

Rojas v Shur
2022 NY Slip Op 33624(U)
October 11, 2022
Supreme Court, Kings County
Docket Number: Index No. 461/13
Judge: Genine D. Edwards
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At an IAS Term, Medical Malpractice Early Settlement Part 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11th day of October 2022.

P R E S E N T:

HON. GENINE D. EDWARDS,

Justice.

-----X

CLAUDIA ROJAS, as Administrator of
Estate of MARIA H. LEYTON, Deceased,

Plaintiff,

DECISION, ORDER, AND JUDGMENT

-against-

Index No. 461/13 (converted to e-filing)

VLADIMIR BORISOVICH SHUR, M.D.,
NEW SEA CREST HEALTH CARE CENTER, LLC,
NEW SEA CREST HEALTH CARE CENTER LLC
d/b/a SEA-CREST HEALTH CARE CENTER, M.D.,
SEA-CREST HEALTH CARE CENTER, and
MAIMONIDES MEDICAL CENTER,

Mot. Seq. No. 3-4

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc. No.:

Notice of Motion, Affirmation (Affidavits), and	
Exhibits Annexed.....	30-94; 95-121
Affirmations in Opposition and Exhibits Annexed.....	123-129; 131-134
Reply Affirmations and Exhibits Annexed.....	130; 135-139, 141; 140

In this action to recover damages for, inter alia, medical malpractice, negligence, and deprivation of rights under Public Health Law § 2801-d, defendants New Sea Crest Health Care Center, LLC, incorrectly sued herein as Sea-Crest Health Care Center, doing business as Sea-Crest Health Care Center, M.D., and Sea-Crest Health Care Center (collectively, "Sea Crest"), jointly move (in Seq. No. 3) for summary judgment dismissing all claims of Claudia Rojas, as the administrator of the estate of Maria H.

Leyton, deceased (“plaintiff”), as against them.¹ Concurrently, defendant Vladimir Borisovich Shur, M.D. (“Dr. Shur”) moves (in Seq. No. 4) for summary judgment dismissing plaintiff’s claims, as well as Sea Crest’s cross-claim for common-law contribution/indemnification, as against him. Plaintiff, while opposing Sea Crest’s motion, does not oppose Dr. Shur’s motion, whereas Sea Crest opposes Dr. Shur’s motion insofar as he seeks dismissal of its cross-claim as against him. The remaining defendant, Maimonides Medical Center (“MMC”), did not move for summary judgment.²

Factual Overview³

On July 2, 2010, plaintiff’s decedent, Maria H. Leyton (the “patient”), then 66 years old, sustained extensive right ankle fractures from a trip-and-fall at her home.⁴ Transported emergently to MMC, the patient underwent, at the hands of Dr. Shur (who, at the time, had admitting privileges at MMC but was not its employee), open reduction, internal fixation with a plate and multiple screws for her right ankle fractures on July 6, 2010 (the “ORIF”). On her third post-operative day, July 9, 2010, the patient was transferred from MMC to Sea Crest for rehabilitation and recovery, with the goal (which

¹ Sea Crest’s notice of motion and supporting affirmation both incorrectly state that the movants are “Sea Crest,” etc. (rather than “New Sea Crest,” etc.), despite their counsel’s representation (as reflected in its signature block on the notice of motion) of “New Sea Crest,” etc. as defendants. *See* Notice of Motion, dated March 10, 2022, at 1-2 (NYSCEF No. 30); Affirmation in Support, dated March 10, 2022, ¶ 1 (NYSCEF No. 31).

² Although the same counsel represents both Dr. Shur and his codefendant MMC, the corresponding notice of motion and supporting affirmation make it clear that only Dr. Shur (of the two defendants it represents in this action) is the movant. *See* Notice of Motion, dated March 14, 2022, at 1-2 (NYSCEF No. 95); Affirmation in Support, dated March 14, 2022, ¶ 2 (NYSCEF No. 96).

³ The parties presented a voluminous factual record that included approximately 8,000 pages of exhibits (excluding duplicate submissions).

⁴ Exacerbating the state of the patient’s right ankle fractures on presentation to MMC was her preexisting “[c]hronic deformity of the anterolateral process of the calcaneus” of her right ankle, as was found on the August 9, 2009 X-ray. *See* MMC’s Records at 01919.

was ultimately achieved approximately nine months later on April 18, 2011) of returning her home. The course of the patient's approximately nine-month-long residence at Sea Crest was punctuated by numerous complications, including emergency room visits and/or hospitalizations at MMC and at nonparty Beth Israel Hospital. The patient's post-operative complications can be classified as falling into one or more of *three* components.

The *first* component of the patient's post-operative complications consisted of: (1) Dr. Shur's incremental (both in-office and in the operating room) removal of the infected internal hardware in the patient's ankle; (2) Dr. Shur's initial application, subsequent adjustments, and ultimate removal of the external fixator on her ankle; and (3) Dr. Shur's arthrodesis (surgical immobilization of a joint by fusion of the adjacent bones) of her ankle. The entirety of the patient's orthopedic complications – in combination with her ongoing diabetes mellitus and peripheral neuropathy – resulted in her acquiring a Charcot (or deformed and shortened) right foot,⁵ with an accompanying (and an approximately 90-degree) inward turn of her right ankle.⁶ The aforementioned ankle deformity and leg-shortening made her wheelchair-dependent, incapable of walking on her own. It is notable that plaintiff's expert, Sanjit R. Konda, M.D. ("Dr. Konda"), a New York State-licensed and board-certified orthopedic surgeon, voiced no complaints about Dr. Shur's intra- and post-operative treatment of the patient. Moreover, Dr. Konda, though

⁵ "Charcot arthropathy (neuropathic joint) is a progressive condition of the musculoskeletal system, characterized by joint dislocations, pathologic fractures, and debilitating deformities; it occurs mostly in the foot and ankle. Failure of fixation in patients with diabetes with peripheral neuropathy can lead to Charcot arthropathy of the ankle." 2 Attorneys' Textbook of Medicine (Third Edition) § 6A.14 (2022) (available on LEXIS).

⁶ See Plaintiff's March 26, 2021 deposition tr at page 69, line 25 to page 70, line 11 (testifying that the patient's right foot, which stayed positioned inward at the 90 degree angle, never improved, that she remained "chair fast" until her death).

confronted with both Dr. Shur's and Sea Crest's concurrently made motions, expressly limited his opinion (in ¶ 6 of his affirmation) to Sea Crest's care of the patient (or its alleged lack thereof).

According to Dr. Konda, the *second* component of the patient's post-operative complications arose (in whole or in part) from Sea Crest's allegedly substandard care of the patient's surgical wound. In that regard, Dr. Konda identified three major departures from the standards of orthopedic nursing care on the part of Sea Crest: (1) Sea Crest's alleged failure to abide by Dr. Shur's recommended surgical wound-care protocol from August 31, 2010 to September 28, 2010; (2) Sea Crest's alleged failure to have the patient follow up with Dr. Shur between September 28, 2010 and November 10, 2010 to address (in Dr. Konda's words in ¶ 24 of his affirmation) "her [then-]active surgical wound dehiscence"; and (3) Sea Crest's alleged nine-day delay from November 21, 2010 to November 30, 2010 in preparing the patient for her follow-up surgery with Dr. Shur. See Dr. Konda's Expert Affirmation, ¶¶ 13-16, 19-23, 25, 31; ¶¶ 24, 26, 32, 35; ¶¶ 27-28. 34 (NYSCEF No. 124). Proceeding to the element of *causation* in the context of Sea Crest's alleged departures, Dr. Konda opined (in ¶ 37 of his affirmation) that such departures (individually and collectively) caused the patient to suffer "the deterioration of her surgical wound, revision surgeries, and related infections" "due to [her then-ongoing surgical wound] dehiscence."

The *third and final* component of the patient's post-operative complications stemmed from the patient's own preexisting comorbidities. Preoperatively, the patient had been suffering (and continued to suffer post-operatively) from: (1) end-stage renal

failure with hemodialysis; (2) congestive heart failure; (3) insulin-dependent diabetes mellitus; (4) hypertension; (5) osteopenia; and (6) hypothyroidism. In addition, an implantable cardioverter defibrillator (“ICD”), which had been inserted into the patient following an earlier cardiovascular incident, was correcting her abnormal heart rhythm. Further, an implanted vein filter, in combination with the anticoagulants or antiplatelet agents (as was medically appropriate under the circumstances), protected her against future blood clots. Additionally, the patient presented to MMC on July 2, 2010 with a preexisting, unrepaired fracture of her right upper wrist – the result of a fall at her home approximately two months earlier – in addition to the tibia and fibula fractures in her right ankle at issue in this case.⁷

After the patient’s discharge from Sea Crest on April 18, 2011, her medico-surgical problems persisted. Approximately seventeen months later, in July 2012, at the age of 68, the patient’s elective admission to MMC for an ICD generator change turned into a life-threatening emergency when an “in-pocket hematoma” developed (not once, but twice) at the ICD site, requiring hematoma evacuations, placement of the JP drains, and a total of five units in blood transfusions.⁸ Nine months later on the morning of April 16, 2013, the patient (then age 69) fell at her home when she rose from her wheelchair unassisted and unsupervised to go to the bathroom (her home health aide had failed to arrive on time). In the course of her ensuing hospitalization at MMC for the fracture of

⁷ See MMC’s Records at 01966 (Patient’s May 28, 2010 visit to MMC). The patient’s broken right wrist was repaired with closed reduction and casting by Dr. Shur in conjunction with his ORIF repair of her right ankle. See MMC’s Records at 00418-00420 (Dr. Shur’s Operative Report for the July 6, 2010 surgery).

⁸ See MMC’s Records at 01303-01304 (Discharge Summary of Patient’s July 9, 2012 to July 24, 2012 Admission).

her right femoral neck, her right hip was percutaneously pinned.⁹ She was discharged to nonparty Caton Nursing Home on April 26, 2013. Ten days later on May 6, 2013, she returned to MMC with shortness of breath and carbon monoxide narcosis (hypercapnia) that, according to MMC, were “most likely due to [the] pleural effusion and fluid overload.”¹⁰ On May 14, 2013, she suffered a cardiac arrest and, although resuscitated, became “unresponsive to [the] deep pain.”¹¹ With the “palliative extubation” having been performed by the MMC staff at her family’s request, she passed away on May 17, 2013.¹²

Litigation

On January 9, 2013, while the patient was still alive, she commenced this action as against Dr. Shur, MMC, and Sea Crest (collectively, “defendants”). Each defendant interposed its (or his) respective answer. In her complaint, the patient (and after her death, her younger daughter as the administrator of her estate and plaintiff herein) alleged as against Sea Crest three causes of action which sounded in: (1) violation of Public Health Law § 2801-d and related statutes; (2) negligence; and (3) gross negligence (the third, fourth, and fifth causes of action, respectively). In her bill of particulars (as supplemented),¹³ plaintiff alleged, as against Sea Crest, the three aforementioned departures (as addressed by Dr. Konda), as well as two additional departures; first, that

⁹ See MMC’s Records at 02145-02146 (Discharge Summary of Patient’s April 16, 2013 to April 26, 2013 Admission).

¹⁰ See MMC’s Records at 02631 (part of Discharge Summary of Patient’s May 6, 2017 to May 17, 2013 Admission).

¹¹ See MMC’s Records at 02632.

¹² See MMC’s Records at 02632.

¹³ See Verified Bill of Particulars as to Sea Crest, dated September 7, 2016, ¶¶ 3, 16, 18; Plaintiff’s Verified Bill of Particulars as to the Sea Crest Health Care Defendants, dated May 16, 2018, ¶ 20.

Sea Crest violated the patient's statutory rights under the Public Health Law as a nursing home resident, as more fully set forth in the margin;¹⁴ and second, that Sea Crest improperly treated the patient's pressure ulcers. Plaintiff sought compensatory and punitive damages as against Sea Crest.¹⁵

After discovery was completed and a note of issue was filed, Sea Crest and Dr. Shur (but not MMC) each timely moved for summary judgment. As noted, plaintiff objected to Sea Crest's motion only. After plaintiff failed to object to Dr. Shur's motion, Sea Crest objected to Dr. Shur's motion insofar as the latter sought dismissal of Sea Crest's cross-claim as against him. On June 17, 2022, this Court, after oral argument, reserved decision on both motions.

¹⁴ The statutory-violations departure was based (at least in part) on plaintiff's deposition testimony regarding her personal observations of chronic understaffing at Sea Crest. *See* Plaintiff's March 26, 2021 EBT tr at page 28, lines 9-14 ("*I would just show up and take my mother to the bathroom. I would leave work to go to [Sea Crest] to take my mother to the bathroom . . .*"); page 31, line 13 to page 32, line 11 (testifying that the head nurse, in response to plaintiff's complaint, apologized with a standard excuse, "*We're a little understaffed today.*"); page 32, line 22 to page 33, line 2 (testifying that the nurses explained away the delays in the patient's waiting to use the bathroom or to be showered as a "*short staff thing*"); page 33, lines 3-12 (testifying that the patient complained to plaintiff "*more than ten times*" about Sea Crest's delays in responding to her [the patient's] calls for assistance) (emphasis added in each instance).

¹⁵ *See* Verified Complaint, ¶¶ 76, 91.

Discussion

1. Threshold Matters

Considering that plaintiff did not object to Dr. Shur's motion, her claims as against him are dismissed without further discussion. Although MMC (the hospital at which Dr. Shur operated on the patient on July 6, 2010) did not move for summary judgment, the Court is empowered to "search the record and grant summary judgment in favor of [MMC as] a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court." *Dunham v. Hilco Const. Co., Inc.*, 89 N.Y.2d 425, 654 N.Y.S.2d 335 (1996). See CPLR 3212 (b) ("If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."). Because plaintiff's claims as against MMC were grounded on Dr. Shur's alleged acts/omissions, dismissal of her claims – and concurrently Sea Crest's cross-claim for contribution/indemnification – as against MMC is warranted upon searching the record. This leaves for the Court's consideration plaintiff's claims as against Sea Crest and the latter's cross-claim for contribution/indemnification as against Dr. Shur.

2. Plaintiff's Claims As Against Sea Crest

A. Compensatory Damages

The competing affidavits/affirmations of Sea Crest's expert, Nurse Jeanine Frumentti ("Nurse Frumentti"), and that of plaintiff's expert, Dr. Konda, raised triable issues of material fact as to *each of the three* categories of Sea Crest's aforementioned departures as identified in (and as explained by) Dr. Konda in his detailed affirmation;

namely: (1) whether Sea Crest's care for the patient's ORIF-related surgical wound was substandard because it violated Dr. Shur's directives; (2) whether Sea Crest (rather than Dr. Shur) should have ensured that the patient followed up with Dr. Shur, between September 28, 2010 and November 10, 2010, to address her then-ongoing surgical wound dehiscence; and (3) whether Sea Crest allegedly wasted nine days in failing to prepare the patient for her repeat surgery on the earlier date of November 21, 2010, instead preparing her for November 30, 2010. In addition, plaintiff's deposition testimony (which must be credited at this stage of litigation) that Sea Crest was chronically understaffed and unable to timely assist her mother raised a triable issue of material fact as to the existence of the statutory violations under the Public Health Law. In that regard, Nurse Frumentti's conclusory averment (in ¶ 56 "n" of her affidavit) – that "[t]here was no instance in [the patient's] admission to Sea Crest where [she] was deprived of her rights as a nursing home resident" – failed to address plaintiff's specific allegations of chronic understaffing at Sea Crest. *See e.g. Roca v. Perel*, 51 A.D.3d 757, 859 N.Y.S.2d 203 (2d Dept., 2008).

On the other hand, plaintiff's allegations underlying her remaining claim that the patient received substandard *pressure-ulcer* care (as opposed to the *surgical wound* care) were unsupported by the record. The "true" pressure ulcers (rather than the surgical wound) were diagnosed at MMC only twice and each time were in a mild form. The first encounter with the patient's pressure wounds at MMC occurred on July 29, 2010 during the patient's follow-up admission when she had a "healing" Stage II pressure wound measuring 0.5 cm by 1 cm on her left buttock, and a "healed" Stage II pressure wound of

2 cm by 0.2 cm on her right buttock.¹⁶ The second (and last) encounter with the patient's pressure ulcers at MMC occurred during her re-admission on (or about) March 8, 2011 when a Stage I sacrum pressure ulcer was documented, albeit without any measurements provided.¹⁷ Nothing in the record indicated that the aforementioned pressure ulcers, as noted in MMC's records, persisted.

Further, except as described below, no record of pressure ulcers appeared in the patient's chart with Sea Crest. In that regard, Sea Crest mischaracterized the patient's *surgical wound* on her right ankle as a Stage IV *pressure ulcer*.¹⁸ As a result of that mischaracterization, Sea Crest's wound-care staff repeatedly cleaned the patient's *surgical wound* with normal saline and packed it with the Iodoform gauze – a type of wound-care treatment appropriate for *pressure ulcers* according to plaintiff's expert, Dr. Konda – instead of applying a wet-to-dry dressing, as was consistently directed by Dr. Shur, which dressing – in concurrence with the opinion of plaintiff's expert, Dr. Konda (in ¶¶ 4-16 of the latter's affirmation) – was appropriate for treating *surgical wounds*. Sea Crest's mischaracterization (and its ensuing allegedly improper treatment) of the patient's *surgical wound* as a *pressure ulcer* should not allow plaintiff to assert (without any other basis in the record) that the patient was also suffering from pressure ulcers (in addition to her surgical wound). Accordingly, plaintiff's remaining claim as

¹⁶ See MMC's Records at 00604-00605 (Wound Assessment) and at 00592 (Pressure Ulcer Assessment).

¹⁷ See MMC's Records at 00880 and at 01283 (Pressure Ulcer Assessment in each instance).

¹⁸ See Sea Crest's Records at 00161 (Pressure Ulcer Record of *Right Ankle [Surgical]* for September 21, 2010, October 5, 2010, and October 12, 2010); at 00160 (Pressure Ulcer Record of *Right Ankle [Surgical]* for October 19, 2010, October 27, 2010, November 2, 2010, and November 9, 2010); at 00159 (Pressure Ulcer Record of *Right Ankle [Surgical]* for November 16, 2010) (emphasis added in each instance).

against Sea Crest, insofar as it was predicated on Sea Crest's alleged failure to guard against (and to treat) the patient's pressure ulcers, is subject to dismissal.

B. Punitive Damages

Construing the evidence in a light most favorable to plaintiff as the nonmovant, Sea Crest established its prima facie entitlement to judgment as a matter of law dismissing her request for punitive damages under the Public Health Law (as well as under the common-law theory of gross negligence) by demonstrating that its conduct was not in willful (nor in reckless) disregard of the patient's rights. *See* Public Health Law § 2801-d [2]; *Vissichelli v. Glen-Haven Residential Health Care Facility, Inc.*, 136 A.D.3d 1021, 25 N.Y.S.3d 639 (2d Dept., 2016). In opposition, plaintiff failed to raise a triable issue of fact. *See Rey v. Park View Nursing Home, Inc.*, 262 A.D.2d 624, 692 N.Y.S.2d 686 (2d Dept., 1999). Accordingly, punitive damages under the Public Health Law (and/or under the common-law theory of gross negligence) are unwarranted. *See Valensi v. Park Ave. Operating Co., LLC*, 169 A.D.3d 960, 94 N.Y.S.3d 311 (2d Dept., 2019).

3. Sea Crest's Cross-Claim As Against Dr. Shur

Lastly, the branch of Dr. Shur's motion for summary judgment dismissing Sea Crest's cross-claim as against him must be denied. Contrary to Dr. Shur's contentions, the timing of Sea Crest's separate objection to Dr. Shur's motion and of its re-submission of Nurse Frumentti's original affidavit in support of such objection is immaterial, as Dr. Shur was not prejudiced by (and was able to respond on the merits to) such objection. The record, when viewed in a light most favorable to Sea Crest as the nonmovant on its

cross claim as against Dr. Shur, raised triable issues of material fact as to (among other triable issues): (1) whether Dr. Shur's wet-to-dry wound-care treatment of the patient's surgical wound was optimal under the circumstances, considering the repeated surgical interventions of her ankle; and (2) whether the gap in Dr. Shur's treatment of the patient from September 28, 2010 and November 10, 2010 was (in whole or in part) attributable to him (rather than to Sea Crest).

The Court reviewed the parties' remaining factual arguments, many of which were not outcome determinative as to potential liability. Any arguments not specifically addressed were considered and were rejected as without merit.

Conclusion

Accordingly, it is

ORDERED that in Seq. No. 3, Sea Crest's motion for summary judgment is *granted to the extent* that: (1) plaintiff's claims as against Sea Crest, insofar as predicated on its alleged failure to guard against (and to treat) the patient's pressure ulcers (as opposed to the patient's surgical wound in her right ankle), are dismissed; and (2) plaintiff's demand for punitive damages is stricken; and *the remainder of its motion is denied*; and it is further

ORDERED that in Seq. No. 4, Dr. Shur's motion for summary judgment is *granted to the extent* that plaintiff's claims as against him are dismissed without costs and disbursements, and *the remainder of his motion is denied*; and it is further

ORDERED that, upon searching the record pursuant to CPLR 3212 (b), plaintiff's claims and Sea Crest's cross-claim *as against MMC* are *dismissed* without costs and

disbursements; the action is severed and continued as against Sea Crest on plaintiff's claims as against it and further continued as against Dr. Shur on Sea Crest's cross-claim as against him; and it is further

ORDERED that to reflect the dismissal and severance of MMC from this action, the dismissal of plaintiff's claims as against Dr. Shur, and the *denial* of Dr. Shur's request for dismissal of Sea Crest's cross-claim as against him, the caption is amended to read in its entirety as follows:

-----X
 CLAUDIA ROJAS, as Administrator of
 Estate of MARIA H. LEYTON, Deceased,
 Plaintiff,

-against-

Index No. 461/13

NEW SEA CREST HEALTH CARE CENTER, LLC,
 NEW SEA CREST HEALTH CARE CENTER LLC
 d/b/a SEA-CREST HEALTH CARE CENTER, M.D.,
 and SEA-CREST HEALTH CARE CENTER,

Defendants.

-----X
 NEW SEA CREST HEALTH CARE CENTER, LLC,
 NEW SEA CREST HEALTH CARE CENTER LLC
 d/b/a SEA-CREST HEALTH CARE CENTER, M.D.,
 and SEA-CREST HEALTH CARE CENTER,

Cross Claim Plaintiffs,

-against-

VLADIMIR BORISOVICH SHUR, M.D.,

Cross Claim Defendant.

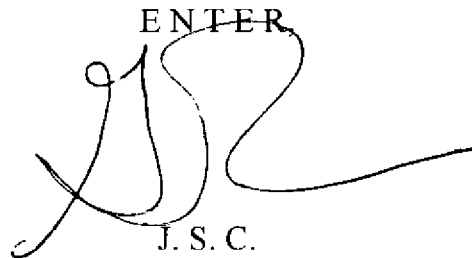
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; and it is further

ORDERED that plaintiff's counsel is directed to electronically serve a copy of this decision, order, and judgment with notice of entry on defendants' respective counsel and to electronically file an affidavit of service thereof with the Kings County Clerk; and it is further

ORDERED that the remaining parties are reminded of their next scheduled ADR appearance in the Medical Malpractice Early Settlement Part 6 on November 10, 2022 at 10:30 a.m.

This constitutes the decision, order, and judgment of the Court.

ENTER

J. S. C.

HON. GENINE D. EDWARDS