

Parks v White Plains Hosp. Med. Ctr.
2020 NY Slip Op 34992(U)
March 23, 2020
Supreme Court, Westchester County
Docket Number: Index No. 51973/2017
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.

-----X
ANTHONY PARKS, Individually and as Administrator of
the ESTATE OF JOEL E. PARKS, Deceased,
Plaintiffs,

DECISION & ORDER
Index No. 51973/2017
Motion Sequence 3

-against-

WHITE PLAINS HOSPITAL MEDICAL CENTER, ASANI
PHILIPS, WESTCHESTER MEDICAL GROUP,
P.C., WESTCHESTER MEDICAL GROUP, MSO, LLC,
WESTCHESTER MEDICAL GROUP, IPA, INC., LAURIE
SALTZMAN-GABELMAN, CABRINI CARE AT HOME,

Defendants.
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The following papers were read on the motion for summary judgment dismissing the complaint, pursuant to CPLR 3212:

Notice of Motion/Affirmation/Exhibits A-Q	1-19
Affidavit in Opposition	20
Memorandum of Law in Opposition	21
Supplemental Affirmation/Affidavit(2) ¹	22-24

Factual and Procedural Background

The plaintiff, Anthony Parks (“the plaintiff/Parks”), commenced this medical malpractice and wrongful death action, pro se², on February 10, 2017 on behalf of himself and the Estate of Joel E. Parks, to recover for personal injuries and the wrongful death of Joel E. Parks (“Mr. Parks/the decedent”). By Decision and Order dated November 15, 2017, the Court granted motions to dismiss by White Plains Hospital Medical Center (“WPH”) and Cabrini Care At Home (“Cabrini”), due to the plaintiff’s failure to timely serve

¹The Supplemental Affirmation and Affidavits will not be considered by the Court, since they are, in effect, an improper sur-reply (*Flores v Stankiewicz*, 35 AD3d 804 [2d Dept 2006]).

²The plaintiff subsequently retained an attorney, who filed a notice of appearance on January 11, 2018.

the summons and complaint. The remaining parties executed a Stipulation of Discontinuance, discontinuing the action against Laurie Saltzman-Gabelman.

Mr. Parks, an eighty-eight year old man, had been hospitalized at WPH from February 8, 2015 through February 10, 2015 for bronchopneumonia, a lung infection. Subsequent to his discharge, Mr. Parks passed away in his sleep and was discovered deceased on February 12, 2015. The complaint alleges that Mr. Parks was prematurely discharged from WPH and that he should have remained in the hospital's inpatient care and received intravenous antibiotics. The complaint alleges that Mr. Parks discharge on oral antibiotic therapy, caused his death.

Asani Phillips, M.D. (s/h/a Asani Philips), and Westchester Medical Group, P. C. ("Westmed"), now file the instant motion for summary judgment seeking to dismiss the complaint, arguing that the care they provided to the decedent was consistent with good and accepted standards of medical care and nothing the defendants did or did not do caused or contributed to Mr. Parks' alleged injuries and/or death.

The defendants contend that Mr. Parks underwent comprehensive discharge planning with a multi disciplinary team prior to his discharge and he was discharged into the care of a home health aide, with a follow up appointment with his primary care physician scheduled. They assert that the dose of oral antibiotics prescribed for outpatient treatment was the same as the intravenous antibiotic dose and the inpatient admission and receipt of intravenous antibiotics for an additional two or more days would have yielded no additional benefit. The defendants further assert that Mr. Parks had a Do Not Intubate and Do Not Resuscitate order in place and there is no intervention that could have been provided at WPH that could have prolonged the decedent's life.

The defendants state that Mr. Parks became a patient of Westmed in 2001 and had a history of prostate cancer, type two diabetes, and chronic anemia. Mr. Parks was admitted to WPH on February 8, 2015 with complaints of confusion and was accompanied by a home health aide. The aide reported that Mr. Parks had a cough for approximately two weeks with some production of whitish sputum. The aid stated that Mr. Parks had otherwise been okay with a normal appetite, but the day prior to the admission Mr. Parks was tired and seemed somewhat confused; the next day Mr. Parks was even more

confused with muffled speech and the aide called an ambulance to transport him to the hospital, where he was admitted with a fever.

Upon admission, doctors ordered scans and blood work and prescribed an antibiotic to treat a possible bacterial pneumonia, which was administered intravenously. Mr. Parks was also prescribed nebulizers to improve lung function and received fluids to manage his blood pressure and some electrolyte imbalances. The doctors also continued his home medications. Mr. Parks was more lucid the next day on February 9, 2015, when he saw Dr. Phillips. His fever was gone, he was lucid and was saturating at 100% oxygenation with a small amount of supplemental oxygen. Dr. Phillips documented that it was likely Mr. Parks would be able to be discharged on the following day.

On February 10, 2015, Dr. Phillips saw Mr. Parks and noted that he continued to improve, with no fever overnight and his oxygen saturation percentage was 100% on room air. Dr. Phillips noted that Mr. Parks continued to improve, however, his blood count cells were below normal and he refused a blood transfusion for religious reasons. Dr. Phillips testified that he discharged Mr. Parks and confirmed that he and his aide were educated on the discharge instructions, to include the continuation of the antibiotic orally and to return to WPH if Mr. Parks' condition worsened. Mr. Parks scheduled a follow-up appointment with Mr. Parks' primary care physician within a week of discharge.

The defendants submitted the affidavit of Jason Orlinick, M.D., physician licensed to practice medicine in the State of Connecticut, board certified in internal medicine. Dr. Orlinick states that he has treated thousands of patients in a hospital setting as a hospitalist, which is a doctor who specializes in the care of patients who are admitted to the hospital.

Dr. Orlinick opines, to a reasonable degree of medical certainty, that the medical care rendered to Mr. Parks by the defendants, conformed to the accepted standards of practice and there were no departures in the treatment rendered to him. Dr. Orlinick opines that Mr. Parks died of extreme old age and the culmination of his underlying chronic co-morbid conditions and that no other intervention or treatment could have been provided by the defendants that would have prolonged his life. Dr. Orlinick opines that Mr. Parks was a good candidate for discharge and that his discharge was properly authorized and

managed by Dr. Phillips, in accordance with the standard of care. Dr. Orlinick further states that Dr. Phillips recognized Mr. Parks' severe anemia and offered him a blood transfusion, but the medical record contained a "No Blood" health care proxy form. Dr. Orlinick opines that Dr. Phillips properly respected Mr. Parks' decision and opines that no further treatment beyond continuing his home regimen of anemia medication could be provided.

Dr. Orlinick opines that there was no barrier to Mr. Parks' discharge on February 10, 2015, and he did not require further inpatient care at that time. Dr. Orlinick also opines that it is not necessary to observe stable patients overnight after switching from IV to oral antibiotic therapy, provided a swallow evaluation is passed, as was done with Mr. Parks. He opines that continued admission to a hospital as an inpatient is only warranted if a patient has an acute medical emergency that requires immediate treatment, awaiting therapy and at risk for decompensation from their condition if released, or has medical needs that cannot be adequately monitored or managed in an outpatient setting. Dr. Orlinick opines that patients should be discharged when their symptoms are relatively stable, they can be safely transitioned to home convalescence and the remainder of the progression of their illness can be managed with outpatient care.

In opposition, the plaintiff argues that the defendants failed to satisfy its burden on their summary judgment motion. The plaintiff submitted an affidavit of Angelo Scotti, M.D., a physician licensed to practice medicine in internal medicine and infectious disease in the State of New Jersey. Dr. Scotti opines to a reasonable degree of medical certainty that the treating health care professionals of Mr. Parks set up the circumstances that substantially contributed to his death. Dr. Scotti opines that the defendants should have foreseen Mr. Parks' death due to unresolved pneumonia on February 12, 2015, since it was preceded by his admission to the hospital for bronchopneumonia, a lung infection.

Dr. Scotti states that a critical part of the defendants' failure to meet standards of care is contained in the autopsy report, which reveals that pneumonia was present in both sides of Mr. Parks lungs, which should have absolutely ruled out discharging him to home. Dr. Scotti opines that the defendants did not properly stabilize Mr. Parks' condition during his brief hospitalization, did not treat for influenza, and did not conduct necessary tests to make certain that Mr. Parks was medically stable and that it was safe to discharge him. Dr.

Scotti opines that Mr. Parks required intravenous antibiotic treatment for his diagnosed pneumonia; he required treatment for influenza; the defendants failed to conduct widely known recognized tests to ensure that the decedent was stable enough to be safely discharged from the hospital; and the decedent would in all probability not have died due to his medical conditions had he remained in the hospital.

Dr. Scotti states that the switch to oral antibiotics was less effective than intravenous and can only take place after stabilization, which is measured over several days and given the co-morbidities that the decedent had, there was no stabilization. Dr. Scotti further states that the defendants failed to conduct a pulse oximetry test on the decedent, which is useful to determine if the patient is able to be upright or is able to walk.

In reply, the defendants argue that Dr. Scotti failed to address causation, in that, he provided no evidence to show that keeping the decedent admitted to the hospital on intravenous antibiotic therapy would have prevented his death.

Discussion

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact,” (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only when such a showing has been made does the burden shift and the opposing party must set forth evidentiary proof establishing the existence of a material issue of fact (see e.g. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The parties' competing contentions are viewed in the light most favorable to the party opposing the motion (see *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]).

“In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice and that such departure was a proximate cause of the plaintiff's injuries” (see *Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011]; see also *Aronov v Soukkary*, 104 AD3d 623). “[A] defendant physician seeking summary judgment must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby” (*Id.*). In opposition, a plaintiff must submit evidentiary facts

or materials to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact. (*Id.*) Typically, the moving party's prima facie case is established by affidavits or affirmations submitted by expert medical professionals and the opposing party can only show genuine issues of material facts by offering their own expert medical testimony countering that of the moving party, (*see Kambat v St. Francis Hosp.*, 89 NY2d 489, 496 [1997]).

Bestowing the benefit of every reasonable inference to the party opposing the motion (*Boyce v. Vasquez*, 249 A.D.2d 724, 726 [3d Dept., 1998]), the Court finds that Dr. Phillips and Westmed have met their prima facie burden of establishing its entitlement to summary judgment and demonstrated that they did not deviate from good and accepted medical practice in the treatment of Mr. Parks by submitting the affirmation of Dr. Orlinick and the deposition testimony of the treating physicians (*see Dandrea v Hertz*, 23 AD3d 332 [2d Dept 2005]). Dr. Orlinick opines that the care rendered by Dr. Phillips was in accordance with good and accepted medical practice and that no acts or omissions on the part of the defendants were the proximate cause of Mr. Parks' death.

The burden then shifted to the plaintiffs to submit evidentiary facts or materials to rebut the prima facie showing, so as to demonstrate the existence of a triable issue of fact. Here, the plaintiff failed to rebut the defendants showing. The plaintiffs' expert contends that the decedent required intravenous antibiotic therapy for his diagnosed pneumonia; the decedent required treatment for influenza; the defendants failed to conduct widely known and recognized tests to ensure that the decedent was stable enough to be safely discharged from the hospital; and the decedent would in all probability not have died due to his medical conditions had he remained in the hospital.

However, Dr. Scotti failed show that the decedent was able to absorb the antibiotics orally and if so why he would not have been able to absorb the medication. Dr. Scotti admits that oral medication is acceptable after stabilization is achieved, but offers no evidence to support his conclusion that Mr. Parks did not achieve stabilization. He simply states, in a conclusory manner, that it was not achieved.

Dr. Scotti also does not offer any information with regard to his assertion that the decedent should have been treated for influenza and does not state how the decedent

should have been treated or how the lack of treatment for influenza caused the decedent's injury or death. Further, Mr. Parks' medical records indicate that he tested negative for influenza. Lastly, Dr. Scotti opines that the defendants failed to conduct widely recognized tests to ensure that Mr. Parks was stable enough to be safely discharged and states that they failed to conduct a pulse oximetry test on the decedent. However, this is also belied by the medical records, which indicate that the very test was performed on the decedent. The record also does not indicate that Mr. Parks was unable to walk or sit upright when he was discharged from the hospital and Dr. Scotti failed to show how any such failure contributed to Mr. Parks' death.

In addition, while the plaintiffs' expert disputes the standard of care offered by the defendants and opines that they departed from the acceptable standard of care, the opposition failed to show that any deviation by the defendants was the proximate cause of the decedent's injuries and death (*see Brinkley v Nassau Health Care Corp.*, 120 AD3d 1287, 1290 [2d Dept 2014]). The affirmation was conclusory and speculative on the issue of proximate cause (*see Feuer v Ng*, 136 AD3d 704, 707 [2d Dept 2016]). Further, the decedent had "Do Not Resuscitate" and "Do Not Intubate" orders in place and Dr. Scotti failed to state what procedures or treatment the defendants could have provided without going afoul of the orders.

Accordingly, based on the foregoing, it is

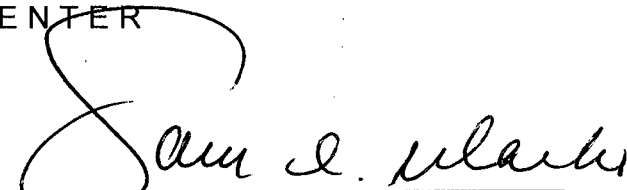
ORDERED that the motion for summary judgment is granted and it is further

ORDERED that the action is dismissed as against Dr. Phillips and Westmed.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
March 23, 2020

ENTER



HON. SAM D. WALKER, J.S.C.