

Brown v Grace Plaza Nursing & Rehabilitation Ctr.

2020 NY Slip Op 35247(U)

April 21, 2020

Supreme Court, Nassau County

Docket Number: Index No. 602531/17

Judge: Randy Sue Marber

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 6

CAROLYN M. BROWN, as Administrator of the
Estate of ELIJAH BROWN, deceased, and
CAROLYN M. BROWN, in her Individual Capacity,

Plaintiffs,

-against-

Index No.: 602531/17
Motion Sequence...04
Motion Date...11/07/19

GRACE PLAZA NURSING AND REHABILITATION
CENTER and PINEGROVE MANOR II, LLC.,

Defendants.

Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x
Reply Affirmation.....x

Upon the foregoing papers, the motion by the Defendant, GRACE PLAZA NURSING AND REHABILITATION CENTER and PINEGROVE MANOR II, LLC (“Grace Plaza”), seeking an Order, pursuant to CPLR § 3212, dismissing the Plaintiff’s Complaint, is decided as hereinafter provided.

The Plaintiff commenced this action on April 27, 2016, to recover damages for the pain, suffering and wrongful death of her husband, the Decedent, Elijah Brown, due to the Defendant’s alleged negligence and violations of Public Health Law §§ 2801-d and

2803-c, relating to the care and treatment rendered to the Decedent while he was a patient/resident at the Defendant's nursing facility. Originally, the Plaintiff did not file a Notice of Medical Malpractice or Certificate of Merit despite certain allegations in the Complaint sounding in medical malpractice.

Issue was joined by service of the Defendant's Answer on or about September 23, 2016. The Plaintiff previously filed a Note of Issue on February 22, 2018 and the prior deadline by which summary judgment motions were to be filed was June 1, 2018. The Defendant previously filed a motion (Seq. 01) for summary judgment, and the Plaintiff cross-moved (Seq. 02) for leave to file a late Notice of Medical Malpractice and to amend the Complaint to add a cause of action for medical malpractice as well as a derivative claim.

By Short Form Order dated October 26, 2018, and entered on November 1, 2018, this Court granted Plaintiff's cross-motion; denied the Defendant's summary judgment motion without prejudice and leave to refile upon the completion of discovery relating to the newly added claims; vacated the Note of Issue; directed the completion of discovery regarding the new claims; and amended the caption accordingly (See SFO, dated 10/26/18, NYSECF Doc. No. 113). The Plaintiff's proposed Amended Complaint dated July 3, 2018, was deemed served, and the Defendant timely filed a Verified Answer in response thereto (See Defendant's Motion at Exhibits "AA" and "BB"). The Amended Complaint asserted two new causes of action: one sounding in medical malpractice and the

other a derivative claim on behalf of the Plaintiff individually for loss of services.

This matter was thereafter re-certified on January 31, 2019, and the Plaintiff filed a Note of Issue on April 29, 2019. The instant summary judgment motion by the Defendant timely followed within sixty (60) days thereof.

On April 11, 2014, the decedent, Elijah Brown, was transferred from North Shore University Hospital to Grace Plaza for short term rehabilitative therapy. Upon admission to Grace Plaza, his medical history was significant for chronic ischemic heart disease, prostate hyperplasia, cellulitis, chronic kidney disease, hypertension, multiple myeloma (in connection to which chemotherapy had recently been halted), uncontrolled Type II diabetes mellitus, congestive heart failure, anemia, acute pain, vitamin deficiency and mixed hyperlipidemia (See Exhibits “K”, “T” and “U”, annexed to Defendants’ Motion). During the course of his admission, the Decedent exhibited elevated blood sugar levels on April 11, as well as between April 14 through April 28, 2014, referable to which his medications were adjusted by the attending physician, Dr. Inna Janas (See Defendants’ Motion at Exhibits “U” and “DD”; see also Plaintiff’s Affirmation in Opposition at Exhibits “12” and “20”).

On April 27, 2014, a weekly progress note indicates that the Decedent was undergoing physical and occupational therapy several times per week and tolerating it well, was incontinent of bladder, afebrile, and had no visible signs or symptoms of distress (see Defendants’ Motion at Exhibit “U”).

On April 28, 2014 at 10:30 a.m., a progress note reveals that Mr. Brown was shivering, complaining of pain in the mid-chest, with a blood pressure of 118/70, temperature of 97, and a pulse of 78 (Id.). At some point, the Decedent was seen by nonparty, Dr. Myles Gombert, who was covering for Dr. Janas, and found the Decedent to be resting and in no acute distress with his blood pressure at 110/60 (Id.). At 2:43 p.m., the Decedent was vomiting and was noted to be weak and pale with his blood pressure at 100/68 (Id.). Dr. Gombert was called and he ordered that Mr. Brown be monitored (id.). At 8:00 p.m., Mr. Brown was observed to be weak, lethargic and not responding verbally, with his blood pressure at 88/54 (Id.). Dr. Gombert was notified and, after concerns raised by the Decedent's family, he ordered that Mr. Brown be transferred to the hospital (Id.). At 9:05 p.m., Mr. Brown departed Grace Plaza by ambulance and was noted to be incoherent with his blood pressure at 90/40 (Id.). At 10:59 p.m., Mr. Brown passed away at Long Island Jewish Medical Center ("LIJ"), with the cause of death listed as sepsis and renal failure (See Defendants' Motion at Exhibit "V").

The Amended Complaint asserts five causes of action: general negligence, statutory violations predicated upon Public Health Law, medical malpractice, wrongful death, and a derivative claim for loss of services, in connection with the Decedent's admission to Grace Plaza from April 11 to April 28, 2014. Punitive damages are sought for all five causes of action (See Amended Complaint, annexed to Defendant's Motion as Exhibit "AA"). The essence of the Plaintiff's claims is premised upon Grace Plaza's

purported failure to diagnose, treat and monitor the Decedent's numerous medical conditions and in failing to timely transfer the Decedent to LIJ on April 28, 2014, and that such failures directly caused his death (See Exhibits "E", "I" and "L").

The Defendant's motion initially seeks an order granting summary judgment and dismissing the Plaintiff's Complaint in its entirety. In the event summary judgment is not granted in its entirety, the Defendant alternatively seeks partial summary judgment, dismissing the Plaintiff's claims for (i) wrongful death; (ii) recklessness and punitive damages; and (iii) statutory violations of the Public Health Law.

Notably, while there are references to recklessness, gross neglect/gross negligence, and gross abuse throughout the Amended Complaint, they were not pled as separate causes of action and are not mentioned in the Bill of Particulars or Supplemental Bills of Particulars.

In moving herein, Grace Plaza proffers the expert affirmation of Vincent Marchello, M.D., a physician licensed to practice in the State of New York, who is a Diplomat of the American Board of Internal Medicine with 35 years of experience in Geriatric Medicine (See Marchello Affirmation at ¶¶ 1, 2, annexed to Defendants' Motion as Exhibit "A1"). Dr. Marchello opines, based upon his review of the pleadings, deposition testimony, the decedent's medical records, as well as the New York State Department of Health investigation and report, within a reasonable degree of medical certainty, that "the care and treatment rendered to the decedent by Grace Plaza was at all

times appropriate, in accordance with applicable standards of professional practice, was neither negligent or [sic] grossly negligent, and did not deprive the decedent of any rights and/or benefits” and that “Grace Plaza’s actions and/or inactions were not the cause, nor a substantial or contributing factor in causing the decedent’s alleged injuries and eventual death” (Id. at ¶ 73).

More specifically, the Defendants’ expert opines that the “decedent’s diabetes was properly and adequately managed” and “insulin was timely and appropriately administered by the staff based on orders and the sliding scale protocol in accordance with all applicable standards of medical and nursing care” (Id. at ¶¶ 43, 44, 45). Dr. Marchello further opines that, “Grace Plaza recognized the signs and symptoms of infection, sepsis, and renal failure and adequately and appropriately provided medical care and treatment for these conditions in order to prevent exacerbation and reoccurrence” (Id. at ¶ 50). To this latter point, Dr. Marchello notes that “[o]n April 28, 2014, blood drawn at 6:35 a.m. reported white blood count as 10”, with a normal range being between 3.8 and 10.5, and as such, there was “absolutely no clinical or laboratory evidence of an infectious process, [or] sepsis” (Id. at ¶63).

The Defendant’s expert additionally maintains that there is no evidence that the Decedent was deprived of “any rights delineated in New York Public Health Law sections 2801-d and 2803-c” and that said opinion is “supported by the independent investigation” undertaken by the Department of Health “which found no evidence of

negligence or statutory violations after a comprehensive investigation prompted by Plaintiff and her attorneys” (Id. at ¶¶ 70, 71; see also Exhibit “X”).

Finally, Dr. Marchello opines that “there is no merit to Plaintiff’s claim that the decedent should have been transferred earlier as this would not have changed his ultimate outcome, even if he had been transferred that morning; the decedent had significant, chronic comorbidities and incurable end-stage cancer given his long-standing renal failure and anemia” (Id. at ¶ 53).

As to the Plaintiff’s demand for punitive damages, the Defendant avers that none of the allegations contained in any of the Plaintiff’s Bills of Particulars rise to the level of recklessness, gross negligence, or malice sufficient to warrant punitive damages.

In opposition, the Plaintiff proffers the affirmation of Perry Starer, M.D., a physician licensed to practice in New York and board certified in Internal and Geriatric Medicine (See Starer Affirmation, annexed to Plaintiff’s Opposition as Exhibit “1”). Dr. Starer opines, based upon his review of the pleadings, deposition testimony and the pertinent hospital and nursing home records, with a reasonable degree of medical certainty, that the Decedent’s uncontrolled “elevated blood glucose” was “indicative of a systemic abnormality” the etiology of which Grace Plaza “failed to identify” leading to the development of sepsis and ultimately Mr. Brown’s death (Id. at ¶¶ 1, 5, 40, 65). Particularly, Dr. Starer states that “Dr. Janus failed to appropriately monitor and work-up Mr. Brown to ascertain the source of his consistently elevated blood sugar levels despite

increasing insulin coverage” and that “Dr. Janas’ failure to reassess and ascertain the source of the elevated blood sugars was a deviation from good and acceptable medical practices which was a substantial cause of the resulting sepsis, [and] renal failure” (Id. at ¶¶ 26, 28, 29, 32, 33). Dr. Starer maintains that Mr. Brown was “immunocompromised” resulting from chemotherapy treatments received in connection to multiple myeloma, leaving him “at a greater risk for infection and sepsis”, and that given said circumstances, Grace Plaza’s “failure to implement a care plan for sepsis was in violation of 42 CFR 483.20 (k) as well as a deviation from good and accepted medical practices” (Id. at ¶¶ 17, 19).

In addition to the foregoing, Dr. Starer opines that in a clear departure of good and accepted medical practice, as well as in violation of Public Health Law § § 2801-d and 2803-c, “Dr. Gombert never re-evaluated Mr. Brown” after 10:30 a.m. on April 28, 2014, irrespective of the Decedent’s deteriorating condition and that “had Mr. Brown been re-evaluated, he would have been transferred to the hospital sooner and the sepsis would have been diagnosed and treated earlier, which could have prevented his untimely death” (Id. at ¶¶ 52-54, 66, 69).

Dr. Starer also opines that “in multiple instances, the acts and omission of the moving defendant, Grace Plaza, amount to negligent and even grossly negligent conduct” and that “[s]ome of their acts and omissions were in reckless disregard of Mr. Brown’s rights and benefits afforded by statute.” In describing other departures from accepted standards of care, including the failure to timely transfer Mr. Brown to the

hospital, Dr. Starer opines that “[s]ome of those departures...also demonstrate a wanton and reckless disregard for Mr. Brown’s rights for which punitive damages can be awarded.” (See Starer Affirmation at ¶ 7).

Having carefully reviewed the extensive record, the Court finds that Grace Plaza has established its entitlement to judgment as a matter of law as to those causes of action sounding in negligence and wrongful death, as well as those claims for punitive damages, by submitting the affirmation of its expert who opined that the Defendant did not deviate from accepted standards of care with respect to the treatment rendered to Mr. Brown (*Ciccotto v Fulton Commons Care Ctr., Inc.*, 149 AD3d 1030, 1031 [2d Dept 2017]; *DePaso v Sarah Neuman Ctr. for Healthcare and Rehabilitation*, 119 AD3d 727, 727-728 [2d Dept 2014]; *Domoroski v Smithtown Ctr. for Rehabilitation and Nursing Care*, 95 AD3d 1165, 1166 [2d Dept 2012]). Here, Grace Plaza has established its prima facie burden having proffered the affirmation of Dr. Marchello, who unequivocally opined that the care and treatment provided by the Defendant was appropriate in every regard and that no action undertaken thereby was a substantial factor in causing Mr. Brown’s injuries and ultimate death.

However, in opposition, the Plaintiff has successfully raised a triable issue of fact with respect to her claims for negligence and wrongful death (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In asserting a claim sounding in medical malpractice “a plaintiff must prove that the defendant deviated or departed from accepted

community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries" (Gachette v Leak, 172 AD3d 1327, 1328 [2d Dept 2019]). "A defendant seeking summary judgment dismissing a complaint alleging medical malpractice '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. at 1329, quoting Stukas v Streiter, 83 AD3d 18, 24 [2d Dept 2011]).

Here, the Plaintiff's expert outlined what, in his opinion, were numerous departures with respect to the care conferred upon Mr. Brown regarding his uncontrolled diabetes, together with departures relating to the Defendant's alleged failure to timely reassess and transfer the Decedent to LIJ on April 28, 2014, particularly given his documented deteriorating condition on that date, and concluded that these departures constituted substantial factors in precipitating Mr. Brown's death.

Turning to the Plaintiff's cause of action predicated upon violations of Public Health Law § 2801-d, liability thereunder "contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule, subject to the defense that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient * * * " (Moore v St. James Health Care Ctr., LLC, 141 AD3d 701, 703 [2d Dept 2016], quoting Gold v. Park Ave. Extended Care Ctr. Corp., 90 AD3d 833, 834 [2d Dept 2011] [internal quotation marks omitted]).

In the instant matter, the Court finds that Grace Plaza has established its

prima facie entitlement to summary judgment via the affirmation of its expert who consistently opined that Mr. Brown's death did not result from any act or omission on the part of the Defendant (*Ciccotto v Fulton Commons Care Ctr., Inc.*, supra at 1031).

In opposition, however, the Plaintiff has raised a triable issue of fact (*Pichardo v St. Barnabas Nursing Home, Inc.*, 134 AD3d 421, 424 [1st Dept 2015]). In his affirmation, Dr. Starer maintained that in neglecting to reevaluate Mr. Brown on April 28, 2014 and effecting a more timely transfer to LIJ, Grace Plaza violated Public Health Law § §2801-d and 2803-c, thus directly challenging and contradicting Dr. Marchello's opinion that given the Decedent's chronic comorbidities an earlier transfer would not have altered the outcome (*Id.*; *Simpson v Edghill*, 169 AD3d 737, 738 [2d Dept 2019]).

Lastly, the Court does not find any basis in the record to support the Plaintiff's demand for punitive damages as none of the alleged negligent acts or omissions rise to the level of gross negligence, wanton and/or reckless disregard for the Decedent's rights sufficient to warrant a punitive damages award. As such, the Plaintiff's demand for punitive damages is dismissed. Moreover, to the extent that the Amended Complaint asserts a claim sounding in gross negligence, wanton and/or reckless disregard for Mr. Brown's rights, such claims are also dismissed.

Accordingly, it is hereby

ORDERED, that the branch of the motion by the Defendant, GRACE PLAZA NURSING AND REHABILITATION CENTER and PINEGROVE MANOR II,

