

McGuire v Cold Spring Hills

2020 NY Slip Op 31971(U)

May 21, 2020

Supreme Court, Queens County

Docket Number: 701922/2016

Judge: Peter J. O'Donoghue

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE IA Part MD
Justice

FILED

Joanna McGuire, as Administrator of the Estate of
Pasquale V. Salvo x Index

5/22/2020
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Number 701922/ 2016 COUNTY CLERK
QUEENS COUNTY

V

Motion
Date January 22, 2020

Cold Spring Hills, et. Al

Motion Seq. No. 6

X

The following papers read on this motion by defendant UPR Care Corp. d/b/a Cold Spring Hills Center for Health and Rehabilitation (Cold Spring Hills) pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against it and all cross claims asserted against it.

Papers
Numbered

- Notice of Motion - Affidavits - ExhibitsEF Doc. #93-#103
Answering Affidavits - ExhibitsEF Doc. #105-#110
Reply AffidavitsEF Doc. #111-114

Upon the foregoing papers it is ordered that the motion is determined as follows:

In February 2016, Pasquale Salvo (hereinafter the decedent) commenced this action against defendants to recover damages for medical malpractice based on treatment the decedent received at the Long Island Jewish Medical Center in New Hyde Park and Cold Spring Hills Center for Health and Rehabilitation (Cold Spring Hills), a nursing home/rehabilitation facility. In 2016, the decedent died. His daughter, having been appointed as administratrix of the decedent's estate, was substituted in that capacity as plaintiff. It is alleged that on August 21, 2013, the decedent was admitted to the hospital, where he underwent surgery on September 4, 2013, but during his confinement there, he developed a sacral pressure ulcer. He was transferred to the nursing home on September 11,

2013 and returned to the hospital for further surgery on September 16, 2013. The decedent again returned to the nursing home on September 23, 2013 and, with the exception of a three-day hospital stay in mid-December, he remained at the nursing home until December 29, 2013. Plaintiff alleges that her as a result of the negligent failure by defendant Cold Spring Hills to provide appropriate care and treatment, the decedent's sacral pressure ulcer became worse and he developed a bone infection and required extensive wound treatment. The complaint asserts a first cause of action against defendant Cold Spring Hills sounding in violation of Public Health Law §§ 2801-d, 2803-c, and 2803-d, and a second cause of action against defendant Cold Spring Hills based upon claimed negligence, gross negligence and malpractice, including a claim of negligence in employing, training and supervising employees and agents, and in reliance upon the doctrine of res ipsa loquitor. Plaintiff seeks an award of compensatory damages with respect to both causes of action against defendant Cold Spring Hills, as well as punitive damages pursuant to Public Health Law § 2801-d(2) with respect to the claim predicated upon violation of Public Health Law § 2801-d, and attorneys' fees pursuant to Public Health Law § 2801-d(6), and common-law punitive damages with respect to the cause of action based upon gross negligence. By the complaint, as amplified by her bill of particulars, plaintiff claims defendant Cold Spring Hills has violated Public Health Law §§ 2801-d, 2803-c and 2803-d, by violating, 10 NYCRR 415.3 (resident rights), 10 NYCRR 415.5 (quality of life), 10 NYCRR 415.12 (quality of care), and 415.13 (nursing services), and the corresponding federal regulations, 42 CFR 483.10, 483.24 (formerly numbered 483.15), 483.25 and 483.35 (formerly numbered 483.30). More specifically, plaintiff claims that defendant Cold Spring Hills violated 10 NYCRR 415.12(c) and 42 CFR 483.25(b)(1), which relate to pressure ulcers. Plaintiff also alleges in her bill of particulars that defendant Cold Spring Hills negligently hired, trained, supervised and retained its employees.

Issue has been joined. Defendant Cold Spring Hills served an answer, and moves for summary judgment dismissing the complaint insofar as asserted against it, and all cross claims asserted against it.

Plaintiff opposes the motion. The remaining defendants have not appeared in relation to the motion.

A summary judgment proponent must make a prima facie showing of an entitlement to same as a matter of law by tendering sufficient evidence to eliminate any material issues of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In a medical malpractice action, a defendant seeking summary judgment must make a prima facie showing of the absence of any departure from good and accepted medical

practice, or that the plaintiff was not injured thereby (*see Fotiou v Goodman*, 74 AD3d 1140 [2d Dept 2010]). With respect to a negligence cause of action, the elements of proof are “the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries” (*Rubin v Staten Is. Univ. Hosp.*, 39 AD3d 618 [2d Dept 2007]). A nursing home has a general duty to exercise reasonable care and diligence in safeguarding a resident, based in part on the capacity of the resident to provide for his or her own safety (*see Alexander v American Med. Response*, 68 AD3d 1026, 1027 [2d Dept 2009]), and a duty not depart from acceptable standards of nursing care customarily exercised in similar facilities (*see Rosen v John J. Foley Skilled Nursing Facility*, 45 AD3d 558, 559 [2d Dept 2007]). In addition, where violations of Public Health Law §§ 2801-d and 2803-c are alleged, a nursing home defendant must establish that it “exercised all care reasonably necessary to prevent and limit the deprivation and injury” (Public Health Law § 2801-d[2]).

In support of the motion, defendant Cold Spring Hills submits, among other things, an affirmation of its counsel, a copy of the pleadings, medial records, deposition transcripts, and an affidavit of its expert witness, Loretta Kaes, a certified assisted living administrator, registered nurse and a licensed nursing home administrator, board certified in gerontological nursing, who is an actively practicing health care professional in New Jersey. Defendant Cold Spring Hills contends that this evidence establishes, a matter of law that it provided care and treatment to the decedent within the acceptable standards of nursing home care, and that such care and treatment did not cause, nor was it related to the worsening of the pressure sore, and did not cause the injuries claimed, and does not provide a basis for the claimed statutory violations. It further contends it did not depart from good and accepted nursing home practice care in its care and treatment of the decedent, and the decedent did not experience any deprivation of rights as plaintiff alleges.

At the outset, the court notes that defendant Cold Spring Hills has failed to show that any cross claims have been asserted against it. That branch of defendant Cold Spring Hills for summary judgment dismissing the cross claims asserted against it is denied as moot.

In addition, to the extent plaintiff asserts in her bill of particulars that defendant Cold Spring Hills negligently hired, trained, supervised and retained its employees, an employer may be liable for a claim of negligent hiring or supervision if an employee commits an “independent act of negligence outside the scope of employment” and the employer “was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act” (*Seiden v Sonstein*, 127 AD3d 1158, 1160–1161 [2d Dept 2015]). Here, plaintiff has failed to allege that anyone employed by defendant Cold Spring Hills has committed an act of negligence outside the scope of his or her employment (*see Lamb v Baker*, 152 AD3d 1230 [4th Dept 2017]). That branch of the motion for summary judgment dismissing the

portion of the complaint asserted against defendant Cold Spring Hills based upon negligent hiring, training, supervision and retention is granted.

With respect to that branch of the motion by defendant Cold Spring Hills for summary judgment dismissing the portion of the complaint insofar as asserted against it based upon negligent care and treatment and malpractice, Kaes states she reviewed the complaint and bills of particulars, the medical records of Cold Spring Hills and Long Island Jewish Medical Center, the hospital records from Long Island Jewish Hospital, medical bills, and deposition transcripts of plaintiff, Kristen Meyer, R.N., and Mary Cavaciuti, R.N. (nurses employed at Long Island Jewish Medical Center). Kaes opines that based upon the reasonable degree of geriatric care certainty, the notes and records from Cold Spring Hills demonstrate that its physicians, nurses, and staff took reasonable steps in an attempt to heal and/or prevent the worsening of the pressure ulcer on his sacrum, which was present when the decedent arrived at Cold Spring Hills. Kaes states that the Cold Spring Hills records indicate the decedent was assessed to have a an unstageable pressure ulcer on his sacrum, and generalized edema throughout his body. Kaes opines that any alleged worsening of the pressure ulcer was not caused by any deficiency in defendant Cold Spring Hills's treatment, but rather, was caused by the decedent's multiple co-morbidities, including prostate cancer, post prostatectomy, benign prostate hypertrophy, alcohol abuse, and pericardial effusion. According to Kaes, the decedent's co-morbidities would have prevented the healing of the decedent's ulcers no matter the quality of care. Kaes opines to a reasonable degree of certainty in the field of nursing home care and geriatric care, the nurses, staff, and physicians at Cold Spring Hills breached no duty of care in their treatment and care of the decedent. She also opines to a reasonable degree of certainty in the field of nursing home care and geriatric care, there was no neglect and no abuse, the decedent had many co-morbidities that complicated his recovery, and the clinical and professional staff as well as the primary bedside care givers at Cold Spring Hills met the challenges and achieved excellent outcomes for the decedent as evidenced by his independence in all activities of daily living and functional ability.

In opposition, plaintiff contends that Kaes has failed to demonstrate she has had experience in wound care, and in any event, her opinion is conclusory, and thus without probative value. Plaintiff submits her bill of particulars, the affidavit of her expert witness, Kathleen Martin, RN, MSN, MPA, LNHA, CPHQ, WCC, a registered nurse in New York, New Jersey and Arizona, s licensed Long Term Care Administrator in the State of New Jersey, and certified Professional in Health Care Quality.¹

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To the extent defendant Cold Spring Hills objects to the affidavit of plaintiff's expert witness because it was subscribed and sworn to out of state and not accompanied by a certificate of conformity as required by CPLR 2309(c), such defect is not fatal, no substantial right of defendant

Martin states that her opinions are based upon her review of the complaint and bills of particulars, the medical records of Cold Spring Hills, Long Island Jewish Medical Center, Long Island ENT Associates, North Shore LIJ hospital, the billing records of Long Island Jewish Medical Center, the medical records of Long Island ENT Associates and the hospital records of St. Joseph Hospital, defendant Cold Spring Hills's motion papers. Martin opines within a reasonable degree of reasonable probability that the care, skill, and/or knowledge exercised or exhibited in the treatment, practice, or work performed by the staff of Cold Spring Hills in their care and treatment of the decedent fell outside of acceptable professional standards or treatment practices. Martin acknowledges the decedent was admitted to Cold Spring Hills with an "unstageable" sacral pressure ulcer, and that during his stay at Cold Spring Hills, he had several transfers to the hospital for unrelated critical issues. Martin also acknowledges that Santyl was ordered, but notes there were many blank dates in the Treatment Administration Record, and that the Weekly Pressure Ulcer Flow Sheet does not appear to have been initiated upon admission. Martin opines that the decedent's ulcer should have been debrided with means other than with Santyl for 4 weeks so to prevent the wound bed from progressing to a deeper wound, which was not done by nursing staff, and required no MD order. Martin states that on or about October 7, 2013, the sacral wound developed into a stage IV ulcer, and due to more drainage, alginate dressing had to be started on November 25, 2013, notwithstanding the form states "small" for drainage amount. According to Martin, the documentation shows that the same treatment, which was provided from day one, was provided until the decedent's discharge from Cold Spring Hills. Martin points out that the decedent's air mattress was never upgraded to a low air loss or Clinitron type. Martin further states that the same care plan was in place for the decedent's entire stay, except on December 13, 2013, when the items "Encourage fluid intake," "Dietary supplements as per order" and "change incontinence brief q 4 hrs," were not checked off on the chart. Martin opines that within a reasonable degree of certainty, the staff of defendant Cold Spring Hills failed to take steps to ensure the decedent's sacral pressure ulcer did not progress and fail to heal, and that such demonstrated negligence is below the standard of care.

Nursing home records indicate assessments of the sacral pressure ulcer, including two September 2013 assessments which indicated it was "unstageable," a third assessment on December 13, 2013, in which the ulcer's size had increased, and a comprehensive assessment known as a "Minimum Data Set," dated December 20, 2013, indicating the ulcer was unhealed and assessed to be "Stage IV."

Cold Spring Hills has been prejudiced by disregarding it. Moreover, the objection has been rendered moot since the expert affidavit and certificate of conformity now are filed (*see Seiden v Sonstein*, 127 AD3d 1158 [2d Dept 2015]; *Midfirst Bank v Agho*, 121 AD3d 3 [2d Dept 2014]).

Kaes states she has personal knowledge of the standards of care in nursing facilities like Cold Spring Hills, including standards regarding the care and management of pressure injuries, but fails to lay the requisite foundation for her asserted familiarity of standards of care in the field of wound care (*see Korszun v Winthrop University Hospital*, 172 AD3d 1343 [2d Dept 2019]). She does not state that she has any wound care expertise, or any specific training, expertise in or understanding of the standard of care of pressure ulcers (*see Tsimbler v Fell*, 123 AD3d 1009 [2d Dept. 2014]; *cf. Pichardo v St. Barnabas Nursing Home, Inc.*, 134 AD3d 421 [1st Dept 2915]). To the extent defendant Cold Spring Hills offers in reply, an additional affidavit of Kaes dated January 6, 2020, to show she is qualified to provide an opinion to show Cold Spring Hills breached no duty of care in the decedent's treatment, that affirmation likewise fails to address the issue of Kaes's specific training or expertise vis-a-vis care and treatment of pressure ulcers. Contrary to the assertion of defense counsel, such affirmation does not indicate that Kaes has experience in developing procedures for care and treatment of pressure ulcers.

More importantly, Kaes's bare conclusory assertions that defendant Cold Spring Hills conformed to accepted nursing home practices relative to the care of the decedent's pressure ulcer, and that his co-morbidities would have prevented the healing of the ulcers no matter the quality of care, are insufficient to establish defendant Cold Spring Hills's entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Center*, 64 NY2d 851 [1985]). Kaes does not explain what appropriate measures or steps the nursing home staff took to care for, or treat, the decedent's sacral pressure ulcer. She does not address plaintiff's testimony that within two days after the decedent's discharge from Cold Spring Hills, he was taken to a wound care facility, evaluated as having a stage four bed sore, and underwent hyperbaric chamber sessions, which healed the sore. Kaes does not explain the discrepancy between the "Therapy Team" record describing the decedent's skin as "Intact" at the time of discharge, and the "Minimum Data Set" dated December 20, 2013, indicating the existence of a stage IV ulcer.

Kaes, who is not a medical doctor, fails to state why or how the decedent's co-morbidities would have caused the pressure ulcer to become worse or prevent it from healing, no matter the quality of care. She does not address the opinions of plaintiff's expert that the wound could have been debrided by a nurse with means other than with Santyl for 4 weeks, without a doctor's order. Additionally, her conclusions as to whether defendant Cold Spring Hills properly cared and managed the decedent's sacral pressure ulcer are contradicted by plaintiff's expert, leaving a conflict of opinion relative to whether defendant Cold Spring Hills breached a duty of care giving rise to plaintiff's claims of negligence and malpractice relative to the care and treatment of the decedent's sacral pressure ulcer, that should be resolved by a finder of fact (*see Pichardo v St. Barnabas Nursing Home, Inc.*, 134 AD3d 421). That branch of the motion by defendant Cold Spring Hills for summary

judgment dismissing the portion of the complaint insofar as asserted against it based upon negligence and medical malpractice predicated upon the alleged negligent care and treatment of the decedent's sacral pressure ulcer is denied.

As to the gross negligence cause of action, the papers of defendant Cold Spring Hills are sufficient to carry its burden on the motion. In a medical malpractice of negligence action, punitive damages are warranted where "the conduct evinces a high degree of moral culpability, or willful or wanton negligence or recklessness" (*Dymtryszyn v Herschman*, 78 AD3d 1108, 1109 [2d Dept 2010]) or "the conduct is so flagrant as to transcend mere carelessness" (*Kraycar v Monahan*, 49 AD3d 507, 508 [2d Dept 2008]). Whereas, punitive damages pursuant to Public Health Law § 2801-d(2) are available "where the deprivation of any such right or benefit is found to have been willful or in reckless disregard of the law rights of the patient."

Although questions of fact exists as to whether defendant Cold Spring Hills negligently cared for, and treated the decedent in relation to his pressure ulcer, it is clear there is no evidence of willful or wanton negligence for the care and treatment of the decedent, or reckless disregard of the law rights of the decedent, warranting punitive damages (*see Vissichelli v Glen-Haven Residential Health Care Facility, Inc.*, 136 AD3d 1021 [2d Dept 2016]; *Rey v Park View Nursing Home*, 262 AD2d 624, 627 [2d Dept 1999]; *see also Everett v Loretto Adult Community, Inc.*, 32 AD3d 1273, 1274 [4th Dept 2006]). In opposition, plaintiff fails to raise a triable issue of fact (CPLR 3212[b]; *see Alvarez v Prospect Hosp*, 68 NY2d 320, 324). Therefore, defendant Cold Spring Hills is entitled to summary judgment dismissing the claim for gross negligence and punitive damages based upon gross negligence and violation of Public Health Law § 2801-d(2). That branch of the motion by defendant Cold Spring Hills for summary judgment dismissing so much of the complaint asserted against it based upon gross negligence, and which seeks an award for common-law punitive damages and punitive based upon violation of Public Health Law § 2801-d is granted.

With respect to the claim pursuant to Public Health Law § 2803-d, section 2803-d is a reporting statute, whereby a procedure is set forth for the reporting of physical abuse, mistreatment or neglect of a nursing home resident by a nursing home staff member. That section requires allows a person who has reasonable cause to believe a nursing home resident has been abused, mistreated, neglected or subjected to the misappropriation of property in the facility to make a report, and requires certain licensed professionals to do so. It provides, among other things, that failure by certain licensed professionals to report abuse of a nursing home resident to be unprofessional conduct in the practice of his or her profession. Under section 2803-d, a person found guilty of abusing a resident is subject to a fine and other penalties. Section 2803-d, however, does not expressly allow for a private right of action

arising from an alleged violation of it (*compare* Public Health Law § 2801-d[1]), and the court is unaware of any case precedent recognizing a private right of action pursuant to it. Plaintiff makes no argument in opposition to that branch of the motion by defendant Cold Spring Hills seeking summary judgment dismissing her claim predicated upon the alleged violation of Public Health Law §2803-d. That branch of the motion by defendant Cold Spring Hills for summary judgment dismissing so much of the complaint as is based upon an alleged violation of Public Health Law § 2803-d is granted.

With respect to the claims by plaintiff pursuant to Public Health Law § 2801-d, section 2801-d provides a basis for liability due to injury to a nursing home patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule. Public Health Law § 2803-c sets forth rights of patients in certain medical facilities, including the right by every patient to receive adequate and appropriate medical care. Thus, deprivation of those rights, predicated upon specific contract provisions, or regulations, codes or rules, can serve as a basis for liability under Public Health Law § 2801-d, but Public Health Law § 2803-c itself does not itself provide a private right of action for its violation.

To the extent plaintiff asserts that defendant Cold Spring Hills violated 10 NYCRR 415.11 and 42 CFR 483.20 and 483.21, as predicates for her claims under Public Health Law § 2801-d, plaintiff did not allege violations of those regulations in the complaint or her bill of particulars with respect to defendant Cold Spring Hills and has not cross moved for leave to amend or supplement the bill of particulars to allege their violation by defendant Cold Spring Hills.

To the extent plaintiff asserts defendant Cold Spring Hills violated 10 NYCRR 415.3(e) (1) and (2), those regulations relate to the resident's right to privacy and confidentiality of his or her records, and privacy in written communication. Plaintiff has failed to allege any specific instance where the decedent's privacy rights were violated.

To the extent plaintiff asserts defendant Cold Spring Hills violated 42 CFR 483.10(c)(1), that regulation grants the resident of a nursing home the right to be informed, and participate in his or her treatment, including his or her total health status, including his or her medical condition. To the extent plaintiff asserts defendant Cold Spring Hills mischaracterized the size of the decedent's pressure ulcer, plaintiff testified that she was apprised of the pressure ulcer's existence, and advised it was being treated. As a consequence, plaintiff has not established any alleged violation of the regulation under her version of the facts.

To the extent plaintiff asserts defendant Cold Spring Hills violated 42 CFR 483.10(g), that regulation grants the resident the right to (1) be informed of his or her rights and the

rules and regulations governing the resident's conduct and responsibilities, (2) access to his or her records, (3) certain notifications orally and in writing, and (4) access to others in and out of the facility. Although plaintiff alleges that her decedent's right to receive notice was violated, she does not cite a specific notice required pursuant to the regulation which was not provided to him.

To the extent plaintiff asserts defendant Cold Spring Hills violated 10 NYCRR 415.5 and 42 CFR 483.24 (formerly numbered 483.15), which relate to residents' quality of life, plaintiff has failed to specify which subsection, if any, of those regulations was violated. In any event, defendant Cold Spring Hills's submissions are sufficient to show, prima facie, that it satisfied its duty of care under these "quality of life" regulations as the decedent was able to choose his activities, interacted with others, had regular family visits, etc. Plaintiff has failed to raise a triable issue of fact with respect to the showing in opposition.

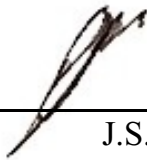
With respect to the claim by plaintiff that defendant Cold Spring Hills violated 10 NYCRR 415.13 ("Nursing services"), plaintiff again has failed to cite to the specific subsection of the regulation alleged to have been violated, or offered any proof that defendant Cold Spring Hills had insufficient nursing staff pursuant to the regulation.

Defendant Cold Spring Hills contends plaintiff may not predicate her claim under Public Health Law 2801-d based upon alleged violation of 10 NYCRR 415.12(c), because that regulation contemplates a scenario where a patient enters a facility without pressure sores, but develops them thereafter. Contrary to such contention, the plain language of that regulation (10 NYCRR 415.12[c]), as well as corresponding federal regulation, 42 CFR 483.25(b)(1), encompasses instances where a resident has a pressure sore at the time of his or her entry into the facility, and impose the requirement that the facility, based upon the comprehensive assessment of a resident, ensures the resident receive necessary treatment and services to promote the healing of the pressure sore, prevent infection and prevent new sores from developing. Plaintiff thus has stated a cause of action based upon violation of Public Health Law § 2801-d predicated upon violation of 10 NYCRR 415.12(c) and 42 CFR 483.25(b)(1), and questions of fact exist as to whether those regulations were violated by defendant Cold Spring Hills in its care and treatment of the sacral pressure ulcer of the decedent, which may require resolution at trial

Under such circumstances, that branch of the motion by defendant Cold Spring Hills for summary judgment dismissing the portion of the complaint insofar as asserted against it based upon violation of Public Health Law §§ 2801-d and 2803-c, predicated upon 10 NYCRR 415.3, 10 NYCRR 415.5, 10 NYCRR 415.13, 42 CFR 483.10, 483.24 (formerly numbered 483.15), and 483.35 (formerly numbered 483.30) is granted. That branch of the motion by defendant Cold Spring Hills for summary judgment dismissing the portion of the

complaint insofar as asserted against it based upon violation of Public Health Law §§ 2801-d and 2803-c, predicated upon 10 NYCRR 415.12(c) and 42 CFR 483.25(b)(1) is denied.

Dated: May 21, 2020



J.S.C.

FILED

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**COUNTY CLERK
QUEENS COUNTY**