

Raynor v Southside Hosp.

2021 NY Slip Op 33628(U)

April 14, 2021

Supreme Court, Nassau County

Docket Number: Index No. 609606/2016

Judge: David P. Sullivan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. DAVID P. SULLIVAN,
Supreme Court Justice.

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RUTH RAYNOR as Administrator of the Estate of
STEVEN RAYNOR,

TRIAL/IAS PART 24
NASSAU COUNTY

Plaintiffs,

-against-

Motion Seq. No. 003, 004
Index No. 609606/2016
Motion Submitted: 04/14/21

SOUTHSIDE HOSPITAL, Individually and d/b/a
NORTH SHORE-LONG ISLAND JEWISH HEALTH
SYSTEM, INC., SOUTH SHORE HEALTHCARE
REGISTERED NURSING, P.C., SOUTH NASSAU
COMMUNITIES HOSPITAL, and TOWNHOUSE
OPERATING CO., LLC, Individually d/b/a
TOWNHOUSE CENTER FOR REHABILITATION &
NURSING,

Defendants.
-----X

The following papers having been read on this motion:

Notice of Motion (South Nassau).....	1
Notice of (Cross-) Motion (Southside).....	2
Opposition (Plaintiff).....	3
Reply (South Nassau)	4
Reply (Southside).....	5

Defendant South Nassau has moved this court for an order granting it summary judgment to dismiss Plaintiff's complaint and any cross-claims asserted against it, pursuant to CPLR §3212. Defendant Southside has cross-moved for the same relief and has also sought relief pursuant to CPLR §3126 for Plaintiff's alleged failure to supplement her bill of particulars. Plaintiff has opposed both motions, whereas Defendant South Shore and Defendant Townhouse have not submitted any papers on the application. Based upon the following, the motion by Defendant

South Nassau is hereby granted over opposition; conversely, the motion for summary judgment and to strike the complaint for failure to provide discovery are both denied as stated hereafter.

This medical malpractice action arises after the Plaintiff's decedent was treated by each of the named Defendants between August 31, 2013, and January 12, 2014. Plaintiff's decedent had been diagnosed with type two diabetes and, more recently, non-Hodgkin's lymphoma, for which he had just completed his final chemotherapy treatment less than ten (10) days before his presentment at Defendant Southside. Plaintiff's decedent arrived in the emergency room at Defendant Southside, complaining of nausea and general weakness and was diagnosed quickly with sepsis related to a recent placement of a chemotherapy port. Plaintiff's decedent was also noted to be at risk for pressure ulcers. Defendant Southside developed a plan to alleviate and prevent pressure ulcers from occurring, which involved turning every two hours, the use of an alternating air mattress, proper wound cleaning and care, and regular skin inspections. After nearly two months in the care of Defendant Southside, and despite the development of pressure ulcers, Plaintiff's decedent was discharged to Defendant South Shore on October 21, 2013.

On October 29, 2013, Plaintiff's decedent arrived at Defendant South Nassau with an extremely high fever, tachycardia, and respiratory complications. His pressure ulcers were diagnosed to be at least stage three and some stage four, including a sacral decubitus ulcer being considered stage four. Defendant South Nassau developed a plan to alleviate the pressure ulcers, including turning every two hours, proper cleaning, and regular inspections; in addition, Defendant South Nassau performed a debridement of the sacral decubitus ulcer successfully. Plaintiff's decedent was then discharged to Defendant Townhouse on November 8, 2013, at which time Plaintiff's decedent did not have any pressure ulcers considered to be stage four and all pressure ulcers were either stable or improving.

On January 8, 2014, Plaintiff's decedent was returned to Defendant South Nassau and diagnosed with pneumonia and a high fever in addition to his other existing comorbidities upon admission. Plaintiff's decedent passed away on January 12, 2014, at Defendant South Nassau's hospital. Plaintiff has now commenced the within action asserting causes of action sounding in general negligence, medical malpractice negligence, and wrongful death, with a request for punitive damages.

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 Hospital, 68 NY2d 320, 508 NYS2d 923 (1986). To make a prima facie showing, the motion must be supported by affidavit, a copy of the pleadings and by other available proof, such as depositions and written admissions. Id. Once a prima facie showing has been made, the burden shifts to the party opposing the motion for 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. Id.; *see also* Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 (1980).

The two essential elements of a medical malpractice claim are a deviation or departure from accepted practice and evidence that such a departure was a proximate cause of injury or damage. Taylor v. Nyack Hospital, 18 AD3d 537, 795 NYS2d 317 (2nd Dept., 2005). A physician moving for summary judgment dismissing a complaint alleging medical malpractice must establish, prima facie, either that there was no departure or that any departure was not a proximate cause of the injuries. Aronov v. Soukkary, 104 AD3d 623, 960 NYS2d 462 (2nd Dept., 2013). In 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. Neyman v. Doshi Diagnostic Imaging Services, P.C., 153 AD3d 538, 59 NYS3d 456 (2nd Dept., 2017).

A review of the moving papers by Defendant South Nassau satisfies for this Court that it has met its burden on the motion. It has submitted a copy of the pleadings, including Plaintiff's bill of particulars, as well as an expert affidavit on its behalf, amongst other things. It should be noted that the bill of particulars specific to this Defendant incorrectly states the time period for the alleged malpractice to be between August 31, 2013, and October 21, 2013. The affiant is an expert physician in the field of internal medicine and has extensive experience in the treatment of pressure ulcers. His opinion, within a reasonable degree of medical certainty, is that Plaintiff's decedent was brought to Defendant South Nassau with several comorbidities and a stage four pressure ulcer when he arrived in late October 2013; however, he was discharged in late November 2013 having improved pressure ulcers at the very least. Likewise, Plaintiff's decedent arrived in January 2014 with the aforementioned comorbidities, plus pneumonia. Under these circumstances, not only did Defendant South Nassau not depart from the standard of care, but also its treatment was not the proximate cause of the death of Plaintiff's decedent. Having satisfied its burden, same is then shifted to Plaintiff to demonstrate that a triable issue of fact still exists sufficient to deny the motion by Defendant South Nassau.

The Court is also satisfied that Defendant Southside has met its burden as well on its motion for summary judgment. In support of the motion, Defendant Southside has submitted its own expert affidavit from a doctor practicing in the field of internal medicine and geriatric medicine. This expert identified Plaintiff's decedent as having several comorbidities that caused the pressure ulcers and that their progression was unavoidable, given his inability to ambulate during his admission at Defendant Southside's hospital. Furthermore, this expert indicates that a debridement

was not done on the sacral decubitus ulcer because it had not advanced to such a stage while Plaintiff's decedent was in its care. The expert for Defendant Southside also opined that the underlying condition of lymphoma and recent chemotherapy was the proximate cause of the development of the pressure ulcers and deteriorating condition of Plaintiff's decedent rather than its care and treatment of him. Thus, it too has satisfied its burden on the motion, and same is also shifted to Plaintiff to demonstrate that a triable issue of fact still exists sufficient to deny the motion by Defendant Southside.

In opposition, Plaintiff has submitted one set of papers to address both motions before the Court; in them, Plaintiff has submitted a single expert affidavit from a physician practicing in internal medicine with experience in acute and long-term care. This expert devotes the vast majority of his opinion on the departures by Defendant Southside, finding that although Defendant Southside formulated a plan to treat Plaintiff's decedent, it also failed to implement that plan consistently. This expert also opines that Defendant Southside's intermittent performance of the care plan for Plaintiff's decedent proximately caused pressure ulcers to develop, sepsis to occur, and the eventual death of Plaintiff's decedent. Plaintiff's expert specifically states that Defendant Southside failed to regularly perform turning of Plaintiff's decedent and did not perform skin checks as often as required, noting that the medical records for Defendant Southside indicate stage one and two pressure ulcers on one day and not the next, which is inconsistent with how these conditions occur. This same expert discussion involving Defendant South Nassau is minimal and lacks any real specificity as to what, if anything, Defendant South Nassau did that was a departure from good an accepted medical practice.

Given this presentation in opposition to both motions by Plaintiff, this Court finds that a triable issue of fact exists as to Defendant Southside only. Indeed, this Court has been presented

with genuinely competing expert affidavits as to Defendant Southside and finds that their respective credibility is best left for a jury to decide. Pirri-Logan v. Pearl, 2021 NY Slip Op 02001 (2nd Dept., 2021). On the other hand, the Court finds that a triable issue of fact has not been raised as to Defendant South Nassau, given that the Plaintiff's expert opinion is conclusory and speculative as to this Defendant. Elstein v. Hammer, 2021 NY Slip Op 01962 (2nd Dept., 2021). Accordingly, Motion Sequence 003 by Defendant South Nassau is hereby granted in full, over opposition, and the complaint and any cross-claims against it are hereby dismissed; conversely, the portion of Motion Sequence 004 by Defendant Southside requesting summary judgment is hereby denied.

Defendant Southside has also requested Plaintiff's complaint be struck given her failure to provide a supplemental bill of particulars as directed on multiple occasions. While this Court does not find that the drastic sanctions of striking the complaint is warranted at this time (*see* Kiernan v. Booth Memorial Medical Center, 175 AD3d 1398, 109 NYS3d 137 [2nd Dept., 2019]), this Court does agree that service and filing of a supplemental bill of particulars is well overdue. Although counsel has indicated as part of Plaintiff's opposition papers that she has indeed served a supplemental bill of particulars upon Defendant Southside, such assertion appears mistaken from this Court's review of the exhibits attached to her opposition papers. Accordingly, Plaintiff shall serve a supplemental bill of particulars upon Defendant Southside, with a copy to Defendant South Shore and Defendant Townhouse, on or before June 17, 2021. Said supplemental bill of particulars shall include a general statement of the acts or omissions constituting the negligence claimed, a more specific statement on the injuries alleged and time of said injuries, and an actual amount demanded for the special damages being claimed. No further extensions shall be afforded to Plaintiff to comply with this directive. Failure to adhere to this deadline provided will result in


striking of the complaint as to Defendant Southside only upon proper formal application to the Court.

Defendant South Nassau shall file and serve a copy of the within order with notice of entry upon all parties served with the motion on or before May 14, 2021. Thereafter, subject to the discretion of the Justice there presiding, Plaintiff and the remaining Defendants shall appear in the DCM Trial Part of Supreme Court, Nassau County, on July 27, 2021.

This hereby constitutes the decision and order of this Court.

Dated: April 14, 2021
Mineola, New York

ENTER


HON. DAVID P. SULLIVAN, J. S. C.

ENTERED

Apr 20 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE