

Youmans v Brooklyn Queens Nursing Home, Inc.
2020 NY Slip Op 34339(U)
December 29, 2020
Supreme Court, Kings County
Docket Number: 512980/2017
Judge: Genine D. Edwards
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At Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 29th day of December 2020.

PRESENT:

Hon. Genine D. Edwards
Justice, Supreme Court

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TABRINA YOUMANS, as Administratrix of the Estate of
ANTHONY DARNELL YOUMANS, and TABRINA
YOUMANS, Individually,

Plaintiffs,

Index. No. 512980/2017

-against-

DECISION/ORDER

BROOKLYN QUEENS NURSING HOME, INC.,
RIVERDALE NURSING HOME, INC. and THE
BROOKDALE UNIVERSITY HOSPITAL MEDICAL
CENTER,

Defendants..

-----X
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notices of Motion and Affirmations in Support.....	1-2
Affirmations in Opposition.....	3-4
Affirmation in Reply.....	5-6

In this action for medical malpractice, defendants Brooklyn Queens Nursing Home, Inc., (“BQNH”) and Brookdale University Hospital Medical Center (“Brookdale”) move for summary judgment, in motion sequences #2 and #3, respectively. Plaintiffs oppose both.

BQNH requests an order: (1) pursuant to CPLR 3212, granting summary judgment and dismissing the complaint against BQNH, with prejudice, on the basis that the care and treatment provided by BQNH conformed with good and accepted medical practice, and that the care and treatment provided was neither a proximate cause of, nor a substantial factor in the alleged injuries and/or damages sustained by decedent; (2) upon dismissal, amending the caption to

delete BQNH as a defendant; (3) upon dismissal, severing the claims insofar as asserted against BQNH; and (4) upon dismissal and severance, directing the entry of judgment in favor of BQNH.

Brookdale requests an order: (1) pursuant to CPLR 3211(a)(5) dismissing claims of negligence for treatment rendered between January 2 and February 10, 2014 at defendant Brookdale as untimely pursuant to the statute of limitations; (2) limiting plaintiffs' claims to the dates of negligence alleged in the pleadings and precluding plaintiffs from asserting claims for treatment outside of the dates alleged; and (3) pursuant to CPLR §3212, granting summary judgment and dismissing the complaint against Brookdale, with prejudice, and dismissing all claims regarding Brookdale as without merit.

Brooklyn Queens Nursing Home, Inc.

BQNH contends it is entitled to summary judgment because the care and treatment rendered to Anthony Darnell Youmans ("decedent") during all three of his admissions comported with good and accepted standards of medical practice and did not contribute to causing his alleged injuries.

"A defendant moving for summary judgment in a medical malpractice action must demonstrate the absence of any material issues of fact with respect to at least one of the elements of a cause of action alleging medical malpractice: (1) whether the physician deviated or departed from accepted community standards of practice, or (2) that such a departure was a proximate cause of the plaintiff's injuries." *Russell v. Garafalo*, -- N.Y.S.3d ---, 2020 N.Y. Slip Op. 07413 (2d Dept. 2020); *See Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011). "Where a defendant makes a prima facie showing on both elements, 'the burden shifts to the plaintiff to rebut the defendant's showing by raising a triable issue of fact as to both the

departure element and the causation element.” *Russell*, 2020 N.Y. Slip Op. 07413 quoting *Gilmore v. Mihail*, 174 A.D.3d 686, 105 N.Y.S.3d 504 (2d Dept. 2019); *See Stukas*, 83 A.D.3d 18.

In support of BQNH’s contention it submitted, inter alia, decedent’s medical records and the expert affirmation of a board certified internist, Vincent P. Garbitelli, M.D. (“Dr. Garbitelli”). Dr. Garbitelli set forth a detailed account of decedent’s medical records and explained why the care provided by BQNH did not depart from accepted standards of medical practice and was not the proximate cause of decedent’s injuries. Regarding causation, Dr. Garbitelli specifically referenced decedent’s autopsy report and medical records to support his opinion that BQNH neither contributed to nor caused decedent’s injuries. Further, Dr. Garbitelli opined that the ulcers were unavoidable due to decedent’s quadriplegia coupled with his frequent refusal of care, treatment and food. Lastly, Dr. Garbitelli indicated that it was very unlikely that decedent’s pressure ulcers caused bacteremia or septicemia because immobile patients, like decedent, have diminished circulation to and from the area of the pressure ulcer.

In opposition, plaintiffs submitted the redacted expert affirmation of a board-certified internist¹. While the internist was able to raise triable issues of fact as to deviations and departures, he failed with respect to causation. Specifically, plaintiffs’ expert did not opine as to several of Dr. Garbitelli’s assertions, including his opinion as to the autopsy report, the unlikelihood that ulcers caused decedent’s septicemia and decedent’s cause of death. Consequently, plaintiffs failed to raise a triable issue of fact as to causation. *See Jacob v. Franklin Hospital Medical Center*, — N.Y.S.3d —, 188 A.D.3d 838 (2d Dept. 2020); *Lyakhovich v. Vernov*, 185 A.D.3d 566, 126 N.Y.S.3d 711 (2d Dept. 2020); *Wagner v. Parker*,

¹ Plaintiffs provided an un-redacted expert affirmation to the Court.

172 A.D.3d 954, 100 N.Y.S.3d 280 (2d Dept. 2019); *Gilmore v. Mihail*, 174 A.D.3d 686, 105 N.Y.S.3d 504 (2d Dept. 2019).

BQNH also argued that it is entitled to dismissal of the claims regarding statutory violations. Of note, plaintiffs' complaint alleges that the staff at BQNH violated New York Public Health Law 2801-d and 2803-c. Liability under the Public Health Law 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. *See* Public Health Law 2801-d (1), (2); *Gold v. Park Ave. Extended Care Center Corp.*, 90 A.D.3d 833, 935 N.Y.S.2d 597 (2d Dept. 2011). But Dr. Garbitelli established, *prima facie*, that BQNH did not violate any contract, statute, regulation, code or rule and that decedent was not injured by any alleged violation. *See Moore v. St. James Health Care Center, LLC*, 141 A.D.3d 701, 35 N.Y.S.3d 464 (2d Dept. 2016); *Novick v. South Nassau Communities Hosp.*, 136 A.D.3d 999, 26 N.Y.S.3d 182 (2d Dept. 2016). And plaintiffs failed to establish that decedent's injuries were caused by the deprivations of rights afforded to decedent under the Public Health Law. *See Moore*, 141 A.D.3d 701; *Novick*, 136 A.D.3d 999; *Gold*, 90 A.D.3d 833.

Brookdale University Hospital Center

Brookdale moved to dismiss as time-barred plaintiffs' claims as to decedent's admission to Brookdale from January 2 through February 10, 2014 ("2014 admission"). Decedent was also a patient of Brookdale from January 13 through January 28, 2015 ("2015 admission").

"To dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the action has expired." *Campane v. Panos*,

142 A.D.3d 1126, 38 N.Y.S.3d 226 (2d Dept. 2016). "If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period" *Id.*

Here, Brookdale established that when this action was commenced on June 30, 2017, the negligence and medical malpractice claims related to decedent's 2014 admission were time-barred by the applicable statute of limitations. *See* CPLR 214-a; CPLR 214(5); *Piccolo v. Panos*, 130 A.D.3d 704, 13 N.Y.S.3d 478 (2d Dept. 2015). In opposition, plaintiffs argued that the statute of limitations was tolled by the continuous treatment doctrine.

"Under the continuous treatment doctrine, the limitations period does not begin to run until the end of the course of treatment if three conditions are met: (1) the patient continued to seek, and in fact obtained, an actual course of treatment from the defendant physician during the relevant period; (2) the course of treatment was for the same conditions or complaints underlying the plaintiff's medical malpractice claim; and (3) the treatment is continuous." *Wright v. Southhampton Hospital*, 187 A.D.3d 1242, 131 N.Y.S.3d 216 (2d Dept. 2020).

The record is devoid of evidence that decedent sought or obtained a course of treatment from Brookdale during the 2014 admission. Thus, the record establishes that decedent and defendant did not mutually agree upon, or contemplate, future consultation or treatment after the 2014 admission. *See Fraumeni v. Oakwood Dental Arts, LLC*, 108 A.D.3d 495, 968 N.Y.S.2d 561 (2d Dept. 2013). Moreover, given that decedent's 2014 admission for gunshot wounds differed from the 2015 admission for respiratory distress, pneumonia, fever, and shortness of breath, plaintiffs failed to present evidence to suggest that the treatments correlate. *See Ceglie v. Bab Nuclear Radiology, P.C.*, 120 A.D.3d 1376, 992 N.Y.S.2d 580 (2d Dept. 2014). Lastly, the

services provided in 2014 and 2015 were discrete and complete. *See Yanez v. Watkins*, 164 A.D.3d 547, 82 N.Y.S.3d 76 (2d Dept. 2018).

Next, Brookdale moved to limit plaintiffs' claims to the dates of negligence alleged in the pleadings and to preclude plaintiffs from asserting claims for treatment outside of those dates. Brookdale posits that although decedent's second admission to Brookdale spanned from January 13 through January 28, 2015, the verified bill of particulars alleged that Brookdale's medical malpractice and negligence concluded on January 13, 2015. Brookdale further submits that plaintiffs had the complete medical records when the supplemental bill of particulars were served on December 12, 2018. The note of issue was filed on May 7, 2020.

In opposition, plaintiffs provide a purported supplemental bill of particulars, dated September 11, 2020, which expanded the dates of alleged negligence and added new injuries. Plaintiffs contend the original verified bill of particulars as to Brookdale reserved their right to amend or supplement same up to and including at the time of trial. However, once a note of issue has been filed, a plaintiff may not serve an amended or supplemental bill of particulars without obtaining leave of the court. *See Salgado v. Town Sports Intl.*, 73 A.D.3d 898, 901 N.Y.S.2d 325 (2d Dept. 2010); *Romanello v. Jason*, 303 A.D.2d 670, 756 N.Y.S.2d 657 (2d Dept. 2003). Contrary to their contention, plaintiffs are not entitled to amend and supplement the bill of particulars without limitation. *See Salgado v. Town Sports Intl.*, 73 A.D.3d 898, 901 N.Y.S.2d 325 (2d Dept. 2010). Significantly, plaintiffs failed to show, inter alia, a reasonable excuse for their extended delay in moving for leave to serve an amended bill of particulars. *See Salgado*, 73 A.D.3d 898; *Sampson v. Contillo*, 55 A.D.3d 591, 865 N.Y.S.2d 137 (2d Dept. 2008).

Finally, Brookdale moved for summary judgment contending that all the claims against Brookdale should be dismissed since the care rendered to decedent was within accepted medical care. In support of its motion Brookdale submitted, inter alia, decedent's medical records and the expert affirmation of a board-certified internist, Jeffrey Nichols, M.D. ("Dr. Nichols"). Dr. Nichols opined that in 2015 decedent's nutritional status was addressed with tube-feeding. However, there was no factual support for same. While Dr. Nichols opined differently as to the tube-feeding in reply, the function of a reply is not to permit the movant to introduce new arguments in support of the motion. *See McKenzie v. Abrahams*, 72 A.D.3d 758, 899 N.Y.S.2d 290 (2d Dept. 2010); *Canter v. Ease Nassau Medical Group*, 270 A.D.2d 381, 704 N.Y.S.2d 624 (2d Dept. 2000); *Ritt by Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 582 N.Y.S.2d 712 (1st Dept. 1992). Consequently, Brookdale did not meet its prima facie burden of demonstrating entitlement to summary judgment. *See Kleinman v. North Shore University Hosp.*, 148 A.D.3d 693, 48 N.Y.S.3d 455 (2d Dept. 2017); *Thomas v. Hermoso*, 110 A.D.3d 984, 973 N.Y.S.2d 344 (2d Dept. 2013). Moreover, Dr. Nichols' opinions regarding deviations and departures from the standard of care were insufficient. Specifically, Dr. Nichols merely recounted the treatment rendered and opined, in a conclusory manner, that such treatment did not represent a departure from good and accepted medical practice. *See Tomeo v. Beccia*, 127 A.D.3d 1071, 7 N.Y.S.3d 472 (2d Dept. 2015).

Accordingly, Brooklyn Queens Nursing Home, Inc.'s motion for summary judgment is granted. Brookdale University Hospital Medical Center's motion is granted, in part, dismissing plaintiffs' claims of negligence for treatment rendered between January 2 and February 10, 2014 and limiting plaintiffs' claims to the dates of negligence alleged in the pleadings and precluding

plaintiffs from asserting claims for treatment outside of the dates alleged, the remainder of the motion is denied.

This constitutes the Decision of this Court.

ENTER,

A handwritten signature in black ink, appearing to be 'G. Edwards', written over the word 'ENTER,'.

Hon. Genine D. Edwards, J.S.C