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| Jay v Clove Lakes Health Care & Rehabilitation Ctr., Inc. |
| 2021 NY Slip Op 31968(U) |
| April 5, 2021 |
| Supreme Court, Richmond County |
| Docket Number: 152236-2018 |
| Judge: Judith N. McMahon |
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

IAS PART 6

FRANK JAY, as the Administrator for the Estate of
BIBIANA JAY, and FRANK JAY, Individually,

ORDER

Plaintiff(s),

- against -

Index Number: 152236-2018

CLOVE LAKES HEALTH CARE AND
REHABILITATION CENTER, INC.,

Hon. Justice
Judith N. McMahon

Defendant(s).

_____x

Defendant’s motion, pursuant to CPLR § 3212, to dismiss this action in its entirety, with prejudice, and directing summary judgment in favor of Defendant Clove Lakes Health Care and Rehabilitation Center, Inc., is granted as detailed herein.

Plaintiff commenced this action against Defendant Clove Lakes under the causes of action for negligence, medical malpractice, and Public Health Law violations.

On April 15, 2016, Plaintiff’s Decedent Bibiana Jay, an 83-year-old woman, was admitted to Richmond University Medical Center ("RUMC") due to shortness of breath. At RUMC, she was treated for community acquired pneumonia, acute COPD exacerbation, hyponatremia, macrocytic anemia, pulmonary fibrosis and was on home oxygen prior to RUMC. Mrs. Jay was to continue receiving supplemental oxygen and be transferred to a short-term rehab facility. On April 19, 2016, Plaintiff’s Decedent was admitted to Clove Lakes. Upon admission, the Decedent was evaluated and had incoming diagnoses of sepsis secondary to pneumonia, hypertension, diabetes, chronic obstructive pulmonary disease, hypersensitivity lung disease, and idiopathic pulmonary fibrosis. Mrs. Jay was a resident at Clove Lakes from April 19, 2016 until April 20, 2016. The Decedent was transferred to Staten Island University Hospital and remained there until her death on April 22, 2016.

Defendant now moves for summary judgment to dismiss Plaintiff’s case as against them.

“The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted standard of care and evidence that the deviation or departure was a proximate cause of injury or damage. In order to establish prima facie entitlement to judgment as a matter of law, a defendant in a medical malpractice action must negate either of these two elements.” *Arocho v. Kruger*, 110 A.D.3d 749, 973 N.Y.S.2d 252 (N.Y.A.D. 2nd Dept 2013); *see also Castro v. New York City Health & Hosps. Corp.*, 74 A.D.3d 1005, 903 N.Y.S.2d 152 (N.Y.A.D. 2nd Dept. 2010). “To prevail on a motion for summary judgment in a

medical malpractice action, the defendant must make a prima facie showing either that there was no departure from good and accepted medical practice, or that any departure was not a proximate cause of the patient's injuries." *Kelly v. Rosca*, 164 A.D.3d 888, 83 N.Y.S.3d 317 (N.Y.A.D. 2nd Dept. 2018).

Defendant established a prima facie entitlement to judgment by showing there was no departure from good and accepted medical practice via the Affirmation of Dr. Roy G. Goldberg. *See Stukas v. Streiter*, 83 A.D.3d 18, (N.Y.A.D. 2nd Dept. 2011); *See also Joyner-Pack v. Sykes*, 54 A.D.3d 727, (N.Y.A.D. 2nd Dept. 2008).

In support of Defendant's motion, Dr. Goldberg opined "that there is no evidence in the record that any nurse, CNA, physician, or any other employee of CLOVE LAKES departed from the standard of care during the decedent's residency at CLOVE LAKES. Moreover, as CLOVE LAKES did not deviate from the standard of care in its treatment of the Plaintiff's decedent, the Plaintiff's decedent was not deprived of any of her rights under New York Public Health Law § 2801-d. Even if these rights were violated, the Defendant used all reasonable effort to prevent such violations, nor was the cause of her death related to the care and treatment Plaintiff's decedent received at CLOVE LAKES. Specifically, in the mere forty-eight (48) hours that the decedent was a resident of CLOVE LAKES, the facility and/or its staff exercised all care reasonably necessary to prevent and limit any deprivation or injury to the decedent."

Dr. Goldberg further opined that, "Any claims that CLOVE LAKES failed to monitor the decedent and/or her oxygen levels are without merit, as the decedent's medical records do not support that claim. Moreover, the decedent was attended to by the CLOVE LAKES staff approximately twenty minutes before attempting to use the restroom unassisted and was attended to again approximately ten (10) minutes prior to being found unresponsive."

Dr. Goldberg concluded, "that Plaintiff's decedent was suffering from various co-morbidities at the time of her admission to CLOVE LAKES and that her ultimate demise was unavoidable in light of her various comorbidities. Accordingly, as CLOVE LAKES did not deviate from the standard of care, the care rendered by CLOVE LAKES to the decedent neither caused nor contribute to her death."

"Once this showing has been made, a plaintiff, in opposition, need only demonstrate the existence of a triable issue of fact as to those elements on which the defendant met the prima facie burden." *Reid v. Soultz*, 138 A.D.3d 1087, 31 N.Y.S.3d 527 (N.Y.A.D. 2nd Dept. 2016); *See also Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980).

Accordingly, the burden shifts to Plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v. Prospect Hosp.*, *supra*. In a medical malpractice action, this requires that a plaintiff "submit evidentiary facts or

materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact... General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant[‘s]... summary judgment motion." *Id.*

“A plaintiff’s expert opinion must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered.” *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 833 N.Y.S.2d 89 (N.Y.A.D. 1st Dept. 2007).

It should be noted that at oral argument on the motion, conducted via Microsoft Teams, Plaintiff stated that there were no claims for wrongful death in this matter, and so to the extent that any such claims were made, they were withdrawn.

Plaintiff submitted an Affirmation from a Doctor specialized in internal medicine and geriatrics in Opposition to Defendant’s motion.

Plaintiff’s Expert opined that “The development of a proper care plan combined with aggressive interventions is utmost necessary to prevent the exacerbation of acute conditions such as COPD and chronic respiratory disease. It is my opinion within a reasonable degree of medical certainty that the plaintiff’s decedent’s care plan did not include interventions to protect the vital organs from the potential effects of physical exertion. For example, although plaintiff’s decedent’s care plan included the monitoring of oxygen saturation levels as ordered by MD, it did not include interventions that would limit her from increasing her body’s oxygen demand by attempting to get up unassisted. There should have been a frequent toileting schedule combined with frequent nursing and/or aide rounds, and a heightened level of overall monitoring for a resident with such chronic conditions. It is my opinion, based upon a reasonable degree of medical certainty that such interventions should have been immediately implemented upon admission and that it was a departure in the standards of good and accepted medicine and nursing care for defendant to fail to implement interventions regarding the exacerbation of chronic conditions immediately upon admission.”

Plaintiff’s Expert further opined that, “contrary to defendant’s contention that all of Defendant’s staff complied with the good and accepted standards of medical care when caring for the plaintiff’s decedent the decedent’s physician notes were not properly followed... plaintiff’s decedent’s oxygen saturation levels were noted on only two (2) occasions, once at 09:36 AM and again at 12:51 PM, despite the physician order of monitoring oxygen saturation levels from 07:00 AM to 03:00 PM. Accordingly, it is my opinion within a reasonable degree of medical certainty that proper oxygen saturation monitoring was not being done in accordance with the decedent’s care plan and in accordance with the physician orders, which clearly stated that an MD should be notified if oxygen saturation levels fell below the normal levels, and that Defendant’s

aforesaid departure was a proximate cause of the severe anoxic brain injury, cardiac infarction, exacerbation of her conditions, and death.”

Plaintiff’s Expert concluded that, “the nursing home violated 42 CFR 483.25(h)(2) and 10 NYCRR §415.12(h)(2), both of which mandate that ‘the facility must ensure that each resident receives adequate supervision and assistive devices to prevent accidents’ for each supervision. For the April 20, 2016 incident, the facility failed to provide assistance, monitoring, interventions and/or supervision during that day. The nursing home also violated 10 NYCRR §415.11 and CFR §483.20, both requiring comprehensive and accurate assessments of functional capacity and each resident’s needs and individualized care plans to meet each resident’s needs. As previously described in detail, the nursing home failed to supervise decedent and regularly and adequately monitor/document her oxygen saturation levels causing her decline in oxygen levels, anoxic brain injury, cardiac infarction, exacerbation of her conditions, and death, and the nursing home’s policy enabled this event.”

“In opposition, the Plaintiff failed to raise a triable issue of fact by the submission of [their] expert’s affidavit[s] since expert opinions which are speculative, conclusory, and unsubstantiated are insufficient to defeat a motion for summary judgment.” *Martirosyan v. Antreasyan*, 153 A.D.3d 616, 57 N.Y.S.3d 404 (N.Y.A.D. 2nd Dept. 2017).

Plaintiff’s Expert’s affirmation is speculative and conclusory as it fails to set forth an explanation of the reasoning and does not rely on specifically cited evidence in the record. *See Tsitrin v. New York Community Hospital*, 154 A.D.3d 994, 62 N.Y.S.3d 506 (N.Y.A.D. 2nd Dept. 2017).

The opinions of Plaintiff’s Expert are conclusory as they are contradicted by the medical records in this case. The evidence in this case clearly establishes that a plan was formulated and executed by Defendant in the care and treatment of Plaintiff’s Decedent. Mrs. Jay did receive the type of care that Plaintiff’s Expert states was necessary. Plaintiff’s Expert then states that Mrs. Jay should have received more of the same treatment that Defendant provided, without providing a basis to determine how much more would have been appropriate. Plaintiff’s Expert’s conclusory statements that Defendant should have done more and that would have prevented Plaintiff’s Decedent’s death are insufficient to oppose summary judgment.

“Where an injury is one which might naturally occur in the progress of a patient’s disease and in the absence of negligence, speculative and conclusory assertions that the plaintiff might have had a more favorable outcome are legally insufficient to establish causation,” *Aparicio v. Goldberg*, 94 A.D.3d 502, 942 N.Y.S.2d 58 (N.Y.A.D. 1st Dept. 2012). Plaintiff’s Expert’s opinions are speculative and conclusory as to both causation and damages.

ORDERED that any allegations related to wrongful death have been withdrawn by Plaintiff; and it is further

ORDERED that Defendant's motion, pursuant to CPLR § 3212, to dismiss this action in its entirety, with prejudice, and directing summary judgment in favor of Defendant Clove Lakes Health Care and Rehabilitation Center, Inc., is granted; and it is further

ORDERED that Plaintiff's Summons and Verified Complaint in this matter are dismissed with prejudice; and it is further


ORDERED that any and all other requested relief is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: April 5, 2021

So Ordered.

ENTER: 

Hon. Judith N. McMahon
J.S.C