Maniscalco v New York-Presbyt. Brooklyn Methodist Hosp.
2022 NY Slip Op 32068(U)
June 27, 2022
Supreme Court, Kings County
Docket Number: Index No. 508495/2017
Judge: Bernard J. Graham
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

MICHAEL MANISCALCO III, as Administrator of the Estate of MICHAEL T. MANISCALCO, JR.,

Index No.: 508495/2017

Plaintiff,

DECISION/ORDER

-against-

NEW YORK-PRESBYTERIAN BROOKLYN METHODIST HOSPITAL and THE NEW YORK METHODIST HOSPITAL,

Hon. Bernard J. Graham
Supreme Court Justice

Defendants

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: award summary judgment to the defendants

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

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

Defendant, New York-Presbyterian Brooklyn Methodist Hospital d/b/a New York Methodist Hospital s/h/a New York-Presbyterian Brooklyn Methodist Hospital and The New York Methodist Hospital ("NYPBMH") has moved (seq. # 8), pursuant to CPLR§ 3212, for an Order awarding summary judgment and a dismissal of plaintiff's complaint, upon the grounds that there are no issues of fact which would warrant a trial in this matter as said defendant was not negligent with respect to the care and treatment that was rendered to Michael T. Maniscalco, Jr. ("decedent") while a patient at the hospital.

The plaintiff, Michael Maniscalco III, as Administrator of the Estate of Michael T. Maniscalco, Jr., ("plaintiff"), by his attorneys, has opposed the relief sought in the motion for summary judgment of the defendant, upon the grounds that there are material issues of fact with regard to the causes of action that have been pled by the plaintiff, as

against the defendant, for negligence, medical malpractice, wrongful death and lack of informed consent, based upon the argument that the defendant failed to implement the proper procedures to both prevent and treat decedent's pressure ulcers.

Background:

On or about May 2, 2017, an action was commenced on behalf of the decedent by the filing of a summons and complaint with the Clerk's office of Kings County.

Issue was joined on behalf of the defendant by the service of a verified answer dated June 20, 2017.

In plaintiff's verified Bill of Particulars, plaintiff alleged that defendant failed to: properly assess the risk of pressure ulcers; create and implement a proper plan of care for pressure ulcers; utilize proper and timely intervention to prevent and treat pressure ulcers; properly diagnose and treat infection; properly assess malnutrition and dehydration; provide proper and timely physician visits, rehabilitative services, therapy and interventions, timely referrals to specialists, and to keep proper and accurate records. As a result of defendant's alleged failures, decedent sustained infected and necrotic pressure ulcers to many parts of his anatomy, including, but not limited to the buttocks, sacrum coccyx, back, head, hips, thigh, calf, elbow, toes, heel, leg, knee and trach site. The decedent sustained bruising and skin tears and had to undergo multiple debridements and a wound vac.

In March, 2019, the defendant moved (seq. #3) to strike plaintiff's claims of punitive damages. By Order of this Court dated August 1, 2019, the plaintiff's claims for punitive damages as well as allegations of reckless and willful conduct that were alleged in the first, second, third and fourth causes of action contained in the summons and complaint as well in the Verified and Supplemental Verified Bill of Particulars were dismissed.

A deposition was conducted of the plaintiff on December 14, 2018. An EBT of Nancy Rizzuto, R.N., (a non-party) was held on February 28, 2020 and October 21, 2020.

A Note of Issue and Certificate of Readiness was filed on behalf of the plaintiff on or about April 2, 2021.

Facts:

On November 19, 2014, the decedent presented by ambulance to the Emergency Department at NYPBMH with complaints of chest pain and shortness of breath.

At the time, the decedent had a prior history of coronary artery disease and high blood pressure. The decedent had a pacemaker inserted in the 1990's, and underwent heart surgery in 2002 when a stent was inserted in the aorta due to an aneurysm. When the decedent presented to the hospital, he was on various cardiac medicines and taking Coumadin for blood thinning and Synthroid for a thyroid condition.

In the Emergency Room, Dr. Karlan performed a cardiac catherization for an assessment of an unstable angina, the result of which revealed a blockage and triple vessel coronary artery disease. Thereafter, the decedent was admitted to the Cardiothoracic Intensive Care Unit. The plan was to obtain a surgical consultation for Coronary Artery Bypass Graft ("CABG") surgery. The CABG surgery as well as aortic valve replacement ("AVR") were scheduled for November 24, 2014, but on the evening prior thereto (November 23), the decedent developed significant respiratory distress, was intubated and placed on a ventilator. The decedent's condition deteriorated overnight which required the use of vasopressors and inotropes to maintain blood pressure and cardiac output.

The decedent underwent emergency CABG surgery on November 24th which was performed by thoracic surgeon, Dr. Berhane Worku. Following surgery, the decedent was taken to the CT-ICU, as he required invasive monitoring and hemodynamic stabilization. The decedent who remained intubated and on a ventilator was allegedly given an overlay mattress and turning and positioning commenced. Three days later, the decedent was experiencing acute renal failure, and an NG tube was inserted for tube feedings. Attempts to wean the decedent off sedation and to take him off vasopressors was initially unsuccessful.

A stage II pressure ulcer on the sacrum was noted on December 1st and a pressure ulcer to the left buttock was documented the following day. The decedent began dialysis treatment on December 3rd. A wound care plan was allegedly implemented and a wound care nurse, as well as an attending plastic surgeon, examined the decedent.

Within the ensuing week, pressure ulcers were noted in the occipital region and on the back of decedent's head. Additional pressure ulcers were documented on the buttocks, sacrum, trochanter and feet during the month of December. At the end of December, 2014, a new wound care assessment and plan was allegedly implemented to address decedent's many pressure ulcers. The plan included the use of foot pillows, seat cushion, a triadyne bed and a nutritional evaluation. Bedside debridements were considered, but not performed due to the decedent's condition at that time.

On January 6, 2015, the decedent was transferred to the Pulmonary Step-Down Unit. On January 7th, a bedside debridement was performed to two ulcers. On January 13th, the decedent was taken off vasopressors, but was still dependent upon a ventilator. Another bedside debridement was performed on January 21st.

On January 29th, a surgical debridement under general anesthesia was performed. Another wound care assessment and plan was allegedly implemented to address the sixteen pressure ulcers, which plan included the use of a triadyne bed, air cushion, heel boots and collagenase.

On February 16, 2015, when the decedent was able to be moved out of the bed and onto a chair, a discharge plan was initiated. The number of pressure ulcers noted were reduced to eight. The decedent was transferred to Kindred Hospital on February 25th. Upon decedent's arrival, he was non-communicative and mechanically ventilated. The decedent was admitted for wound care, ventilator extubation and dialysis. During the ensuing two month period that decedent was a patient at Kindred Hospital, he remained on a ventilator and had chronic stage IV congestive heart failure. The decedent passed away on May 21, 2015.

Parties' Contentions:

Here, the Court is presented with the issue as to whether defendant NYPBMH 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 NYPBMH, and a dismissal of plaintiff's cause of action against said defendant, counsel offers the affirmation of Michael Perskin, M.D., who opines that the care and services NYPBMH provided to the decedent were in accordance with good and accepted medical and hospital practice, that the treatment rendered did not result in any deprivation of right or benefit to the decedent as a hospital resident, and that the treatment rendered was not the proximate cause of the decedent's claimed injuries.

Plaintiff, by their attorney, opposes defendant NYPBMH motion for summary judgment, arguing that issues of fact exist with regard to NYPBMH care and treatment of the decedent's pressure ulcers. In support, plaintiff offers the affirmation of an expert who opines that NYPBMH departed from the standard of care by failing to implement the proper pressure ulcer interventions, specifically turning and positioning the decedent at least every two hours and providing a specialty bed immediately following surgery.

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 defendant NYPBMH has presented sufficient evidence to meet this burden, supported by an expert affirmation. The expert, Dr. Perskin opines that the development and worsening of the decedent's pressure ulcers during his admission to NYPBMH was unavoidable due to the life-preserving interventions being implemented

following the hypoxic event on November 23, 2014. Dr. Perskin notes that the decedent had no skin issues upon admission to NYPBMH on November 19, 2014, but developed skin issues following the hypoxic event on November 23, 2014, after which he became hypotensive and deteriorated, requiring the use of vasopressors, placement on a ventilator and a feeding tube, and CABG surgery in order to save his life. Dr. Perskin claims the decedent's pre-existing co-morbidities also contributed to the deterioration of his condition, which included severe peripheral vascular disease, severe coronary artery disease, diabetes mellitus, hypertension, hypothyroidism, abdominal aortic aneurysm, atrial fibrillation, obesity and a history of tobacco use. Dr. Perskin explains that vasopressors, which are used to treat life-threatening low blood pressure that can occur with certain medical conditions or during surgical procedures like a CABG procedure, cause the blood flow to be shunted from reaching less vital organs like the skin. As a result, Dr. Perskin asserts that the use of vasopressors reduced the decedent's already inadequate blood flow (due to underlying peripheral vascular disease) and directly contributed to the development and worsening of the pressure ulcers. Dr. Perskin further argues that the decedent's skin condition began to improve once he was taken off the vasopressors on January 13, 2015, and that upon discharge the number of ulcers had reduced from thirteen to eight. Dr. Perskin opines that despite the regular turning and positioning of the decedent, and the following of all pressure ulcer prevention policies and protocols, the rapid deterioration of the decedent's skin condition was unavoidable due to the necessary life-preserving interventions employed by NYPBMH.

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 opposing defendant NYPBMH's motion, plaintiff's expert has failed to raise an issue of fact with regard to the treatment rendered by NYPBMH. Plaintiff's expert claims that a pressure ulcer can only be categorized as "unavoidable" if all the proper protocols and standards for pressure ulcer prevention were carried out and documented, and that despite the application of those measures, an ulcer develops. Both defendant's expert and plaintiff's expert refer to the National Pressure Ulcer Advisory Panel ("NPUAP"), which states that for a pressure ulcer to be "unavoidable means the individual developed a pressure injury even though the provider evaluated the individual's clinical condition and pressure injury risk factors, defined and implemented interventions that are consistent with individual needs, goals, and recognized standards of practice, monitored and evaluated the impact of the interventions, and revised the approaches as appropriate." Plaintiff's expert claims that the ulcers were not "unavoidable" because NYMBPH failed to define and implement the necessary interventions of turning and positioning, provide a specialty bed immediately after surgery, evaluate the effectiveness of treatment, and revise the interventions based on the ulcers' condition. Plaintiff's expert acknowledges that the decedent's co-morbidities, medical conditions, and medical treatment including vasopressors, increased his risk for developing pressure ulcers, and maintains that these are "risk factors for developing pressure ulcers, not their cause."

However, plaintiff's expert concedes that a skin assessment was performed upon the decedent's admission to NYPBMH to determine his risk of developing pressure ulcers, and that his Braden Scale score was 19[1] out of 23. (See Plaintiff's Exhibit "B-2", p. 2869, Exhibit "D", p. 75). On November 21, 2014, the first skin care plan documented that the decedent's Braden score was 18 ("high risk" for pressure ulcers) and was

[1] Plaintiff's expert also notes that the NYPBMH skin care policy states that a score of 18 or less is considered "high risk." (See Plaintiff's Exhibit "C", p. 2). The lower the number, the greater the risk of developing pressure ulcers.

medically stable awaiting surgery. Following the surgery, the decedent's Braden score was 11, which indicated an increase in decedent's risk of developing pressure ulcers. It is undisputed that the decedent was appropriately evaluated as high risk for developing pressure ulcers prior to and following the surgery. Although plaintiff claims a specialty bed was not provided following decedent's surgery, the record indicates that the decedent was given an overlay mattress[2] on November 24, 2014, and that turning and positioning was employed and properly documented every two hours. (See Defendant's Exhibit "J7", p. 2877, Exhibit "M", p. 2,905-2,906). Plaintiff's argument that the entries from November 24 - November 26 reflect that the decedent was left on his back for two days following surgery is contrary to the record, which contains a note from Nurse Dundar stating: "Turned Right then turned Left then turned back onto back." (See Plaintiff's Exhibit "B-5", p. 2,819). There are numerous entries in the record that confirm the care plans for decedent's pressure ulcers were appropriately created and implemented by NYPBMH from November 19, 2014, to February 25, 2015. (See Defendant's Exhibit "J", pp. 412, 3,903, 3,991, 3,992, 3,997, 6,965, 7,040, 7,296, 7,308). Plaintiff's expert also provides no evidentiary support for the argument that further ulcers developed following the discontinuance of the vasopressors, as the cite to Plaintiff's Exhibit "B-4" p. 10595 is incorrect, and upon review, it does not appear that said exhibit contains any evidence that would support this argument. As such, plaintiff has failed to establish that the treatment rendered by NYPBMH was a substantial factor in causing the decedent's pressure ulcers.

As plaintiff's expert's affirmation misrepresents the record and relies on unsupported speculation as to the impact of the alleged failure or delay in initiating pressure ulcer treatment and prevention protocol, plaintiff has failed to raise an issue of fact with regard to whether NYPBMH departed from good and accepted medical

[2] The type of specialty bed given to the decedent was a "Stryker In Touch" bed, which defendant states is designed to prevent pressure ulcers. The "Triadyne" bed that plaintiff claims the decedent should have been given is another specialty mattress that is also used to prevent pressure ulcers. The record states that throughout his admission, the decedent was either on a "Stryker In Touch" or a "Triadyne" mattress, which are both in accordance with the "high risk" guidelines. (See Defendant's Exhibit "L", p. 2,881-2,882).

practice. Accordingly, the motion for summary judgment dismissing plaintiff's medical malpractice claims against NYPBMH is granted.

With respect to the portions of the motion to dismiss plaintiff's claims of wrongful death and lack of informed consent as against NYPBMH, said portions of the motion are likewise granted. Plaintiff's counsel has not offered opposition to NYPBMH's motion to dismiss plaintiff's claim for lack of informed consent. In addition, plaintiff has not offered any evidence that the pressure ulcers caused the decedent's death.

Conclusion:

The defendant, NYPBMH, has met its burden for establishing a prima facie case for summary judgment, and the plaintiff, in opposition, has failed to meet his burden to offer admissible evidence raising a question of fact as to whether NYPBMH departed from good and accepted medical practice in the treatment of the decedent. Accordingly, the motion by defendant NYPBMH 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: June 27, 2022
Brooklyn, NY

ENTER

Hon. Bernard J. Graham, Justice
Supreme Court, Kings County

HON. BERNARD J. GRAHAM