Murphy v Popescu
2019 NY Slip Op 34594(U)
September 19, 2019
Supreme Court, Westchester County
Docket Number: Index No. 68519/2016
Judge: Charles D. Wood
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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

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MARY E. MURPHY, by her Guardian Ad Litem THOMAS J. MURPHY, and THOMAS J. MURPHY, individually,

Plaintiffs,

-against-

DECISION & ORDER
Index No.: 68519/2016
Seq Nos. 2, 3 &4

OXANA POPESCU, ATRIA MANAGEMENT COMPANY, LLC d/b/a ATRIA SENIOR LIVING, ASSEN BOGDANOV, RESOURCE MEDICAL SERVICES, P.C., and MODERN MEDICAL PRACTICE P.L.L.C.,

Defendants.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 79-137 were read in connection with the motions for summary judgment of Assen Bogdanov (Seq 2); and of Oxana Popescu, M.D. and Oxana Popescu, M.D., P.C., s/h/a Modern Medical Practice PLLC (Seq 3); and by Resource Medical Services, P.C. ("Medical Practice") (Seq 4).

Plaintiffs seeks recovery of money damages after plaintiff Mary E. Murphy's ("the resident") fall, resulting in a hip fracture at Atria, an assisted living residence.

Now, based upon the foregoing, the motions are decided as follows:

As an initial matter, by motion seq No. 4, defendant, Resource Medical seeks a so-ordered Stipulation of Discontinuance with prejudice pursuant to CPLR 3217(b). As there is no

opposition to this motion, and there is no cross-claims by any co-defendant, and plaintiff having executed a Stipulation of Discontinuance, this court will so order said Stipulation, granting Resource Medical leave to file the May 20, 2019, Stipulation of Discontinuance (NYSCEF Doc No. 120) with prejudice with the clerk of the court upon payment of the requisite filing fee; and deleting the name of Resource Medical Services, P.C. from the caption.

Turning now to the merits of Motion Seqs 2 and 3, it is well-settled that a 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 Hospital, 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; see Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; see also Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is "required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court's function in considering a summary judgment motion is not to resolve

issues, but to determine if any material issues of fact exist (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Stukas v Streiter, 83 AD3d 18, 23 [2d Dept 2011]).

"To establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries" (Stukas v Streiter, 83 AD3d 18,23 [2d Dept 2011]). "A defendant physician seeking summary judgment must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby" (Iulo v Staten Island University Hospital, 106 AD3d 696,697 [2d Dept 2013]). To defeat defendant's application, the plaintiff must only submit evidentiary facts or materials to rebut the defendant's prima facie showing. In other words, "this means that if the defendant demonstrates only that he or she did not depart from good and accepted medical practice, plaintiff need only raise a triable issue of fact as to whether such a departure occurred. The plaintiff is required to raise a triable issue of fact as to causation only in the event that the defendant makes an independent prima facie showing that any claimed departure was not a proximate cause of the plaintiff's injuries" (Stukas v Streiter, 83 AD3d 18). To successfully oppose a motion for summary judgment dismissing a cause of action sounding in medical malpractice, a plaintiff must submit a physician's affidavit of merit attesting to (depending on the defendant's prima facie showing) a departure from accepted practice and/or containing the attesting doctor's opinion that the defendant's omissions or departures were a competent producing cause of the injury (Domaradzki v Glen Cove Ob/Gyn Associates, 242 AD2d 282 [2d Dept 1997]; see Arkin v Resnick, 68 AD3d 692,694 [2d Dept 2009]). Conclusory or general allegations of medical malpractice, "unsupported by competent evidence tending to establish the essential elements are insufficient to defeat a motion for

summary judgment" (Mendez v City of New York, 295 AD2d 487 [2d Dept 2002]; see Alvarez v Prospect Hospital, supra, at 325).

To establish proximate cause in a medical malpractice action, "a plaintiff needs do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant" (Johnson v Jamaica Hospital Medical Center, 21 AD3d 881, 883 [2d Dept 2005] citing Holton v Sprain Brook Manor Nursing Home, 253 AD2d 852 [2d Dept 1998]; see Clarke v Limone, 40 AD3d 571, 571-572 [2d Dept 2007]). Since the burden of proof does not ask the plaintiff to eliminate every possible cause of her injury, "the plaintiff's expert need not quantify the exact extent to which a particular act or omission decreased a patient's chances [of a cure or increased her injury], as long as the jury can infer that it was probable that some diminution" in the plaintiff's chance of a better outcome (Jump v Facelle, 275 AD2d 345, 346 [2d Dept 2000]; see Flaherty v Fromberg, 46 AD3d 743, 745 [2d Dept 2007]; Calvin v New York Medical Group, P.C., 286 AD2d 469, 470 [2d Dept 2001]). In addition, summary judgment "is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions...such credibility can only be resolved by a jury" (Feinberg v Feit, 23 AD3d 517, 519 [2d Dept 2005] quoting Shields v Baktidy, 11 AD3d 671, 672 [2d Dept 2004]; see generally Darwick v Paternoster, 56 AD3d 714, 715 [2d Dept 2008]; Adjetey v New York City Health and Hospitals Corp., 63 AD3d 865 [2d Dept 2009]).

By way of background, in March and April 2014, the resident (who was born in 1951), underwent two orthopedic operative procedures under anesthesia. Following those procedures, she suffered a severe deterioration in her mental function. On April 24, 2014, the resident was admitted to Lawrence Hospital for worsening dementia. Six days later, on April 30, 2014, the

resident was transferred to St. Cabrini Nursing Home for rehabilitation, and it was here that plaintiff first alleges negligence against Dr. Bogdanov. During the approximately six weeks that the resident was at St. Cabrini, Dr. Bogdanov was her medical doctor. She ambulated with a walker, and she needed one person's assistance for bathing, bed mobility, and dressing. During her stay at St. Cabrini, she never fell, and her physical and cognitive abilities improved, and the she was discharged in stable condition.

On June 13, 2014, the resident was transferred to the memory unit of codefendant Atria Assisted Living. Prior to this transfer, Dr. Bogdanov signed an Assisted Living Residence Medical Evaluation form, also known as a "3122" dated June 12, 2014, which described her primary diagnosis as altered mental status and her secondary diagnosis included dementia and status/post left knee arthoplasty. It also noted that she could not manage her medical equipment (wheelchair, walker) independently. She was on three medications for depression, dementia and DVT prophlaxis. Dr. Bogdanov also indicated that the resident was medically and mentally suited for care in an Adult Home/Enriched Housing Program/Assisted Living Residence/Enhanced Assisted Living Residence (EARL)/Special Needs Assisted Living Residence (SNALR); and that she was not in need of continual acute or long term medical or nursing care, including 24 hour skilled nursing care or supervision, which would require placement in a hospital or nursing home.

Prior to being transferred to Atria, the resident was examined by Atria's resident services director, licensed practical nurse Margarida Velardo on June 12th, and determined that the resident was an appropriate candidate for Atria. Upon the resident's arrival at Atria, a pre-admission evaluation was performed, and it was noted by defendant Dr. Popescu that she had advanced dementia, and an inability to follow directions, was nonverbal and wheelchair bound,

and had a low potential for recovery. A fall worksheet was completed, and her care plan included assisting with toileting, educate for fall prevention, routine checks private duty nurse, and participate in daily activity.

During her stay at Atria, the resident fell many times, including the morning after she was admitted. On one occasion, on July 5th, she fell and hit her head. EMS was called and she was transferred to White Plains Hospital, where she remained overnight before being returned to Atria. She fell again on July 13th. Although she was able to ambulate that day, the next morning she complained of knee pain and was unable to ambulate. She was again transferred to White Plains Hospital where a left hip fracture was diagnosed.

According to the complaint, Dr. Bogdanov departed from good and accepted medical practice by improperly discharging the resident to Atria, failing to recognize that the resident required enhanced assistance and nursing care, failing to provide adequate information to Atria regarding the resident's need for constant supervision and assistance, her incontinence, her thought and cognitive disorder, and her significant risk for falls and in failing to make recommendations for safety to the transferee facility, including the placement of a bed alarm and bedrails.

In support of his motion for summary judgment, Dr. Bogdanov offers the Affirmation of Martin Bolic, MD, board certified in internal medicine, and is currently in private practice in Internal Medicine in Nassau County and is affiliated with NYU Winthrop Hospital (NYSCEF Doc No. 91). Based upon Dr. Bolic's review of this case, and the medical records, Bolic opines that the care and treatment Dr. Bogdanov rendered to resident complied with the accepted standards of care.

The expert opines that Dr. Bogdanov accurately completed the pre-admission medical evaluation form prior to her transfer to Atria on June 13, 2014. Dr. Bogdanov also provided adequate information to Atria concerning the patient's condition, and it was in fact appropriate to transfer the resident to Atria's Assisted Living memory unit. At the time of transfer to Atria, the resident's condition was stable, her physical and cognitive abilities had improved during her stay. Importantly, while at St. Cabini, the resident did not fall. Based on the patient's condition at the time of transfer, Dr. Bogdanov properly certified the patient as suitable for transfer to an assisted living facility and appropriately deferred to Atria who would and did make their own independent evaluation of the resident's suitability for the specific level of care provided by Atria's memory unit.

As to causation, Dr. Bogdanov was not involved in the resident's care during her month long stay at Atria. Thus, any injury sustained while she was a resident of Atria and under the care and supervision of other medical providers cannot be attributed to Dr. Bogdanov. There can be no causal connection between Dr. Bogdanov's care of the resident, which ended on June 13, 2014.

In light of Dr. Bogdanov's submissions including through his expert's Affirmation, Dr. Bogdanov made a prima facie showing that the doctor exercised reasonable care in supervising the resident, plaintiffs submitted evidence, including their expert's Affirmation, sufficient to raise a question of fact as to whether Dr. Bogdanov properly denoted the resident as suitable resident to Atria and implemented available precautions to protect the resident from a foreseeable risk of falling (D'Elia v Menorah Home & Hosp. for Aged & Infirm, 51 AD3d 848, 852 [2d Dept 2008]).

In opposition, plaintiffs assert that the physician who completes the form 3122 is required to determine and certify "the medical suitability" for the specific type facility that has been approved. Plaintiffs offer the affirmation of Perry J. Starer, MD, a physician certified in Internal Medicine and in Geriatric Medicine. Dr. Starer opines that Dr. Bogdanov departed from good and accepted practice by certifying on form 3122 that the resident was medically suited to an Adult Home, Enriched housing facility or an Assisted Living Facility. Dr. Starer asserts that as the discharging physician, Dr. Bogdanov was required to approve and certify transfer and admission only to a facility that provided sufficient services and staffing that would be required to provide his patient with a safe environment based upon her current limitation and disabilities. This requirement that a medical professional certify their patient's suitability for admission is based upon the fact that these medical professionals provide a unique knowledge of a patient's medical and mental capacity, essential in determining the patient's needs and safety requirements. Dr. Bogdanov's certification that the resident was medically suited for Assisted Living (as well as Adult Home and Enriched Housing) constituted a departure from good and accpeted practice as she chronically in need of the physical assistance of another person in order to walk, and was not capable of operating medical equipment with only intermittent or occasional assistance from medical personnel. The expert also explains that the admitting team at Atria was not made up of doctors. It is further the expert's opinion that if Dr. Bogdanov had not certified and approved the transfer of the resident to Atria Woodlands, the resident would not have sustained her fall that resulted in her left hip fracture as the fall was a direct result of the inadequate monitoring and supervision that were provided by that facility which allowed the resident to suffer an unwitnessed fall when she left her bed unaccompanied and unassisted by any Atria Staff. According to the expert,

such lack of supervision which involved checks and assistance only once every 4 hours, despite the fact that the patient's incontinence required her to go to the bathroom at least once every 2 hours, was a consequence of the limited ability of such a facility, based upon staffing of providing adequate monitoring and assistance to such a patient.

Based upon this record, as is the case here, summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions (Simpson v Edghill, 169 AD3d 737, 738 [2d Dept 2019]).

Turning next to Motion Seq 3, defendant Dr. Popescu offers the Affirmation of Dr. Feingold, board certified in Internal Medicine, who opines that Dr. Popescu's medical examinations, and all aspects of her evaluation and performance of the limited care she provided conformed with good and accepted standards. Dr. Feingold emphasizes that Dr. Popsecu had a limited role, and her duties did not extend to an ongoing assessment of plaintiff being placed for residency at Atria. Dr. Popescu was not an employee or agent of Atria but was a private physician hired by the family, and only saw the resident on two occasions. Without notice of any further necessity to follow up due to changes in the resident's condition, Dr. Popescu had no duty to travel to the facility for unscheduled visits and examine the resident. Dr. Popescu was unaware of all of the falls excluding the initial fall which she became aware of on her visit to the resident on June 23, 2014. If the resident was not suited for the facility, this decision rests with those who made this determination to place her within Atria and not with Dr. Popescu. The expert concludes that Dr. Popescu conducted an appropriate assessment and provided medical services that conformed with all good and accepted standards of care based on her involvement with the resident.

In contravention, it is plaintiff's expert, Dr. Starer opines that the resident's injury would have likely been prevented by the presence of a bed alarm as such an alarm would have alerted the Atria Staff that the resident was attempting to exit the bed in the early morning of July 13, 2014, giving them the opportunity to prevent her fall. While Dr. Popescu was not board certified in Geriatric or Internal Medicine in 2014, having failed her recertification examination, she was required to be familar with the standards of care in the treatment and management of patients in adult care facilities as well as the regulations and requirements for admission and retention of residents in the different types of adult care facilites by virtue of the fact that she consented to assess and treat the resident.

Plaintiff's expert explains that in accordance with good and accepted practice of physicians retained to provide care at such facilities, it is required that the physician fully assess the patient to determine whether the type of facility his patient is in is appropriate and whether the facility has taken appropriate measures to keep his patient safe. This includes an assessment of the patient's risk of falls, as that is a common source of injury at Adult Care Facilities, and whether the measures taken and the services provided at the facility were adequate to keep the patient safe. Dr. Popescu direction on June 23, 2014, that she discussed with personnel to assist and monitor patient for fall risk prevention, while inadequate, shows an understanding that she had a responsibility to make recommendations and to instruct the Atria staff to take actions in order to keep her patient safe and reflect her inadequate order of July 3, 2014, that staff should use ½ rail for positioning and turning only.

The expert continues that regulations of the State of New York does not permit the retention of residents who are non-ambulatory or require continual assistance of others to ambulate, and other infirmities. It was therefore a departure on the part of Dr. Popescu in

failing to advise the resident's husband that his wife required a higher level of supervision or care than what was and could be provided by Atria. Due to the resident's overall condition, including her incontinence, she required much more than once every 2 hour checks. Therefore, the failure to Dr. Popsecu to recommend to Mr. Murphy that he should retain a 24 hour private duty nurse or aide so as to provide his wife continuous surveillance constituted a departure from accepted standards of medical practice. It is the expert's opinion that if the patient had not been retained at Atria, that she would not have sustained a fall that fractured her hip.

Taking into consideration the parties' submissions, the court finds that Dr. Popescu made out a prima facie entitlement to judgment at law. However, in opposition, plaintiffs raised a triable issue of fact through the affirmation of her expert, that Dr. Popescu had a duty to recommend an appropriate facility for the resident.

Accordingly, due to these conflicting medical expert opinions, can only be resolved by a jury.

The court has considered the remainder of the factual and legal contentions of the parties and to the extent not specifically addressed, finds them to be without merit or rendered moot by other aspects of this decision. This constitutes the decision and order of the court.

Accordingly, based upon the stated reasons, it is hereby

ORDERED, that the summary judgment motions by Assen Bogdanov (Seq 2) and that of Oxana Popescu (Seq 3) are denied; and it is further

ORDERED, that Resource Medical Services, P.C.., to have this court so order the Stipulation of Discontinuance (Seq 4) is **granted** simultaneously executed as of this date; and it is further

ORDERED, that the caption shall be amended to read:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MARY E. MURPHY, by her Guardian Ad Litem THOMAS J. MURPHY, and THOMAS J. MURPHY, individually,

Plaintiffs,

-against-

Index No.: 68519/2016

OXANA POPESCU, ATRIA MANAGEMENT COMPANY, LLC d/b/a ATRIA SENIOR LIVING, ASSEN BOGDANOV, and MODERN MEDICAL PRACTICE P.L.L.C.,

Defendants.

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; and it is further

ORDERED, that the remaining parties are directed to appear on Nov. 19, 2019 at 9:15 A.M. in Courtroom 1600, the Settlement Conference Part, at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

Dated: September 19, 2019
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF