

**Cortez v Terrence Cardinal Cooke Health Ctr.**

2020 NY Slip Op 34642(U)

June 29, 2020

Supreme Court, Bronx County

Docket Number: Index No. 20485/2015E

Judge: Llinét M. Rosado

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 25

-----X  
CORTEZ, ERNESTO

Index No. 0020485/2015E

-against-

Hon. Llinet M. Rosado

TERENCE CARDINAL COOKE

Justice Supreme Court

-----X  
The following papers numbered 1 to 3 were read on this motion ( Seq. No. 6 )  
for SUMMARY JUDGMENT noticed on September 10, 2019.

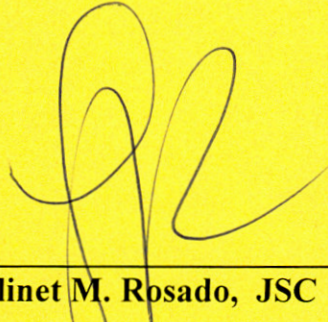
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1
Answering Affidavit and Exhibits	No(s). 2
Replying Affidavit and Exhibits	No(s). 3

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the attached decision*

SEE MEMORANDUM DECISION

Motion is Respectfully Referred to Justice: \_\_\_\_\_  
Dated: \_\_\_\_\_

Dated: 6/29/2020

Hon.   
Llinet M. Rosado, JSC

- 1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY  CASE STILL ACTIVE
- 2. MOTION IS.....  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE.....  SETTLE ORDER  SUBMIT ORDER  SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT  REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 25

-----X  
Ernesto Cortez, as Administrator of the Estate of  
Juana Cortez,

Plaintiff,

-against-

Terrence Cardinal Cooke Health Center,

DECISION AND ORDER

Index No. 20485/2015E

Defendant.

-----X  
Hon. Llinét M. Rosado, J.S.C.:

Upon the foregoing papers, defendant Terrence Cardinal Cooke Health Center (hereinafter, "TCC") moves for an order pursuant to CPLR 3012(a) dismissing the case for failure to provide a certificate of merit or, in the alternative, granting summary judgment pursuant to CPLR 3212.

**Factual Background & Procedural History**

This wrongful death action was commenced by filing a summons and complaint on or about January 28, 2015. The complaint contains three causes of action, which sound in violation of Public Health Law sections 2801-d, and 2803-c (first cause of action), negligence (second cause of action), and wrongful death (third cause of action). Defendant joined issue on or about March 10, 2015. Discovery concluded and a note of issue was filed on or about April 9, 2019. The instant motion was filed on or about August 7, 2019.

Decedent Juana Cortez was admitted to Mount Sinai Hospital for approximately three weeks in 2012 with complaints of back pain caused by a fractured vertebra. Prior to admittance, decedent had been admitted to Mount Sinai on several occasions due to a myriad of health concerns, including but not limited to cardiovascular issues. During her admission in Mount

Sinai decedent was treated for complications due to her cardiovascular condition, anemia, and bedsores on her buttocks. Following discharge from Mount Sinai on October 22, 2012, Mrs. Cortez was transferred to TCC to receive rehabilitation therapy. Plaintiff, Mrs. Cortez's son, alleges that decedent had initial progress with therapy at TCC, which later stalled after she was transferred to a different floor. After the transfer, Mrs. Cortez's appetite and demeanor declined as her back pain increased. Plaintiff alleges that his mother had on several occasions complained to him about mistreatment and neglect by TCC staff, including allegations that male staff would lay in bed with her. Plaintiff posits that due to understaffing, mistreatment, and neglect, his mother became malnourished and developed bedsores. Plaintiff asserts that once his mother transferred to a different hospital her overall demeanor improved, she began eating, and the sores improved. Mrs. Cortez passed away on April 3, 2013. This action was commenced sounding in wrongful death.

Defendant denies all allegations of mistreatment, neglect, or negligence. Rather TCC asserts that decedent entered TCC with various health concerns, including failure to thrive, undernourishment, and a predisposition for bedsores. Defendant references the decedent's medical history, which notes that the decedent was plagued by many health issues throughout her life, including severe stage heart failure, a fractured lumbar, and Stage II bedsores on both her buttocks. Defendant asserts that a comprehensive nursing and care plan was formulated and effectuated for the care of decedent and it was in fact decedent's deteriorating health as a result of age and her prior medical history that ultimately lead to her decline and death on April 3, 2013. Defendant supports its claims that all standards of medical care and attention were met by an affirmation by Dr. Diamond. Additionally, defendant notes that towards the end of the decedent's residency at TCC, plaintiff discussed with TCC officials transferring decedent to a

hospice facility, Calvary Hospital. Upon discharge from TCC, decedent lived and was treated at Calvary Hospital from January 22, 2013 until her death. Additionally, TCC asserts that Mrs. Cortez was not only prone to but had experienced several hallucinations caused by prescribed medication. TCC asserts that their staff conformed to medical protocol in regard to Mrs. Cortez's care.

### Legal Standard

#### CPLR 3012 (a): Motion to Dismiss

When commencing an action for medical, dental, or podiatric malpractice, CPLR 3012(a) requires that the complaint be accompanied by a certificate executed by the attorney for the plaintiff declaring that the attorney has reviewed the facts of the case and has consulted with at least one physician or professional in the field in which the malpractice occurred. However, the overwhelming majority of courts in all four judicial departments agree that the mere failure to serve a certificate of merit is not alone grounds for dismissal. (*Horn v Boyle*, 260 AD2d 76 [3d Dep't 1999]; *Bowles v State*, 208 AD2d 440 [1st Dep't 1994]; *Dye v Leve*, 181 AD2d 89 [4th Dep't 1992]; *Kolb v Strogh*, 158 AD2d 15 [2d Dep't 1990]). The rationale is that procedural defaults are punishable only by means specifically authorized by statute or rule, and there is no authority to dismiss a malpractice claim for failure to serve a certificate of merit. Rather, the trial court issues an order for the plaintiff to comply with the statute within a particular time period, and if the plaintiff fails to do so the court then imposes sanctions, potentially including dismissal. *Id.*

#### CPLR 3212: Motion for Summary Judgment

The court's function on a motion for summary judgment is issue finding rather than issue determination *Silman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 (1957). The 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...failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers...once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324, 501 NE2d 572, 574, 508 NYS2d 923, 925-926 (1986). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. *Rotuba Extruders v. Ceppos*, 46 NY2d 223(1978).

#### Medical Malpractice

A defendant in a medical malpractice action establishes a prima facie entitlement to summary judgment by showing that in treating the plaintiff, defendant did not depart from good and accepted medical practice, or that any such departure was not the proximate cause of plaintiff's alleged injuries (*Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 2 [1st Dept. 2015]). If a defendant in a medical malpractice action establishes prima facie entitlement to summary judgment plaintiff must rebut defendant's prima facie showing "with medical evidence that defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged." (*Pullman v Silverman*, 125 AD3d 562, 562 [1st Dept. 2015], *aff'd* 28 NY3d 1060 [2016]).

#### Public Health Law 2801

The Appellate Division, First Department has taken the view that a nursing home claim under PHL 2801-(d)(1) may accompany a common law tort claim. In *Zeides v. Hebrew Home for*

*the Aged at Riverdale, Inc.*, 300 A.D.2d 178 (1st Dept. 2002), which addressed the scope of a cause of action under PHL 2801-(d)(1), the plaintiff decedent sustained injuries including bedsores, malnutrition and falls while residing in defendant nursing home. The complaint alleged negligence, wrongful death, promoted by a deprivation of rights under PHL 2801-(d)(1) and 10 NYCRR 415.12. Defendant moved to dismiss the action as barred by the statute of limitations applicable to medical malpractice actions. The Supreme Court, Bronx County, denied the motion.

The Appellate Division affirmed the trial court's decision. The *Zeides* court determined that although the negligence claim was intermingled with the claims of malpractice, the cause of action under the Public Health Law was not barred by the malpractice statute of limitations. The Court found that the statute does not contain intent to equate its private right of action with one for either medical malpractice or ordinary negligence. The court held that the statutory basis for liability is a deprivation of a right rather than a departure from proper practice or a breach of duty of care.

Public Health Law 2801 provides litigants a private statutory cause of action for residents of nursing homes who have experienced a deprivation of rights, and that deprivation caused an injury. This private right of action is cumulative and separate and apart from any other causes of action, such as medical malpractice and/or negligence. The court in *Morisett v Terence Cardinal Cooke Health Care Ctr.*, (8 Misc. 3d 506 [Sup Ct. New York County 2005]) reviewed the text of PHL 2801(d) and its legislative history, and held that a plaintiff may state a cause of action under PHL 2801(d) "even if the plaintiff has simultaneously asserted traditional medical malpractice and negligence claims." (*id.* at 507).

In an action for a violation of PHL 2801, the plaintiff has the burden of proving a deprivation by a residential health care facility of “any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation, where noncompliance by said facility with such statute, code, rule or regulation has not been expressly authorized by the appropriate governmental authority.”

### Discussion

#### Motion to Dismiss pursuant to CPLR 3012 (a)

As a threshold matter, defendant’s motion to dismiss pursuant to CPLR 3012 (a) fails. Defendant contends that the case at bar is rooted in medical malpractice; therefore, it should be dismissed for plaintiff’s failure to file a certificate of merit. Plaintiff posits that the case is one rooted in Public Health Law, that no claim was made for medical malpractice, and therefore CPLR 3012 (a) is not applicable. When commencing an action in medical malpractice, CPLR 3012(a) requires the complaint include a certificate of merit affirming that the attorney has consulted with a practicing physician specializing in the area of medicine from which the action has arisen. If the certificate of merit is absent from the complaint, then the action is subject to dismissal. Yet, an overwhelming majority of courts in all four judicial departments agree that the failure to serve a certificate of merit is not alone grounds for dismissal. (*Horn v Boyle*, 260 AD2d 76[3d Dep’t 1999]; *Bowles v State*, 208 AD2d 440[1st Dep’t 1994]; *Dye v Leve*, 181 AD2d 89 [4th Dep’t 1992]; *Kolb v Strogh*, 158 AD2d 15[2d Dep’t 1990]). Therefore, even if the claims sound in medical malpractice, the motion to dismiss pursuant to CLPR 3012(a) must be denied.

Motion for Summary Judgment pursuant to CPLR 3212

To prevail on a motion for summary judgment, the proponent of the 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. Once a showing has been made the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact. (*Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Mere conclusory allegations or speculation may not defeat a motion for summary judgment. (see e.g. *DePodwin & Murphy v Fonvil*, 38 AD3d 827, 827 [2007]; *Carleton Studio v MONY Life Ins. Co.*, 18 AD3d 491, 492 [2005]). The court is not to determine credibility but whether a factual issue exists. (*Capelin Assoc v Globe Mfg.*, 34 NY2d 338 [1973]).

Plaintiff asserts that Mrs. Cortez was left unattended for hours at a time, leading to the development of bedsores, and experienced several forms of mistreatment by staff. Additionally, Plaintiff asserts that TCC was understaffed and unable to adequately care for the number of patients living at the facility. Furthermore, Plaintiff maintains that TCC failed to identify, notice, and care for decedent's developing and worsening bedsores.

Movant contends that Mrs. Cortez received exemplary care and did not experience any skin breakdowns during the first two months of her residency at TCC. TCC asserts that Mrs. Cortez's declining health was symptomatic of her pervasive and chronic health issues and that all appropriate interventions were timely implemented by TCC to minimize risk of bedsores, promote wound healing, and overall health.

Movant supports their motion with an affidavit by physician Dr. Lawrence Diamond. Dr. Diamond opines that in view of decedent's history of extremely life-threatening medical issues

including coronary artery disease, congestive heart failure, severe ventricular dysfunction, hyperlipidemia, hypertension, chronic infections, a history of pressure ulcers on her buttocks, and that hospice care was recommended before the events at issue, decedent had multiple risk factors for developing pressure ulcers and was in failing health long before admittance to TCC.

Dr. Diamond notes that decedent had an extensive medical history. On January 25, 2012 when decedent was seen at Martha Stewart Center (a geriatric center of Mount Sinai) it was noted that decedent had a prior history of a pressure ulcer on her buttocks, and an examination revealed healed ulcers with the dimensions of 3.0 x 2.0 cm on the left buttock and 5.0 x 2.0 cm on the right buttock. A later doctor's visit due to congestive heart failure from February 6-9, 2012 indicated that in addition to coronary concerns, decedent had a Stage II left buttock pressure ulcer that measured 3.0 x 2.0 cm. and a Stage II right buttock pressure ulcer that measured 4.0 x 2.0 cm. After a series of hospitalizations, decedent and her family were referred to hospice care. Decedent was then released from the hospital with referrals for skilled nursing care and physical therapy.

It is Dr. Diamond's opinion that physicians refer patients to hospice care when they are deemed to have a terminal condition and their life expectancy is less than 6 months. Dr. Diamond further opines that within a reasonable degree of medical certainty that once a patient has sustained a pressure ulcer, which occurred at Mount Sinai, the risk of subsequent ulcers is greatly increased. Dr. Diamond further contends that due to decedent's malnutrition, anemia, declining weight, and predisposition that her bedsores were unavoidable. He further asserts that upon reviewing TCC's medical charts for decedent as well as their care plan that decedent was well taken care of and the prescribed action of care was well within a reasonable standard of care expected of a facility such as TCC.

The defendant has therefore established a prima facie case.

In opposition, plaintiff submits the expert report of Dr. Thomas Perls. Dr. Perls in his affidavit posits that TCC departed from applicable standards of care especially in regard to the progression and worsening of decedent's bedsores. Dr. Perls contends that TCC failed to properly evaluate decedent's clinical condition and pressure ulcer risk factors. Further, he states that the decedent did not have pressure ulcers when she entered the facility and specifically asserts that upon reviewing the deposition testimony by TCC staff that the Braden Scale was incorrectly assessed when decedent entered the facility. TCC staff evaluated decedent's Braden Scale and determined her to be slightly immobile yet Dr. Perls asserts that she was bed bound.

Dr. Perls further asserts that TCC's records indicate that decedent had developed a stage III bedsore without any further findings or records of a previous developing sore. Dr. Perls asserts that a facility executing a standard of care would have performed regular skin integrity checks and would have discovered such a bedsore at a much earlier stage. Plaintiff's expert further posits malnourishment does not make the development of bedsores unavoidable, rather TCC could have prescribed other measures to prevent the development that are not indicated on decedent's patient chart.

Because both parties provide conflicting expert testimony, and the defendant contends that no such departures occurred there is a question of fact as to whether there were any departures from the accepted standard of care with respect to the treatment of bedsores. Both parties annexed affirmations from physicians who based their reviews on medical records, depositions, discovery, and pleadings. The physicians' affirmations are conflicting in their determinations as to whether TCC acted within the standard of care with respect to the treatment of bedsores.

Plaintiff, however, fails to adduce any expert testimony as to any other alleged departures or negligence. Moreover, there is no expert testimony that any negligence in the care and treatment leading to the formation of bedsores contributed to the decedent's death.

Accordingly, that branch of the motion seeking summary judgment is granted in part as to all claims other than the formation and treatment of bedsores.

TCC asserts PHL 2801-d (2) contains an affirmative defense for residential health care facilities in that there is no liability "unless there is a finding that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient." Movant contends that the development or existence of an ulcer is insufficient to establish a violation of Public Health Law, and arguendo if it was sufficient, that PHL 2801-d (2) is applicable. TCC further contends that TCC did not deviate from the standard of care, and therefore did not violate Public Health Law.

Plaintiff posits that TCC has not actually averred as to what specific treatment TCC provided Mrs. Cortez to substantiate her proper care. Further, plaintiff posits that there is no demonstration through the TCC medical chart that care plans and orders were actually fulfilled and that the standard of care was effectuated. Because there is a question of fact as to the attentiveness of the TCC staff, mistreatment of decedent, and potential malnutrition, summary judgment is denied.

For the foregoing reasons, it is hereby

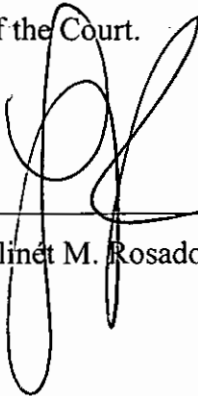
**ORDERED**, that the branch of the motion seeking to dismiss pursuant to CPLR 3012 (a) is denied; and it is further

**ORDERED**, that the branch of the motion for summary judgment is granted in part dismissing all claims and causes of action, including wrongful death, other than those claims relating to the formation, care and treatment of bedsores; and it is further

**ORDERED**, that such part of the motion seeking to preclude evidence or to exclude testimony is denied, without prejudice to renew before the trial justice.

This is the Decision and Order of the Court.

Date: June 29, 2020



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Hon. Linet M. Rosado, J.S.C.