

**Francione-Nicacci v Winthrop Univ. Hosp.**

2020 NY Slip Op 35297(U)

January 7, 2020

Supreme Court, Nassau County

Docket Number: Index No. 605015/15

Judge: James P. McCormack

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**SUPREME COURT - STATE OF NEW YORK**  
**TRIAL/IAS TERM, PART 18 NASSAU COUNTY**

**PRESENT:**

***Honorable James P. McCormack***  
***Justice of the Supreme Court***

\_\_\_\_\_X

**TERESA FRANCIONE-NICACCI, as  
Administrator of the Estate of MARY  
FRANCIONE, deceased,**

**Index No. 605015/15**

**Plaintiffs(s),**

**Motion Seq. No.: 003**

**-against-**

**Motion Submitted: 11/4/19**

**WINTHROP UNIVERSITY HOSPITAL,  
TOWNHOUSE CENTER FOR  
REHABILITATION & NURSING, and  
TOWNHOUSE OPERATING COMPANY,**

**Defendants(s)**

\_\_\_\_\_X

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X  
Affirmation in Opposition/Supporting Exhibits.....X  
Reply Affirmation/Supporting Exhibits.....X

Defendant, Townhouse Center for Rehabilitation & Nursing, and Townhouse  
Operating Company, LLC (Townhouse), moves this court for an order, pursuant to CPLR  
§3212, granting summary judgment and dismissing the complaint against it. Plaintiff,

Teresa Francione- Nicacci (Teresa), as Administrator of the Estate of Mary Francione (Mary), deceased, opposes the motion.

Plaintiff commenced this medical malpractice action by summons and complaint dated July 31, 2015. Issue was joined by service of an answer by Winthrop dated August 31, 2015. Defendants Townhouse Center for Rehabilitation and Nursing and Townhouse Operating Company, LLC interposed an answer dated September 2, 2015. The case certified ready for trial on June 29, 2017, and a note of issue was filed on August 7, 2017.

On December 16, 2013, Mary was admitted to Co-Defendant Winthrop University Hospital (Winthrop), complaining of chest pains radiating to her shoulder, and shortness of breath. At the time, she suffered from, *inter alia*, hypertension, diabetes, hyperlipidemia and carotid stenosis. On December 17, Mary underwent two-vessel coronary artery bypass and aortic valve replacement. She would suffer from respiratory distress, and on January 8 required a tracheostomy. She would suffer from rashes, spiking fevers and skin ulcers prior to her transfer to Townhouse.

On February 4, 2013, Mary was admitted to Townhouse for nursing care and rehabilitation. Upon admission, it was noted that she had a Stage II sacral ulcer, a Stage II buttock ulcer, ecchymosis on her lower right abdomen and behind both ears, rashes under her breasts and at her groin, and some toes were gangrenous. She also suffered from various skin lesions. Further, she was not responsive to stimuli, was not communicating with others and showed no awareness as to time, place and person. She could only be fed through a feeding tube and a Foley catheter was in place. It is

repeatedly noted she was in a “comatose state”.

Townhouse instituted multiple care plans, including turning Mary every two hours and using pressure-reducing devices for her bed and chairs. A Townhouse chart seems to indicate repositioning took place during the evening tour on February 4, the night tour on February 5, the evening tour on February 5 and the evening tour on February 6. The other tours are left blank (as opposed to having a line slashed through them as existed for the periods of time prior to Mary’s admittance).

On February 5, Mary was running a fever of 102.1, and by the next day it increased to 103.8. At that time, Dr. Roman Brushtein issued an order to transfer Mary back to Winthrop due to her fever, and fear of respiratory failure. She was transferred to Winthrop at 11:30 p.m. on February 6. It appears Mary spent a total of just over 56 and a half hours at Townhouse (from 2:55 p.m. on February 4 to 11:30 p.m. on February 6). She would not return to Townhouse and though she experienced a period of improvement while at Winthrop, including the ability to come off of a ventilator, talk and become oriented to time, place and person, she would eventually succumb to, *inter alia*, respiratory failure and she passed away on April 4, 2014 after being transferred to North Shore University Hospital- Plainview.

Townhouse now moves for summary judgment, arguing that the care she was provided during her stay was proper, that she was not at Townhouse long enough for any of her injuries to have been caused, or worsened, while there, and to the extent it can be argued that they were caused or worsened, they were not the proximate cause of her

injuries or death.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez V. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York, supra*). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 (1<sup>st</sup> Dept 1992), and it should only be granted when there and it should only be granted when there are no triable issues of fact (*see Andre v. Pomeroy*, 35 NY2d 361 [1974]).

In support of the motion, Townhouse submits, *inter alia*, records from Winthrop, their own records, the pleadings and the bill of particulars, and the expert affidavit of Dr. Vincent Marchello a physician, Board Certified in Geriatric Medicine. In general, Dr.

Marchello opines that all care provided by Townhouse was within acceptable standards of care. According to Dr. Marchello, Mary was admitted to Townhouse “in a significantly debilitated and medically compromised condition,” based upon Winthrop diagnosing her with coronary artery disease, bi-lateral purulent bronchitis and pleural effusion, diffuse encephalopathy and diffuse bowel dilation together with the recent coronary artery bypass grafting and aortic valve replacement.

Dr. Marchello states that Townhouse’s care plans for Mary were proper. As for the care plan for skin care, Mary was to be turned and repositioned every two hours, was to use a pressure relief mattress, pressure reducing chairs, various topical medications and other preventative measures. Based upon his review of Townhouse’s records, Dr. Marchello found this plan was followed during Mary’s stay. Regardless, Dr. Marchello opined that Mary did not stay at Townhouse long enough for her pre-existing ulcers to heal. Further, in light of her multiple co-morbidities, “including lack of mobility, elevated blood glucose, BUN and Creatinine, bi-lateral purulent bronchitis and pleural effusion, diffuse encephalopathy and diffuse bowel dilatation, thrombocytopenia, urinary tract infection, hypertension, hypothyroidism, respiratory failure, and anemia,” her ability to heal was severely compromised, particularly during such a short stay. In particular, her compromised respiratory ability resulted in a diminution of oxygen reaching her skin which adversely impacted the ability of her skin ulcers to heal. Further, as she was being fed by way of a feeding tube, she was unable to receive an absorb nutrition in a way that would have aided her improvement. Regardless, Dr. Marchello states the care she

received was appropriate and was not a deviation from good and accepted medical practice.

Regarding proximate cause, Dr. Marchello opines that Mary's multiple co-morbidities and her extensive surgical and medical history were responsible for the injuries complained of in the complaint and bill of particulars. Further, in light of the fact that she was at Townhouse briefly, and was properly cared for during that brief time, Townhouse's care could not be the proximate cause of her injuries and death, or caused her injuries to worsen. As for the existing pressure ulcers, there is no evidence that they became infected while at Townhouse. This is further supported by Winthrop's records once she was transferred back to their care.

Finally, Dr. Marchello states that, in connection with the claim of a violation of Public Health Law §2801-d, only CFR §§483.25(c)(2) and 415.12(c)(2) apply as the pressure ulcers were already in existence at the time of Mary's admission to Townhouse. The fact that these ulcers may have worsened was not related to care provided by Townhouse, but was caused by the multiple co-morbidities. Any allegations of violations of other regulations are without merit as Townhouse's care was appropriate.

The court finds that Townhouse has established entitlement to summary judgment as a matter of law. Dr. Marchello has established that Townhouse's care was appropriate, and to the extent that it can be argued there were departures, these were not the proximate cause of Mary's injuries and death. The burden shifts to Teresa to raise a material issue of fact requiring a trial of the action.

In opposition, Teresa relies upon some records from Winthrop and Townhouse, and the expert affirmation of Rhianon Iassogna, a nurse practitioner. It is possible that Nurse Iassogna could raise an issue of fact regarding nursing care Mary received at Townhouse, and it is further possible that her interpretation of Townhouse's records could be seen to indicate that the care plan was not followed at times. However, the court need not reach those issues as Nurse Iassogna was not competent to opine on whether or not any deviation of the standard of care was a proximate cause of Mary's injuries. (*Boltyansky v. New York Community Hosp.*, 175 AD3d 1478 [2d Dept 2019]). Perhaps as an acknowledgment of this fact, the expert affirmation is silent regarding proximate cause. Absent any admissible evidence indicating Townhouse's care was a proximate cause of the injuries, Teresa is unable to raise an issue of fact.

Accordingly, it is hereby

**ORDERED**, that Townhouse's motion for summary judgment is GRANTED in its entirety. The complaint is dismissed as against Townhouse.

This constitutes the decision and order of the court. The court has considered the other arguments raised by the parties and finds them to be without merit.

Dated: January 7, 2020  
Mineola, New York

**ENTERED**  
JAN 09 2020  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

  
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JAMES P. McCORMACK, J.S.C.

7