

Schreiber v New York City Health & Hosps. Corp.

2022 NY Slip Op 31741(U)

May 31, 2022

Supreme Court, New York County

Docket Number: Index No. 154862/2014

Judge: Erika Edwards

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

PRESENT: HON. ERIKA EDWARDS

PART 10M

Justice

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INDEX NO. 154862/2014

PATRICIA SCHREIBER, as administrator of the Estate of
THERESA WALSH,

MOTION DATE 01/27/2020

Plaintiff,

MOTION SEQ. NO. 005

- v -

THE NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, GOUVERNEUR HOSPITAL, JOHN/JANE
DOES(s) #1-3, EMPLOYEES OF GOUVERNEUR
HOSPITAL, THE CITY OF NEW YORK, and JOHN/JANE
DOES(s) #1-3, NEW YORK CITY POLICE OFFICERS, and
J. PETROCELLI CONTRACTING,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 139, 141, 142, 143, 144, 145, 146, 147

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents, the court grants Defendants New York City Health and Hospitals Corporation's ("NYCHHC") and Gouverneur Hospital's ("Gouverneur") summary judgment motion and the court dismisses Plaintiff Patricia Schreiber, as administrator of the Estate of Theresa Walsh's ("Plaintiff") complaint as against Defendants NYCHHC and Gouverneur.

Plaintiff brought this action against Defendants NYCHHC, Gouverneur, The City of New York, New York City Police Officers and J. Petrocelli Contracting alleging wrongful death, medical malpractice and negligence. The court previously dismissed the action against Defendants J. Petrocelli Contracting and The City of New York, which includes the New York City Police Officers.

Plaintiff had a total hip replacement surgery at New York University Hospital for Joint Diseases on August 8, 2013. She was transferred to Gouverneur on August 11, 2013, for rehabilitation. On August 14, 2013, Plaintiff indicated that she had feelings of depression over the past two weeks and was sad because of her illness. Psychotherapy was ordered and Plaintiff took prescription medications. The records indicate that Plaintiff's mood improved and she did not express any suicidal or homicidal ideations. On August 21, 2013, at approximately 6:15 a.m., Plaintiff used her walker to exit her room on the 13th floor and she went down to the 1st floor. Plaintiff took a freight elevator to another floor and walked through an area which was under construction with substantial debris, which were both off limits to patients and visitors. Plaintiff walked to a patio area and sat on a ledge with her legs dangling over the edge which was approximately 20 feet above a loading dock. Members of the hospital police were called and they successfully talked Plaintiff off of the ledge. Plaintiff had been rambling incoherently and she barricaded herself into a corner with some debris. Unfortunately, when members of the New York City Police Department Emergency Services Unit arrived, Plaintiff got back onto the ledge and they were unable to prevent her from falling off of the ledge down onto the pavement. As a result of her fall, Plaintiff suffered serious injuries which caused her continued hospitalization and ultimately, her death on August 30, 2013.

Plaintiff alleges in substance that Defendants NYCHHC and Gouverneur provided her with medication that caused her to become disoriented, confused and/or to suffer mental lapses and otherwise impair her mobility, balance and coordination. Plaintiff further alleges in substance that Defendants NYCHHC and Gouverneur were negligent and departed from accepted standards of medical practice in their care and treatment of Plaintiff in that they had inadequate security and/or supervision of Plaintiff, they knew or should have known that

Plaintiff could be a danger to herself and have episodes of wandering, they should have provided her with a Wanderguard alert monitor, which was included in her treatment plan, and they should have requested that Plaintiff undergo a psychiatric consultation.

Defendants NYCHHC and Gouverneur now move for summary judgment in their favor under motion sequence 005 and they rely on the expert affirmation of Dr. Ian Newmark. Defendants NYCHHC and Gouverneur argue in substance that they are entitled to summary judgment in their favor as a matter of law and that Plaintiff failed to raise a triable issue of fact. They further argue that Plaintiff was treated appropriately and in accordance with the standard of care, her actions were not foreseeable and they cannot be held liable for Plaintiff's fall and injuries. Defendants NYCHHC and Gouverneur further argue in substance that Gouverneur is a skilled nursing/rehabilitation facility with outpatient clinical services, but it does not have an inpatient psychiatric facility, nor emergency department.

They further argue that Plaintiff suffered a sudden, unforeseeable psychotic break. Defendants NYCHHC and Gouverneur further argue in substance that although Plaintiff had been taking medications for depression, difficulty sleeping, pain management and methadone for years, she had no complications. She also had no history of any psychiatric hospitalizations, acute psychotic episodes, or wandering. Defendants NYCHHC and Gouverneur also argue that Plaintiff had no regular treatment with a psychiatrist during the years prior to the incident and there was nothing in her behavior while at Gouverneur that required close observation or wander safeguards.

Defendants NYCHHC and Gouverneur further argue that the court should dismiss Plaintiff's medical malpractice claims because Plaintiff failed to file a Certificate of Merit, failed to disclose a medical expert and failed to provide specific facts to support her claims that

Defendants NYCHHC and Gouverneur were liable for failing to refer Plaintiff for a psychiatric consultation and failing to provide proper medication. They also failed to explain how such failures were the proximate cause of Plaintiff's psychotic break, her fall or her injuries. Additionally, Defendants NYCHHC and Gouverneur argue that Plaintiff had been taking the same medications for years and there was no change in her psychiatric condition or in her behavior. Also, Plaintiff was assessed and determined to be at low risk of wandering, there was no order for a Wanderguard, no need for one to be ordered and they did not depart by failing to order one for Plaintiff.

Defendants NYCHHC and Gouverneur argue in substance that Plaintiff's negligence claims must be dismissed because Plaintiff's psychotic breakdown which caused her fall was sudden and unforeseeable. Plaintiff had no history of wandering or having any suicidal ideations and she was competent, alert and psychiatrically stable throughout her admission. Although a security officer was assigned to monitor the surveillance camera on the freight elevator, he was making rounds at the time Plaintiff used it. Additionally, they argue that there were no prior incidents of patients or visitors gaining unauthorized access to the freight elevator, construction site or patio area, so they had no notice and Plaintiff's actions were unforeseeable.

Plaintiff opposes the motion and relies on the expert affirmation of Ayman Elfiky, M.D., MPH, MSc, MBA. Plaintiff argues in substance that Defendants NYCHHC and Gouverneur departed from accepted standards of care and were negligent in their treatment and care of Plaintiff. Plaintiff argues that Defendants NYCHHC and Gouverneur committed medical malpractice by failing to provide Plaintiff with a Wanderguard monitoring device which should have been attached to her wrist or ankle. Plaintiff argues in substance that she was suffering from depression and her Comprehensive Care Plan Evaluation indicated that staff determined that she

was required to wear a Wanderguard and that she was not permitted to leave the facility without supervision and/or staff awareness. Plaintiff further argues that Defendants NYCHHC and Gouverneur failed to provide her with a Wanderguard and they failed to closely observe, monitor and supervise her.

Plaintiff further argues that she requested psychological consults, but Defendants NYCHHC and Gouverneur failed to provide them. Plaintiff denies that there is anything in the medical records to support Defendants NYCHHC's and Gouverneur's claim that Plaintiff had a psychotic episode on the day of her fall, as the records simply indicate that she was missing from her bed. Since the staff was not even aware that Plaintiff had left her bed, let alone her room and floor, a Wanderguard would have alerted staff that Plaintiff had wandered away. Plaintiff further argues in substance that such failures to provide Plaintiff with a Wanderguard and a psychological consultation proximately caused her fall and injuries.

Plaintiff further argues that issues of fact exist to be tried, including whether Defendants NYCHHC and Gouverneur were negligent in failing to provide warning signs to indicate that patients were not permitted to use the freight elevator, failing to have anyone monitoring the surveillance cameras inside of the freight elevator and how Plaintiff was able to gain access to the freight elevator and construction site undetected.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light

most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

In a medical or dental malpractice action, a defendant doctor or provider moving for summary judgment must establish that in treating the plaintiff there was no departure from good and accepted medical or dental practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]). It is well settled that expert opinion must be detailed, specific, based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). If a defendant's expert affidavit contains "[b]are conclusory denials of negligence without any factual relationship to the alleged injuries" and "fails to address the essential factual allegations set forth in the complaint" or bill of particulars, then it is insufficient to establish defendant's entitlement to summary judgment as a matter of law (*Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003] [internal quotations omitted]; *see Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the

existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In medical and dental malpractice actions, to defeat the motion, a plaintiff must rebut the defendant's prima facie showing by submitting an affidavit from a physician attesting that the defendant departed from accepted medical or dental practice and that the departure was the proximate cause of the injuries alleged (*Roques*, 73 AD3d at 207). An expert affidavit which sets forth general allegations of malpractice or conclusions, misstatements of evidence or assertions unsupported by competent evidence is insufficient to demonstrate that defendants failed to comport with accepted medical practice or that any such failure was the proximate cause of a plaintiff's injuries (*Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]; *Alvarez*, 68 NY2d at 325).

Competing expert affidavits alone are insufficient to avert summary judgment since experts almost always disagree, but the question is whether plaintiff's expert's opinion is based upon facts sufficiently supported in the record to raise an issue for the trier of fact (*De Jesus v Mishra*, 93 AD3d 135, 138 [1st Dept 2012]). "Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hospital*, 99 NY2d 542, 544 [2002] [internal quotations omitted]). However, "[w]here the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*id.*).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011]),

citing *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Summary judgment should be awarded when a party cannot raise a factual issue for trial (*Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept 1984]; CPLR 3212[b]).

Here, the court finds that Defendants NYCHHC and Gouverneur demonstrated their entitlement to summary judgment in their favor as a matter of law and Plaintiff failed to raise any triable issues of fact. The court finds that Plaintiff's expert failed to rebut Defendants NYCHHC's and Gouverneur's arguments that they did not depart from good and accepted medical practice, that they were not negligent and that none of their alleged acts or omissions were the proximate cause of Plaintiff's fall or injuries.

The court finds that Plaintiff's expert's opinions regarding Defendants NYCHHC and Gouverneur's alleged departures, negligence and proximate cause were conclusory, speculative and unsupported by, if not contrary to, the evidence. Dr. Elfiky failed to demonstrate how Plaintiff's depression required a psychiatric consultation, a Wanderguard, or how they were required by appropriate standards of care. Additionally, he failed to demonstrate that if Plaintiff had a consultation then she would not have attempted to commit suicide. The evidence demonstrated that Plaintiff had no history of wandering or having psychiatric episodes, she appeared to be stable on her medication regimen and there was nothing in her behavior prior to the fall while she was hospitalized to give Defendants NYCHHC and Gouverneur notice that she would have a psychotic breakdown or commit suicide. Therefore, the court finds that Plaintiff failed to raise a material issue of fact to indicate that Defendants NYCHHC and Gouverneur committed malpractice or that there was proximate cause.

Additionally, the court finds that Plaintiff's negligence claims must also be dismissed. Defendants NYCHHC and Gouverneur had no notice that Plaintiff, nor any other patient or

visitor, would enter a restricted area by using a freight elevator to cross through an active construction site and gain access to the patio area without the authority to do so. Therefore, Plaintiff failed to demonstrate that Defendants NYCHHC and Gouverneur were negligent in that they breached a duty of care owed to Plaintiff or that such breach caused Plaintiff's injuries.

Therefore, the court grants Defendants NYCHHC's and Gouverneur's motion for summary judgment and dismisses Plaintiff's complaint.

The court has considered any and all additional arguments raised by the parties, but not discussed herein, and the court denies all additional requests for relief not expressly granted.

As such, it is hereby

ORDERED that the court grants Defendants New York City Health and Hospitals Corporation's and Gouverneur Hospital's summary judgment motion filed under motion sequence 005 and the court dismisses Plaintiff Patricia Schreiber, as administrator of the Estate of Theresa Walsh's complaint as against Defendants New York City Health and Hospitals Corporation and Gouverneur Hospital; and it is further

ORDERED that the court directs the Clerk of the Court to enter judgment in favor of Defendants New York City Health and Hospitals Corporation and Gouverneur Hospital as against Plaintiff Patricia Schreiber, as administrator of the Estate of Theresa Walsh, without costs.

5/31/2022

DATE


ERIKA EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE