

Mathew v Kings Harbor Health Servs., LLC
2021 NY Slip Op 33658(U)
October 29, 2021
Supreme Court, Westchester County
Docket Number: Index No. 56388/2020
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
DOLORES MATHEW,

Plaintiff,

-against-

**KINGS HARBOR HEALTH SERVICES, LLC d/b/a
KINGS HARBOR MULTICARE CENTER,**

Defendants.
-----X

**DECISION & ORDER
INDEX NO. 56388/2020
Seq No. 2**

WOOD, J.

New York State Courts Electronic Filing (“NYSCEF”) Documents Numbers 76-127, were read in connection with the motion for summary judgment from defendant Kings Harbor to dismiss the complaint.

In an action to recover damages for negligence, gross negligence, and violations of Public Health Law §2801–d, and §2803 and also invoking the res ipsa loquitor doctrine against nursing home for the lack of appropriate treatment and care of plaintiff’s ulcers and an abscess, purportedly causing plaintiff to be forced to undergo medical treatment, incur medical expenses, suffer disfigurement, disability, pain and suffering, mental anguish, and loss of enjoyment of life.

The record shows that plaintiff, 66 years old at the time, was admitted to Kings Harbor from Jacobi Hospital on January 17, 2017, at 9:10 PM. She had uncontrolled diabetes, and had sustained a hip fracture from a fall, that necessitated a total hip replacement. When plaintiff arrived at Kings Harbor, she was assessed by Nurse Floribel Camara. Plaintiff was found to have a surgical wound status post total hip arthroplasty, and allegedly had pressure wounds,

specifically a linear opening to the inter-gluteal cleft with no bleeding or drainage. The nurse took two photographs of plaintiff's wounds, and allegedly notified the medical doctor and Wound Team of plaintiff's wound status. Plaintiff received an air mattress and was placed on a turning and positioning (TP) schedule as indicated in the Resident Nursing Instructions at 9:52 PM on January 17, 2017.

On February 6, 2017, vascular surgeon Dr. Porreca, found that the patient had a stage III pressure ulcer and an abscess. He diagnosed sacral abscess and sent the patient to the Emergency Department for incision and debridement. After incision and drainage of the pilonidal abscess in the Emergency Room she was brought back to Kings Harbor and was doing well. She was not complaining of any pain. On February 8, 2017, the patient was again seen by Wound Care. The stage IV pressure ulcers were complicated by the abscess. The abscess was considered to be a wound due to the incision and debridement in the Emergency Department. The left buttock extension area remained stage IV. The patient's diabetes was under better control. According to King Harbor, by the time the patient was discharged she was noted to have reached all of her occupational and physical therapy goals.

Now, based upon the foregoing, the motion is decided as follows:

It is well-settled that a 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, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; see

Jakobovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; see also Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is “required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion” (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). In considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Stukas v Streiter, 83 AD3d 18, 23 [2d Dept 2011]).

In support of its motion, Kings Harbor offers the medical affirmation of Lawrence Diamond, M.D., a Diplomate of the American Board of Family Practice with a Certificate of Added Qualifications in Geriatric Medicine (NYSCEF#78). Dr. Diamond recites that plaintiff was admitted to Kings Harbor with stage III pressure sores to the right inner buttocks and to the intergluteal cleft. The pressure ulcers did not develop at Kings Harbor; the patient came into the facility with them. The pressure ulcers were cared for and treated in accordance with the standard of care. Upon admission to the facility, the patient was given an air mattress and a gel cushion for her wheelchair for pressure distribution. She was to be turned and positioned every two hours or at least reminded to turn herself. This was entirely appropriate under the circumstances. The Wound Care Team attended to the patient’s pressure ulcers on a weekly basis, and sometimes on a twice weekly basis, as per the Skin Impairment Progress Sheets (NYSCEF#78). On January 25,

2017 Wound Care observes a change in the pressure ulcers. The treatment was properly and appropriately changed to Santyl to chemically debride the ulcers and promote healing. A surgical consult was requested. The medical doctor was notified. The pressure ulcer was now stage IV. Treatment orders were carried out properly and appropriately according to Dr. Diamond (NYSCEF#78). Dr. Diamond believes that there is nothing that Kings Harbor could have done to prevent this abscess or the pilonidal abscess, and the fact that they worsened was due to plaintiff's co-morbidities, including uncontrolled diabetes and anemia.

Additionally, Dr. Diamond disagrees with plaintiff's contention that Kings Harbor failed to ensure that plaintiff's abilities and activities of daily living did not diminish. Referring to the Kings Harbor Physical Therapy and Occupational Therapy records, the Nurses notes, and plaintiff's own deposition testimony, Dr. Diamond asserts that these sources indicate that plaintiff's abilities to perform activities of daily living in fact improved at Kings Harbor, and plaintiff met all of her goals in terms of activities of daily living, transferring and ambulation.

Next, as for plaintiff's charge that Kings Harbor failed to have plaintiff seen by a physician at least once every 30 days. Dr. Diamond responds that based upon the Kings Harbor chart, the patient was seen by medicine on at least seven occasions in just 44 days. She was additionally seen by a vascular consult on two occasions, Wound Care on numerous occasions and a psychiatric consult. Thus, Dr. Diamond asserts that this allegation is moot as well.

Plaintiff's allegation that Kings Harbor failed to comply with charting is also disputed by Dr. Diamond, who states that the chart is detailed and complete up to the standard of care. Dr. Diamond points out that the physician's orders were carried out (NYSCEF#78).

Dr. Diamond concludes that Kings Harbor provided excellent care to plaintiff, in that it healed pre-existing pressure ulcers; plaintiff's diabetes and hypertension were under control; and provided therapy and care which assisted plaintiff in meeting her goals for activities of daily living and ambulation after total hip replacement surgery. Kings Harbor did not contribute to the development of the pressure ulcers or the pilonidal abscess. The diligence and good care by Kings Harbor led to the healing of the pressure ulcers. Plaintiff left Kings Harbor free of any pressure ulcers. When plaintiff returned from the Emergency Room to Kings Harbor, the facility appropriately and properly treated and cared for the wound left from the incision and debridement of the abscess and it healed in less than 10 days (NYSCEF#78).

In light of the foregoing, Kings Harbor established a prima facie case of entitlement to summary judgment as evidenced by medical records and the affirmation of Dr. Diamond, who expounded that plaintiff's treatment was within good and accepted medical practice and was not a proximate cause of her injury, given her co-morbidities of diabetes and anemia.

In opposition, plaintiff offers the medical affirmation of Ronald Roth, M.D., whose credentials include familiarity with the standard of care in Nursing Homes and Hospitals with regard to the geriatric population (NYSCEF#101). Dr. Roth opines that Kings Harbor deviated from good and acceptable Nursing Home practice and violated State and Federal regulations, which caused plaintiff to develop decubitus ulcers resulting in permanent scarring. Dr. Roth attests that plaintiff received sub-standard care, which violated the governing regulations and the standard of care applicable to nursing homes

The alleged substandard care included not performing a proper assessment upon admission to Kings Harbor, specifically, an inaccurate assessment of plaintiff's wound. Dr. Roth notes that the PRI (Patient Review Instrument) completed by Jacobi Hospital indicates that upon

transfer out of Jacobi Hospital, plaintiff had no pressure ulcers. Contradictorily, there are records that indicate plaintiff had wounds upon admission. While there are numerous mentions of multiple pressure ulcers there are only 2 progress sheets indicating only 2 wounds. On each assessment there appears to be a change in the original staging from a stage 2 that was over written to become a stage 3 on each wound.

According to Dr. Roth, another disturbing aspect of the medical records that calls into question the integrity of the entire chart is the documentation of services provided while plaintiff was actually not in the facility. Dr. Roth notes that on February 6, 2017, at noon, plaintiff was transferred to Einstein Hospital for an evaluation and did not return until 8:15 pm . Despite not being physically present in the facility, the CNA documentation shows plaintiff was turned and positioned at noon, 4pm and 6pm This is one example of the CNA's blindly clicking a box without actually providing the service, calling into question the veracity of the entire chart. While the care plan detailed the exact position, plaintiff was to be positioned at 2-hour intervals throughout the day the CNA documentation records do not reflect which position plaintiff was in at any given 2-hour interval.

Dr. Roth continues that the documentation of these multiple wounds was unprofessional and contradictory throughout the residency of plaintiff as the wounds clearly deteriorated as a result of the ineffective care and treatment rendered to this compromised individual. The records indicate that the wound, based upon the facilities incomplete chart, worsened from at least from a stage 3 wound to a stage 4 wound under Kings Harbor's care. Therefore, Kings Harbor violated the state and federal regulations regarding the deterioration of pressure ulcers.

Dr. Roth explains that as for the Comprehensive Care Plan, Federal regulations require a full assessment of every resident within 14 days of admission and at least every 12 months

thereafter unless there is a significant change in the resident's condition. On admission, for example, no turned and positioned for the first night at the facility-interventions that were necessary to avoid the development and progression of bedsores, and these omissions directly caused or contributed to the injury.

According to Dr. Roth, while the accountability records do indicate some turning and positioning, it is woefully inadequate. It is his opinion that the failure to reassess plaintiff and put the program interventions in place constituted an additional departure from good and acceptable practice was a substantial contributing factor in the development and worsening of plaintiff's pain and suffering.

Construing the evidence in a light most favorable to nonmovant plaintiff, particularly, the medical records, and Dr. Roth's affirmation with exhibits attached, questions of fact were raised by plaintiff that precludes summary judgment as to the cause of action based on ordinary negligence. Triable issues of fact exist as to whether Kings Harbor were negligent in their treatment of plaintiff and whether such negligence was a substantial factor in causing plaintiff's injuries. Initially the assessment of plaintiff raises questions regarding her condition upon her admission to the facility as shown by the seemingly conflicting documentation of the wounds which range from no pressure ulcers, to several ulcers a stage II altered to reflect a stage III. As plaintiff's counsel points out, such disparities calls into question the accuracy of the clinical record that according to Dr. Roth contributed to the development and deterioration of plaintiff's pressure ulcers. There is also a question of fact as to where plaintiff's ulcers developed as the records of Jacobi and the PRI, do not indicate any skin impairment upon discharge. Additionally, questions as to whether plaintiff's ulcers and other complications were unavoidable and as a result of pre-existing conditions.

In addition, plaintiff in opposition raises triable questions of fact as to whether Kings Harbor violated Public Health Law § 2801-d(1). The basis for liability under the statute “is neither deviation from accepted standards of medical practice nor breach of a duty of care. Rather, it contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule” (Novick v S. Nassau Communities Hosp., 136 A.D.3d 999, 1001 [2d Dept 2016]), citing (Zeides v. Hebrew Home for Aged at Riverdale, 300 A.D.2d 178, 179 [1st Dept 2002]). Public Health Law § 2803-c (3) (e), protects “the right to receive adequate and appropriate medical care” set forth in 10 NYCRR 415.12, including the failure to prevent the development of pressure sores (Id).

Additionally, there is a triable issue of fact whether Kings Harbor violated the Code of Federal Regulations that provides that for Pressure ulcers- Based on the comprehensive assessment of a resident, the facility must ensure that:

“(i) A resident receives care, consistent with professional standards of practice, to prevent pressure ulcers and does not develop pressure ulcers unless the individual's clinical condition demonstrates that they were unavoidable; and
(ii) A resident with pressure ulcers receives necessary treatment and services, consistent with professional standards of practice, to promote healing, prevent infection and prevent new ulcers from developing” (42 C.F.R. § 483.25).

Nevertheless, to the extent that plaintiff brings a claim for gross negligence, there is no evidence in the record to support a finding that King Harbor’s conduct constituted gross misbehavior, or that its care and treatment of plaintiff rose to the level of willful, wanton or reckless conduct that transgressed mere negligence (Chauca v Abraham, 30 NY3d 325, 331 [2d Dept 2017]). Thus, the cause of action for gross negligence is dismissed.

Accordingly, the record demonstrates that there is a question of fact as to the sufficiency of plaintiff's case that may rise to the level of negligence or a statutory violation, but there is no competent evidence of any unordinary misconduct that would warrant punitive damages.

In the end, the parties' motion papers present a credibility battle between the parties' experts, and issues of credibility are properly left to a jury for its resolution" of those issues (Barbuto v Winthrop Univ. Hosp., 305 AD2d 623, 624 [2d Dept. 2003]).

The court has considered the remainder of the factual and legal contentions of the parties and to the extent not specifically addressed, finds them to be without merit or rendered moot by other aspects of this decision. This constitutes the decision and order of the court.


Therefore, based upon the stated reasons, it is hereby

ORDERED, that defendant Kings Harbor's motion for summary judgment is **denied**, except that the cause of action alleging gross negligence is dismissed; and it is further

ORDERED, that the parties are directed to appear in the Settlement Conference Part, at a date, time, place and mode as so designated by that Part.

The Clerk shall mark his records accordingly.

Dated: October 29, 2021
White Plains, New York



HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF