Flynn v Montefiore Home Care
2020 NY Slip Op 35436(U)
January 3, 2020
Supreme Court, Bronx County
Docket Number: Index No. 31453/2017E
Judge: George J. Silver

Index №.: 31453/2017E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 19A

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ROSEMARIE FLYNN Index №.: 31453/2017E

-against- **Hon. GEORGE J. SILVER**

MONTEFIORE HOME CARE, MONTEFIORE MEDICAL CENTER, MONTEFIORE HEALTH SYSTEM, INC., GAYE HARDING, TANA WILLIAMS, "NURSE" ROSAMUND, and "NURSE DOE," Justice Supreme Court

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The following papers numbered 1 to 3 were read on this motion to **DISMISS** (Seq. 001):

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1
Answering Affidavit and Exhibits	No(s).	2
Replying Affidavit and Exhibits	No(s).	3

GEORGE J. SILVER, J:

In this medical malpractice action, defendants MONTEFIORE HOME CARE, MONTEFIORE MEDICAL CENTER, GAYE HARDING and TANA WILLIAMS ("defendants") move, pursuant to CPLR §3211, for dismissal of plaintiff ROSEMARIE FLYNN's ("plaintiff") complaint on the grounds that this action was filed after the applicable statute of limitations that governs medical malpractice actions (*see* CPLR §214–a).

BACKGROUND AND ARGUMENTS

As is relevant to the instant motion, plaintiff's complaint alleges that from December 1, 2014 through December 9, 2014, defendants were "scheduled and assigned to visit plaintiff's home to provide oversight and general assistance and neglected to properly care for plaintiff." Plaintiff further alleges that plaintiff's ostomy bag, a prosthetic medical device that provides a means for the collection of waste, repeatedly leaked as a result of defendants' negligence, thereby dehydrating and famishing plaintiff. Plaintiff alleges that defendants assumed a duty to plaintiff to exercise reasonable care under the circumstances.

Despite plaintiff's contention that defendants' purported actions sound in negligence, the gravamen of defendants' defense is that this action is exclusively a medical malpractice action that was brought after the 2 ½-year statute of limitations provided by CPLR § 214–a. To be sure, defendants contend that the entire action sounds in medical malpractice and must therefore be dismissed. Illustratively, defendants highlight that plaintiff's care was rendered by registered nurses who provided nursing care outside of a hospital or clinical setting for plaintiff's convenience. That nursing care, defendants aver, could only have been rendered by medical

professionals in accordance with nursing standards of care, thereby taking this matter outside the ambit of treatment within the common knowledge of a lay person. Therefore, by definition, defendants contend that this court must conclude that this action sounds in medical malpractice. Defendants submit plaintiff's action for medical malpractice accrued on December 9, 2014, the final date of her treatment, thereby rendering a medical malpractice claim timely if filed prior to June 7, 2017. As plaintiff's complaint was filed on November 30, 2017, nearly six months after the time to file a medical malpractice action expired, defendants argue that dismissal is warranted.

In opposition, plaintiff argues that defendants improperly advised plaintiff that members of her family could render plaintiff's post-surgical care, which included changing of plaintiff's ostomy bag. Plaintiff contends that her and her family were further informed that this was a routine matter, and that the kind of post-surgical care plaintiff required was done by millions of people every day who suffer from various medical conditions involving the digestive or urinary systems. As plaintiff's care was rendered by non-medical personnel, most notably plaintiff's family members, plaintiff contends that this action sounds in negligence. Additionally, citing *Friedman v. New York Hospital-Cornell Medical Center*, 65 AD3d 850 (1st Dept. 2009) plaintiff contends that negligence principles are applicable to medical malpractice cases where the alleged negligent act may be readily determined by the trier of fact based on common knowledge.

In reply, defendants highlight that the alleged deficiencies in plaintiff's home nursing care solely pertain to the treatment of plaintiff's ostomy bag and an alleged failure to assess plaintiff for dehydration. Defendants contend that an assessment of both aspects of plaintiff's case could only have been properly judged by medical professionals pursuant to the applicable standard of care with respect to home wound care nurses. As such, defendants contend that plaintiff and her family's ability to care for plaintiff after receiving limited training is irrelevant to the inquiry of whether this matter sounds in medical malpractice. Rather, defendants highlight the intervention of trained medical staff in plaintiff's care for several days until she was re-admitted for dehydration illustrates that plaintiff's care was beyond the ambit of common knowledge. As such, defendants reiterate that dismissal of plaintiff's claims under tighter filing constraints than those in negligence actions warrants dismissal of plaintiff's case.

DISCUSSION

At the outset, it must be acknowledged that by definition a nursing home offers health-related services, lodging, board and physical care in addition to professional nursing care (Public Health Law § 2801[2], [3], [4] [b]). Where a court is tasked with distinguishing whether conduct may be deemed malpractice or negligence, "[t]he critical factor is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached" *Caso v. St. Francis Hosp.*, 34 AD3d 714, 714 [2d Dept. 2006]). As such, a claim sounds in medical malpractice "when the challenged conduct 'constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician'" (*Weiner v. Lenox Hill Hosp.*, 88 NY2d 788, 788 [1996], *quoting Bleiler v. Bodnar*, 65 NY2d 65, 72 [1985]). In contrast, a claim sounds in negligence "when 'the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the hospital's failure in fulfilling a different duty'" (*Weiner*, 88 NY2d at 788, *supra quoting Bleiler*, 65 NY2d at 73, *supra*). The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical

science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of facts (*see Miller v. Albany Med. Center Hosp.*, 95 AD2d 977, 978 [3rd Dept. 1983]). Where the matter requires the consideration of the professional skill and knowledge of the practitioner or the medical facility, the more specialized theory of medical malpractice applies (*Papa v. Brunswick Gen. Hosp.*, 132 AD2d 601 [2d Dept. 1987]; *Coarsen v. New York Hospital-Cornell Med. Center*, 114 AD2d 254 [1st Dept. 1986]). Noting this distinction, the substantive question before this court is whether the intervention of plaintiff's family when caring for plaintiff and changing her ostomy bag and subsequently assessing her for dehydration required specialized skill outside the sphere of common everyday experience.

Here, defendants contend that a cause of action sounds in medical malpractice not ordinary negligence when the duty owed to the plaintiff arises from the physician-patient relationship or is substantially related to medical treatment. Defendants argue that the methods of care employed by plaintiff and plaintiff's family were derived from trained hospital staff and involved professional skill and judgment. As depositions have yet to be conducted, defendants' assertions are premised on conjecture rather than testimony. In opposition to defendants' instant application, plaintiff asserts that when a complaint is not directly concerned with the furnishing of medical treatment to a patient, the claim sounds in negligence (*Weiner v. Lenox Hill Hosp.*, 88 NY2d 784, 788 [1996]). Plaintiff also offers no testimony to support the theory upon which she states her allegations are premised.

In assessing the nature of plaintiff's claims herein, the court's attention is drawn to a trial court decision within this County that was rendered in *Rodriguez v. Mount Sinai Medical Center*, 798 NYS2d 713 [Sup. Ct. Bronx Co. 2004]). There, the court similarly confronted the issue of medical malpractice versus negligence. In analyzing both theories, the court found that a large number negligence claims sound in medical malpractice as opposed to negligence because the conduct complained of involves the assessment of plaintiff's condition or degree of supervision. The court stated that "[t]he functions of training, instructing, educating and supervising of medical staff are deemed to sound in medical malpractice on the rationale that the claims are in effect a challenge to the adequacy and timeliness of the rendering of medical treatment, since such functions are an integral part of the rendition of medical treatment." Upon its review of the relevant caselaw, the court then created a comprehensive list of circumstances that classify as medical malpractice as opposed to negligence in order to facilitate ease in distinguishing these types of claims.

Utilizing a similar approach here, the court finds that it is highly unlikely that the claims at issue here could ultimately be found to sound in negligence rather than medical malpractice (*Rodriguez*, 798 NYS2d at 713, *supra*). To be sure, the viability of plaintiff's general negligence claim is murky at best. Indeed, the record indicates that the intervention of physicians or nurses possessing sufficient qualifications to be deemed skilled medical professionals was essential at various junctures in plaintiff's care (*see Bleiler*, 65 NY2d at 72, *supra*). Still, defendants have not offered categorical proof that all classes of medical professionals involved in plaintiff's care, including practical nurses and orderlies, were required to exercise independent medical judgment unique to medical professionals. To be sure, the record does not identify all persons who supervised the treatment of plaintiff, nor does it fully permit any assessment of the qualifications

of the persons involved in providing her with care. In the absence of such proof, the court will not assume that the care rendered was outside the ambit of common knowledge simply because it sounds like it was. And while the absence of proof submitted in connection with this motion is not proof of absence, more is required before an action as drastic as dismissal is warranted. In addition, plaintiff's allegation that her ostomy bag leaked as a result of defendants' negligence, thereby causing dehydration, arguably falls outside the realm of medical malpractice and squarely within the purview of negligence. As such, at this juncture in the litigation, prior to discovery commencing in earnest, the court finds that for the purposes of the subject motion, it cannot be concluded as a matter of law that the action sounds exclusively in medical malpractice so as to require dismissal pursuant to CPLR §3211(a)(5).

As such, further discovery is necessary to assess the nature of the alleged deficiencies in the care provided by plaintiff, and whether those alleged deficiencies are exclusively attributable to medical malpractice rather than negligence. Therefore, it is hereby

ORDERED that the instant motion is denied with leave for defendants to renew their application upon completion of discovery; and it is further

ORDERED that defendants are directed to serve a copy of this order, with notice of entry, upon plaintiff within twenty (20) days of the issuance noted below; and it is further

ORDERED that the parties are directed to appear for a conference before the court on Wednesday March 25, 2020 at 9:30 AM at the courthouse located at 851 Grand Concourse, Room 600 (Part 19A).

This constitutes the decision and order of the court.

1/3/2020