

Anthony v Hollis Park Manor Nursing Home
2021 NY Slip Op 33103(U)
November 4, 2021
Supreme Court, Queens County
Docket Number: Index No. 706872 2016
Judge: Peter J. O'Donoghue
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE
Justice

IA Part MD



CAROLYN METCALF ANTHONY, by her
Administrator DAVID H. ANTHONY, III,

Index
Number 706872 2016

Plaintiff
-against-

Motion
Date August 4, 2021

HOLLIS PARK MANOR NURSING HOME and
NEW YORK HOSPITAL QUEENS,

Motion Seq. No. 6

Defendants

The following papers read on this motion by defendant New York-Presbyterian Queens (NYPQ) s/h/a New York Hospital Queens for an order granting summary judgment dismissing the action against said defendant with prejudice and directing the Clerk of the Court to enter a judgment in its favor.

Papers
Numbered

Notice of Motion-Affirmations- Statement of Material Facts-Exhibits..	EF 99-112
Opposing Affirmation-Exhibits.....	EF 115-120
Reply Affirmation.....	EF 121

Upon the foregoing papers the motion is determined as follows:

Plaintiff's decedent Carolyn Metcalf Anthony had been a resident of Hollis Parking Manor Nursing Home (Hollis Park) since 2001. On July 28, 2015, she was found to have an injury on the left side of her body. Ms. Anthony was then 91 years old, non-ambulatory, suffered from dementia, and needed total care for all of her daily needs. On July 29, 2015, a portable x-ray of Ms. Anthony's upper extremity taken at Hollis Park confirmed that she had a left shoulder dislocation and no definite acute fracture identified, with a moderate degree of osteoporosis and moderate degree of osteoarthritis. On July 30, 2015, Mr. Anthony consented to the transfer of his mother, Ms. Anthony, to NYPQ for an orthopedic consult. An x-ray of Ms. Anthony's left shoulder taken at NYHQ on July 30, 2015, showed a left anterior shoulder dislocation and probable Hills-Sachs deformity. A pelvic x-ray taken the same date showed a left femoral neck fracture. A CT scan taken at said hospital on July 31,

2015, showed an anterior/medial dislocation of the humeral head with fracture of the humeral head. Fragments measuring up to 2.6 cm were identified adjacent to the glenoid.

Mr. Anthony testified at this deposition that he received a telephone call from Dr. Radeos, an emergency department physician, who told him that his mother had an anterior shoulder dislocation and a urinary tract infection, at which time he consented to a non-surgical shoulder reduction. Two attempts at the shoulder reduction were made, and Mr. Anthony was informed that it was not successful. Mr. Anthony testified that on July 31, 2015, received a telephone call from Dr. Michael Fu, who had examined Ms. Anthony and found a shoulder dislocation, a left shoulder fracture and a hip fracture. Mr. Anthony declined to consent to hip replacement surgery. Ms. Anthony was treated for a urinary tract infection and pain management while she was a patient at NYPQ. At Mr. Anthony's request, his mother did not return to Hollis Park, and was transferred to Silvercrest Nursing and Rehabilitation (Silvercrest) on August 6, 2015.

On October 2, 2015, Ms. Anthony was transferred from Silvercrest to NYPQ with labored breathing and chest congestion. She was found to have sepsis due to pneumonia and died on October 9, 2015. Said hospital's notice of death form lists the cause of death as coronary artery disease/cardiopulmonary arrest due to septic shock secondary to bacteremia/pneumonia and coronary artery disease.

Plaintiff commenced the within action on June 11, 2016, and alleges causes of action against NYPQ for medical malpractice, negligence and res ipsa loquitur. The bill of particulars alleges that Mr. Anthony was informed by the nursing home staff that his mother had fallen and he was "unsure of the exact location of the fall". The bill of particulars further allege that NYPQ through its employees, departed from standards of good and accepted hospital care in failing to properly assess Ms. Anthony upon admission with respect to fall risk, orientation; having unqualified and/or untrained staff members perform her assessment upon admission; in failing to maintain her safety; in failing to properly supervise her as part of fall prevention; in failing to prevent falls; in failing to properly care plan for her risk of falls despite being aware of history of dementia; in failing to prevent injury; in failing to accurately and properly document her chart; in failing to properly instruct hospital staff in the caring of a patient; in failing to provide the necessary supervision for a patient with history of dementia; in failing to follow the care plan that was in place although it was inadequate in failing to make a proper risk assessment; in failing to properly monitor a patient with a history of falls; in failing to use bed alarms and sensors; in failing to provide a low bed; in failing to formulate a plan of care to prevent falls; in failing to properly evaluate the patient for injury following the fall; in failing to properly treat hip and shoulder injury; in failing to order and/or perform a CT scan or x-ray of the head following a fall and obvious injury, in failing to provide proper pain management; in failing to properly train and

supervise its personnel; particularly its CNAs, nursing staff and nursing supervisors and/or hospital personnel concerning the prevention of falls; in failing to prepare adequate care plans; and, in failing to have adequate staffing levels of nurses, nurse assistants and other personnel to ensure prompt and proper care to Ms. Anthony, and that such staffing levels are mandated by Federal and New York State laws. Plaintiff alleges that as a result of the hospital's alleged negligence and malpractice, the decedent sustained a dislocated shoulder, fractured shoulder, fractured hip, chronic pain, inflammation, conscious pain and suffering, anxiety, depression, mental anguish and fear, and death.

Defendant NYPQ has served a verified answer and interposed 10 affirmative defenses.

Defendant NYPQ now moves for summary judgment dismissing the complaint with prejudice. In support of the motion, defendant submits a copy of the pleadings, an affirmation from its counsel, an affirmation from its medical expert, Joseph Anthony Bosco III, the decedent's medical records from Hollis Park, the medical records of NYPQ, and deposition transcripts of David Anthony and Aditya Derasari, M.D., a witness for the defendant hospital, sued herein as New York Hospital Queens, and a copy of the hospital's notice of death form.

Plaintiff in opposition submits among other things an affirmation from its counsel, copies of the deposition transcripts of Dr. Arum Arora, a private attending physician at the defendant hospital, and Dr. Michael Radeos, who was employed by an entity that contracted with defendant hospital to run its emergency department, as well as an extract from the decedent's medical chart.

On a motion for summary judgment dismissing a cause of action alleging medical malpractice, the defendant bears the initial burden of establishing that there was no departure from good and accepted medical practice or that any alleged departure did not proximately cause the plaintiff's injuries (*see Carradice v Jamaica Hosp. Med. Ctr.*, AD3d ,2021 NY Slip Op 05688 [2d Dept 2021]; *Pirri-Logan v Pearl*, 192 AD3d 1149, 1150 [2d Dept 2021]; *Elstein v Hammer*, 192 AD3d 1075, 1076 [2d Dept 2021]; *Kogan v Bizekis*, 180 AD3d 659, 660 [2d Dept 2020]). “ ‘In order to sustain this prima facie burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars’ ” (*Kogan v Biekos*, 180 AD3d at 660, quoting *Sheppard v Brookhaven Mem. Hosp. Med. Ctr.*, 171 AD3d 1234, 1235 [2d Dept 2019]). In order to rebut the defendant's prima facie showing, a plaintiff must submit an expert opinion that specifically addresses the defense expert's allegations (*see Pirri-Logan v Pearl*, 192 AD3d at 1150; *DiLorenzo v Zaso*, 148 AD3d 1111, 1112 [2d Dept 2017]).

Here, NYPQ established its prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it through, among other things, the affirmation of its expert Dr. Joseph Anthony Bosco, a physician board-certified in orthopedic surgery, who opines, based upon his review of the plaintiff’s verified bills of particulars, the pertinent medical records including NYPQ’s chart, Hollis Park’s chart, imaging and the deposition testimony, that NYPQ did not depart from accepted medical practice as the injuries Ms. Anthony incurred were sustained prior to her arrival at NYPQ, and that the treatment provided by NYPQ’s staff and employees was in accordance with the accepted standard of care, and that there was no act or omission that caused or contributed to any injury or further injury. Dr. Bosco in his affirmation addresses in full the claims alleged in the plaintiff’s bill of particulars.

This Court also finds that defendant NYPQ has established prima facie that plaintiff cannot maintain his claims for negligence and for res ipsa loquitur, as there is no evidence in the record that the decedent sustained a fall during the time she was a patient at defendant hospital in 2015, or that any of her fractures occurred while she was a patient at said hospital in 2015.

Plaintiff in opposition has failed to raise a triable issue of fact. Plaintiff has not submitted an affirmation from a medical expert, and his counsel’s affirmation is conclusory, speculative, and not supported by the evidence. To the extent that plaintiff’s counsel now asserts that the two non-surgical reduction attempts caused a further injury to the decedent and that her family was not aware of the reduction, said claims were not raised in the verified complaint or the bills of particulars, and therefore are rejected. It is well settled that “[a] plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars” (*Anonymous v Gleason*, 175 AD3d 614, 616-17 [2d Dept 2019], quoting *Palka v Village of Ossining*, 120 AD3d 641, 643, [2d Dept 2004]; see *Samer v Desai*, 179 AD3d 860, 861-64 [2d Dept 2020]; *Hanson v Sewanhaka Cent. High Sch. Dist.*, 155 AD3d 702, 703[2d Dept 2017]; *Shaw v City of New York*, 139 A.D.3d 698, 699–700 [2d Dept 2016]; *Garcia v Richer*, 132 AD3d 809, 810 [2d Dept 2015]; *Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012]).

Accordingly, the motion by defendant NYPQ, sued herein as New York Hospital Queen for summary judgment dismissing the complaint with prejudice is granted, and the Clerk of the Court is directed to enter a judgment in said defendant’s favor.

Dated: November 4 , 2021

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Hon. Peter J. O’Donoghue, J.S.C.

