

Marrone v Tumminelo
2022 NY Slip Op 32081(U)
June 27, 2022
Supreme Court, Kings County
Docket Number: Index No. 507936/2016
Judge: Bernard J. Graham
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

DINO MARRONE, as Administrator for the Estate of
VITO MARRONE,

Index No.: 507936/2016

Plaintiff,

DECISION/ORDER

-against-

CALOGERO TUMMINELLO, M.D., WYCKOFF
HEIGHTS MEDICAL CENTER, EXCELLENT
HOME CARE SERVICES, LLC and DRY HARBOR
HRF, INC.,

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 defendant, Excellent Home Care Services, LLC, pursuant to CPLR § 3212 and a dismissal of the action as against said defendant

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, Excellent Home Care Services, LLC (“Excellent Home Care”) has moved, (seq.1) 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 home care services that were provided to Vito Marrone (“decedent”).

Counsel for the plaintiff Dino Marrone, as Administrator for the Estate of Vito Marrone (“plaintiff”), has opposed the relief sought in the motion for summary judgment of defendant, Excellent Home Care, 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 this defendant, for negligence, medical malpractice, failure to properly train its personnel and

maintain adequate staffing levels, as well as negligent hiring, with respect to the home care and treatment that was rendered to the decedent.

Background:

On or about May 12, 2016, 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. The following day, an Amended Summons and Complaint was filed by plaintiff's counsel. In said complaint, plaintiff seeks to recover damages based upon alleged negligence, medical malpractice, violation of Public Health Law § 2801-d¹, as well as lack of informed consent as against the defendants.

Issue was joined on behalf of defendant Wyckoff Heights Medical Center ("Wyckoff") by the service of a verified answer dated May 24, 2016. Verified answers were also filed on behalf of defendants Excellent Home Care on June 21, 2016, Calogero Tumminello, M.D. ("Dr. Tumminello") on August 31, 2016 and Dry Harbor HRF, Inc. ("Dry Harbor") on September 1, 2016.

Following the commencement of this action, the decedent passed away on July 28, 2016. Thereafter, a petition was filed with the Surrogate's Court of Kings County on behalf of the Estate of the decedent for the appointment of an administrator. On December 22, 2017, the plaintiff, Dino Marrone, was appointed as the administrator of the decedent's Estate by the Surrogate's Court. The attorneys for the respective parties then entered into a stipulation in which they agreed to the amendment of the caption of this matter to reflect the substitution of the administrator ("plaintiff"), in place and instead of the decedent, and to place the matter on the court's calendar. The stipulation was "So Ordered" by the undersigned on May 25, 2018 (see NYSCEF Doc. No. 59).

The plaintiff served its response to defendants' Demand for a verified Bill of Particulars, in which it is alleged that defendant Excellent Home Services was negligent in providing services and care to the decedent by failing to: recognize and maintain

¹ A cause of action for violation of Public Health Law § 2801-d is alleged as against co-defendant Dry Harbor HRF Inc.)

decedent's skin integrity; properly provide pressure ulcer prevention; provide routine skin care; provide a proper physical assessment; provide the necessary treatment and services to promote healing and prevent the progression of pressure ulcers; implement and utilize an air mattress and/or pressure relieving devices; timely rotate decedent's body and reposition decedent while in a bed or chair every two hours; obtain a consultation with a dermatologist or wound care specialist; properly train its personnel.

A deposition was conducted of Dino Marrone, the administrator of decedent's Estate on September 21, 2020; Lina Guerrieri, (the daughter of the decedent and a non-party witness) on April 28, 2021; defendant Dr. Tumminello on June 22, 2021; Ramzy Salama, P.A. (on behalf of defendant Wyckoff) on August 16, 2021; Gong Da Zhao, R.N. ("Nurse Zhao") (on behalf of defendant Excellent Home Care) on September 21, 2021; and Felicidad Guild, R.N., (a non-party witness, and former employee of defendant Dry Harbor) on November 15, 2021.

A Note of Issue and Certificate of Readiness was filed on behalf of the plaintiff on or about November 16, 2021.

Facts:

On November 3, 2013, the decedent presented to the Wyckoff emergency room with complaints of having had a sudden onset of weakness. At the time, the decedent was diagnosed with a left anterior cerebral artery infarct (stroke). A CT of the head revealed a left anterior cerebral artery infarct ("ACA") with mild hemorrhage conversion. The decedent also demonstrated right sided hemiplegia. Since the decedent failed a speech and swallow test, he was considered to be at a high risk for aspiration and choking. A PEG tube was inserted to provide both nutrients and medication. During decedent's admission to Wyckoff, he allegedly developed several pressure ulcers to the right and left buttock and left shin.

Prior to the stroke in November 2013, the decedent's medical history included dementia, peripheral artery disease, thoracic spondylosis, atrial fibrillation, hypertension, coronary artery disease, Type II diabetes, edema, malignant hypertensive heart disease,

hyperlipidemia and thoracic stenosis. The decedent also had a history of having sustained several injuries which included a broken right hip which required an open reduction and internal fixation. In addition, the decedent incurred a spinal compression fracture following a fall in 2010 and a compression fracture of the L3 vertebrae in 2012 after a fall at home.

On November 21, 2013 the decedent was transferred to Dry Harbor, where pressure ulcers were noted. During the ensuing five month period in which the decedent was a patient at Dry Harbor he underwent rehabilitation. The decedent was then transferred to Wyckoff for period of time to address respiratory distress, shortness of breath, tachycardia and pneumonia.

On or about March 24, 2014, the decedent was transferred from Dry Harbor to his home. Prior to discharge, the decedent was noted to have a Stage III sacral ulcer which measured 8.2(x)9(x) 0.2 cm. When the decedent was discharged from Dry Harbor to his home, he was provided with home care from Excellent Home Care. Home health aide services were approved for four hours a day, for five days each week (Monday-Friday). These services which included home health aides and nurses were provided to the decedent between March 26, 2014 and April 17, 2014.

A nurse from Excellent Home Care, Ann Marie Davis, performed an intake at the decedent's residence. The assessment of the decedent was performed by Nurse Zhao, in which the decedent's daughter, Lina Guerreri ("Ms. Guerreri") was allegedly instructed as to the performance of wound care, which included cleansing the wound, applying hydrogel, and dressing changes. Nurse Zhao noted that the decedent had a sacral stage II ulcer with 80% slough (non-viable tissue) or tissue on top of the wound bed (see Nurse Zhao EBT p. 38-40), and 10% granulation. During the first two visits, the nurse performed wound care and also demonstrated how to administer food to the decedent via the PEG tube. Nurses were allegedly assigned to the decedent's home on a daily basis for the initial ten days and then every other day for a week with visits less frequent thereafter.

Among the duties allegedly performed by the Excellent Home Care health aides were routine skin care on a daily basis (not wound care to the decedent's sacral ulcer), assistance with transfers, as well as turning and positioning the decedent at least every two hours. The decedent was noted to be incontinent of the bowel and bladder and required a Hoyer lift for transfers.

It is alleged that the sacral wound, periodically measured by Nurse Zhao and Nurse Akbasher, did not increase in size during the three week period that home services were provided, nor were there any signs or symptoms of infection (see Nurse Zhao EBT p. 40-43).

The decedent's family allegedly hired another individual to assist in the care of the decedent during the period of time that Excellent Home Care aides were not present.

Home health aides provided services to the decedent between March 26, 2014 and April 17, 2014. On April 17th, the decedent was transferred to Wyckoff due to a clogged feeding tube. On May 2, 2014, the decedent was admitted to MJHS Hospice and Palliative Care ("MJHS") from Wyckoff, when the decedent's family determined that they could no longer care for him at home and he needed long term care placement. During the ensuing two year period the decedent had admissions to Wyckoff, Ozanam Hall Nursing Home (on August 27, 2014), Flushing Hospital Medical Center, as well as New York Hospital Queens. On July 28, 2016, the decedent passed away while a resident of MJHS.

Parties' contentions:

Here, this Court is presented with the issue as to whether defendant Excellent Home Care Services, LLC ("Excellent Home Care") 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, specifically the sacral pressure ulcer.

In support of the Motion to Dismiss on behalf of Excellent Home Care, counsel for this defendant offers the expert medical affirmation of Gisele Wolf-Klein, M.D. ("Dr.

Wolf-Klein”), who opines that since a home health aide presented to the decedent’s house every day of the week² as scheduled, that establishes that the staffing level of the home health aides was adequate, and such frequency was appropriate to conduct assessments of the decedent’s condition. In addition, Dr. Wolf-Klein asserts that the care provided by the Excellent Home Care home health aides met the standards of care, as they presented to the decedent’s home for the approved amount of time per week and provided services properly and as directed. Dr. Wolf-Klein notes that the scope of the duties of the home health aides did not include any acts related to the decedent’s feeding tube or wound care, which tasks were carried out exclusively by the decedent’s family, with the exception of the first few visits, during which the home health aides properly instructed the decedent’s caregiver regarding wound care. Dr. Wolf-Klein maintains that a number of the alleged injuries predated the services of Excellent Home Care employees, or were caused by the decedents preexisting conditions, and that the wound did not continue to worsen in any manner during the course of treatment.

Counsel for defendant also notes that plaintiff has alleged three separate theories of liability against Excellent Home Care: (1) vicarious liability for the alleged medical malpractice of its employees; (2) vicarious liability for the alleged negligent conduct of its employees; and (3) direct liability for failure to properly train and supervise its personnel and failing to have adequate staffing levels of personnel to ensure proper care to the decedent. Counsel asserts that plaintiff cannot maintain a claim for negligent hiring against Excellent Home Care because their employees were acting under the scope of their employment and as such, Excellent Home Care would only be liable for its employees under a theory of respondeat superior.

Plaintiff, by their attorneys, opposes the relief sought in the motion by offering the expert medical affirmation of John Laintonio, M.D. (“Dr. Laintonio”), who opines that there is no evidence in the record that Excellent Home Care instructed the decedent’s daughter as to proper wound care or performing a skin care assessment. Plaintiff’s

² Monday through Friday, from March 26, 2014 to April 17, 2014.

counsel asserts that the pressure ulcer indicated on the Start of Care assessment (stage III pressure ulcer measuring 8x8cm with no depth) was different from the pressure ulcer documented on the referral assessment (stage III sacral ulcer measuring 8.2x9x0.2cm with 80% slough and 10% granulation), and was also inconsistent with another entry noting the pressure ulcer was stage IV. Plaintiff's counsel also points to further discrepancies in the notes of Nurse Akbasher (who, on 3/25/14, documented a stage III sacral ulcer 8x8cm with no depth, 60% granulation tissue and 40% necrotic tissue) and Nurse Zhao (who, on 3/26/14, documented a stage III sacral ulcer 8.5x9x0.3cm with 80% slough and 20% granulation). Plaintiff's counsel claims that the further entries made by Nurse Zhao did not reflect any change in the size of the ulcer, which Dr. Liantonio opines is "clinically impossible," and more likely reflects that the skin assessments were not being done. Plaintiff's counsel asserts that the discrepancy in Nurse Zhao's record of 4/14/14 and the Wyckoff record of 4/17/14 (when the sacral ulcer was debrided and tested positive for infection) further supports their contention that accurate records were not being kept and/or regular skin assessments were not being performed. Dr. Liantonio argues that Excellent Home Care's failure to adequately assess and monitor the wound was a substantial factor in the worsening of the decedent's sacral pressure ulcer from stage III to stage IV, which required surgical debridement.

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 [2nd Dept. 2015], quoting Matos v. Khan, 119 AD3d 909, 910 [2nd Dept. 2014].

This Court finds that the defendant Excellent Home Care has presented evidence that the treatment rendered to the decedent was performed in accordance with the proper medical standards. Defendant has established that the decedent already had the stage III sacral pressure ulcer when the decedent was discharged to his home from Dry Harbor and

Excellent Home Care began providing care in the decedent's home. In addition, Excellent Home Care has presented evidence that the decedent's family, specifically his daughter, was responsible for wound care, and was trained by one of the home care nurses in how to provide said care. The Court has reviewed the deposition testimony of Ms. Guerrieri, the decedent's daughter, and finds that the following excerpts establish not only that Ms. Guerrieri was responsible for wound care, but was also instructed by the Excellent Home Care nurse.

Q: When your father was discharged from Dry Harbor and went home, did a nurse come to the house to take care of the bedsore?

A: Yes.

(See Guerrieri EBT, p. 43, 13-17)

Q: Was she also teaching you how to do it [clean the wound]?

A: Yes.

Q: Can you tell me what she told you and what she did?

A: We have to take the bandage off and then the gauze in the hole – inside the wound – and we had to spray and clean up the whole area and put – I don't know what they call – the gauze, a long string, like a finger wide, we used to stuff it in and put the bandage again.

Q: And the nurse did this on the three days that she came?

A: Yes.

Q: Did she do that more than once a day or more than once?

A: More than once.

Q: How many times?

A: I don't remember but I think it was about two, three times a day. I don't remember.

(See Guerrieri EBT, p. 47, 5-23)

A: I would take the bandage off and the gauze inside the hole – because it was a hole – and we had to take – I had to take it out, clean it. There was a spray, a medication, that we had to put in and then stuff it with the gauze and put a bandage on top.

Q: how many times would you do that in one day?

A: I would do it three times.

Q: For how long did you do that three times a day?

...

A: Weeks. Weeks.

Q: During the time that you took care of the bedsore for that time period that you described as weeks, did the bedsore change in any way, whether it be size or if there was any depth to it or any other way that you can describe?

A: The size used to get smaller. Every day it used to get better and better until the hole got better and better.

(See Guerrieri EBT, p. 54-55)

The decedent's daughter also testifies that while she was caring for it, the wound got smaller and eventually healed.

Q: During the time that you cared for the wound while your father was at home for weeks, as you describe the time period, did the wound always get smaller?

A: Yes.

Q: When was the first time you noticed it getting smaller?

A: I don't recall the time but it was after a few weeks.

Q: So you took care of the wound after the visiting nurse took care of it for three days at home, right?

A: Yes.

Q: You took care of the wound for a few weeks after that?

A: No. I didn't say – not a few weeks, it might be more like a month, month and a half. I don't recall exactly the time.

Q: So, let's say if you took care of the wound for a month to a month and a half, who took care of the wound after that?

A: I did. I always did.

Q: So, how long did you take care of the wound after the nurse took care of the wound for three days while your father was at home?

A: Until it got better. I don't remember the time – you know, the time that passed, I don't recall.

Q: What do you mean "until it got better," how did it get better?

A: It got smaller, smaller until it was fine.

Q: So, the wound healed?

A: Yes.

(See Guerrieri EBT, p. 57-58)

Here, the decedent's daughter's deposition testimony establishes that not only was she trained on how to care for the decedent's wound, but also that the wound healed under her care.

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 plaintiff's 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].

While plaintiff’s counsel argues that there is no record of the decedent’s daughter being taught about the risks and signs of infection or about risks and signs of worsening ulcers, the deposition testimony cited above reflects that the decedent’s daughter was trained in wound care, did care for the decedent’s wound, and the wound healed under her care. The foundation of Dr. Liatonio’s opinion regarding Excellent Home Care’s failure to educate the decedent’s daughter is premised upon there being no “mention of teaching about the risks and signs of infection or about risks of worsening ulcers…” in the medical records. This assumption is disproved by Nurse Zhao’s deposition testimony, in which she responds to a question about what was included in “the teaching process by the nurse to the family,” by stating that she instructed the family to “Look for wound infection, any signs and symptoms of infection, just follow the doctor’s order for the wound treatment.” (See EBT of Nurse Zhao, p. 19, 1, 3-8). This assumption is further disproved by the decedent’s daughter’s deposition testimony, in which she states she was instructed on how to care for the decedent’s wounds. In addition, plaintiff failed to offer evidence supporting their contention that defendant’s wound measurements were “clinically impossible” because there was no change in the size of the wounds. However, “opinion evidence must be based on facts in the record or [generally] known to the witness. Experts may not assume the very question their testimony seeks to prove.” Ippolito v Consolidated Edison of New York, 177 AD3d 715, 717 [2d Dept 2019]; Simo v New York City Transit Authority, 13 AD3d 609, 611 [2d Dept 2004]; Cassano v Hagstrom, 5 NY2d 643, 646 [1959].³ As such, plaintiff has failed to submit evidence that raises a question of fact, and defendant Excellent Home Care’s motion to dismiss plaintiff’s cause of action as against Excellent Home Care’s employees for medical malpractice and negligence is granted.

³ The Court of Appeals concluded that the plaintiff’s expert improperly attempted to “testify, despite his lack of knowledge, as to what he assumed or believed defendant had done and then from those assumed facts draw an inference of malpractice.” Cassano v Hagstrom, 5 NY2d 643, 646 [1959].

With respect to the portion of defendant Excellent Home Care's motion to dismiss plaintiff's cause of action as against Excellent Home Care for failure to properly train and supervise its personnel and failing to have adequate staffing levels of personnel to ensure proper care to the decedent, this Court finds that such a claim cannot be sustained against Excellent Home Care. "Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training." Henry v Sunrise Manor Ctr. for Nursing and Rehabilitation, 147 AD3d 739, 741-42, 46 NYS3d 649 [2d Dept 2017]. "While an exception exists to the above general principle where the plaintiff seeks punitive damages from the employer 'based on alleged gross negligence in the hiring or retention of the employee' ... here, that exception is inapplicable because the claimants did not seek punitive damages based upon an allegation that the defendant was grossly negligent in the hiring of its employees." Deker v State, 164 AD3d 50, 653-54, 83 NYS3d 533 [2d Dept 2018]. As Excellent Home Care is vicariously liable for their employee's negligence, said portion of defendant Excellent Home Care's motion is granted and plaintiff's claim for negligent supervision or training as against Excellent Home Care is dismissed.

Conclusion:

The defendant Excellent Home Care has met their 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 Excellent Home Care departed from good and accepted medical practice in the treatment of the decedent. Accordingly, the motion by Excellent Home Care for summary judgment and a dismissal of plaintiff's complaint, pursuant to CPLR §3212, is granted in its entirety.

In accordance with the above, the caption is amended to read as follows:

DINO MARRONE, as Administrator for the Estate of
VITO MARRONE,

Index No.: 507936/2016

Plaintiff,

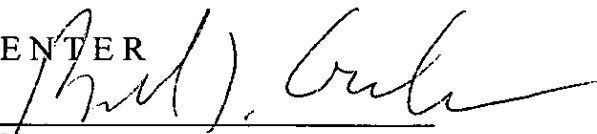
-against-

CALOGERO TUMMINELLO, M.D., WYCKOFF
HEIGHTS MEDICAL CENTER, and DRY HARBOR
HRF, INC.,

Defendants

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