

Clayton v Meadowbrook Care Ctr., Inc.
2021 NY Slip Op 32091(U)
September 29, 2021
Supreme Court, Nassau County
Docket Number: Index No: 601153/2018
Judge: Sharon M.J. Gianelli
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 11
Present: Hon. Sharon M.J. Gianelli

CATHY CLAYTON, as Administrator of the
Estate of JOSEPH GULOTTA, deceased

Index No: 601153/2018

Plaintiff,

Motion Seq. No: 001

-against -

Decision and Order

MEADOWBROOK CARE CENTER, INC. and
SOUTH NASSAU COMMUNITIES HOSPITAL,

Defendants.

Papers submitted on this motion:
Defendant Meadowbrook Care Center, Inc.'s
Notice of Motion, Affirmation, and
Exhibits in Support _____X
Plaintiff's Affirmation, Affidavit, and
Exhibits in Opposition _____X
Defendant Meadowbrook Care Center, Inc.'s Reply ___X

This action was commenced by the filing of a Summons and Verified Complaint on January 25, 2018. A Verified Answer was interposed by Defendant Meadowbrook Care Center, Inc. (hereinafter referred to as "Defendant Meadowbrook") on February 28, 2018. Defendant South Nassau Communities Hospital (hereinafter referred to as "Defendant South Nassau") interposed a Verified Answer on March 2, 2018.

Defendant Meadowbrook now moves for an Order dismissing Plaintiff's Causes of Action for general negligence, entitlement to punitive damages, negligent hiring, failure to supervise staff, failure to train staff, failure to discharge unqualified staff, and understaffing.

As a preliminary matter, Plaintiff has agreed to dismiss the Cause of Action as to negligence.

Factual History

Plaintiff-Decedent was a patient at Defendant Meadowbrook on several occasions beginning August 5, 2015. Plaintiff-Decedent's last admission to Defendant Meadowbrook took place from July 11, 2016 to July 20, 2016.

Plaintiff-Decedent was admitted to Defendant South Nassau on several occasions. Plaintiff-Decedent was last admitted to Defendant South Nassau on July 20, 2016, where he subsequently died on July 29, 2016.

According to Plaintiff's expert, Perry Starer, M.D.,

On July 11, 2016, Mr. Gulotta was admitted to Meadowbrook for the final time with a Fentanyl patch, applied during the hospitalization to address pain. On July 13, 2016, treatment for an unstageable ulcer to Mr. Gulotta's posterior right neck was ordered. After nine days, Mr. Gulotta was admitted to SNCH where he was found with an infected decubitus, hypotensive and hypothermic. On July 25, 2016, the neck ulcer was noted to be necrotic and infected with maggots growing from the trach site attributed to compression by the trach collar. He passed on July 29, 2016 at the age of 77.

Defendant argues that Plaintiff raises six causes of actions sounding in Public Health Law violations, negligence, negligence per se, medical malpractice, and wrongful death;

all of which ultimately amount to allegations that Meadowbrook failed to properly monitor, supervise, and prevent the development and deterioration of pressure ulcers.

Further, Defendant argues that Plaintiff's causes of action in negligence and negligence *per se* are rooted in professional malpractice. Plaintiff's negligence and negligence *per se* actions are therefore inappropriate and should be dismissed.

Defendant also argues that Plaintiff's allegations as to negligent hiring, supervision, training, retention of staff, discharge of unqualified staff, understaffing, punitive damages, and wrongful death have not been pursued and are not supported by the evidence, and therefore must also be dismissed with prejudice.

In support of its contention that allegations regarding negligent hiring, supervision, training, retention of staff, discharge of unqualified staff and understaffing should be dismissed, Defendant offers the affidavit of Dr. Cameron Hernandez, who is Board Certified in Internal Medicine and Geriatric Medicine by the American Board of Internal Medicine.

Dr. Hernandez states that she "reviewed the relevant pleadings, including the Verified Bill of Particulars, the Supplemental Verified Bill of Particulars, the medical records of the decedent maintained by Defendant, the Plaintiff's death certificate, and the deposition testimony of all parties."

Dr. Hernandez offers the opinion that that there is no basis for Plaintiff to maintain claims regarding negligent hiring, supervision, training, retention of staff, discharge of unqualified staff and understaffing as “the evidence indicates that the staff and other medical providers' treatment of the resident at Meadowbrook, was at all times within the standard of good and accepted nursing home care and the staff and other medical providers did not deprive the resident of any right or benefit pursuant to the Public Health Law or any other statutory or regulatory provision.”

Dr. Hernandez does not cite specifically to the pleadings, the Verified Bill of Particulars, the Supplemental Verified Bill of Particulars, the medical records of the decedent maintained by Defendant, the Plaintiff's death certificate, or the deposition testimony of any party.

In Opposition, Plaintiff first agrees to dismiss the Cause of Action as to negligence on consent.

However, Plaintiff argues that Defendant has not established a *prima facie* entitlement to Summary Judgment as to other causes of action, as Defendant's expert affidavit is conclusory and fails to cite to any records to support her opinions.

Plaintiff further argues that multiple questions of fact remain which would preclude the granting of summary judgment in favor of Defendant Meadowbrook.

Plaintiff offers the expert affidavit of Perry Starer, M.D. who is a board-certified physician in the field of internal medicine with a subspecialty of geriatric medicine.

Dr. Starer states “It is important to note that I do not agree with the opinions expressed in the affirmation of Cameron R. Hernandez, M.D. Beyond that, I do not know what he bases his opinions on since there are no facts or records referred to in his affirmation supporting his opinions. Since there is no substance to Dr. Hernandez’s opinions, I will not reference the affirmation herein other than to state my complete and utter disagreement with his conclusions.”

Dr. Starer goes on to opine “It is my opinion with a reasonable degree of medical and nursing certainty that the Meadowbrook’s negligent supervision of staff, failure to train staff, failure to discharge unqualified staff and overall understaffing were a substantial factor and proximate cause of the injuries claimed herein, Plaintiff/Decedent’s worsening health status and the death of Mr. Gulotta on July 29, 2016.”

In Reply, Defendant Meadowbrook argues that the claim for punitive damages must be dismissed.

Further, Defendant argues that the expert affidavit offered in support of the motion establishes a sufficient basis for the granting of Summary Judgment.

Analysis/Law

Summary judgment is a drastic remedy and is not warranted unless the movant demonstrates that no genuine triable issues of fact exist (*Zuckerman v New York*, 49 NY2d 557 [1980]).

Initially, "the proponent of a summary judgment motion must make a *prima-facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial (*Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

The burden on the movant for summary judgment is a heavy one and where there is any doubt at all as to the existence of a factual issue, summary judgment must be denied (*Ratner v Elovitz*, supra). It is well established that all competent evidence must be viewed in the light most favorable to Plaintiff. On a motion such as this one, the Court is required to accept the Plaintiff's pleading as true and the Court's decision must be made on the version of the facts most favorable to the Plaintiff (*Henderson v New York*, 178 AD2d 129 [1st Dept 1991]).

It has long been established that the mere presence of factual issues defeats summary judgment and where there is any doubt at all as to the existence of a factual issue, summary judgment must be denied (*Ratner v Elovitz*, supra). The existence of

conflicting expert opinions in a medical malpractice action creates triable issues of fact (*Wallenquest v Brookhaven Mem. Hosp. Med. Ctr.*, 28 AD3d 538 [2d Dept 2006]).

In medical malpractice actions such as this one, summary judgment is infrequently granted, and it is only done so where the proponent makes a *prima-facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (*Winegrad v New York University Medical Center*, supra.) On a motion for summary judgment dismissing a medical malpractice cause of action, a defendant must make a *prima-facie* showing either that he or she did not depart from good and accepted medical practice or that any departure was not a proximate cause of the plaintiff's injuries (*see Omane v Sambaziotis*, 150 AD3d 1126 [2d Dept 2017])

It is also incumbent on the part moving for summary judgment defendants, to demonstrate the merits of their defense by the submission of, in this case the admissible form, not to merely point to gaps in the evidence in plaintiffs proof (*Alvarez v 21st Century Renovations Ltd.*, 66 AD3d 524 [1st Dept 2009]). The Court must draw all reasonable inferences from the affirmation of the Plaintiff's expert in the Plaintiff's favor to infer a nexus between the alleged departures from acceptable medical practice and the injury (*id.*).

In this case, Defendant offers the expert affidavit of Dr. Hernandez who avers that there was no evidence of negligent supervision of staff, failure to train staff, failure to

discharge unqualified staff or overall understaffing, but she does not cite specifically to the pleadings, the Verified Bill of Particulars, the Supplemental Verified Bill of Particulars, the medical records of the decedent maintained by Defendant, the Plaintiff's death certificate, or the deposition testimony of any party.

A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the movant's prima facie burden (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 [2005]).

Since the defendants have failed to meet their prima facie burden, it is unnecessary to determine whether the plaintiff's papers submitted in opposition are sufficient to raise a triable issue of fact (*Levin v Khan*, 73 AD3d 991 [2d Dept 2010]).

Accordingly,

It is

ORDERED, that Defendant Meadowbrook Care Center Inc.'s motion for an Order dismissing Plaintiff's Causes of Action sounding in general negligence, is Granted on Consent; and

It is

ORDERED, that Defendant Meadowbrook Care Center Inc.'s motion for an Order dismissing Plaintiff's Causes of Action for entitlement to punitive damages, is Denied; and

It is

ORDERED, that Defendant Meadowbrook Care Center Inc.'s motion for an Order dismissing Plaintiff's Causes of Action for negligent hiring, is Denied; and

It is

ORDERED, that Defendant Meadowbrook Care Center Inc.'s motion for an Order dismissing Plaintiff's Causes of Action for failure to supervise staff, is Denied; and

It is

ORDERED, that Defendant Meadowbrook Care Center Inc.'s motion for an Order dismissing Plaintiff's Causes of Action for failure to train staff, is Denied; and

It is

ORDERED, that Defendant Meadowbrook Care Center Inc.'s motion for an Order dismissing Plaintiff's Causes of Action for failure to discharge unqualified staff, is Denied; and

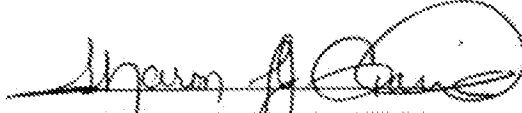
It is

ORDERED, that Defendant Meadowbrook Care Center Inc.'s motion for an Order dismissing Plaintiff's Causes of Action for understaffing, is Denied.

All applications not specifically addressed herein are denied.

The forgoing constitutes the decision and order of the Court.

DATED: Mineola, New York
September 29, 2021



HON. SHARON M. J. GIANELLI,
Justice of the Supreme Court

The conformed signature on this Order and copies thereof shall be deemed original.

ENTERED

Oct 04 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE