

Colon v Wyckoff Heights Med. Ctr.
2021 NY Slip Op 30763(U)
February 25, 2021
Supreme Court, Kings County
Docket Number: 513224/2017
Judge: Bernard J. Graham
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

MIRIAM COLON, Attorney-In-Fact for
JUANITA RIVERA,

Index No.: 513224/2017

Plaintiff,

DECISION/ORDER

-against-

WYCKOFF HEIGHTS MEDICAL CENTER,

Hon. Bernard J. Graham
Supreme Court Justice

Defendants.

WYCKOFF HEIGHTS MEDICAL CENTER,

Third-Party Plaintiff,

-against-

UTPAL BHATT, M.D., LEONORA MONROE, M.D.,
ROBERT LEVEY, M.D., JESUS LANZA, M.D., and
DEEPAK SETIA, M.D.

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Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: award summary judgment to the defendants, pursuant to CPLR § 3212.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1-2, 3-4, 5-6</u>
Order to Show cause and Affidavits Annexed.....	<u>7, 8, 9</u>
Answering Affidavits.....	<u>10, 11, 12</u>
Replying Affidavits.....	<u> </u>
Exhibits.....	<u> </u>
Other: (memo).....	<u> </u>

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendant, Wyckoff Heights Medical Center (“Wyckoff”) has moved (seq. 4), pursuant to CPLR§ 3212, for an Order awarding summary judgment and a dismissal of plaintiff’s complaint, upon the grounds that they were neither negligent nor departed from accepted medical or hospital malpractice with respect to the care that was rendered to Juanita Rivera (“plaintiff”) and there are no issues of fact which would warrant a trial in

this matter. Third-party Defendants, Utpal Bhatt, M.D. (“Dr. Bhatt”), Robert Levey, M.D., (“Dr. Levey”), and Jesus Lanza, M.D. (“Dr. Lanza”) (seq. 5), as well as defendants Leonara Monroe, M.D. (“Dr. Monroe”) and Deepak Setia, M.D. (“Dr. Setia”) (seq. 6) have moved for an Order pursuant CPLR§§ 3012-a and 3406 to dismiss the third-party action as to these defendants, due to the failure to file a notice of medical malpractice action and certificate of merit, as well as for an Order awarding summary judgment and a dismissal of the third-party complaint, pursuant to CPLR§ 3212.

The plaintiff, by her Attorney-in-Fact, Miriam Colon, who is the daughter of the plaintiff, has opposed the motions by the defendants for summary judgment and a dismissal of the action, upon the grounds that there are material issues of fact with regard to the causes of action that have been pled by the plaintiff, as against the defendants, for medical malpractice and negligence in the care and treatment that was rendered to Juanita Rivera.

Partial opposition was offered by counsel for Wyckoff to the motions to dismiss by the third-party defendants, having maintained that in the event a determination is made that they are negligent, Wyckoff should be indemnified for any alleged malpractice on the part of these medical professionals.

Background:

This is an action sounding in medical malpractice arising out of the alleged failure of Wyckoff to prevent and treat the plaintiff’s pressure ulcers while she was under their care.

An action was commenced on or about July 10, 2017, on behalf of the plaintiff, by the filing of a summons and complaint against defendant Wyckoff. Issue was joined on behalf of defendant Wyckoff. Thereafter, on or about January 31, 2018, Wyckoff commenced a third-party action by the filing of a third-party summons and complaint.

A deposition of Miriam Colon was held on August 28, 2018. In addition, E.B.T.’s were conducted of Sonia Burns, R.N. (“Nurse Burns”), on behalf of Wyckoff; as well as third-party defendants Dr. Bhatt and Dr. Monroe.

A Note of Issue and Certificate of Readiness was filed on behalf of the plaintiff on or about February 20, 2020.

Facts:

The plaintiff was admitted to Wyckoff from March 29 through April 4, 2016 to treat what was described as a possible transit ischemic attack. At the time of her discharge, the plaintiff's medical chart appears to indicate that her skin was intact and her Braden score was indicative of one who was either not at risk or at a low risk for developing a pressure ulcer. Four days later (on April 8, 2016), the plaintiff was found unresponsive in her home by her daughter, which resulted in an emergency call to 911. Emergency Medical Services (E.M.S.) responded, found the plaintiff to be unconscious and in respiratory failure, whereupon she was intubated by ambulance techs and transported to the Emergency Department at Wyckoff. Upon arrival, the plaintiff was admitted to the Intensive Care Unit ("ICU") under the care of Dr. Bhatt who was the pulmonary and critical care attending physician. Dr. Bhatt documented the plaintiff's condition as being "critical". At that point Dr. Bhatt's primary focus was to resuscitate the plaintiff's vitals and attempt to improve her prognosis by the use of aggressive resuscitation (see Dr. Bhatt EBT p. 10). At the time, the plaintiff had multi-organ failure and Dr. Bhatt diagnosed plaintiff with sepsis due to pneumonia with acute hypoxic respiratory failure, rhabdomyolysis and diabetic ketoacidosis and he offered a very poor prognosis for her recovery. Plaintiff's medical history included acute hypoxic respiratory failure requiring intubation, septic shock, acute kidney injury, diabetes, dementia and rhabdomyolysis, hypotension, an extremely low Albumin level which is indicative of malnourishment and a deep tissue injury (see Dr. Bhatt EBT p. 13).

Upon admission, Nurse Burns, an Emergency Department nurse, performed a skin assessment of plaintiff's entire body to ascertain if there were any wounds or any break or redness in the skin (see Nurse Burns EBT p. 12, 31, 49). Nurse Burns noted "redness to the perineal (groin) area" and a discolored blister in the left heel which was described as unstageable. Nurse Burns stated that a photo would have been taken of those affected

areas, but the camera was not working that day (see Nurse Burns EBT p.67, 70-73). The parties offer contradictory opinions as to whether during their assessment, the nursing staff documented the presence of a pre-existing unstageable wound and a left heel ulcer. This assessment is disputed by Miriam Colon, who testified that the pressure ulcer on plaintiff's (Ms. Rivera's) lower back first appeared during the patient's hospital stay at Wyckoff and that she did not have any wounds prior to her admission (see Ms. Colon's EBT p. 68-71,106). The staff of Wyckoff allegedly implemented a plan of management for treatment of these pressure ulcers which included the use of an air alternating mattress, turning and repositioning, moisture and protective skin barrier applications.

The plaintiff remained intubated from April 8th to April 14th at which time she was extubated and transferred to telemetry for further monitoring and management. It was not until after that point in time that either Dr. Levey, Dr. Monroe or Dr. Setia became part of the treatment team for plaintiff.

On April 18th, Dr. Levey, a medical attending physician requested that Dr. Monroe, a general surgeon and wound-care consultant, who worked with the wound care team at Wyckoff, conduct a consult with the plaintiff with respect to her wounds. Upon review, Dr. Monroe opined that plaintiff was malnourished when she was initially admitted to Wyckoff on April 8th and had a deep tissue injury. Dr. Monroe further opined that plaintiff was at a high risk for ulcers based upon several factors which included her comorbidities, her age, and the medications she was taking (see Dr. Monroe EBT p. 10-12). Thereafter, Dr. Monroe designed and implemented a plan for the placement of REG-2, a nutritional consult and a wound debridement.

The initial involvement Dr. Setia, an internist, had with the plaintiff was on April 20th, when he performed an exam.

On April 22, a debridement was performed upon the plaintiff and three days later, a wound VAC was placed at the sacral ulcer to promote healing. Despite the fact that the wound VAC was removed two days later due to the presence of dermatitis, an examination of the make-up of the tissue indicated that the ulcer was healing (see Dr. Monroe EBT p. 16-17). The following day (April 28th), the plaintiff was transferred to

Dry Harbor Nursing Home. Thereafter, on May 5th at the behest of Ms. Colon who was concerned as to the level of wound care being provided at the Nursing Home, plaintiff was discharged from the Nursing Home and transferred by ambulance to NYU Langone, (see Ms. Colon's EBT p. 76-77) where she remained a patient from May 5th to May 17, 2016. Following, plaintiff's discharge from NYU Langone to her residence, she continued to receive treatment for the sacral pressure ulcer which allegedly progressed to a stage 3 chronic sacral ulcer.

Parties' Contentions:

Here, the Court is presented with the issue as to whether a question of fact exists with respect to the alleged negligence of defendant/third-party plaintiff Wyckoff, and third-party defendants Dr. Bhatt, Dr. Monroe, Dr. Levey, Dr. Lanza, and Dr. Setia, and if they deviated from the standard of medical and hospital care in the treatment of the plaintiff while as a patient at Wyckoff from April 8, 2016 through April 28, 2016.

In support of the motion for summary judgment by defendant/third-party plaintiff Wyckoff, counsel offers the affirmation of Luigi Capobianco, M.D. ("Dr. Capobianco"), who opines that Wyckoff did not deviate from the accepted standards of medical care in its treatment of plaintiff.

In support of the motions for summary judgment by third-party defendants Dr. Bhatt, Dr. Levey, and Dr. Lanza, counsel offers the affirmation of Brian Feingold, M.D. ("Dr. Feingold"), who opines that the plaintiff was properly treated within the accepted standards of care while at Wyckoff and under the care of Dr. Bhatt, Dr. Levey, and Dr. Lanza, and that none of the alleged acts or omissions caused or contributed to plaintiff's alleged injuries. Rather, Dr. Feingold asserts the injuries predated plaintiff's first contact with Dr. Bhatt, Dr. Levey, and Dr. Lanza. Third-party defendants Dr. Bhatt, Dr. Levey, Dr. Lanza also argue that the third-party action should be dismissed due to the third-party plaintiff's failure to file a notice of medical malpractice or certificate of merit.

In support of the motions for summary judgment by third-party defendants Dr. Monroe and Dr. Setia, counsel adopts the affirmations of Dr. Capobianco and Dr.

Feingold, who both opine that the care and treatment rendered to the plaintiff while at Wyckoff did not depart from the standard of care and was not the proximate cause of her alleged injuries. Third-party defendants Dr. Monroe and Dr. Setia also adopt third-party co-defendants Dr. Bhatt, Dr. Levey, and Dr. Lanza's argument that the third-party action should be dismissed due to the third-party plaintiff's failure to file a notice of medical malpractice or certificate of merit.

Plaintiff, by her attorneys, opposes defendant Wyckoff's motion for summary judgment, and partially opposes the motions of third-party defendants Dr. Bhatt, Dr. Levey, Dr. Lanza, Dr. Monroe, and Dr. Setia, by offering the affirmation of Dr. Perry Starer ("Dr. Starer"), who opines the defendant and third-party defendants committed specific acts of malpractice in the treatment of the plaintiff, such as failing to keep accurate records, and failing to develop and implement a plan of care for preventing and treating plaintiff's pressure ulcer.

Defendant/third-party plaintiff Wyckoff, by its attorneys, partially opposes the motions for summary judgment submitted on behalf of third-party defendants, but primarily that of third-party defendant Dr. Bhatt. Wyckoff asserts that they brought a third-party action against the physicians based on a theory of indemnification, as the Bill of Particulars served by plaintiff's counsel asserts allegations regarding medical care outside of the purview of the hospital staff which would be the responsibility of the attending physicians who treated the plaintiff. Wyckoff asserts that it does not allege any of the physicians deviated from accepted standards of practice or that their treatment was a substantial contributing factor to plaintiff's alleged injuries. Wyckoff opposes Dr. Bhatt's motion in particular because, as the attending physician in the ICU, he was in charge of the plaintiff's care and treatment while in the ICU at Wyckoff and would be primarily responsible for initiating wound care treatment.

Discussion:

A defendant moving for summary judgment in a case sounding in medical malpractice "must make a prima facie showing either that there was no departure from

accepted medical practice, or that any departure was not a proximate cause of the plaintiff's injuries." Guctas v Pessolano, 132 AD3d 632, 633 [2d Dept 2015], quoting Matos v Khan, 119 AD3d 909, 910 [2d Dept 2014].

This Court finds that the defendant and third-party defendants have presented evidence sufficient to meet this burden, which included the submission of expert affirmations. Dr. Capobianco states that plaintiff had a sacral deep tissue injury at the time of her presentation to Wyckoff, and the development of the sacral pressure ulcer was inevitable due to her malnutrition and poor health. Dr. Capobianco opines that plaintiff presented with numerous comorbidities, which together presented "a perfect storm for developing skin ulcers." (See Dr. Capobianco's Affirmation, annexed to Wyckoff's Motion for Summary Judgment as Exhibit "K", para. 4). According to Dr. Capobianco, nothing could have been done to prevent plaintiff from developing the sacral pressure ulcer, as plaintiff was so sick upon admission that the treatment team's focus was on life-saving measures and overcoming severe malnutrition. Dr. Capobianco asserts that not only did the plaintiff survive, but her condition improved to the extent she was no longer malnourished, had improved Albumin numbers, and was healthy enough to be discharged. Dr. Capobianco states that prior to discharge plaintiff underwent a debridement of her sacral ulcer, and that the sacral ulcer eventually healed, which he opines was a "genuinely miraculous result...due to the excellent care she received" at Wyckoff. (See Dr. Capobianco's Affirmation, annexed to Wyckoff's Motion for Summary Judgment as Exhibit "K", para. 7-8).

In addition, Dr. Feingold, the expert for third-party defendant physicians, opines that the plaintiff already suffered from the alleged injuries prior to her initial contact with the third-party defendant physicians, and asserts that the physicians "should be applauded for saving the patient's life." (See Dr. Bhatt, Dr. Levey, and Dr. Lanza's Motion for Summary Judgment, para. 33). Dr. Feingold maintains that Dr. Bhatt's deposition testimony and plaintiff's medical records¹ indicate plaintiff was "about to die" and had

¹ Dr. Feingold references the entries made in plaintiff's medical chart by nurses on April 8, 2016, which document the presence of a "pre-existing unstageable 7x10 cm sacral wound, and a 1x1 cm left heel ulcer." (See Dr. Feingold's Affirmation, annexed to Dr. Bhatt, Dr. Levey, and Dr. Lanza's Motion for Summary Judgment as Exhibit "B", para.

pre-existing deep tissue injuries when she was first admitted to Wyckoff, and Dr. Bhatt, along with the other physicians, performed treatment to resuscitate the plaintiff and save her life. Dr. Feingold agrees with Dr. Capobianco that plaintiff's comorbidities and malnourishment created a risk for a worsening of her pre-existing ulcers and/or developing new wounds. Third-party defendants Dr. Monroe and Dr. Setia also assert that they didn't treat plaintiff until ten days into her admission at Wyckoff, and as such cannot be said to have caused the progression of the ulcers.

Once the movant has made a prima facie showing, the plaintiff must submit evidence in opposition to rebut the movant's prima facie showing. Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Poter v Adams, 104 AD3d 925 [2d Dept 2013]; Stukas v Streiter, 83 AD3d 18 [2d Dept 2011]. The plaintiff must "lay bare her proof and produce evidence, in admissible form, sufficient to raise a triable issue of fact as to the essential elements of a medical malpractice claim, to wit, (1) a deviation or departure from accepted medical practice, [and/or] (2) evidence that such a departure was a proximate cause of injury." Sheridan v Bieniewicz, 7 AD3d 508, 509 [2d Dept 2004]; Gargiulo v Geiss, 40 AD3d 811-812 [2d Dept 2007]. In order to prevail on a claim for medical malpractice, "expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause." Nicholas v Stammer, 49 AD3d 832-833 [2008].

In addressing the issue of proximate cause, the Court notes that "[i]n a medical malpractice action, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant." Johnson v Jamaica Hosp. Med. Ctr., 21 AD3d 881, 883 [2d Dept 2005]. "A plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may

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infer that the defendant's conduct diminished the plaintiffs chance of a better outcome or increased [the] injury." Semel v Guzman, 84 AD3d 1054, 1055-1056 [2d Dept 2011]. "The issue is whether a doctor's negligence is more likely than not a proximate cause of [a plaintiff's] injury is usually for the jury to decide." Polanco v Reed, 105 AD3d 438, 439 [1st Dept 2013]. It has also been held that where "a failure to treat is alleged, the plaintiff simply must show that it was probable that some diminution in the chance of survival had occurred." Borawski v Huang, 34 AD3d 409, 410 [2d Dept 2006]. "[T]he evidence presented by the plaintiff need not eliminate every other possible cause of the resulting injury." Clarke v Limone, 40 AD3d 571, 571-572 [2d Dept 2007], *lv denied* 9 NY3d 809 [2017].

In opposing defendant Wyckoff's motion, and in partial opposition to third-party defendants Dr. Bhatt, Dr. Levey, Dr. Lanza, Dr. Monroe, and Dr. Setia's motions, plaintiff's expert has failed to raise an issue of fact with regard to the treatment rendered by Wyckoff and the third-party defendant physicians. Plaintiff's expert, Dr. Starer, claims that a pressure ulcer can only be categorized as "unavoidable" if all the proper protocols and standards for pressure ulcer prevention were carried out and documented, and that despite the application of those measures, an ulcer develops. (See Dr. Starer's Affirmation, annexed to Plaintiff's Opposition as Exhibit "5", para. 10). Dr. Starer asserts that Dr. Capobianco failed to identify what the "necessary interventions" that he referred to actually were and failed to explain how they were "appropriately initiated and maintained." However, the nursing notes from April 8, 2016 show not only that plaintiff presented to Wyckoff with an existing wound, but that the wound was assessed, and specific pressure ulcer treatment/prevention measures were in place, within two hours following plaintiff's transfer from the ER to the ICU. (See Wyckoff Nursing Notes, annexed to Defendant/Third-Party Plaintiff Wyckoff's Reply as Exhibit "A"). The nursing notes directly contradict Dr. Starer's claim that the plaintiff did not present to Wyckoff with an existing deep tissue injury, as well as the claim that Wyckoff and the third-party defendant physicians did not follow and/or document the proper protocols and

standards for pressure ulcer prevention. Dr. Bhatt also testified at his deposition that the plaintiff had a wound when she was admitted to the ICU. (See EBT of Dr. Bhatt, annexed to Defendant/Third-Party Plaintiff Wyckoff's Motion for Summary Judgment as Exhibit "H", p. 25).

The medical records reflect that when the plaintiff presented to the Emergency Department at Wyckoff, and was subsequently admitted to the ICU, she was experiencing acute hypoxic respiratory failure and sepsis. Dr. Starer's argument that Wyckoff and the third-party defendant physicians departed from the standard of care for implementing life-saving measures to stabilize the plaintiff, and that the delay of a few hours (during which the life-saving treatment was being administered) somehow caused plaintiff to develop a pressure ulcer (which Dr. Starer asserts was not there before her admission) is completely unsupported by the record. The record states that plaintiff presented to the ER at about 2:39 pm, was examined by Nurse Burns at 3:50 pm², was admitted to the ICU at 3:50 pm, and was transferred to that unit approximately one hour later. At 6:48 pm, the nursing notes indicate pressure ulcer management and prevention protocols were in place, and at 6:50 pm the nurse notes there was an unstageable sacral ulcer present on admission. Pressure ulcer management and prevention protocols were documented at 9:00 pm as well, including the reduction shearing forces/friction, moisture management with hydrocolloid agent, elevation of heels, air mattress in use, and turning/positioning every two hours.

Dr. Starer asserts that the plaintiff did not suffer from any condition that necessitated treatment that would have required the use of a device (such as a mechanical ventilator) where the appropriate pressure ulcer interventions could not have been implemented. However, that argument is contradicted by the medical records, which state that plaintiff had been placed on a ventilator while in the ER. (See ER 4.8.16 WHMC

² At which time plaintiff was noted by Nurse Burns to have "redness to the perineal area, left heel, and discolored closed blisters, unstageable noted." (See ER 4.8.16 WHMC Records, annexed to Defendant/Third-Party Plaintiff Wyckoff's Motion for Summary Judgment as Exhibit "M", p. 39). Nurse Burns also testified during her deposition that the "perineal area" would include the sacrum, coccyx, and buttocks area. (See EBT of Nurse Burns, annexed to Defendant/Third-Party Plaintiff Wyckoff's Motion for Summary Judgment as Exhibit "G", pp. 72-73).

Records, annexed to Defendant/Third-Party Plaintiff Wyckoff's Motion for Summary Judgment as Exhibit "M", p. 39).

Dr. Starer also opines that a wound care consult should have been ordered immediately to assess the plaintiff's skin condition, and that the need for such a consult would have been even more urgent if plaintiff did in fact arrive with a deep tissue injury or unstageable pressure ulcer. However, Wyckoff has offered evidence in the form of an affidavit from Patricia Meade, the AVP of Nursing Operations at Wyckoff, as well as the relevant Consultation Request policy, which confirm that it would not have been possible for a wound care consult to have been ordered "immediately," as "ICU nurses cannot write orders for medical or surgical consultations," but rather a physician or his/her "designee" must request the consult. (See Aff. of Patricia Meade, annexed to Defendant/Third-Party Plaintiff Wyckoff's Partial Opposition as Exhibit "C", para. 5; See also WHMC Consultation Request Policy, annexed to Defendant/Third-Party Plaintiff Wyckoff's Reply as Exhibit "D").

As plaintiff's expert's affirmation misrepresents the record and relies on unsupported speculation as to the impact of the alleged failure or delay in initiating pressure ulcer treatment and prevention protocol, plaintiff has failed to raise an issue of fact with regard to whether Wyckoff departed from good and accepted medical practice, and the motion for summary judgment dismissing plaintiff's medical malpractice claims against them is granted.

This Court recognizes that defendant/third-party plaintiff Wyckoff has not asserted any claims of medical malpractice against the third-party defendant physicians and has brought the third-party action for the sole purpose of indemnification should Wyckoff be found liable for medical malpractice. As the medical malpractice claims against defendant/third-party plaintiff Wyckoff have been dismissed, and plaintiff has failed to raise an issue of fact with regard to the treatment rendered by the third-party defendant physicians, the motions for summary judgment dismissing all medical malpractice claims against them are granted.

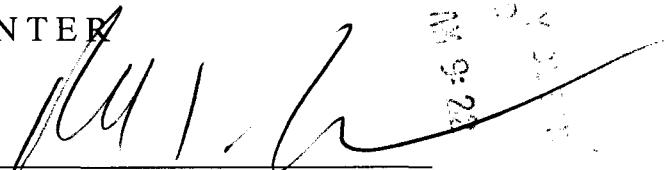
Conclusion:

The defendant/third-party plaintiff Wyckoff, and the third-party defendant physicians Dr. Bhatt, Dr. Levey, Dr. Lanza, Dr. Monroe, and Dr. Setia, have met their burden for establishing a prima facie case for summary judgment, and the plaintiff, in opposition, has failed to meet her burden to offer admissible evidence raising a question of fact as to whether Wyckoff and the third-party defendant physicians departed from good and accepted medical practice in the treatment of the plaintiff. Accordingly, the motions by defendant/third-party plaintiff Wyckoff, and third-party defendant physicians Dr. Bhatt, Dr. Levey, Dr. Lanza, Dr. Monroe, and Dr. Setia for summary judgment and a dismissal of plaintiff's complaint, pursuant to CPLR §3212, are granted.

This shall constitute the decision and order of this Court.

Dated: February 25, 2021
Brooklyn, NY

ENTER



Hon. Bernard J. Graham, Justice
Supreme Court, Kings County

HON. BERNARD J. GRAHAM

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