition, plaintiff's expert affidavits raised a triable issue of fact as to whether the defendants departed from good and accepted medical practice and whether such departures were a proximate cause of plaintiff's injuries (see *Reustle v Petraco*, 155 AD3d 658).

Public Health Law

Public Health Law § 2801-d 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 (see *Zeides v Hebrew Home for the Aged at Riverdale, Inc.*, 300 AD2d 178 [1st Dept 2002]). Relief is predicated on Public Health Law § 2803-c (3) (e), specifically deprivation of "the right to receive adequate and appropriate medical care" (Id). Specifically plaintiff alleges that Westchester Center violated 10 NYCRR 415.3 (resident's rights); 415.4 (resident behavior and facility practices); 415.11 (resident assessment and care planning); 415.12 (quality of care); 415.13 (nursing services); 415.14 (dietary services); 415.15 (medical services); and 415.22 (clinical records).

"The statutory basis of liability 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, subject to the defense that the 'facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient' " (*Zeides v Hebrew Home for the Aged at Riverdale, Inc.*, 300 AD2d at 179; Public Health Law § 2801-d [1][2]).

Here, in support of its motion for summary judgment, Westchester Center submitted the affirmation of its expert physician, Dr. Wolf-Klein, who opined that it did not violate the various federal and state regulations set forth in the plaintiff's bill of particulars as the basis for a cause of action pursuant to section 2801-d, and that even if any regulations were violated, none of the alleged violations proximately caused the

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decedent's injuries (see Public Health Law § 2801-d [1]; *Gold v Park Ave. Extended Care Ctr. Corp.*, 90 AD3d 833 [2d Dept 2011]). In opposition, however, plaintiff raised triable issues of fact as plaintiff's expert opined, to the contrary, that Westchester Center violated the decedent's right to receive adequate and appropriate care.

Dr. Jesmajian

Dr. Jesmajian demonstrated entitlement to summary judgment. "[I]n order to reach any discussions about deviation from accepted medical practice, it is necessary first to establish the existence of a duty" (*Burtman v Brown*, 97 AD3d 156, 161 [1st Dept 2012]). The question of duty is a legal one for the courts to resolve and is generally not an appropriate subject for expert opinion (see *McAlwee v Westchester Health Assoc., PLLC*, 163 AD3d 549, 551 [2d Dept 2018]).

Dr. Jesmajian established his prima facie entitlement to judgment as a matter of law by presenting evidence establishing that he did not owe a duty of care to the plaintiff based on the treatment he received at Sound Shore (see *McAlwee v Westchester Health Assoc., PLLC*, 163 AD3d 549; *Burns v Goyal*, 145 AD3d 952, 954 [2d Dept 2016]). Dr. Jesmajian submitted an affidavit and the plaintiff's medical records from Sound Shore establishing that he did not treat plaintiff and that he did not have a duty to supervise the Sound Shore attending physician's treatment of the plaintiff. In addition, the decedent's son, the plaintiff Javier Rosenzwaig testified that he did not recall the name of Dr. Jesmajian. In opposition, the plaintiff failed to raise a triable issue of fact.

Accordingly, it is

ORDERED that the motion of the defendants Vanessa G. Completo Buot, M.D. and Christopher O. Adubor, M.D. for summary judgment dismissing the complaint and to so-order a stipulation of discontinuance is **GRANTED** solely to the extent that the stipulation of discontinuance dated June 7, 2018, shall be so-ordered and **counsel shall submit a copy of the stipulation for so-ordering to the Court within twenty days of the date hereof**, and the motion is otherwise **DENIED** (motion sequence 2); and it is further

ORDERED that the motion of the defendants MS Acquisition I, LLC d/b/a Westchester Center for Rehabilitation & Nursing for summary judgment dismissing the complaint is **DENIED** (motion sequence 3); and it is further

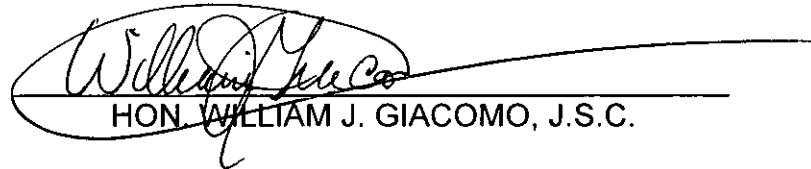
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ORDERED that the branch of the motion of the defendants' Sound Shore Medical Center, Stephen H. Jesmajian, M.D. and Daniel H. Pomerantz, M.D. for summary judgment dismissing the complaint insofar as asserted against Stephen H. Jesmajian, M.D. is **GRANTED** and the complaint is dismissed as against Stephen H. Jesmajian (motion sequence 4); and it is further

ORDERED that the branch of the motion of the defendants' Sound Shore Medical Center and Daniel H. Pomerantz, M.D. for summary judgment dismissing the complaint insofar as asserted against them is **DENIED** (motion sequence 4).

Counsel for all parties are directed to appear in the Settlement Conference Part, Room 1600, on **May 7, 2019, at 9:15 a.m.** for further proceedings.

Dated: White Plains, New York
April 2, 2019


HON. WILLIAM J. GIACOMO, J.S.C.