

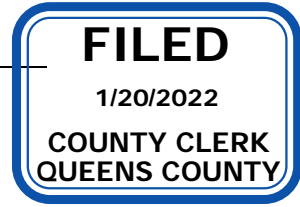
Seifstein v Schmuter
2022 NY Slip Op 32453(U)
January 11, 2022
Supreme Court, Queens County
Docket Number: Index No. 710656 2017
Judge: Peter J. O'Donoghue
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE O'Donoghue
Justice

IA Part MDP



LYNN SEIFSTEIN as Executor of the Estate of
THELMA SEIFSTEIN, Deceased,

Index
Number 710656 2017

Plaintiff
-against-

Motion
Date August 25, 2021

ELENA A. SCHMUTER, D.O, et. al.

Motion Seq. Nos. 2 & 3

x

The following numbered papers were read on these motions by defendants Plainview Hospital (Plainview) and Northwell Health, Inc. (Northwell) (Seq. #2) and defendants Elena A. Schmuter D.O. (Schmuter), Elena Schmuter Medical P.C. (ESM), Gulati & Goyal Physicians, LLP (G&G) (Seq. #3) seeking summary judgment and dismissal of the complaint.

Papers
Numbered

Sequence #2

Notice of Motion - Affidavits - Exhibits.... EF 47-72
Answering Affidavits - Exhibits..... EF 100-107,115-116,
119-129,142
Reply Affidavits..... EF 144

Sequence #3

Notice of Motion - Affidavits - Exhibits.... EF 73-99
Notice of Motion - Affidavits - Exhibits.... EF 47-72
Answering Affidavits - Exhibits..... EF 108-114,117-118,
130-141
Reply Affidavits..... EF 143

Upon the foregoing papers it is ordered that the motions are determined as follows:

Plaintiff Lynn Seifstein commenced this action as

executor of the estate of her mother Thelma Seifstein (decedent), asserting causes of action against Schmuter, ESM, G&G, Plainview and Northwell for medical malpractice, wrongful death and negligence. Decedent initially sought treatment in the emergency room of Plainview on May 15, 2016 for injuries as a result of a fall and was subsequently admitted to Plainview until June 15, 2016, at which time she was transferred to St. Francis Hospital. Upon decedent's admission to Plainview, Schmuter, who was employed by G&G, was assigned as her attending physician. Schmuter arranged for consultations of decedent from various specialists, including three doctors employed by G & G. Plaintiff seeks to recover damages from defendants alleging that said defendants negligently failed to properly treat decedent from May 15, 2016 through June 15, 2016 resulting in serious injuries including fluid overload, pressure ulcers and her death on August 13, 2016. Defendants seek to have the action against them dismissed alleging that the provided medical care and treatment to decedent was appropriate.

The court shall first consider the motion of defendants, Schmuter, ESM and G&G (seq. #3) seeking summary judgment and dismissal of the complaint against them. At the outset, the unopposed branch of the motion seeking dismissal of the claim against ESM is granted as it has been demonstrated that ESM was not in existence at the time of the alleged malpractice. However, the branch of the motion seeking summary judgment against Schmuter and G&G is denied. Questions of fact exist, including but not limited to, whether defendants deviated from good and accepted medical practices in failing to properly manage and monitor the administration of fluids; in failing to implement a proper and timely treatment plan; in failing to properly and timely address decedent's respiratory symptoms; in failing to properly coordinate decedent's care among the medical providers; in failing to order a timely and appropriate nutritional evaluation and intervention; in failing to timely and properly assess and treat the sacral pressure ulcer and; in failing to timely arrange for a wound consultation for the pressure ulcer; and if so, whether such departure was a substantial factor in causing decedent's injuries and death, which may require resolution at trial. These issues of fact are based on conflicting expert affirmations submitted by defendants and plaintiff. (See *M.C. v Huntington Hosp.*, 175 AD3d 578 [2d Dept 2019]; *Henry v Sunrise Manor Ctr. for Nursing and Rehabilitation*, 147

AD3d 739 [2d Dept 2017]; *Feinberg v Feit*, 23 AD3d 517 [2d Dept 2005].)

The branch of the motion seeking dismissal of claims of vicarious liability of G&G for the negligence or malpractice of any treating or consulting physicians not employed by G&G is granted. G&G's vicarious liability is limited to the malpractice or negligence of Schmuter and other physicians within its employee who treated decedent, under the doctrine of respondeat superior. (See *Samer v Desai*, 179 AD3d 860 [2d Dept 2020]; *Poplawski v Gross*, 81 AD3d 801 [2d Dept 2011]; *Keitel v Kurtz*, 54 AD3d 387 [2d Dept 2008].)

The branch of the motion seeking dismissal of claims of vicarious liability of Schmuter for any alleged negligence or malpractice of her covering or consulting physicians is granted. It is well settled that "[in] the absence of some recognized traditional legal relationship such as a partnership, master and servant, or agency, between physicians in the treatment of patients, the imposition of liability on one for the negligence of the other has been largely limited to situations of joint action in diagnosis or treatment or some control of the course of treatment of one by the other". (*Reeck v Huntington Hosp.*, 215 AD2d 464, 465 [2d Dept 1995], quoting *Kavanaugh v Nussbaum*, 71 NY2d 535, 547 [1988], quoting *Graddy v New York Med. Coll.*, 19 AD2d 426, 429 [1st Dept 1963]; cf. *Ross v Mandeville*, 45 AD3d 755 [2d Dept 2007].) Here, Schmuter establishes the absence of a relationship and any control over the covering and consulting specialists' treatment of the decedent's condition. In opposition, plaintiff fails to raise a triable issue of fact.

To the extent that plaintiff's expert is alleging that Schmuter failed to take a proper history and reconcile plaintiff's at home medications, as such claim is not discernable from the pleadings, it shall not be considered herein. (See *King v Marwest, LLC*, 192 AD3d 874 [2d Dept 2021]; *Larcy v Kamler*, 185 AD3d 563 [2d Dept 2020].)

Similarly, Plainview and Northwell's motion for summary judgment and dismissal of the complaint (seq. #2) is denied. Initially, in the absence of an affidavit from someone with personal knowledge, the branch of the motion seeking to have all claims against Northwell dismissed on the basis that it is an entity that does not provide patient care is denied.


Questions of fact exist, including but not limited to, whether these defendants deviated from the applicable standards of medical and nursing care in failing to properly manage and monitor the administration of fluids; in failing to document input and output of fluids; in failing to properly and timely address respiratory symptoms; in failing to properly treat and assess hypothermia; in failing to provide proper and timely nursing interventions; in failing to obtain proper and timely orders or instructions for appropriate medications and treatment; in failing to document decedent's chart regarding her care and treatment; in failing to adhere to Northwell's policy and procedures regarding the prevention, assessment and treatment of pressure ulcers; in failing to properly assess and address nutritional needs; in failing to timely and properly assess and treat the sacral pressure ulcer; in failing to timely arrange for a wound consultation for the pressure ulcer; in failing to properly document the presence and appearance of wounds; in failing to timely advise Schmuter of deteriorating pressure ulcers; and if so, whether such departure was a substantial factor in causing decedent's injuries and death, which may require resolution at trial. These issues of fact are based on conflicting expert affirmations submitted by defendants and plaintiff. (See *M.C. v Huntington Hosp.*, 175 AD3d 578 [2d Dept 2019]; *Henry v Sunrise Manor Ctr. for Nursing and Rehabilitation*, 147 AD3d 739 [2d Dept 2017]; *Feinberg v Feit*, 23 AD3d 517 [2d Dept 2005].)

The branch of the motion which seeks summary judgment dismissing the claim against Plainview based upon vicarious liability is denied. Plainview failed to establish prima facie that it could not be held vicariously liable for the alleged malpractice of Schmuter and her consulting physicians. Generally a hospital may not be held liable for the acts of independent physicians except when a patient seeks treatment from a hospital through its emergency room, as opposed to a private physician of their own choosing. Here, although Plainview establishes that Schmuter was not its employee, it fails to establish that the "emergency room" exception does not apply. (See *Pinnock v Mercy Med. Ctr.*, 180 AD3d 1088 [2d Dept 2020]; *Galluccio v Grossman*, 161 AD3d 1049 [2d Dept 2018]; *Salvatore v Winthrop Univ. Med. Ctr.*, 36 AD3d 887 [2d Dept 2007].)

The branches of the motions seeking dismissal of plaintiff's claims for punitive damages are granted as against all defendants. The record is devoid of any evidence of any wilful or wanton negligence or recklessness on the part of defendants which would warrant an award of punitive damages. (See *Dmytryszyn v Herschman*, 78 AD3d 1108 [2d Dept 2010]; *Hill v 2016 Realty Assoc.*, 42 AD3d 432 [2d Dept 2007]; *Morrell v Gorenkoff*, 278 AD2d 210 [2d Dept 2000]; *Lee v Health Force*, 268 AD2d 564 [2000]; *Rey v Park View Nursing Home*, 262 AD2d 624 [1999].)

Accordingly, Plainview and Northwell's motion (Seq. #2) is granted solely to the extent of dismissing claims of punitive damages. Schmuter, ESM, and G&G's motion (Seq. #3) is granted solely to the extent of dismissing all claims against ESM; dismissing claims of the vicarious liability of Schmuter; dismissing reference to any claim that Schmuter failed to take a proper history and reconcile plaintiff's at home medications; and dismissing claims of punitive damages. The motions are otherwise denied.

Dated: January 11, 2022



Peter J. O'Donoghue, J.S.C.