

Reape v NCRNC, LLC
2022 NY Slip Op 31959(U)
June 21, 2022
Supreme Court, New York County
Docket Number: Index No. 805403/2016
Judge: Erika M. 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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KENNETH REAPE, as Administrator of the Estate of
HUBERT REAPE, and KENNETH REAPE, Individually,

Plaintiffs,

INDEX NO. 805403/2016MOTION DATE 09/20/2021MOTION SEQ. NO. 004

- v -

NCRNC, LLC d/b/a NORTHEAST CENTER FOR
REHABILITATION & BRAIN INJURY and
HEALTHALLIANCE HOSPITAL BROADWAY CAMPUS
d/b/a THE KINGSTON HOSPITAL,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, the court grants in part Defendant HealthAlliance Hospital Broadway Campus d/b/a The Kingston Hospital's ("Hospital") motion for summary judgment dismissal of Plaintiffs Kenneth Reape, as Administrator of the Estate of Hubert Reape's, and Kenneth Reape, Individually's ("Plaintiffs") amended complaint, but only to the extent that the court dismisses Plaintiff Kenneth Reape's cause of action for wrongful death filed in his individual capacity and dismisses Plaintiffs' claims regarding the Deceased Plaintiff's negligence and malpractice claims for his admissions to Defendant Hospital from July 18, 2014-July 30, 2014 and August 1, 2014-August 5, 2014. The court denies the remainder of the motion.

Plaintiffs filed this wrongful death, medical malpractice and negligence action against Defendants NCRC, LLC d/b/a Northeast Center for Rehabilitation & Brain Injury ("Northeast Center") and Hospital (collectively, "Defendants") alleging in substance that Defendants

departed from good and accepted medical practice and were negligent in their care and treatment of the deceased Plaintiff, Hubert Reape, which caused multiple pressure ulcers to develop and progress, resulting in his death on November 6, 2014. Plaintiffs further allege that the Deceased Plaintiff suffered pressure ulcers to the sacrum, right buttock, left buttock, left and right heels, left hip, left ankle, left ischium, left trochanter, and coccyx. His injuries also included infection, sepsis, necrosis, scarring, deep tissue injury, debridements, dehydration, malnutrition, emotional trauma, pain and suffering and death. Plaintiffs' causes of action against Defendant Northeast Center also included violations of Public Health Law §§ 2801-D and 2803-C, gross negligence and negligent hiring.

Plaintiffs further allege in substance that the Deceased Plaintiff resided at Northeast Center because he was immobile and ventilator dependent. He was severely injured when he was forced to jump out of a window to escape a fire in December 2013. The deceased Plaintiff also suffered from chronic respiratory obstruction and respiratory failure, Stage IV metastatic prostate cancer, chronic Hepatitis C and other conditions and illnesses. When he was 65 years old, he was taken by ambulance to Defendant Hospital because of abnormal laboratory results. He had multiple hospital admissions for numerous illnesses and conditions, including July 18-30, 2014, August 1-5, 2014, August 11-September 3, 2014, September 18-22, 2014 and October 17-November 6, 2014.

Defendant Hospital now moves under motion sequence 004 for summary judgment dismissal of Plaintiffs' amended complaint, entry of judgment in its favor and to amend the caption to delete its name. Defendant Hospital relies on the expert affidavit of Kathryn Baxter, FNP and the affirmation of Santo DiFino, M.D., who both opine in substance that Defendant Hospital's care and treatment of the Deceased Plaintiff was within the standard of care and was

not a substantial factor in causing his injuries or death. Defendant Hospital further argues in substance that the Deceased Plaintiff was imminently susceptible to skin deterioration and infection, even with adequate wound care and comprehensive treatment, because his body was shutting down and unable to heal itself. The Deceased Plaintiff was bedridden and in the terminal stages of his prostate cancer which had spread to his bones and lungs, he was dependent on a ventilator with a tracheostomy and a percutaneous endoscopic gastrostomy feeding tube. He also suffered multiple traumas, including smoke inhalation, rib fractures and traumatic brain injury from escaping the fire, as well as several other serious conditions, including malnutrition, anemia, COPD and a compromised immune system.

Additionally, Defendant Hospital argues in substance that the Deceased Plaintiff's prostate cancer became castration-resistant ("CRPC") by April 2013 and his death was within the expected lifespan range for someone like him who had extensive bone metastases, lung metastases and cancer cachexia. Furthermore, Defendant Hospital argues that it provided the Deceased Plaintiff with a pressure relief mattress and specialty bed throughout his admission, but his injuries were unavoidable. Defendant Hospital further argues that the Deceased Plaintiff's injuries and death were due solely to his preexisting and underlying medical conditions.

Defendant Hospital also argues in substance that Kenneth Reape is only permitted to bring the wrongful death action as the representative of the Deceased Plaintiff's Estate, but not in his individual capacity. Additionally, it argues that Plaintiff's expert affirmation had no probative value, the expert was not qualified to render an opinion in this case and he or she failed to rebut the opinions of Defendant Hospital's experts.

Plaintiffs oppose Defendants motion and rely on their expert affidavit to argue that there are questions of fact to be tried regarding Defendant Hospital's departures and whether such

departures were the proximate cause of the Deceased Plaintiff's injuries and wrongful death. Plaintiff's expert disagreed with Defendant Hospital's experts and opined that the Deceased Plaintiff's pressure ulcers were preventable and avoidable. Plaintiffs argued in substance that Defendant Hospital failed to turn and position the Deceased Plaintiff every two hours, as indicated on their records on August 11, 2014, and failed to implement preventative measures, like pressure relief mattress and specialty bed, required to adequately care for a person in the Deceased Plaintiff's condition due to his immobility, medical conditions and co-morbidities. Plaintiffs further argue in substance that Defendant Hospital's departures were a proximate cause of the Deceased Plaintiff's injuries and deprived him of the substantial opportunity for a better prognosis and more favorable outcome.

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]).

As an initial matter, the court considers Defendant Hospital's statement of material facts and the expert affirmations/affidavits submitted by both parties.

Here, the court finds that Defendant Hospital met its initial burden of establishing its entitlement to summary judgment as a matter of law, however, Plaintiffs' expert's opinions are

sufficiently based upon facts adequately supported in the record to raise issues to be resolved by the trier of fact. Such disputed factual issues include, but are not necessarily limited to, whether Defendant Hospital was negligent and departed from good and accepted nursing and medical care and treatment of the Deceased Plaintiff's wounds; whether the development and progression of the Deceased Plaintiff's skin breakdown, decubitus ulcers and their consequences were unavoidable due to his conditions and co-morbidities, or were they avoidable and preventable during his admissions at Defendant Hospital beginning with the admission from August 11, 2014 to September 3, 2014; and whether such actions or inactions were a substantial factor in causing the Deceased Plaintiff's injuries and/or death.

The court dismisses Kenneth Reape's cause of action for wrongful death in his individual capacity only, but continues his wrongful death claim against Defendants in his capacity as the Administrator of the Deceased Plaintiff's Estate.

Additionally, the court finds that Plaintiffs' expert failed to allege that Defendant Hospital was negligent or that it departed from accepted standard of care during the Deceased Plaintiff's first two hospital admissions from July 18, 2014-July 30, 2014 and August 1, 2014-August 5, 2014. Therefore, the court dismisses Plaintiffs' claims as to these admissions.

The court denies the remainder of Defendant's motion. The court has considered all additional arguments not discussed herein and denies all additional requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court grants in part Defendant HealthAlliance Hospital Broadway Campus d/b/a The Kingston Hospital's motion for summary judgment dismissal of Plaintiffs Kenneth Reape, as Administrator of the Estate of Hubert Reape's, and Kenneth Reape,

Individually’s amended complaint, but only to the extent that the court dismisses Plaintiff Kenneth Reape’s Seventh Cause of Action for wrongful death filed in his individual capacity and dismisses Plaintiffs’ claims related to Plaintiffs Fifth and Sixth Causes of Action regarding the Deceased Plaintiff’s admissions to Defendant HealthAlliance Hospital Broadway Campus d/b/a The Kingston Hospital from July 18, 2014-July 30, 2014 and August 1, 2014-August 5, 2014; and it is further

ORDERED that the court denies the remainder of the motion; and it is further

ORDERED that the parties are directed to appear for a settlement/status conference and to set a trial date on July 14, 2022, at 11:30 a.m., in person in Part 10M, located at 60 Centre Street, Room #412, New York, New York.



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6/21/2022
DATE

ERIKA EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE