

Moore v Patel
2020 NY Slip Op 34714(U)
June 18, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 17-606515
Judge: Martha L. Luft
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SHORT FORM ORDER

INDEX No. 17-606515
 CAL. No. 19-02218MM

SUPREME COURT - STATE OF NEW YORK
 I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
 Acting Justice of the Supreme Court

MOTION DATE 4-14-20 (003 & 004)
 ADJ. DATE 6-2-20
 Mot. Seq. # 003 - MG
 # 004 - MG; CASEDISP

-----X
 STEPHEN Z. MOORE, SR., as Administrator of
 the Estate of ANNIE MAE MOORE, and
 STEPHEN Z. MOORE, SR., Individually,

Plaintiff,

- against -

MITUL R. PATEL, M.D., and THE NURSING
 CARE CENTER AT MEDFORD INC., d/b/a
 MEDFORD MULTICARE CENTER FOR
 LIVING,

Defendants.
 -----X

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Upon the following papers read on these e-filed motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers filed by defendant Mitul R. Patel, M.D., on March 6, 2020; filed by defendant The Nursing Care Center at Medford, Inc., d/b/a Medford Multicare Center for Living, on March 10, 2020; Notice of Cross Motion and supporting papers filed by plaintiff, on May 4, 2020; filed by plaintiff, on May 4, 2020; Answering Affidavits and supporting papers filed by defendant Mitul R. Patel, M.D., on May 18, 2020; filed by defendant The Nursing Care Center at Medford, Inc., d/b/a Medford Multicare Center for Living, on May 29, 2020; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (#003) by defendant Mitul R. Patel, M.D., and the motion by defendant The Nursing Care Center at Medford, Inc., d/b/a Medford Multicare Center for Living, are consolidated for the purposes of this determination; and it is further

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ORDERED that the motion by Mitul R. Patel, M.D., for summary judgment dismissing the complaint as asserted against him is granted; and it is further

ORDERED that the motion by The Nursing Care Center at Medford, Inc., d/b/a Medford Multicare Center for Living, for summary judgment dismissing the complaint as asserted against it is granted.

Plaintiff commenced this action seeking damages for medical malpractice, negligence, and wrongful death allegedly arising from the treatment of plaintiff's decedent, Annie Moore, by defendants Mitul R. Patel, M.D., and The Nursing Care Center at Medford, Inc., d/b/a Medford Multicare Center for Living (Medford Multicare). With respect to Dr. Patel, plaintiff alleges that medical malpractice occurred between April 19, 2013 and October 17, 2013, and with respect to Medford Multicare between April 19, 2013 and July 6, 2013. Plaintiff also alleges a cause of action pursuant Public Health Law § 2801-d against Medford Multicare. Plaintiff sues derivatively for loss of services.

Dr. Patel now moves for summary judgment dismissing the complaint as asserted against him, arguing that the action is barred by the statute of limitations, that the care and treatment he provided was within the standards of good and accepted medical practice, and was not a proximate cause of decedent's alleged injuries and death. In support of his motion, Dr. Patel submits, inter alia, the affirmation of Rosario J. Romano, M.D., the decedent's certified medical record from Medford Multicare, and the transcripts of the depositions of the parties. Plaintiff opposes the motion, arguing that questions of fact exist with respect to whether Dr. Patel deviated from the applicable standard of care. Plaintiff submits, inter alia, the affirmation of a physician board certified in internal medicine and geriatric medicine.

With respect to Dr. Patel's argument that plaintiff's action is time barred, CPLR 214-a provides that an action sounding in medical malpractice must be commenced within 2½ years of either the act or omission complained of, or the last treatment where there has been continuous treatment for the same condition or complaint which gave rise to the act or omission (*see Lohnas v Luzi*, 30 NY3d 752, 71 NYS3d 404 [2018]; *Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 670 NYS2d 169 [1998]; *Nykorchuck v Henriques*, 78 NY2d 255, 258, 573 NYS2d 434 [1991]; *Gray v Wyckoff Hgts. Med. Ctr.*, 155 AD3d 616, 62 NYS3d 540 [2d Dept 2017]; *Ceglio v Bab Nuclear Radiology, P.C.*, 120 AD3d 1376, 992 NYS2d 580 [2d Dept 2014]). On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired (*see Williams v City of Yonkers*, 160 AD3d 1017, 1019, 76 NYS3d 92 [2d Dept 2018]; *Stewart v GDC Tower at Greystone*, 138 AD3d 729, 30 NYS3d 638 [2d Dept 2016]; *Williams-Guillaume v Bank of America, N.A.*, 130 AD3d 1016, 14 NYS3d 466 [2d Dept 2015]). If the defendant meets this initial burden, the burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (*see Williams v City of Yonkers, supra*; *Elia v Perla*, 150 AD3d 962, 964, 55 NYS3d 305 [2d Dept 2017]; *Quinn v McCabe, Collins, McGeough & Fowler, LLP*, 138 AD3d 1085, 1086, 30 NYS3d 288 [2d Dept 2016]).

Here, Dr. Patel argues that the statute of limitations expired on January 6, 2016, as his treatment of decedent ended on July 6, 2013 upon her transfer from Medford Multicare to Brookhaven Hospital, and that all of the allegations in the complaint occurred on or before July 6, 2013. Plaintiff originally commenced an action on February 15, 2016, but it was dismissed due to his lack of capacity to sue. Subsequently,

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plaintiff was appointed as administrator of the estate of decedent on February 28, 2017, and commenced the instant action, based on the same claims, on April 7, 2017, relating it back to the action brought on February 15, 2016 (*see* CPLR 205 [a]). As plaintiff's first action was commenced on February 16, 2016, it was filed beyond the statute of limitations, which expired on January 6, 2016. Dr. Patel having met his burden, the burden now shifts to plaintiff to raise an issue of fact with respect to whether the statute of limitations is tolled or is otherwise inapplicable. Plaintiff does not address defendant's argument in his opposition and, as such, the action is dismissed as against Dr. Patel.

Medford Multicare also moves for summary judgment dismissing the complaint as asserted against it, arguing that it provided proper nursing home care, and that the care and treatment its staff provided was not the proximate cause of decedent's alleged injuries and death. In support of its motion, Medford Multicare submits the affirmation of Gisele Wolf-Klein, M.D., decedent's medical records, and the transcripts of the depositions of the parties. Plaintiff opposes the motion, arguing that questions of fact exist with respect to whether Medford Multicare and its staff deviated from the applicable standard of care in their treatment of decedent, and whether decedent's rights under the Public Health Law were violated. Plaintiff submits the affirmation of a physician board certified in internal medicine and geriatric medicine.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The moving party has the initial burden of proving entitlement to summary judgment (*id.*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once the moving party has made the requisite showing, the burden then shifts to the opposing party, who is then required to present admissible evidence and facts sufficient to require a trial on any issue of fact (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). On such motion, the court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the non-moving party; the court is not responsible for resolving issues of fact or determining issues of credibility (*see Chimbo v Bolivar*, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; *Kolivas v Kirchoff*, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Chimbo v Bolivar*, *supra*; *Benetatos v Comerford*, 78 AD3d 750, 911 NYS2d 155 [2d Dept 2010]).

A medical malpractice action, which is a type of negligence action, involves three basic duties of care owed to a patient by a professional health care provider and hospital: (1) the duty to possess the same knowledge and skill that is possessed by an average member of the medical profession in the locality where the provider practices; (2) the duty to use reasonable care and diligence in the exercise of his or her professional knowledge and skill; and (3) the duty to use best judgment applying his or her knowledge and exercising his or her skill (*see Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668 [2002]; *Pike v Honsinger*, 155 NY 201, 49 NE 760 [1898]). As healthcare providers, doctors and hospitals owe a duty of reasonable care to their patients while rendering medical treatment; a breach of this duty constitutes medical malpractice (*see Dupree v Giugliano*, 20 NY3d 921, 924, 958 NYS2d 312, 314 [2012]; *Tracy v Vassar*

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Bros. Hosp., 130 AD3d 713, 715, 13 NYS3d 226, 288 [2d Dept 2015], quoting *Scott v Uljanov*, 74 NY2d 673, 675, 543 NYS2d 369 [1989]). A plaintiff asserting a claim for medical malpractice, therefore, must present proof (1) that the defendant deviated or departed from accepted standards of medical practice, and (2) that such deviation or departure was a proximate cause of his or her injury or damage (see *Lowe v Japal*, 170 AD3d 701, 95 NYS3d 363 [2d Dept 2019]; *Gullo v Bellhaven Ctr. for Geriatric & Rehabilitative Care, Inc.*, 157 AD3d 773, 69 NYS3d 108 [2d Dept 2018]; *Duvidovich v George*, 122 AD3d 666, 995 NYS2d 616 [2d Dept 2014]; *Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]). A plaintiff must also present proof that the defendant's deviation of care was a substantial factor in bringing about his or her injury (see *Wild v Catholic Health Sys.*, 21 NY3d 951, 969 NYS2d 846 [2013]; *Zak v Brookhaven Memorial Hosp. Med. Ctr.*, 54 AD3d 852, 863 NYS2d 821 [2d Dept 2008]; *Lyons v McCauley*, 252 AD2d 516, 675 NYS2d 375 [2d Dept 1998]).

A defendant seeking summary judgment on a medical malpractice claim has the initial burden of establishing, through medical records and competent expert affidavits, the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured thereby (see *Gullo v Bellhaven Ctr. for Geriatric Rehabilitative Care, Inc.*, *supra*; *Stucchio v Bikvan*, 155 AD3d 666, 63 NYS3d 498 [2d Dept 2017]; *Mackauer v Parikh*, 148 AD3d 873, 49 NYS3d 488 [2d Dept 2017]; *Feuer v Ng*, 136 AD3d 704, 24 NYS3d 198 [2d Dept 2016]). The defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (see *Sheppard v Brookhaven Mem. Hosp. Ctr.*, 171 AD3d 1234, 98 NYS3d 629 [2d Dept 2019]; *Mackauer v Parikh*, *supra*; *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]). The burden is not met "if defendant's expert renders an opinion that is conclusory in nature or unsupported by competent evidence" (*Alvarez v Prospect Hosp.*, *supra* at 324; see *Smarkucki v Kleinman*, 171 AD3d 1118, 98 NYS3d 232 [2d Dept 2019]; *Bongiovanni v Cavagnuolo*, 138 AD3d 12, 24 NYS3d 689 [2d Dept 2016]; *Duvidovich v George*, *supra*). Once this burden is satisfied, in opposition, a plaintiff must submit evidentiary proof "to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact" (*Stukas v Streiter*, 83 AD3d 18, 24, 918 NYS2d 176 [2d Dept 2011], quoting *Deutsch v Claglassian*, 71 AD3d 718, 719, 896 NYS2d 431 [2d Dept 2010]; see *Wagner v Parker*, 172 AD3d 954, 100 NYS3d 280 [2d Dept 2019]; *Gray v Patel*, 171 AD3d 1141, 99 NYS3d 76 [2d Dept 2019]). The burden on the plaintiff is not to prove his or her entire case, but "merely to raise a triable issue of fact with respect to the elements or theories established by the moving party" (*Stukas v Streiter*, *supra* at 25). Summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (see *Lefkowitz v Kelly*, 170 AD3d 1148, 96 NYS3d 642 [2d Dept 2019]; *Jagenburg v Chen-Stiebel*, 165 AD3d 1239, 85 NYS3d 558 [2d Dept 2018]; *Leto v Feld*, 131 AD3d 590, 15 NYS3d 208 [2d Dept 2015]).

Medford Multicare has established, prima facie, entitlement to summary judgment by submitting evidentiary proof in admissible form to show that its staff did not deviate or depart from applicable standards of care in the treatment rendered to decedent during her admission from April 19, 2013 to July 6, 2013 (see *Gullo v Bellhaven Ctr. for Geriatric & Rehabilitative Care, Inc.*, *supra*; *Duvidovich v George*, 122 AD3d 666, 995 NYS2d 616 [2d Dept 2014]). Medford Multicare submits the affirmation of Gisele Wolf-Klein, M.D., who avers that she is licensed to practice medicine in New York and that she is board certified in internal medicine and geriatric medicine. Dr. Wolf-Klein opines, within a reasonable degree of medical certainty, that Medford Multicare's staff did not deviate or depart from accepted standards of medical and nursing home care during decedent's admission. Dr. Wolf-Klein opines that upon decedent's admission to

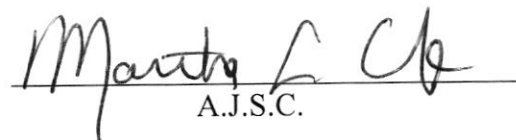
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Medford Multicare, she was appropriately evaluated for aspiration risk, which resulted in orders for a pureed diet, and appropriately assessed for skin breakdowns, which resulted in skin protective measures in her care plan. Dr. Wolf-Klein also opines that decedent was properly assessed for fall risk, and that fall precautions were appropriately added to her care plan and implemented. Dr. Wolf-Klein opines that the fall precautions that were put in place by Medford Multicare were within the standard of nursing home care. Dr. Wolf-Klein notes that decedent did not have a history of falls while at Medford Multicare, nor did she have a history of getting up without assistance. While considering this history, Dr. Wolf-Klein opines that it was appropriate not to have decedent physically restrained or placed on one-to-one supervision. With respect to proximate cause, Dr. Wolf-Klein opines that the CT scans performed at Brookhaven Hospital after decedent's fall on July 6, which did not reveal any acute hemorrhagic or non-hemorrhagic event, shows conclusively that such fall did not cause her subsequent non-responsive or vegetative state. Dr. Wolf-Klein opines that had the fall been a proximate cause of her injuries, the imaging would have revealed a brain bleed or ischemic event.

Medford Multicare having met its prima facie burden on the motion, the burden now shifts to plaintiff to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, *supra*). Plaintiff has failed to raise triable issues of fact with respect to causation, as his expert's opinion with respect to proximate cause are conclusory (*see Navas v New York Hosp. Med. Ctr. Of Queens*, 180 AD3d 796, 119 NYS3d 543 [2d Dept 2020]; *Lowe v Japal*, *supra*; *Gullo v Bellhaven Ctr. for Geriatric & Rehabilitative Care, Inc.*, *supra*). Plaintiff's expert avers that he or she is licensed to practice medicine in New York and that he or she is board certified in internal medicine and geriatric medicine. Plaintiff's expert opines, within a reasonable degree of medical certainty, that the care and treatment provided to decedent by Medford Multicare's staff was not in accordance with good and accepted medical practice and that it was in violation of the Public Health Law. Specifically, plaintiff's expert opines that Medford Multicare improperly calculated decedent's fall risk and failed to appreciate a recent history of a fall during an admission to Good Samaritan Hospital. Plaintiff's expert opines that the miscalculation of decedent's risk assessment indicates a departure from good and accepted practice, and that this failure to take all reasonable and necessary steps to prevent a fall deprived decedent of her general rights under the Public Health Law. However, plaintiff's expert fails to rebut Medford Multicare's prima facie showing with respect to causation, as his expert merely states that the deviations from the accepted standards of medical care were the proximate cause of decedent's alleged injuries and death (*see Schwartz v Patridge*, 179 AD3d 963, 117 NYS3d 300 [2d Dept 2020]; *Tsitrin v New York Community Hosp.*, 154 AD3d 994, 62 NYS3d 506 [2d Dept 2017]; *Hernandez v Nwaishienyi*, 148 AD3d 684, 48 NYS3d 467 [2d Dept 2017]). As such, the motion by Medford Multicare for summary judgment dismissing the complaint as asserted against it is granted.

Accordingly, the motion by Mitul R. Patel, M.D., for summary judgment dismissing the complaint as asserted against him is granted, and the motion by The Nursing Care Center at Medford, Inc., d/b/a Medford Multicare Center for Living, for summary judgment dismissing the complaint as asserted against it is granted.

Dated: June 18, 2020


A.J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION