STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DAVID PEZZINO,

Plaintiff,

- against

DECISION AND ORDER
INDEX NO. 2011-4803

WEDGEWOOD HEALTHCARE CENTER, LLC,

Defendant.

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **CANTOR, WOLFF, NICASTRO & HALL LCC**
David J. Wolff, Esq., Of Counsel
Attorneys for Plaintiff

BARGNESI BRITT PLLC
Julie Bargnesi, Esq., Of Counsel
Jason T. Britt, Esq., Of Counsel
Attorneys for Defendant

WALKER, J.

Defendant has applied for summary judgment, dismissing the Complaint, pursuant to CPLR 3212 (NYSCEF Doc. 9; Motion No. 7).

BACKGROUND

Plaintiff contends that, *inter alia*, while he was a resident at Defendant's facility ("Facility"), he suffered personal injuries on March 5, 2010, when Defendant's aides ("Aides") dropped him in attempting to place him on a commode ("Incident"), causing his surgically repaired left hip to dislocate, requiring multiple surgical revisions to his hip (Doc. 2, ¶53; Doc.

14, pp. 6-10). Plaintiff further contends that, as a result of the Incident and Defendant's failure to follow its treatment plan, he is permanently confined to a wheelchair (Doc. 14, pp. 10-11).

Plaintiff was 62 years old at the time of the Incident, and he had a history of chronic back pain dating back to 1981. At the time of the Incident, Plaintiff had also been diagnosed with pre-existing conditions, including, *inter alia*, avascular necrosis of the left hip, septic arthritis of the left hip, uncontrolled diabetes, asthma, hypertension, hyperlipidemia, chronic obstructive pulmonary disease, coronary artery disease, anxiety, sleep disorder, chronic spinal lipoma and paraparesis, chronic steroid use, urinary retention and chronic Foley catheterization, and gastroesophageal reflux disease (Docs. 17 and 18).

In February 2010, Plaintiff was diagnosed with a fractured left hip, necessitating repair through a total hip replacement. On March 1, 2010, Plaintiff underwent total left hip replacement surgery at Kenmore Mercy Hospital ("Hospital") by non-party, Peter Shields, M.D. ("Initial Hip Surgery") (*Id*).

Prior to the Initial Hip Surgery and as part of the pre-operative process, a culture was taken of the hip joint to check for infection. While this pre-operative culture initially resulted in a negative reading, it would eventually grow out a bacteria that was present in the hip joint prior to the Initial Hip Surgery(Doc. 20, ¶14).

On March 5, 2010, Plaintiff was transferred from the Hospital to the Facility for post-surgical rehabilitation.

Upon admission to the Facility, Physical Therapist Claudine Lachowski evaluated Plaintiff and recommended that he be transported via a "total assistance of two with a Vanderlift"

(Doc. 25, pp. 15), and that he should not bend more than ninety (90) degrees[1] (*Id*., at pp. 16-17). Additionally, Ms. Lachowski indicated the goal of rehabilitation was to improve range of motion, strength, transfers, and ambulation, all toward enabling the Plaintiff to return to some level of independence (*Id*., at pp. 17-18).

With respect to the Incident, Plaintiff contends that on March 5, 2010, shortly after his admission to the Facility, he needed to use the bathroom and called for assistance; that he was transferred by two of the Aides onto a wheelchair and into the bathroom; and as the Aides were transferring him onto the commode without the Vanderlift (as recommended), he began to fall (Doc. 27, pp. 64-66). Plaintiff testified at his deposition, as follows:

> When they were getting me up to get me on the toilet, I started falling. And they grabbed my arms, but I went straight down with my knees up in my chest and my butt on the floor. I wasn't laying on the floor, but my knees were up in my chest and my back was against the toilet I guess you could call it . . . . They couldn't lift me. And they were screaming and I was screaming. As soon as I fell, I felt like something pop or break or whatever. I don't know what it was. I was screaming my brains out and they were screaming (*Id*., at pp. 65-66).

Plaintiff's long-time partner, Patricia Buseck, claims to have been in Plaintiff's room at the Facility at the time of the Incident.

Ms. Buseck testified at her deposition that she heard Plaintiff and the Aides screaming from the bathroom and witnessed a therapist and nurse run into the room immediately after the Incident (Doc. 28, p. 80). According to Ms. Busek, the therapist and nurse inquired as to why

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[1] A vanderlift (or vander-lift) is a mechanical lift used by the medical community, which enables hospital/rehabilitation patients to be safely transported, regardless of their range of motion limitations and without breaking the ninety (90) degree angle (https://www.vancare.com/patient-lifts/mobile-lifts/full-body/vancare-vanderlift-ii-b600.html).

Plaintiff was on the floor, and they expressed concern over his having been transported to the commode without the recommended Vanderlift (*Id*.). Ms. Buseck further testified that when the therapist and nurse inquired with the Aides as to why Plaintiff was on the floor, one of them replied that "I wasn't going to break my back" (*Id*., at p. 83).

While Ms. Buseck was unable to identify the Aides, nurse or therapist by name, the physical therapist may have been Ms. Lachowski, because Plaintiff testified that the physical therapist that assisted him immediately after the Incident was the same person who evaluated him upon admission to the Facility (Doc. 27, p. 66). In contrast however, Ms. Lachowski testified at her deposition that "I did not see that event [i.e., the Incident] occur" (Doc. 25, p. 34). In any event, Plaintiff further testified that the therapist "started chewing them [i.e., the Aides] out" and asked them "why didn't you use the lift?" Plaintiff could not recall the Aides' response, because he was in too much pain and screaming (Doc. 27, p. 66).

While Ms. Buseck did not witness the Incident, which occurred in the bathroom attached to Plaintiff's room, she was seated in the room at the time of the Incident and described the events leading up to it and the Incident itself, as follows: the Aides assisted Plaintiff out of his bed and into a wheelchair; Plaintiff was able to take the steps required to transfer himself from the bed to the wheelchair; the Aides wheeled Plaintiff into the bathroom; and upon entering the bathroom, Ms. Buseck heard Plaintiff "screaming don't drop me" (*Id*., at pp. 79-80; quotation at p. 80).

Plaintiff contends that the Incident caused him excruciating pain, which caused him to have difficulty remembering the rest of the day. He claims to have informed a physician from the Facility the next morning that he had fallen, and that he was given fentanyl patches for the pain

(*Id*., at pp. 81-83). Ms. Buseck contends that when she visited Plaintiff the next day at the Hospital, he was not himself (Doc. 28, pp. 96-98).

By March 7, 20210, the pre-operative hip joint culture taken on March 1, 2010 began to demonstrate slow bacterial growth, indicating infection (Doc. 20, ¶14). However, the results of this growth were not reported to Plaintiff's hip surgeon (Dr. Shields), other providers at the Hospital, or Defendant's providers.

On March 10, 2010, following complaints of pain, imaging was ordered, which revealed that Plaintiff's left hip had become dislocated. Plaintiff was then transferred back to the Hospital by ambulance for corrective surgery.

With respect to the Incident, the ambulance's records provide, as follows:

> Pt stated that after his arrival on Fri, Staff attempted to transfer Pt to toilet when they attempted this, they dropped the Pt. But caught him before he hit the floor. However Pt stated that when that happened, he felt that his leg was twisted the wrong way, and he immediately felt severe pain. Pt stated that he had decreased motion and endurance in joint. Pt stated pain has been constant with no relief since incident (Doc. 34, p. 4).

On March 11, 2010, Dr. Shields performed corrective surgery of the dislocated left hip. At this point, the positive results of the culture growth had not been reported to him.

While at the Hospital, Plaintiff alleged that the Aides dropped him during a transfer to the bathroom (at the Facility), constituting the Incident.

Following the March 11, 2010 surgery, Plaintiff was transferred back to the Facility on March 15, 2010, to resume rehabilitation. Upon readmission to the Facility, Dr. Frederick Beck, an attending physician at the Facility, was informed of Plaintiff's allegation that the Aides dropped him during his first admission at the Facility. Dr. Beck noted in Plaintiff's chart that he

investigated Plaintiff's claim by interviewing other staff members and reviewing records. He determined there was no veracity to Plaintiff's allegation.

On March 17, 2010, Plaintiff claimed he was unable to participate in physical therapy, because he was tired. The following day, Plaintiff resumed participation in physical therapy.

On March 22, 2010, Plaintiff began exhibiting increased drainage of his surgical incision, accompanied by increased complaints of pain. Dr. Shields was consulted, and he requested that imaging be performed at the Facility.

On March 23, 2010, Plaintiff was transferred to the Hospital with increased complaints of pain and drainage. The imaging results indicated that Plaintiff's left hip had become dislocated again. Plaintiff was not thereafter readmitted to the Facility.

On or before March 25, 2010 (the record is unclear as to the exact date) (Doc. 18 - Report of Dr. Shields' consultation, March 25, 2010), Dr. Shields had been made aware of the positive results showing growth in the culture taken prior to the Initial Hip Surgery performed on March 1, 2010, indicating that the left hip joint was infected. As a result, Dr. Shields determined a third surgery would be required to correct the dislocation and remove the infected hardware. Accordingly, on March 25, 2010, Plaintiff underwent an extensive debridement of the left hip joint with removal of the total hip replacement hardware, and an antibiotic spacer was inserted to promote healing of the infected joint.

On March 31, 2010, Plaintiff had a follow-up x-ray, which revealed that the antibiotic spacer had become dislocated. Accordingly, on April 9, 2010, Plaintiff had another surgical

procedure to remove the antibiotic spacer and a Girdlestone procedure was performed[2].

STANDARD OF REVIEW

It is well settled that,

> [t]he 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 eliminate any material issues of fact from the case (*Winegrad v New York Univ. Medical Ctr.*, 64 NY2d 851, 853 [1985]).

Where the proponent of a summary judgment motion makes this *prima facie* showing,

> the burden shifts to the party opposing summary judgment 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.*, 68 NY2d 320, 324 [1986]).

Factual issues raised by the opposing party must be genuine, as opposed to speculative (*Trahwen LLC v. Ming 99 Cent City #7, Inc.*, 106 AD3d 1467, 1468 [4th Dept 2013]), and "[m]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment (*Gilbert Frank Corp. v. Fed. Ins. Co.*, 70 NY2d 966, 967 [1988] [citation omitted]).

DISCUSSION

Preliminarily, Defendant contends that Plaintiff has asserted a claim grounded in medical malpractice. However, the Complaint (Doc. 2) does not assert a medical malpractice claim. Rather, the Complaint asserts three (3) causes of action; the first grounded in statutory violations of various sections of the New York Public Health Law ("PHL"); the second grounded in

[2] A girdlestone procedure is one of several options (along with, *inter alia*, antibiotics and debridement) for treating a dislocated hip that has become infected (*see* "Girdlestone procedure: when and why," published by the National Library of Medicine at https://pubmed.ncbi.nlm.nih.gov/22956380/).

ordinary negligence; and the third grounded in gross negligence.

First Cause of Action (Alleged Violations of PHL §§2801-d and 2801-c)

Preliminarily, PHL §2801-c authorizes the court to "enjoin violations or threatened violations of any provisions of [PHL Article 28]." Plaintiff left the Facility in excess of a decade ago, and PHL §2801-c no longer applies to this action.

Public Health Law §2801–d(1) provides, in relevant part, as follows:

> Any residential health care facility that deprives any patient of said facility of any right or benefit, shall be liable to said patient for injuries suffered as a result of said deprivation.

42 CFR 483.15(a) and the State equivalent, 10 NYCRR § 415.5(a) and § 415.3(a), require maintenance of a nursing home resident's dignity/dignified existence. Liability, however, does not exist where the facility ". . . exercised all care reasonably necessary to prevent and limit the deprivation and injury for which liability is asserted . . . " (PHL §2801–d[1]).

Similar to traditional negligence cases, to prevail on a PHL §2801 cause of action, a plaintiff must prove an injury that is caused by the defendant's actions or inactions (*Novick v. South Nassau Communities Hospital*, 136 AD3d 999 [2d Dept 2016]). Liability under the Public Health Law is premised upon the existence of "injuries" being "proximately caused" by alleged regulatory and/or statutory violations (*Id*., 36 AD3d at 999).

Defendant contends that Plaintiff is unable to establish a causal link between any alleged regulatory and/or statutory violations and the injuries claimed in his Amended Verified Bill of Particulars.

Defendant's contention that Plaintiff's PHL (and negligence) claims should be dismissed, because its records do not disclose evidence of the Incident is misplaced, because the status of

such records is not dispositive of the claim. Both Plaintiff and Ms. Buseck have described the Incident in detail. Rural/Metro Medical Services' records also reflect Plaintiff's description of the Incident.

Defendant asks the court to fully credit Defendant's records (which Plaintiff contends are incomplete) and follow-up investigation into whether the Incident occurred and discount the sworn testimony of Plaintiff and Ms. Buseck, but there is no basis to do so. Rather, the juxtaposition of the absence of any reference to the Incident in the records and no one from the Facility recalling the Incident, to Plaintiff's and Ms. Buscek's sworn deposition testimony, creates material questions of fact grounded in witness credibility for the jury to resolve (*Santos v. Temco Service Industries, Inc.*, 295 AD2d 218 [1st Dept 2002]; *see also; Zbock v. Gietz*, 145 AD3d 1521, 1523 [4th Dept 2016]).

Next, Defendant contends that Plaintiff's PHL claims should be dismissed, because the medical records and the opinion of Defendant's expert, Edward C. Tanner, M.D., conclusively establish that Plaintiff's left hip was infected prior to the Initial Hip Surgery and prior to his admission to the Facility. As such, Defendant contends, the surgical procedures following Plaintiff's second admission to the Facility (including the Girdlestone procedure) were necessitated by the infection rather than the Incident, which Defendant denies ever occurred.

Dr. Tanner is a physician licensed to practice in New York and a Board certified orthopedic surgeon. Dr. Tanner's qualifications are set forth with particularity in his Affidavit (Doc. 20), and the court acknowledges him as an expert in the field of orthopedic medicine and surgery.

Upon his review of the pleadings in this case and the pertinent medical records and

deposition transcripts, Dr. Tanner opined, within a reasonable degree of medical certainty, as follows:

> a. Hip dislocation following hip replacement surgery is a known non-negligent complication that can occur without trauma or negligence;
>
> b. The medical records disclose that the plaintiff had a confirmed infection that predated his initial hip replacement surgery and admission to . . . [the Facility], and
>
> c. It was that preexisting infection that ultimately necessitated removal of the prosthesis and Girdlestone procedure (*Id.*, at §5).

Plaintiff's expert, Hervey S. Sicherman, M.D., rendered a contrasting opinion.

Dr. Sicherman is a physician licensed to practice medicine in the States of New Jersey and New York, and he practices in the field of orthopedics. Based upon a review of his CV, the court recognizes Dr. Sicherman as an expert in the field of orthopedic medicine and surgery (Doc. 39).

Upon his review of the pertinent medical records, Plaintiff's deposition transcript, and the affirmation of Plaintiff's counsel, dated June 21, 2021 (Doc. 30), Dr. Sicherman opined, within a reasonable degree of medical certainty, *inter alia*, as follows: (i) Plaintiff's hip became dislocated as a result of the Incident and the Facility's staff having broken the 90 degree angle upon lifting Plaintiff out of the wheelchair in their attempt to place Plaintiff on the commode; (ii) in breaking the 90 degree angle, the Aides violated post-surgical instructions not to do so; (iii) had Plaintiff been properly staffed in a Vanderlift, the 90 degree angle would not have been broken; (iv) as a result of the Incident, Plaintiff suffered a dislocation of his left hip; (v) the Aides' failure to

adhere to such post-surgical instructions was "outside the care of a reasonably prudent rehabilitation facility" (Doc. 36, ¶¶4-8); and (vi) "[a]lthough a hip dislocation can be a non-negligent complication of the procedure, there is no evidence to suggest that it occurred in that manner here. The evidence demonstrates that the defendant's failure to properly ensure the safety of the patient caused the hip dislocation which necessitated the revision procedure" (*Id*., at ¶9).

Clearly, there are competing expert opinions related to the causation of the Incident, and there is no basis for the court to favor one opinion over the other. Under such circumstances, summary judgment must be denied (*Haas v. F.F. Thompson Hosp., Inc*., 86 AD3d 913, 914 [4th Dept 2011] [conflicting opinions of the parties' respective medical experts present credibility issues that cannot be resolved on a motion for summary judgment]).

Moreover, in rendering their respective opinions, both experts rely on different conclusions regarding the happening of the Incident. For purposes of his opinion, Dr. Tanner assumes the Incident never occurred. He relies on the fact that Defendants' medical records do not reflect it, and that Defendant's internal investigation could not substantiate it (Doc. §§18-21). However, Defendant's records are not dispositive of the issue. The court rejects Defendant's contention that Plaintiff has failed to submit evidentiary proof showing that the medical records have been falsified. Plaintiff is not required to do so, and *State Bank of McAuliffe* (97 AD2d 607 [3d Dept 1983]), relied on by Defendant, does not require same.

McAuliffe held that a party relying on the affirmative defense of forgery must submit proof, in evidentiary form, disputing his or her signature (such as a driver's license or passport). The defendant in *McAuliffe* failed to so, despite that exemplars of his signature would have been

readily available to him. The factual circumstances and holding in *McAuliffe* are inapplicable to the instant matter. Other than his own deposition testimony and the testimony of Ms. Buseck, no evidence exits that Plaintiff could submit to prove that Defendant's medical records are incomplete.

On the other hand, for purposes of his opinion, Dr. Sicherman assumes the Incident occurred, precisely in the manner described by Plaintiff and Ms. Buseck. However, whether the Incident occurred and whether Defendant's records are accurate and complete both constitute material issues of fact that may only be answered by a fact finder at trial.

Finally, assuming the Incident occurred, Defendant contends that it should be excused from any liability arising out of it, because the infection would have necessitated a surgery anyway. The infection, however, is a red herring and does not absolve Defendant from consequences associated with the Incident.

The infection and the Incident are separate events. Plaintiff attributes excruciating pain for several days as a result of the Incident, which is separate and apart from the Incident. In addition, the infection did not cause a dislocation, while Plaintiff's expert opines that the Incident did cause a dislocation that (in addition to the infection) also needed to be addressed.

Second and Third Causes of Action (Negligence and Gross Negligence, Respectively)

It is well settled that

> [g]ross negligence, differs in kind, not only degree, from claims of ordinary negligence. To constitute gross negligence, a party's conduct must smack of intentional wrongdoing or evince a reckless indifference to the rights of others. Stated differently, a party is grossly negligent when it fails to exercise even slight care or slight diligence. Ordinarily, the question of gross negligence is a matter to be determined by the trier of fact (*Dolphin Holdings, Ltd. v.*

Gander & White Shipping, Inc., 122 AD3d 901, 902 [2d Dept 2014] [internal citations omitted]).

Defendant's application, seeking the dismissal of Plaintiff's claims grounded in negligence and gross negligence, is denied for the reasons previously stated. Whether the Incident occurred and, if so, whether Defendant's conduct (e.g., failing to use a Vanderlift and breaking the 90 degree angle), rose to the level of gross negligence, are material questions fact to be determined by the jury. While there is no evidence in the record to support a claim that Defendant's conduct constituted "intentional wrongdoing," a jury could reasonably find that Defendants "fail[ed] to exercise even slight care or slight diligence" (*Id*).

Punitive Damages

The *ad damnum* clause of the Complaint seeks punitive damages, and Defendant seeks to dismiss this claim.

PHL §2801-d(2) allows for punitive damages for conduct that is "willful or in reckless disregard of the lawful rights of the patient." In order to prevail on a claim for punitive damages under PHL §2801-d(2), a plaintiff must show ". . . conduct that could be viewed as so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others" (*Everett v. Loretto Adult Community, Inc*., 32 AD3d 1273, 1274 [4th Dept 2006]).

Defendant relies on decisions expressing the standard of review as "malicious" or motivated "by evil or reprehensible motives" (*see e.g.*, *Vissichelli v. Glen-Haven*, 2013 WL 6218994 [Sup Ct, Nassau County, May 29, 2013]). However, the standard enunciated by the Appellate Division, Fourth Department in *Everett* is lower. *Everett* requires a showing of recklessness or wanton negligence, which does not implicate evil or reprehensible motives.

In light of the foregoing, it is hereby

ORDERED, that Defendant's application for summary judgment is denied.

This constitutes the Decision and Order of this court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Counsel are reminded that jury selection is scheduled for October 14, 2021 and the jury trial is scheduled to commence on October 18, 2021.

Dated: July 20, 2021
Buffalo, New York

HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice