Estate of Maliniak v New York Methodist Hosp.
2022 NY Slip Op 31149(U)
April 8, 2022
Supreme Court, Kings County
Docket Number: Index No. 501980/2016
Judge: Bernard J. Graham
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

THE ESTATE OF ANNIE MALINIAK, by her daughter SYLVIA JANKELEWICZ, Administratrix,

Plaintiff(s),

-against-

NEW YORK METHODIST HOSPITAL,

Defendant.

Index No.: 501980/2016

DECISION/ORDER

Hon. Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion and cross-motion to: award summary judgment to the defendant New York Methodist Hospital, pursuant to CPLR § 3212.

Papers	Numbered
Notice of Motion and Affidavits Annexed......................	1-2
Order to Show cause and Affidavits Annexed............	
Answering Affidavits & Cross-motion......................	3
Replying Affidavits...	4
Exhibits..	
Other: .... (memo)..	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendant, New York Methodist Hospital ("NYMH"), has moved (seq. 7), pursuant to CPLR §3212, for an Order awarding summary judgment to said defendant and a dismissal of all causes of action as against said party upon the grounds that the defendant was not negligent in the care and treatment that was rendered to Annie Maliniak ("decedent"), and as such there are no genuine, material issues of fact that would warrant a trial on this matter.

Counsel for the plaintiff, The Estate of Annie Maliniak, by her daughter, Sylvia Jankelewicz, Administratrix ("plaintiff"), has opposed the relief sought by the defendant, asserting that there are triable issues of fact with respect to whether the defendant was negligent in the care and treatment that was rendered to the decedent and whether the defendant's expert failed to meet their prima facie burden. There was a further argument

that the submission of defendant's motion was untimely and thus should not be considered.

Background:

On or about February 12, 2016, an action was commenced on behalf of the plaintiff, by the filing of a summons and verified complaint with the Clerk's office of Kings County. In said complaint, the plaintiff seeks to recover damages based upon alleged medical malpractice and common law negligence.

Issue was joined by the defendant, by the service of their verified answer, dated March 21, 2016.

In plaintiff's response to defendant's Demand for a Bill of Particulars, it is alleged that the defendant was negligent in the treatment of the decedent from April 5, 2015-April 27, 2015. Plaintiff has alleged that NYPH failed to: perform proper tests, take a medical history and keep proper records; order consultants to prevent the development of ulcers; timely diagnose and prevent the formation of bed sores/ulcers; disclose reasonably foreseeable risks and benefits in the care and treatment of the decedent; as well as to disclose alternatives to treatment. As a result of the defendant's alleged negligence, the decedent endured debilitating and painful bed sores which became aggravated and worsened under defendant's care.

Sylvia Jankelewicz, the Administratrix of the decedent's Estate, was deposed on May 22, 2018 as well as on March 22, 2019. The deposition of Nurse Dorette Bethune, ("R.N. Bethune)[1] on behalf of NYMH, was held on November 21, 2019, and the EBT of Jeremiah H. Gelles, M.D. ("Dr. Gelles")[2], also on behalf of NYMH, was conducted on December 10, 2020.

A Note of Issue and Certificate of Readiness was filed on behalf of the plaintiff on or about April 9, 2021.

[1] R.N. Bethune was an emergency room staff nurse (See EBT of R.N. Bethune p. 10).
[2] Dr. Gelles was an attending physician in the Department of Medicine, the Division of Cardiology (see Dr. Gelles EBT p.11).

As to the timing of the filing of this Motion for Summary judgment by the defendant, there is a dispute amongst counsel as to the length of the extension of time to file same which was afforded by Judge Jeanine Edwards. Counsel for defendant argues that the deadline was extended to June 29th, while counsel for the plaintiff maintains that the filing deadline was June 22nd. The motion was filed on June 28th.

Facts:

The decedent, who was 90 years old, presented to the Emergency Department at Maimonides Medical Center ("Maimonides") on April 2, 2015. Upon examination, she was found to be lethargic, disoriented and had a fever of 102.7. The decedent was diagnosed with a urinary tract infection and was being treated with Cefepime and Vancomycin (antibiotics). The medical records at Maimonides indicated that the decedent had redness in the sacrum area. The decedent was discharged from Maimonides on April 3rd.

Two days later, (April 5th), the decedent, while at home, was having trouble breathing and her daughter called EMS, wherein she was transported to NYMH. The decedent was taken to the Emergency Department at NYMH where they evaluated and attempted to treat her shortness of breath. The decedent's medical history included dementia, chronic kidney disease, hyperlipidemia, and Type II diabetes. At the time of her admission, the decedent was bedbound and not ambulatory, and was incontinent of both the bladder and bowel. The albumin level of the decedent was found to be low and her white blood cell count elevated. Either pneumonia or a pulmonary edema was suspected following a chest x-ray. The triage (obtain vital information, blood sampling, as well as addressing the patient's complaints) was performed by R.N. Bethune. R.N. Bethune also conducted a skin assessment which indicated that the decedent had a Stage I ulcer on her sacrum (see EBT of R.N. Bethune p.15, 19). It was determined that since the decedent had elevated cardiac enzymes, with suspected sepsis and tachycardia, she was admitted to telemetry. The decedent remained on a Bi-level Positive Airway pressure (BiPAP) machine.

On April 6th, an echocardiogram revealed anterior hypokinesis with left ventricular ejection fraction of 39%. The critical care unit also evaluated the decedent whose recommendation was for the patient to be closely monitored and to remain on antibiotics for pneumonia. The decedent was also placed on nasal oxygen with saturation in the 90's.

Dr. Gelles performed a cardiology consult on April 7th, wherein he noted that the decedent had an acute anterior wall myocardial infarction, cardiomyopathy and coronary artery disease. Lasix was administered to the decedent and the use of the BiPAP machine was ended. Dr. Gelles arranged for a pulmonary consultation with Dr. Gudi[3] as it appeared that the decedent was microaspirating, which condition made it difficult for the patient to clear her lungs which could lead to pneumonia. A catheter was inserted to assist with the patient's incontinence care.

When an x-ray taken of the decedent revealed abnormal results, the decedent was evaluated by an infectious disease specialist. The decedent was also evaluated by a speech therapist who then placed the patient on a pureed food diet.

On April 11, 2015, after a further evaluation by Dr. Gelles, who believed that the decedent likely had critical Coronary Artery Disease, the doctor advised her family that treatment should include angiography and percutaneous coronary intervention. It is alleged that the decedent's family did not consent to the proposed intervention and instead requested that the decedent receive only conservative treatment until she was discharged from the hospital to her home. A skin assessment found her to have excoriation to her groin and under her breasts.

Two days later (April 13th), the decedent desaturated to 76%, and through deep suction a large amount of mucus was removed. The decedent's white blood cell count was elevated and she remained on Vancomycin and Meropenem and her oxygen level was increased. The decedent was also placed on Heparin for deep vein thrombosis.

Upon admission, the defendant allegedly had a care plan in place for the prevention of ulcers. The decedent was allegedly given a specialized mattress designed

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[3] Dr. Gudi was an attending physician who specialized in pulmonary and critical care (see Dr. Gelles EBT p. 16).

for pressure injury prevention, as well as provided with Nutrashield cream, a body positioner, heel protector and was turned and positioned very two hours. The decedent's nutritional intake was also allegedly monitored.

As of April 15th, the decedent was noted to have excoriation to her groin, buttocks and breasts. Five days later, the patient was also found by nursing to have a rash on her upper back. On April 22nd, the decedent was noted to have a Stage II sacral/coccyx pressure ulcer that measured 5(x)5 cm and Calazime[4] was provided for treatment.

On April 26th, the decedent's family agreed that the decedent would have home hospice care and the patient was discharged from NYPH on April 27th to her home. At that time, RN Maxiana Louis documented that the decedent had a Stage II sacral ulcer which measured 5cm (x) 5 cm with no exudate.[5] The decedent was given prescriptions for Plavis, Metoprolol and Zyvox.

At home, the decedent remained bedbound with maximum assistance. Hospice care was provided by Caring Hospice Services who made an assessment of the decedent. The nurse documented that the decedent had pain in her chest and buttocks. She was found to have lost twenty five pounds in a five month period which was allegedly related to her failure to thrive. A home health aide provided home hospice care five days per week for four hours per day for personal care, homemaking and nutrition. On April 28th, Dr. Tirupati Raju ordered Zinc for wound healing and Nystatin ointment for fungal rash of the groin.

On May 4th, a wound assessment indicated that there was a new coccyx pressure ulcer that measured 2(x)3(x) o.1 cm, with no drainage and 100% eschar, as well as a right buttock ulcer, 3(x)5(x) 0.1 cm. with yellow slough attributed to shearing.

On May 8th, the decedent was presumed to have a urinary tract infection. An unstageable coccyx ulcer, 1(x)(2) was noted with 100% purple wound bed with allegedly no sign of an infection. That day, the family contacted Hatzaloh (a private ambulance

[4] Calazime is a lotion that is applied to a patient to prevent further irritation from urine or feces (see EBT of R.N. Bethune p.44).
[5] See NYMH Hospital Records annexed as Defendant's Exhibit Y, NYSEF doc. #184-185, p. 511.

service), but when they arrived no life support was provided because of a DNR/DNI. The ambulance crew pronounced the decedent had passed away.

Parties' Contentions:

Here, the Court is presented with the issue of whether defendant NYMH departed from accepted medical practice in the care and treatment rendered to the decedent, and if so, whether that departure from accepted medical practice was the proximate cause of the injuries that allegedly occurred.

In support of the motion for summary judgment by NYMH and a dismissal of plaintiff's cause of action against it, counsel offers the affirmation of Gisele P. Wolf-Klein, M.D. ("Dr. Wolf-Klein"), who opines that the care and treatment rendered to the decedent at NYMH from April 5, 2015 through April 27, 2015 was in accordance with the standards of care and that none of the alleged departures proximately caused or contributed to the decedent's claimed injuries, including the development and/or worsening of pressure ulcers. Dr. Wolf-Klein asserts that the existence of decedent's pressure ulcers predated her admission to NYMH and were proximately caused by the decedent's numerous co-morbidities.

Plaintiff, by her attorneys, opposes the relief sought in the motion by offering the affirmation of Oskar Maciej Jacunski, PhD, IMD, DHS, RN, HC, ("Nurse Jacunski"), who opines that NYMH departed from the standards of care by failing to closely monitor the decedent's glucose levels to prevent impeded wound healing, and failing to ensure the decedent's chucks (urine pads) were kept clean and dry to prevent infection.

Discussion:

A defendant moving for summary judgment in a case sounding in medical malpractice "must make a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the plaintiff's injuries." Guctas v Pessolano, 132 AD3d 632, 633 [2d Dept 2015], quoting

Matos v Khan, 119 AD3d 909, 910 [2d Dept 2014]. This Court finds that the defendant NYCHB has presented evidence sufficient to meet this burden.

Once the movant has made a prima facie showing, the plaintiff must submit evidence in opposition to rebut the movant's prima facie showing. Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Poter v Adams, 104 AD3d 925 [2d Dept 2013]; Stukas v Streiter, 83 AD3d 18 [2d Dept 2011]. The plaintiff must "lay bare her proof and produce evidence, in admissible form, sufficient to raise a triable issue of fact as to the essential elements of a medical malpractice claim, to wit, (1) a deviation or departure from accepted medical practice, [and/or] (2) evidence that such a departure was a proximate cause of injury." Sheridan v Bieniewicz, 7 AD3d 508, 509 [2d Dept 2004]; Gargiulo v Geiss, 40 AD3d 811-812 [2d Dept 2007]. In order to prevail on a claim for medical malpractice, "expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause." Nicholas v Stammer, 49 AD3d 832-833 [2008]. In addressing the issue of proximate cause, the Court notes that "[i]n 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." Johnson v Jamaica Hosp. Med. Ctr., 21 AD3d 881, 883 [2d Dept 2005]. "A plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiffs chance of a better outcome or increased [the] injury." Semel v Guzman, 84 AD3d 1054, 1055-1056 [2d Dept 2011]. "The issue is whether a doctor's negligence is more likely than not a proximate cause of [a plaintiff's] injury is usually for the jury to decide." Polanco v Reed, 105 AD3d 438, 439 [1st Dept 2013]. It has also been held that where "a failure to treat is alleged, the plaintiff simply must show that it was probable that some diminution in the chance of survival had occurred." Borawski v Huang, 34 AD3d 409, 410 [2d Dept 2006]. "[T]he evidence presented by the plaintiff need not eliminate every other possible cause

of the resulting injury." Clarke v Limone, 40 AD3d 571, 571-572 [2d Dept 2007], *lv denied* 9 NY3d 809 [2017].

This Court finds that the defendant has established prima facie entitlement to summary judgment by the submission of the affirmation of Dr. Wolf-Klein, as well as the decedent's medical records, which demonstrate that NYMH did not depart from the accepted standards of medical practice in their treatment of the decedent, and that any alleged departures were not a proximate cause of her injuries.

Specifically, NYMH has established, through Dr. Wolf-Klein's affirmation, that the decedent was bedbound, had elevated cardiac enzymes with suspected sepsis and tachycardia as well as many co-morbidities,[6] and was therefore predisposed to skin breakdown upon her admission to NYMH. Dr. Wolf-Klein opines that the decedent was admitted to NYMH with a pre-existing Stage I pressure ulcer on the sacrum,[7] and that the deterioration of that ulcer to Stage II was unavoidable due to the decedent's underlying medical conditions. Dr. Wolf-Klein asserts there is no basis to support plaintiff's allegation that NYMH failed to recognize or diagnose pressure ulcers, and the record reflects that the decedent underwent diagnostic testing, including x-rays, throughout her admission to NYMH. Dr. Wolf-Klein cites to specific elements of the care plan created on April 7th to minimize the risk of the decedent's skin breakdown and prevent pressure ulcers, including monitoring her skin every shift for redness, edema, warmth, drainage or discoloration, maintaining clean and dry skin, an overlay mattress, incontinence care and turning and positioning every two hours.[8] The record reflects that NYMH also developed a respiratory and nutritional care plan, and decedent's diet and fluid intake were monitored and managed during her admission, which is an important factor in preventing skin breakdown and pressure ulcers.

Dr. Wolf-Klein opines that the interventions addressed in the care plans were implemented and the decedent's skin was constantly assessed. The decedent was

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[6] The decedent's co-morbidities included dementia, chronic kidney disease, hyperlipidemia and type II diabetes.
[7] See NYMH Hospital Records annexed as Defendant's Exhibit Y, NYSEF doc. #184-185, p. 46.
[8] See NYMH Hospital Records annexed as Defendant's Exhibit Y, NYSEF doc. #184-185, p. 557-60.

provided with a specialized mattress designed for pressure ulcer prevention, was turned and positioned every two hours, and was provided with Nutrashield cream, a body positioner and heel protectors. Dr. Wolf-Klein states that Braden Scale assessments were performed daily, the decedent utilized a catheter to assist with incontinence, and her incontinence briefs were changed every shift. Although the pressure ulcer the decedent presented to NYMH with progressed from Stage I to Stage II, Dr. Wolf-Klein contends that the pressure ulcer did not further increase in size through the time of the decedent's discharge and the decedent was receiving active supervision and appropriate intervention regarding her skin. The expert asserts that the mere progression of an existing wound does not suggest or indicate negligence on the part of NYMH, nor does the lack of complete healing of such a wound during hospitalization, and that minor deviations in documentation regarding turning and positioning are not demonstrative of malpractice. The record reflects that the coccyx pressure ulcer was not present upon decedent's discharge from NYMH. Dr. Wolf-Klein also addresses the redness on decedent's skin, stating that it was a recurrent and unavoidable fungal rash due to conditions in the decedent's home.[9] The expert opines that there is no evidence that suggest that the decedent died as a result of any pressure ulcers, skin breakdown, or associated infections, and that the treatment rendered to the decedent was within the standard of care. Rather, Dr. Wolf-Klein asserts that the ulcers described in the hospice records resulted from the care she received at home, which was primarily given by family members.[10]

Plaintiff has failed to provide sufficient evidence to raise an issue of fact with respect to the treatment provided to the decedent at NYMH. Nurse Jacunski's affirmation states that decedent's blood glucose and albumin levels should have been monitored more frequently, nutrition assessments should have been performed more frequently, a hydrocolloid cream should have been prescribed rather than the Calazime cream, the

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[9] Dr. Wolf-Klein notes that there was an order placed by Dr. Tirupati Raju on April 28, 2015, for Nystatin ointment, which is prescribed to treat fungal rash.

[10] The record reflects that the decedent was only receiving four hours of home hospice care per day, five days per week, and that the rest of her care was provided by family members, who may or may not have implemented appropriate turning and positioning or hygiene care.

urine pads should have been changed more frequently, and the hospital should have placed the decedent in Intensive Care due to her need for frequent monitoring and care. However, Nurse Jacunski fails to take into account plaintiff's type II diabetes, which would explain decedent's high blood glucose readings and lower albumin levels and makes no cognizable argument regarding how these readings were caused by any malpractice or negligence on the part of NYMH. The note stating the decedent's "chucks" (urine pads) were soaked was made upon the decedent's admission to NYMH from non-party Maimonides, which does not demonstrate any departure by NYMH. Nurse Jacunski's assertion that the hospital's documentation of turning and positioning was inconsistent and therefore cannot be relied upon, is speculative and conclusory, as these are minor inconsistencies, and the record indicates that the proper pressure ulcer interventions were performed in accordance with the standard of care. In addition, the allegation that Nurse Gelles tried to delete records is against the evidence in the record, which indicates that a duplicate entry was made and was crossed out because it was made in error. Nurse Jacunski's vague allegations about nutrition and hydration are insufficient to raise a question as to whether the decedents nutrition was appropriately managed, and the alleged failure of NYMH to take photographs of the decedent's skin is unsupported by any citation that this is a departure from NYMH policy or the standard of care. Further, Nurse Jacunski does not address Dr. Wolf-Klein's assertion that the redness around the decedent's breasts, buttocks and genitalia was the result of a fungal rash and not related to pressure ulcers.

As plaintiff's expert's affirmation is speculative and conclusory, plaintiff has failed to raise an issue of fact with regard to whether NYMH departed from good and accepted medical practice, and the motion for summary judgment dismissing plaintiff's medical malpractice claims against them is granted. As plaintiff did not oppose the portion of defendant's motion to dismiss the claims regarding PHL §2801(d), PHL §2803, punitive damages, negligent hiring and training of staff, and wrongful death, those portions of defendant's motion for summary judgment are also granted.

In addressing the contention that defendant's motion was untimely, this Court finds that the submission was within one week of the two disputed deadlines, which this Court finds is de minimus and should not be determinative of the motion.

Conclusion:

The defendant, NYMH, has met their burden for establishing a prima facie case for summary judgment, and the plaintiff, in opposition, has failed to meet its burden to offer admissible evidence raising a question of fact as to whether NYMH departed from good and accepted medical practice in the treatment of the decedent. Accordingly, the motion by defendant NYMH for summary judgment and a dismissal of plaintiff's complaint, pursuant to CPLR §3212, is granted.

This shall constitute the decision and order of this Court.

Dated: April 8 , 2022
Brooklyn, NY

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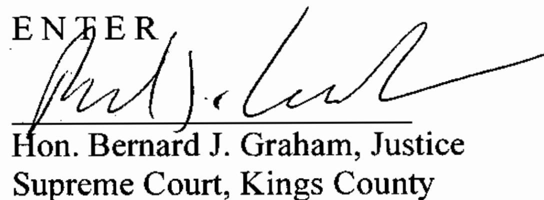

Hon. Bernard J. Graham, Justice
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