

English v Albany Med. Ctr.

2020 NY Slip Op 34756(U)

April 29, 2020

Supreme Court, Albany County

Docket Number: Index No. 901164-17

Judge: Christina L. Ryba

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

**DONNA H. ENGLISH, As Administrator of the Estate
of DAVID C. ENGLISH, Deceased,**

Plaintiff,

-against-

**ALBANY MEDICAL CENTER, THE STANTON
NURSING AND REHABILITATION CENTRE
and/or GLENS FALLS NURSING AND
REHABILITATION CENTER LLC,. As Owner and
Operator of THE STANTON NURSING AND
REHABILITATION CENTRE,
Defendants.**

**DECISION AND ORDER
Index No. 901164-17
RJI No. 01-17-124883**

APPEARANCES:

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For Defendant Albany Medical Center
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For Defendant The Stanton Nursing and
Rehabilitation Centre and/or Glens Falls Nursing
and Rehabilitation Center LLC, as Owner and
Operator of The Stanton Nursing and Rehabilitation Centre
20 Corporate Woods Boulevard
Albany, New York 12211

RYBA, J.,

On September 29, 2014, 70-year old decedent David C. English (hereinafter decedent) was admitted to defendant Albany Medical Center Hospital (hereinafter AMC) after experiencing an

acute neurological event in his home which rendered him a quadriplegic. After undergoing cervical decompression surgery, decedent remained bedridden during a 17-day admission at AMC and was ultimately discharged on October 16, 2014. On that date, decedent was admitted to the care of defendant The Stanton Nursing and Rehabilitation Centre and/or Glens Falls Nursing and Rehabilitation Center LLC, as Owner and Operator of The Stanton Nursing and Rehabilitation Centre (hereinafter Stanton), a residential skilled nursing facility, where decedent remained bedridden for 42 days until his transfer to Glens Falls Hospital on November 27, 2014. It is undisputed that while under the care of AMC and Stanton, decedent developed what plaintiff claims were severe pressure wounds, otherwise known as bed sores, on his buttocks, back and legs. During the 15 months following his release from Stanton, decedent resided at another skilled nursing facility and was periodically hospitalized in order to undergo various debridement and other wound care procedures to treat the ulcerated pressure wounds. Decedent ultimately passed away on February 6, 2016.

Plaintiff, Donna H. English, as administrator of decedent's estate, thereafter commenced this action against defendants alleging three causes of action sounding in negligence as against all defendants, violations of Public Health Law § 2801-d as against Stanton, and medical malpractice as against AMC. Following discovery, plaintiff served a Note of Issue on July 26, 2019 and the Court established a trial date of December 9, 2019. Stanton thereafter filed a motion in limine seeking to preclude plaintiff from offering certain expert testimony at trial on the ground that, inter alia, plaintiff's expert disclosure was unduly vague and did not contain reasonable detail connecting the generic allegations of the disclosure to any factual acts or omissions allegedly attributable to the defendants. As an alternative to preclusion, Stanton sought an order compelling plaintiff to

supplement her expert disclosure. By order dated October 11, 2019, the Court directed plaintiff to serve supplemental expert disclosure no later than October 18, 2019. Plaintiff served a timely supplemental expert disclosure identifying Perry J. Starer MD as her medical expert and Amy Swineherd RN as her nursing expert. On October 31, 2019, the Court issued an order permitting Stanton to withdraw its motion to preclude, directing the filing of dispositive motions by December 30, 2019, directing the service of any responses thereto by January 27, 2020, and establishing July 20, 2020 as the new trial date.

On December 30, 2019, AMC filed the present motion seeking an order striking plaintiff's supplemental expert witness disclosure as unduly vague, precluding plaintiff from offering any expert testimony at trial, for summary judgment dismissing the complaint against it based upon the expert affidavits of Michael Dolamore, MD and Heidi Cross, RN. On January 27, 2020, plaintiff filed papers in opposition to the motion which consisted of an attorney affidavit, the affidavit of a registered nurse whose identify had been redacted, and the affidavit of Harry Strothers, MD, a new medical expert that plaintiff had not previously identified in her expert disclosure. Also on January 27, 2020, plaintiff served a motion for summary judgment, supported by the expert affidavit of Strothers, for an order granting summary judgment on the issue of liability as against AMC and striking certain of AMC's affirmative defenses. AMC opposes plaintiff's motion as untimely and on the merits. Stanton appears to take no position on either motion.

Initially addressing plaintiff's motion for summary judgment, which was filed 28 days beyond the Court-ordered deadline, it should be noted that the discovery deadlines in this matter have been repeatedly extended in order to enable plaintiff to supplement her expert disclosure. Plaintiff has failed to demonstrate that she was unaware of the December 30, 2019 dispositive motion deadline

established by the Court, or that good cause otherwise exists for her failure to comply with the deadline or timely request an extension thereof. Given plaintiff's failure to establish any explanation for the delay, as well as AMC's contention that consideration of the motion would result in prejudice by virtue of allegedly new claims of malpractice asserted by experts that were not previously disclosed by plaintiff, the Court in its exercise of its discretion deems it appropriate to deny the motion as untimely (see, Brill v City of New York, 2 NY3d 648, 652 [2004]; Town of Kinderhook v. Slovak, 47 AD3d 1093 [2008]; Ramman v Dumber, 45 AD3d 497 [2007]). Nonetheless, even if the Court were to consider the motion on the merits, it would find that questions of fact preclude summary judgment in plaintiff's favor.

The Court will next turn to AMC's motion for an order striking plaintiff's October 18, 2019 supplemental expert disclosure, precluding plaintiff from offering expert testimony at trial, and for summary judgment dismissing the complaint against it. CPLR 3101 (d) (1) (I) requires an expert disclosure to identify "in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinion on which each expert is expected to testify, the qualification of each expert witness and a summary of the grounds for each expert's opinion." AMC's motion challenges plaintiff's expert disclosure on the ground that it neglects to include reasonable detail as to the substance of the facts and opinions of the expert, fails to differentiate between the claimed negligent acts of the various defendants, and is essentially a reiteration of the allegations set forth in plaintiff's previous expert disclosure. In opposition, plaintiff claims that the October 18, 2019 supplemental expert disclosure provides sufficient notice under CPLR 3101, as evidenced by AMC's ability to formulate a defense through the expert affidavits of Cross and Dolamore. The Court is vested with broad discretion when addressing issues surrounding expert

disclose, and in the exercise of that discretion herein the Court deems plaintiff's October 18, 2019 supplemental expert disclosure to possess the minimum requirements necessary to fulfill the mandates of CPLR 3101 (d). Thus, the Court declines to strike the October 18, 2019 supplemental expert disclosure or otherwise preclude plaintiff from offering expert testimony at trial which is deemed to fall within the scope of that disclosure.¹

Turning to that aspect of AMC's motion which seeks summary judgment dismissing the complaint against it, it is well established that summary judgment is a drastic remedy which should not be granted if there is any doubt as to the existence of a material issue of fact (see, Rossal-Daub v Walter, 58 AD3d 992, 995 [2009]; Napierski v Finn, 289 AD2d 869, 871 [1996]). In assessing the summary judgment motions, the Court must be mindful that "[i]n all but the most extraordinary instances, whether a defendant has conformed to the standard of conduct required by law is a question of fact" necessitating a trial (see, Kiernan v Hendrick, 116 AD2d 779, 781 [1986], appeal dismissed 68 NY2d 661 [1986]). In addition, where the parties adduce conflicting medical expert opinions in a medical malpractice action, a triable issue of fact is raised and summary judgment is not appropriate (see, Cummings v Brroklyn Hosp. Cent., 147 AD3d 902, 904 [2017]; Carter v Tana, 68 AD3d 1577 [2009]). Competing expert opinions necessarily raise credibility issues which may only be resolved by a jury (see, DiGeronimo v Fuchs, 101 AD3d 933, 935 [2012]; Hayden v Gordon, 91 AD3d 819, 821 [2012]).

In support of the motion for summary judgment, AMC relies upon the affidavits of Dolamore

¹Notably, the Court makes no ruling with respect to the admissibility of a second supplemental expert disclosure served by plaintiff on February 11, 2020, well beyond the October 18, 2019 deadline.

and Cross to provide testimony with regard to the standard of care in preventing and treating pressure wounds. Dolamore and Cross both detail the manner in which the care provided to decedent by AMC with regard to pressure wound prevention and treatment, including cleaning, dressing changes, repositioning decedent and the provision of specialized mattresses, complied with the applicable standard of care. These experts further opine that the breakdown of decedent's skin was due to his co-morbidities and immobility, rather than to any negligence or deviation from the standard of care by AMC. This evidence is sufficient to satisfy AMC's initial burden on the motion, thus shifting the burden to plaintiff "to establish, through competent expert medical opinion evidence, that there exists a triable issue of fact as to whether there was a deviation from the accepted standard of care and whether there exists a causal nexus between that deviation and [decedent's] injuries" (Helfer v Chapin, 96 AD3d 1270, 1272 [2012]; see, Longtemps v Oliva, 110 AD3d 1316, 1318 [2013]).

In addressing the opposing expert proof offered by plaintiff, namely the affidavit of Harry Strothers and the affidavit of an unidentified nursing expert, the Court is limiting its inquiry for purposes of this motion to the opinions expressed by those experts that fall within the scope of the original supplemental expert disclosure filed by plaintiff on October 18, 2019. Although AMC argues that the opinions of these experts should not be considered because they were not timely disclosed within the Court-ordered deadline, courts have often considered expert evidence in opposition to a summary judgment motion where the expert has not been timely disclosed. However, the Court makes no determination as to whether any testimony of Strothers or the unidentified nurse would be admissible at trial, nor does it pass upon the admissibility of any expert opinions that exceed the scope of the original supplemental expert disclosure served on October 18, 2019.

A review of plaintiff's October 18, 2019 supplemental expert disclosure reveals that plaintiff expected to call an expert to testify that AMC was negligent and/or deviated from the standard of applicable medical care by failing to, inter alia, timely diagnose the early signs of a developing pressure wound, properly turn and reposition decedent to prevent or ameliorate pressure wounds, and timely provide decedent with an appropriate air mattress. The expert affidavits offered by plaintiff in opposition to AMC's summary judgment motion sufficiently detail the manner in which AMC allegedly deviated from the standard of care in regard to these particular matters. As for AMC's contention that decedent's injuries were caused by his comorbidities and immobility rather than malpractice, Strothers avers that decedent's comorbidities and immobility should have alerted AMC that decedent was at higher risk for developing pressure wounds, and that their failure to appreciate this increased risk was a substantial factor in causing decedent's injury and ultimate death.² Plaintiff's expert affidavits contained enough facts and opinions that were supported by the record and within the scope of original supplemental expert disclosure to create a material issue of fact as to whether there was a departure from accepted medical practice, and whether any such departure was a substantial factor in causing an injury to decedent (see, O'Connor v Kingston Hosp., 166 AD3d 1401, 1402 [2018]; Moyer v Roy, 152 AD3d 1188, 1189 [2017]). Accordingly, AMC's motion for summary judgment is denied.

For the foregoing reasons, it is

ORDERED that the motion by defendant Albany Medical Center is denied, and it is further


² It should be noted that although plaintiff periodically mentions in passing that decedent's injuries contributed to his death, plaintiff has not asserted any cause of action sounding in wrongful death.

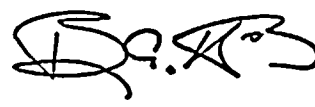
ORDERED that plaintiff's motion is denied.

This constitutes the Decision & Order of the Court, the original of which is being transmitted to the Albany County Clerk for electronic filing and entry. Upon such entry, counsel for plaintiff shall promptly serve notice of entry on all other parties (see, Uniform Rules for Trial Courts [22 NYCRR] § 202.5-b [h] [1], [2]).

ENTER.

Dated: April 29, 2020


HON. CHRISTINA L. RYBA
SUPREME COURT JUSTICE



04/30/2020