

Ramos v Fort Tryon LLC
2022 NY Slip Op 34272(U)
December 16, 2022
Supreme Court, New York County
Docket Number: Index No. 151852/2018
Judge: Erika M. Edwards
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA M. EDWARDS

PART 10M

Justice

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ERICK RAMOS, in his capacity as ADMINISTRATOR of the
ESTATE of EDITH RAMOS,

Plaintiff,

INDEX NO. 151852/2018

MOTION DATE 06/10/2022

MOTION SEQ. NO. 004

- v -

FORT TRYON LLC, FORT TRYON REHABILITATION &
HEALTH CARE FACILITY LLC, FORT TRYON CENTER
FOR REHABILITATION & NURSING, INC., JOHN DOE as
employee of the abovementioned Defendants, and JANE
DOE as employee of the abovementioned Defendants,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 75, 76, 77, 78, 79,
80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, the court grants in part Defendant Fort Tryon
Rehabilitation and Health Care Center, LLC’s and Fort Tryon Center for Rehabilitation and
Nursing, Inc.’s (collectively, “Defendants”) motion for summary judgment to the extent that the
court grants the portion of the motion seeking dismissal of Plaintiff Erick Ramos, in his capacity
as Administrator of the Estate of Edith Ramos’ (“Plaintiff”) causes of action for breach of
contract and punitive damages and denies the portion seeking dismissal of Plaintiff’s causes of
action for negligence, violation of New York Public Health Law (“PHL”) § 2801-d and wrongful
death.

Plaintiff alleges in substance that Defendants, their agents, servants or employees were
negligent in their care and treatment of the Deceased Plaintiff at their facility and deprived her of
her right to appropriate medical and nursing care and habitable accommodations from February
21, 2017 to March 15, 2017. Plaintiff’s complaint asserts causes of action for negligence, breach

of contract, violations of Public Health Law § 2801(d), New York Public Health Law § 2803(c), 10 NYCRR § 415(a)(1) and 42 CFR § 483, survivorship and wrongful death. Plaintiff further alleges that such acts or omissions were a departure from accepted standards of medical and nursing care and that they were the proximate cause of the Deceased Plaintiff's alleged injuries. Such alleged injuries include a massive stroke on March 15, 2017, her death on March 23, 2017, physical pain, emotional trauma, emotional distress and mental anguish. Plaintiff further alleges that prior to the Deceased Plaintiff's death, Defendants' agents, servants or employees caused her to suffer from lack of oxygen, dehydration, sepsis, abnormally high temperature and tachycardia. Plaintiff alleges that Defendants failed to provide adequate diaper changing so the Deceased Plaintiff was forced to remain in her own urine and feces for an unreasonable amount of time. She also choked due to a faulty oxygen machine and failure to suction her airway and she was refused prescribed medications.

Defendants now move for summary judgment dismissal of several of Plaintiff's causes of actions. Defendants rely on the expert affidavit of Dr. Lawrence Diamond and argue in substance that they were not negligent, they provided the Deceased Plaintiff with good and accepted medical and nursing care and that their employees' actions or inactions were not the proximate cause of the Deceased Plaintiff's alleged injuries or death. Dr. Lawrence opined in substance that the Deceased Plaintiff suffered two strokes/cerebral infarctions involving the left middle cerebral artery (MCA) prior to her admission at Defendants' facility. He also opined that she suffered from several pre-existing underlying medical conditions which made her prognosis and chance for a meaningful recovery very poor prior to her admission to Defendants' facility. Therefore, he opined that her death was caused by her underlying conditions and there was nothing that Defendants did or failed to do which contributed to her alleged injuries or death. As such,

Defendants argue that the court should dismiss Plaintiff's claims for negligence and wrongful death.

Defendants further argue in substance that they did not violate New York Public Health Law §§ 2801-d and 2803-c because they did not deprive the Deceased Plaintiff of any of her resident's rights and they exercised all care reasonably necessary to prevent and limit the alleged deprivation and injury. Defendants further argue that they did not act recklessly, wantonly or grossly negligent, so punitive damages are inapplicable, and there is no support for Plaintiff's breach of contract, as Plaintiff failed to produce a valid contract.

Plaintiff opposes the motion as to Plaintiff's claims involving negligence, violation of Public Health Law 2801-d, wrongful death and punitive damages. Plaintiff relies on the expert affidavit of Perry J. Starer, M.D. who opined in substance that Defendants departed from the accepted standards of medical care and that the departure was the proximate cause of Plaintiff's injuries. Plaintiff argues that the conflicting expert opinions preclude the court's granting of summary judgment and demonstrate disputed issues of fact. Plaintiff further argues that Defendants' expert failed to address the violation of the Public Health Law claims, while Plaintiff's expert discussed in detail how Defendants violated the Public Health Law regulations and how such violations were the proximate cause of Plaintiff's injuries and death. Plaintiff also argues in substance that there is no basis to dismiss Plaintiff's claims for wrongful death and punitive damages.

More specifically, Dr. Starer set forth the applicable minimum standards of care in long-term care facilities, including the ones set forth in Plaintiff's claims that Defendants violated Public Health Law §§ 2801-d and 2803-c and additional regulations and set forth several departures from accepted standards of care.

Dr. Starer disagrees with many of Dr. Diamond's opinions regarding whether Defendants departed from the applicable standard of care and whether such departures caused Plaintiff's alleged injuries and death. Plaintiff alleges in substance that although Plaintiff suffered a left MCA stroke on January 24, 2017, prior to her admission at Fort Tryon on February 21, 2017, while Plaintiff was admitted to New York Presbyterian on March 15, 2017, it was determined that Plaintiff had also suffered a right MCA stroke. Plaintiff argues that the subsequent stroke occurred while she was at Fort Tryon and that it was caused by Defendants' departures from the standard of care.

Additionally, Plaintiff argues that Plaintiff had sepsis while at Fort Tryon, which was caused by Defendants' failure to properly monitor and treat her urinary tract infection and that it led to her stroke. Plaintiff further argues that Defendants failed to provide proper hygienic care, failed to properly monitor and treat Plaintiff's elevated heartrate, tachycardia and decreased oxygen levels.

In reply, Defendants argue in substance that Plaintiff's expert's affirmation should be disregarded because it is conclusory, speculative and not based on the record. Defendants further argue that their expert's opinions were supported by the medical records and deposition testimony.

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 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 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 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 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]).

Public Health Law § 2801-d confers a private right of action on a patient in a nursing home for injuries sustained as a result of the deprivation of specified rights (PHL § 2801-d). Relief is predicated on Public Health Law § 2803-c, as well as regulations set forth in 10 NYCRR § 415, et seq. and 42 CFR § 483, et seq. PHL § 2801-d(2), permits punitive damages to be assessed against a residential health care facility where the deprivation of such right or benefit “is found to have been willful or in reckless disregard of the lawful rights of the patient” (PHL § 2801-d[2]).

Here, the court finds that Defendants have met their initial burden of demonstrating their entitlement to summary judgment in their favor as a matter of law as to Plaintiff’s negligence, breach of contract, wrongful death and punitive damages claims. However, the court finds that Defendants failed to demonstrate their prima facie entitlement to dismissal of Plaintiff’s violation of Public Health Law § 2801-d claim and that Plaintiff demonstrated that disputed issues of fact remain to be tried as to Plaintiff’s negligence and wrongful death claims. Plaintiff failed to oppose her breach of contract claim. Therefore, the court grants dismissal of Plaintiff’s breach of contract and punitive damages claims and denies dismissal of Plaintiff’s negligence, violation of Public Health Law § 2801-d and wrongful death claims.

The court determines that Plaintiff demonstrated disputed issues of material facts which include, but are not necessarily limited to, whether Defendants were negligent and deviated from the accepted standards of care in their care and treatment of the Deceased Plaintiff, whether they

violated Public Health Law § 2801-d and whether such actions or inactions were the proximate cause of the Deceased Plaintiff's death and other alleged injuries.

The court determines that Defendants demonstrated their prima facie entitlement of dismissal of Plaintiff's claim for punitive damages because, although their expert did not specifically address the alleged violations of the Public Health Law, he discussed the lack of any departures from the applicable standard of care and opined that Defendants provided proper care and treatment of the Deceased Plaintiff, which included Plaintiff's allegations. The court finds that Defendants demonstrated that they did not engage in conduct "having a high degree of moral culpability which manifested a conscious disregard for the rights of others or conduct so reckless as to the amount to such disregard" (*Greenberg v Meyreles*, 155 AD3d 1001 [2d Dept 2017]). Additionally, the court finds that Plaintiff failed to raise an issue of fact as to whether punitive damages are warranted.

The court has considered any additional arguments raised by the parties which were not discussed herein and the court denies any additional requests for relief which were not specifically granted herein.

As such, it is hereby

ORDERED that the court grants in part Defendant Fort Tryon Rehabilitation and Health Care Center, LLC's and Fort Tryon Center for Rehabilitation and Nursing, Inc.'s motion for summary judgment to the extent that the court grants the portion of the motion seeking dismissal of Plaintiff Erick Ramos, in his capacity as Administrator of the Estate of Edith Ramos' Second Cause of Action for breach of contract and claim for punitive damages and denies the remainder of the motion; and it is further

