SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

TRIAL PART 20
NASSAU COUNTY

MARGUERITE MCGOVERN, Executor of the Estate of VIRGINIA BIONDO, deceased,

Plaintiff,

-against-

MOTION # 03
INDEX # 608690/16
MOTION SUBMITTED: JANUARY 17, 2020

OCEANSIDE CARE CENTER, Inc., and MICHAEL SMAR, M.D,

Defendants.

The following papers having been read on this motion:

Notice of Motion/Order to Show Cause.....1
Cross Motion/Answering Affidavits.....2
Reply Affidavits.....3

Defendant, Michael Smar, M.D. moves pursuant to CPLR 3212 for summary judgment dismissing the complaint as to him.

The verified complaint contains five separate causes of action. Only the fifth cause of action, sounding in medical malpractice, is asserted against Dr. Smar. Virginia Biondo, now deceased, was admitted to the Oceanside Care Center on July 3, 2012 for rehabilitation following a colectomy performed at South Nassau Communities Hospital. During her stay at the facility Mrs. Biondo sustained falls on May 18, 2014, June 12, 2014 and August 29, 2014.

The accident report for the fall on May 18, 2014 states that Mrs. Biondo, "was walking with a rolling walker in the hallway and suddenly sshe turned to the right side towards Rm 47P and she fell on the floor" (see Plaintiff's N, Notice of Motion). Mrs. Biondo was then transported to South Nassau Communities Hospital, where she was diagnosed with a fracture of the right shoulder and right clavicle. Mrs. Biondo returned to Oceanside on May 20, 2014. The most recent "Risk for Falls Comprehensive Care Plan" was updated on May 21, 2014 to include interventions, and an updated evaluation by the nursing staff (See Exhibit O, Notice of Motion). Defendant Dr. Smar examined the resident on May 21, 2014, reviewed her medications and labs, noted her history of a fall at the facility, and documented her injuries.

On June 12, 2014 at approximately 6:40AM, Ms. Biondo was found on the floor of her room. Her bed was noted to be in the lowest position with the wheels locked. Ms. Biondo stated that "my phone fell on the floor. I went to pick it up and slipped and fell."(see, Exhibit R, Accident/Falls Investigation, Exhibit R). She was transported to Nassau Communities Hospital where she was evaluated in the Emergency Department. An x-ray revealed an acute non-displaced insufficiency fracture of the right superior pubic ramus, and the resident was discharged on the same day (Jue 12, 2014). On June 13, 2014, Dr. Smar requested neuro checks every shift for three days, bed rest for three days and subcutaneous administration of Lovenox 40 mg for three days (See, Exhibit S, Notice of Motion).

On August 29, 2014 at 9:45AM, Mrs. Biondo was again found on the floor of her room. She had been attempting to go to the bathroom without assistance. No injuries were sustained. At the request of her daughter, the Mrs. Biondo was transferred from Oceanside to Park Avenue Extended Care Center on September 29, 2014.

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" *Stukas v. Streiter*, 83 A.D.3d 18, 23, 918 N.Y.S.2d 176 (Second Dept., 2008). A defendant moving for summary judgment in a medical malpractice action must demonstrate the absence of any material issues of fact (*see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572), with respect to at least one of those elements (*see DiLorenzo v. Zaso*, 148 A.D.3d 1111, 1112, 50 N.Y.S.3d 503[Second Dept., 2017]; *Cham v. St. Mary's Hosp. of Brooklyn*, 72 A.D.3d 1003, 1004, 901 N.Y.S.2d 65 [Second Dept. 2010]). Where a defendant physician 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" *Stukas v. Streiter*, 83 A.D.3d at 25, 918 N.Y.S.2d 176(Second Dept., 2011). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" *Feinberg v. Feit*, 23 A.D.3d 517, 519, 806 N.Y.S.2d 661(Second Dept., 2005). "General and conclusory allegations of medical malpractice, however, unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a defendant physician's summary judgment motion" (*Myers v. Ferrara*, 56 A.D.3d 78, 84, 864 N.Y.S.2d 517 (Second Sept., 2008), *Simpson v. Edghill*, 169 A.D.3d 737, 737–38, 93 N.Y.S.3d 399, 401–02 (Second Dept., 2019]).

Dr. Smar argues that he is entitled to summary judgment as a matter of law as the care he rendered to Ms. Biondo was well within good and accepted medical practice and was not the proximate cause of the injuries claimed. In support of Dr. Smar's position, he submitted the

Affirmation of Michael L. Hundert, M.D., a physician Board Certified in Internal Medicine with a subcertification in Geriatric Medicine. Dr. Hundert opines, that after reviewing all of the relevant medical records and testimony of the parties,, it is Dr. Hundert's opinion, within a reasonable degree of medical certainty, that Dr. Smar rendered appropriate care to Ms. Biondo while she was a resident of Oceanside, and specifically, during the period of the alleged negligence. The period alleged in plaintiff's "Supplemental Bill of Particulars" is limited by the plaintiff to the three discrete days that Dr. Smar treated or evaluated Mrs. Biondo after her falls. Ms. Biondo who had been identified by the nursing staff on admission to the facility as a fall risk, and in response had Comprehensive Care Plans in place. Dr. Hundert states that the role of an attending physician in a nursing home setting does not include the assessment of a resident in order to evaluate her fall risk or to establish a Comprehensive Care Plan, nor does it or should it involve the facilitation, implementation or amendment of that care plan. He further states that the role of a medical doctor does not involve an assessment of whether cushions, pillows wedges, or chair/bed alarms are appropriate for a nursing home. The Comprehensive Care Plan is designed by the day to day caregivers to provide a framework for those staff members in a nursing home to provide for the safety and well-being of the residents. As stated by Dr. Hundert, other than providing to the staff appropriate documentation to the resident's chronic and acute medical status, and orders addressing a resident's medical issues, needs or diagnoses, an attending physician has no role whatsoever in the formulation or implementation of a Care Plan, and specifically, no role in implementing or amending a Care Plan of or Fall Risk or Activities of Daily Living.

Dr. Smar testified that what his duties with respect to the safety of patients were "ordering of side rails so that they don't roll out of bed, making sure a resident has enough blankets, making sure they are being taken care of by physical therapists, and making sure they are eating." He specifically denied that his role as attending physician at Oceanside involved a review of Comprehensive Care Plans prepared for his patients nor did it involve participation in care plan meetings. He testified he had no involvement at any time relevant to this case in preparing or consulting on any policies or procedures of Oceanside Care Center, nor was he involved in assessments for fall prevention for patients at Oceanside as the same was a "nursing task." He would not be involved in implementing any interventions to prevent falls. Based on this evidence, Dr Smar established a *prima facie* showing of entitlement to summary judgment.

In a medical malpractice action, once the movant has made a *prima facie* showing of entitlement to judgment, a plaintiff in opposing a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the *prima facie* showing by the defendant physician so as to demonstrate the existence of a triable issue of fact (*Anderson v. Lamonte*, 306

AD2d 232).

Plaintiff contends that Dr. Smar's evidence raises numerous questions of fact precluding summary judgment. These issues include: 1) whether Ms. Biondo was a well known fall risk; 2) whether Ms. Biondo was on medications which increased her risk of falls cue to side effects, like dizziness; 3) whether Dr. Smar was aware of the side effects of these medications; 4)whether Dr. Smar adjusted Ms. Biondo's medications just prior to each fall; 5)whether Dr. Smar failed to order additional fall precautions; and 6) whether Dr. Smar failed to order a side rail for the right side of Ms. Biondo's 7) whether this conduct caused Ms. Biondo to fall and sustain injuries.

Plaintiff submitted the expert affidavit of Dr. Perry Starer, who is board certified in the field of internal medicine with sub-specialty in geriatric medicine. Dr. Smar's opined that "the standard of care for attending physicians in Oceanside is the entirety of their [the resident's] care, including their safety, which includes ordering side rails so his patients don't roll out of bed." Dr. Starter opined that: Dr. Smar violated this standard of care by failing to keep Ms. Biondo safe, failing to make sure Ms. Biondo was being taken care of by physical therapy, failing to order side rails for both sides of the bed; failing to order increased supervision when medications were changed; and failing to make sure nursing was aware of the side effects of medications that could have an impact on Ms. Biondo's behavior and/or ability to walk.

Moving defendant asserted that the affidavit of Dr. Starer contains only general allegations of medical malpractice and are conclusory in nature and is not availing (*see Holbrook v. United Hospital Medical Center*, 248 AD2d 358 [Second Dept., 1998). The court disagrees, the affidavit is specific enough to raises triable issues of fact. In addition the respective parties have raised sharp issues of credibility that are properly left to the trier of fact for resolution *Barbuto v. Winthrop University Hospital*, 305 AD2d 623 (Second Dept., 2003).

Accordingly, it is hereby

ORDERED that the motion for summary judgment motion is denied.

E N T E R

DATED: May 11, 2020

Jack L. Libert

HON. JACK L. LIBERT
J. S. C.

ENTERED
May 14 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE

4