

<b>Castellanos v Jamaica Hosp. Med. Ctr.</b>
2020 NY Slip Op 32479(U)
June 3, 2020
Supreme Court, Queens County
Docket Number: 705895/2014
Judge: Peter J. O'Donoghue
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Short Form Order

**FILED**

**6/4/2020  
11:42 AM**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**COUNTY CLERK  
QUEENS COUNTY**

Present: HONORABLE Peter J. O'Donoghue IA Part MD  
Justice

Aurora Castellanos as Administratrix of the  
Estate of Fernando Castellanos,

x Index  
Number 705895/ 2014

V

Jamaica Hospital Medical Center, et. Al

Motion  
Date February 26, 2020

Motion Seq. No. 6

x

The following papers read on this motion by defendant Long Island Care Center, Inc. (LICC) pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against it, or in the alternative, dismissing those causes of action asserted against it based upon negligence, violation of Public Health Law §§ 2801-d and 2803-c, recklessness, and wrongful death, and seeking punitive damages, attorneys' fees, and all claims asserted against it in the bills of particulars which fall outside the scope of the amended complaint.

Papers  
Numbered

Notice of Motion - Affidavits - Exhibits .....EF Doc. #139-#159  
Answering Affidavits - Exhibits .....EF Doc. #163-#168  
Reply Affidavits .....EF Doc. #169

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

Plaintiff Aurora Castellanos, as the administratrix of the estate of her father, Fernando Castellanos, asserts causes of action against defendant LICC in the amended complaint based upon negligence, wrongful death and violations of Public Health Law §§ 2801-d and 2803-c. Plaintiff's decedent was admitted to defendant Jamaica Hospital Care Center on January 28,

2012, and then transferred to the care and treatment of defendant LICC, a nursing home, on March 8, 2012. This admission was the first of three admissions to defendant LICC. The first admission was from March 8, 2012 to April 23, 2012, when the decedent was transferred to Flushing Hospital. The decedent returned from Flushing Hospital to defendant LICC and was admitted from May 15, 2012 to August 11, 2012, when the decedent was transferred to New York Hospital Queens (NYHQ). The decedent was transferred back to LICC for a third admission from August 28, 2012 to November 23, 2012. Plaintiff seeks to recover damages from defendant LICC, claiming that on the first admission, her decedent was transferred from Jamaica Hospital to LICC with a stage II sacral pressure ulcer, which developed to a stage III ulcer, and eventually becoming unstageable. Plaintiff also claims that her decedent developed other pressure ulcers while at LICC, including gangrene on the decedent's left foot between the second and third toes, and an unstageable pressure ulcer under the decedent's trachea tube from a failure to move the tube. Plaintiff additionally claims that the decedent's sacral pressure ulcer was caused to worsen, and ulcers were caused to develop all over decedent's body, including on the ears, due to the negligence and carelessness of defendant LICC and its failure to provide basic care, including positioning and turning of the decedent's body. Plaintiff further alleges that the negligent care and treatment by defendant LICC caused her decedent's death on November 23, 2012. By the amended complaint, as amplified by the bills of particulars, plaintiff claims defendant LICC has violated Public Health Law §§ 2801-d and 2803-c, by violating 10 NYCRR 415.3 (resident's rights), 10 NYCRR 415.12 (quality of care) and 10 NYCRR 415.12(c) (pressure sores), and the corresponding federal regulations, 42 CFR 483.20(b) (assessment of a resident's needs), 42 CFR 483.25(c) (pressure sores), 42 CFR 483.75(1) (clinical record keeping), and 42 CFR 483.10 (notices). Plaintiff also alleges in her bill of particulars that defendant LICC failed to use reasonable care in the employment, training and supervision of its employees.

Issue is joined.

Defendant LICC moves for summary judgment dismissing the complaint insofar as asserted against it. Plaintiff opposes the motion. Defendant Jamaica Hospital Medical Center has 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 an action involving the rendition of medical or nursing care, it is incumbent upon the defendant moving for summary judgment to establish, prima facie, the absence of any departure from good and accepted professional practice or that any departure was not a proximate cause of the plaintiff's injuries, through medical records and competent expert

affidavits (*see Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1044 [2d Dept 2010]). With respect to the claims 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.

In support of its motion, defendant LICC submits, among other things, a copy of the pleadings, and plaintiff's bill of particulars and amended bill of particulars with respect to LICC, the various transcripts of deposition testimony, medical records of defendants and an affirmation of its expert witness, Umesh K. Gidwani, M.D, MS, a physician licensed to practice in the State of New York, who is board certified in pulmonary diseases, critical care medicine and palliative care.

Dr. Gidwani states in his affirmation that his opinions therein are based on his education, training and experience and his review of the complaint, plaintiff's bills of particulars, amended bills of particulars and supplemental bills of particulars, records maintained by defendants Jamaica Hospital and LICC, and non-parties Flushing Hospital and NYHQ, and the deposition transcripts of plaintiff, and Norma Castellanos and Rose Mancina, (the decedent's wife and stepdaughter, respectively). Dr. Gidwani opines that the decedent suffered from unavoidable skin ulcers, and that within a reasonable degree of medical and nursing certainty, the LICC staff effectively and properly assessed the decedent, established a comprehensive care plan to address his needs upon admission, adequately implemented appropriate and necessary interventions and treatments, and followed all physician orders, including those for nutrition, hydration, social welfare, incontinence, wound care, and medications. He also opines that to a reasonable degree of medical certainty, the care and treatment rendered by defendant LICC was appropriate, and did not depart from good and accepted practice, and was neither a proximate cause of, or a substantial contributing factor in, the decedent's alleged injuries or death. Dr. Gidwani further opines that within a reasonable degree of medical certainty, the decedent's development of skin ulcers, infection, sepsis, septic shock, multi-organ failure and death were not due to negligence or inadequate care on the part of defendant LICC. He additionally opines that to a reasonable degree of medical certainty, the decedent's sacral ulcer could not have been healed by any practical interventions, and that given the decedent's mitigating factors and comorbidities, the decedent's ulcers were unavoidable. It is Dr. Gidwani's opinion that defendant LICC did not violate any resident rights of the decedent and was not negligent because the care provided to the decedent was appropriate, adequate and within the standards of care, and no act or

omission by defendant LICC caused or contributed to the decedent's claimed injuries or death. Dr. Gidwani states that topical treatment, chemical and surgical debridement, and turning and positioning of the decedent to the extent possible, were part of the interventions which were attempted to improve the condition of the decedent's skin, and that to the extent the decedent developed vascular ulcers to his lower extremities towards the end of life, he opines to a reasonable degree of medical certainty, those wounds were unrelated to pressure, and more likely the result of the decedent's PVD and poor vascular condition. Dr. Gidwani attributes the rash, with which the decedent presented during the last admission, to physical stress from the decedent's multiple severe comorbidities. He opines that the rash, and its progression into ulcers, was as a consequence of the decedent's debilitated condition, and was not preventable by any intervention that could have been undertaken by the LICC staff. Dr. Gidwani opines that the LICC staff took all available steps and followed all physician's orders to treat the decedent's pre-existing infections, and took all possible precautions to prevent the decedent from developing additional ones. Dr. Gidwani also opines that to a reasonable degree of medical certainty, the decedent's inability to recover from pre-existing infections and development of additional infections was unavoidable in light of the decedent's ventilator-dependent respiratory failure, severe brain damage, liver disease, immobility, prior bacterial infections, generally weakened state as a result of anemia and cardiac condition, and overall poor medical condition. Dr. Gidwani additionally opines that within a reasonable degree of medical certainty, defendant LICC promptly transferred the decedent to the hospital upon observation of a deterioration of the decedent's condition, and to a reasonable degree of medical and nursing certainty, no evidence exists that LICC was negligent in the hiring of any staff who provided care and treatment to the decedent. Dr. Gidwani further opines that within a reasonable degree of medical certainty defendant LICC took all reasonable measures to prevent any violations of the decedent's rights to the extent those rights are enumerated under Public Health Law §§ 2801-d and 2803-c, and corresponding state and federal regulations, including making reasonable efforts to prevent or limit pressure sores, properly assessing the decedent, establishing a comprehensive care plan, following all physician orders, calling a doctor and ordering a transfer when there was a significant change in the condition of the decedent, adequately documenting the decedent's chart, and regularly contacting plaintiff regarding the decedent's condition and treatment (*see* 10 NYCRR 415.12, 42 CFR 483.25, 42 CFR 483.20, 42 CFR 483.75, and 42 CFR 483.10). Dr. Gidwani additionally opines that the LICC staff did not act maliciously, recklessly or grossly indifferent to patient care and there is no indication of inappropriate abusive behavior directed at the decedent by the LICC staff. Dr. Gidwani, in conclusion, opines that within a reasonable degree of medical certainty, defendant LICC did not violate any resident rights of the decedent, and was not negligent because the care provided to him was appropriate, adequate and within the standards of care, and no act or omission by defendant LICC caused or contributed to the decedent's claimed injuries or death.

In opposition, plaintiff contends that defendant LICC has failed to establish a prima facie showing of entitlement to summary judgment. She asserts that defendant LICC failed to provide the turning and positioning records to justify its expert's opinions with respect to her claims based upon the worsening of the decedent's sacral pressure ulcer and development and progression of additional pressure ulcers, while in defendant LICC's care. Contrary to this assertion, defendant LICC has submitted its turning and positioning records with respect to the first and second admissions, and for the dates of August 29-31, 2012, during the third admission (*see* defendant LICC's Exhibit "L", EF Doc. #159 at 969-984). To the extent the turning and positioning records for the period September 1, 2012 through November 23, 2012 have not been submitted, other medical records submitted by plaintiff, support plaintiff's expert's opinion that with respect to the third admission, all available interventions were in place, including turning and positioning every two hours, pressure relieving cushion, heel booties, elbow pads, nutritional supplements and pressure relieving mattress, and that throughout the third admission, the decedent remained ventilator dependent, with a feeding tube in place and a Foley catheter for incontinence, and was not alert or oriented, and unable to open the eyes spontaneously, and the decedent's skin ulcers and other complications were unavoidable and the result of preexisting conditions, as well as other risk factors. As a consequence, plaintiff has failed to raise a triable issue of fact as to whether the defendant's expert's opinions are unsupported by evidence in the medical/nursing home records.

To the extent plaintiff also contends that defendant LICC has failed to make out a prima facie case to rebut her negligence/malpractice claim, as particularized in paragraphs 2(f) and (g) of her bill of particulars to LICC, those claims were previously withdrawn pursuant to a letter dated April 19, 2016 of her counsel (*see* EF Doc. #106).

Insofar as plaintiff contends that defendant LICC has failed to make out a prima facie case to rebut her claim predicated on LICC's alleged failure to use reasonable care in the employment, training and supervision of its employees (*see* paragraph 2[1] of the bill of particulars to LICC, EF Doc. #164), an employer may be liable for a claim of negligent hiring, training 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 LICC committed an act of negligence outside the scope of his or her employment (*see Lamb v Baker*, 152 AD3d 1230 [4<sup>th</sup> Dept 2017]).

To the extent plaintiff contends that defendant LICC did not raise any specific defenses or explanations with respect to her "dignity claim" as particularized in paragraph 2(m) in the bill of particulars (EF Doc. #164) to LICC, her claim is predicated upon an allegation of gross negligence by LICC in failing to use care and disregarding the

rights and safety of others, while knowing its conduct would result in injury. Such allegation is insufficient to state a claim based upon gross negligence, or an award of punitive damages under the common law or predicated upon an alleged violation of Public Health Law § 2801-d(2) (*see* CPLR 3013; *Dymtryszyn v Herschman*, 78 AD3d 1108, 1109 [2d Dept 2010]; *Kraycar v Monahan*, 49 AD3d 507, 508 [2d Dept 2008]). In any event, defendant LICC has established prima facie that it was not guilty of gross negligence or conduct in willful or in reckless disregard of the law rights of the patient, as well as its prima facie entitlement to judgment as a matter of law dismissing the request for punitive damages under the Public Health Law by demonstrating that its conduct was not in willful or reckless disregard of the decedent's rights (*see* Public Health Law § 2801-d[2]). In opposition, plaintiff has failed to raise a triable issue of fact with respect to this showing (*see Valensi v Park Avenue Operating Co., LLC*, 169 AD3d 960 [2d Dept 2019]).

The additional contention by plaintiff that defendant LICC has failed to establish prima facie entitlement to summary judgment dismissing her "dignity" claims, predicated upon LICC's inadequate staffing of nurses/certified nurses aides (*see* paragraph 2[d], and [h] of bill of particulars to defendant LICC [EF Doc. #164]), allowing the decedent to remain in his own feces for hours, and failure to institute a plan of care to prevent skin breakdown (*see* paragraph 2[j] of the bill of particulars to LICC), is without merit. Defendant LICC has met its initial burden with respect to those claims by submitting the records of LICC, including those of bowel and incontinent care, and the affirmation of its expert physician, who affirms that defendant LICC established a comprehensive care plan, and did not deviate from the accepted standard of care in the care and treatment and assessment of the decedent (*see Carton v Buffalo General Hosp. Deaconess Skilled Nursing Facility Div.*, 83 AD3d 1404 [4<sup>th</sup> Dept 2011]). Plaintiff has failed to raise a triable issue of fact as to that showing insofar as she has failed to offer an affirmation or affidavit of an expert witness in opposition.

Under such circumstances, summary judgment dismissing the amended complaint insofar as asserted against defendant LICC is warranted. The motion by defendant LICC for dismissing the amended complaint insofar as asserted against it is granted.

The amended caption shall read as follows:

( S E E   N E X T   P A G E )

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

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Aurora Castellanos as Administratrix of the  
Estate of Fernando Castellanos,

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