

Balgobin v Jamaica Hosp. Med Ctr.

2022 NY Slip Op 34598(U)

March 31, 2022

Supreme Court, Queens County

Docket Number: Index No. 718089/2018

Judge: Peter J. O'Donoghue

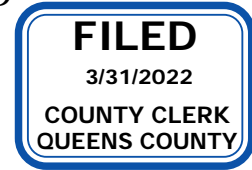
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE
Justice

IA Part MD



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BOJDHAT BALGOBIN,

Index
Number 718089 2018

Plaintiff
-against-

Motion
Date December 15, 2021

JAMAICA HOSPITAL MEDICAL CENTER and
JAMAICA HOSPITAL NURSING HOME
COMPANY, INC.,

Motion Seq. No. 1

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The following papers read on this motion by defendant Jamaica Hospital Nursing Home Company Inc. (Trump Pavilion¹) for an order granting summary judgment dismissing all claims asserted against it, and directing the entry of judgment, with prejudice, in its favor; and in the alternative for an order granting partial summary as to any of the issues addressed herein which plaintiff fails to rebut with competent evidence.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmations-Statement of Material Facts-Exhibits	EF 24-48
Opposing Affirmation - Statement of Material Facts - Exhibits	
-Affidavits.....	EF 75-81
Reply Affirmation- Exhibit.....	EF 83-84

Upon the foregoing papers this motion is determined as follows:

Plaintiff Bojdhat Balgobin commenced the within action on November 27, 2018, and alleges causes of action against Trump Pavilion for negligence and medical malpractice, lack of informed consent, and for a violation of Public Health Law §2801-d. With respect to the third cause of action plaintiff seeks to recover compensatory and punitive damages. Defendant served an answer and interposed nine affirmative defenses.

Plaintiff amplifies his claims against Trump Pavilion in his bill of particulars, alleging

¹Defendant refers to itself in the moving papers as doing business as the Trump Pavillion and will be referred to as such herein.

that its negligent acts and omissions took place during a continuous course of treatment commencing on March 1, 2017 and continuing up to and including July 19, 2017, excluding hospital visits². In essence it is alleged that Trump Pavilion failed to properly, appropriately, and timely prevent, diagnose, evaluate, and treat plaintiff's pressure ulcers. Specifically, plaintiff claims that Trump Pavilion failed to adequately and competently attend to plaintiff in a manner so as to prevent pressure ulcers from occurring; failed to recognize and/or observe plaintiff's deteriorating clinical condition, including dehydration and appearance of new pressure ulcers; failed to provide proper care, resulting in development of pressure ulcers and serious infectious conditions; failed to properly clean the plaintiff's skin, causing plaintiff to suffer stage IV pressure ulcers; failed to employ pressure offloading interventions, such as rotating and repositioning at regular intervals, use of pressure relieving mattresses, cushions, and pillows, in a timely and proper manner; and failed to provide necessary treatment and services to promote pressure ulcer healing and prevention of the development of new sores. Plaintiff further alleges that Trump Pavilion did not provide proper communication of his condition to his family and that it did not properly supervise or train staff that treated him.

With respect to the third cause of action for a violation of Public Health Law § 2801-d, the bill of particulars cites to Public Health Law §§ 2803-c, 2803-d, 2803-e, 10 NYCRR 415.4(b)(3), 10 NYCRR 415.11, 10 NYCRR 415.12©, 10 NYCRR 415.12(I), 10 NYCRR 415.12(j), 10 NYCRR 415.13, 10 NYCRR 415.29, 42 CFR 403.20, 42 CFR 483, 42 CFR 483.13(c)(3), 42 CFR 483.20, 42 CFR 483.25, 42 CFR 483.25(I), 42 CFR 483.25(j), 42 CFR 483.40, 42 CFR 483.70, 42 USC 1396r, and 42 USC 13951. It is also alleged that defendant violated Public Health Law §§ 2803-c (3) a, b, g, h and 2803-c (5).

Plaintiff alleges that he sustained the following injuries: perianal wound; stage IV sacral pressure ulcer; hemiplegia/hemiparesis; ulcer with suspected deep tissue injury in evolution: 1"; hypopigmented scar to sacral area; multiple pressure sores; skin necrosis; muscle necrosis; sacrum with yellow slough/black necrosis/granulation; pain related to pressure ulcer at sacral region; infected sacral wound; and edema to right lower extremity and left lower extremity. It is alleged that said injuries are "accompanied by severe pain, tenderness, swelling, stiffness, discomfort, deformity, disfigurement, distress, weakness, depression, stress, psychological difficulties, restriction of motion and with related injuries, damages, compromise and degeneration of the underlying soft tissues, ligaments and musculature and ail of the natural flowing therefrom; psychological embarrassment due to scarring, impairment and deformities causing the plaintiff to make both conscious and

²Plaintiff was a resident at Trump Pavilion from March 1-7, 2017, March 21, 2017, and April 5-July 19, 2017. He was a patient at Jamaica Hospital Medical Center from February 19, 2017 to March 1, 2017; March 7, 2017 to March 21, 2017; and March 21, 2017 to April 5, 2017.

subconscious efforts to limit the use and visibility of those areas and impairments.”

Plaintiff alleges as a result of said injuries he “has suffered and continues to suffer pains in the head, severe and persistent dizziness, severe nervousness, tension, anxiety, irritability, emotional anguish, depression and distress, loss of appetite and difficulty sleeping; that he has further suffered and continues to suffer severe pain and difficulty with prolonged standing, walking, bending, climbing stairs, lifting, performing strenuous activities, finding a comfortable position or sleeping”. It is further alleged that plaintiff “has and will continue to experience impairment, disruption and difficulty with daily activities, way of life and enjoyment of life including significant impairment of numerous daily activities that plaintiff had previously taken for granted, and ; aggravation, activation and/or precipitation of any underlying, hypertrophic, degenerative, arthritic, circulatory, arterial, Venous or systematic condition complained of” and that all of said injuries “are permanent in nature and duration, and were caused, aggravated and/or exacerbated by the aforementioned occurrence”.

Defendant Trump Pavilion now moves for summary judgment dismissing the complaint with prejudice. Plaintiff opposes the motion.

On a motion for summary judgment dismissing a cause of action alleging medical malpractice, the defendant bears the initial burden of establishing that there was no departure from good and accepted medical practice or that any alleged departure did not proximately cause the plaintiff's injuries (*see Carradice v Jamaica Hosp. Med. Ctr.*, 198 AD3d 863, 864 [2d Dept 2021]; *Pirri-Logan v Pearl*, 192 AD3d 1149, 1150 [2d Dept 2021]; *Elstein v Hammer*, 192 AD3d 1075, 1076 [2d Dept 2021]; *Roca v Perel*, 51 AD3d 757, 758-759 [2d Dept 2008]). If the defendant makes such a showing, the burden shifts to the plaintiff to raise a triable issue of fact as to those elements on which the defendant met its prima facie burden of proof (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Sheppard v Brookhaven Mem. Hosp. Med. Ctr.*, 171 AD3d 1234, 1235 [2d Dept 2019]). Generally, summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions (*see Elstein v Hammer*, 192 AD3d at 1077; *Feinberg v Feit*, 23 AD3d 517, 519 [2d Dept 2005]). However, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact (*see Carradice v Jamaica Hosp. Med. Ctr.*, 198 AD3d at 864; *Elstein v Hammer*, 192 AD3d at 1077; *Wagner v Parker*, 172 AD3d 954, 955 [2d Dept 2019]). “In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant’s experts, setting forth an explanation of the reasoning and relying on “specifically cited evidence in the record” (*Tsitrin v New York Community Hosp.*, 154 AD3d 994, 995-96 [2d Dept 2017], quoting *Roca v Perel*, 51 AD3d at 759). On a motion for summary judgment, the party opposing the motion is entitled to every favorable

inference that may be drawn from the pleadings and affidavits submitted by the parties (*see Rosario v Our Lady of Consolation Nursing and Rehabilitation Care Ctr.*, 186 AD3d 1426, 1427 [2d Dept 2020]).

Public Health Law §2801-d confers a private right of action to a patient in a nursing home for injuries sustained as the result of the deprivation of specified rights (Public Health Law § 2801-d [1]; *Henry v Sunrise Manor Ctr. for Nursing & Rehab.*, 147 AD3d 739, 741 [2d Dept 2017]; *Moore v St. James Health Care Ctr., LLC*, 141 AD3d 701, 703 [2d Dept 2016]; *Zeides v Hebrew Home for Aged at Riverdale*, 300 AD2d 178, 179 [1st Dept 2002]). “The basis for liability under the [Public Health Law] ‘is neither deviation from accepted standards of medical practice nor breach of a duty of care. Rather, it contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule’ ” (*Henry v Sunrise Manor Ctr. for Nursing and Rehabilitation*, 147 AD3d 739, 741 [2d Dept 2017], quoting, *Novick v South Nassau Communities Hosp.*, 136 AD3d 999, 1001 [2d Dept 2016], quoting *Zeides v Hebrew Home for Aged at Riverdale*, 300 AD2d 178, 179, [1st Dept 2002]; *see Moore v St. James Health Care Ctr., LLC*, 141 AD3d 701, 703 [2d Dept 2016]).

Public Health Law §2803-c states, in pertinent part, as follows:

1. The principles enunciated in subdivision three hereof are declared to be the public policy of the state and a copy of such statement of rights and responsibilities shall be posted conspicuously in a public place in each facility covered hereunder.
2. The commissioner shall require that every nursing home and facility providing health related service, as defined in subdivision two and paragraph (b) of subdivision four of section twenty-eight hundred one of this article, shall adopt and make public a statement of the rights and responsibilities of the patients who are receiving care in such facilities, and shall treat such patients in accordance with the provisions of such statement.
3. Said statement of rights and responsibilities shall include, but not be limited to the following:
* * * * *
 - e. Every patient shall have the right to receive adequate and appropriate medical care, to be fully informed of his or her medical condition and proposed treatment unless medically contraindicated, and to refuse medication and treatment after being fully informed of and understanding the consequences of such actions.

The Code of Federal Regulations directs nursing homes to provide residents with a quality of care, based on a comprehensive assessment of a resident, in accordance with professional standards of practice, the comprehensive person-centered care plan, and the

resident's choices (*see* 42 CFR § 483.25). With regard to the development of pressure ulcers: “[b]ased on the comprehensive assessment of a resident, the facility must ensure that . . . (I) [a] resident receives care, consistent with professional standards of practice, to prevent pressure ulcers and does not develop pressure ulcers unless the individual's clinical condition demonstrates that they were unavoidable; and (ii) [a] resident with pressure ulcers receives necessary treatment and services, consistent with professional standards of practice, to promote healing, prevent infection and prevent new ulcers from developing” (42 CFR § 483.25 [b] [1]).

New York State Department of Health regulations concerning the minimum quality of care applicable to nursing homes directs: “© Pressure sores. Based on the comprehensive assessment of a resident, the facility shall ensure that: (1) a resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable despite every effort to prevent them; and (2) a resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing” (10 NYCRR § 415.12 [c]).

Defendant Trump Pavilion has established its *prima facie* entitlement to summary judgment dismissing the complaint in its entirety, as a matter of law, by submitting among other things, the affirmation of its medical expert, Gisele Wolf-Klein, M.D., a physician licensed to practice medicine in the State of New York, who is board certified in internal medicine and geriatric medicine. Dr. Wolf-Klein, based upon her review of the medical records sets forth a detailed account of the plaintiff's care and treatment by defendant Trump Pavilion throughout the course of each period of residency, and the course of his care and treatment during each hospitalization. Dr. Wolf-Klein opines with a reasonable degree of medical certainty that all of the care that plaintiff received at Trump Pavilion was compliant with the standards of care and further opines that his alleged injuries were not caused by or contributed to by any departures on the part of Trump Pavilion. She specifically rebuts each allegation made in plaintiff's bill of particulars, including his claims of statutory violations (*see Pirri-Logan v Pearl*, 192 AD3d at 1149; *Gilmore v Mihail*, 174AD3d 686, 687 [2d Dept 2019]; *Khosrova v Westermann*, 109 AD3d 965, 966 [2d Dept 2013]; *Andreoni v Richmond*, 82 AD3d 1139, 1139 [2d Dept 2011]).

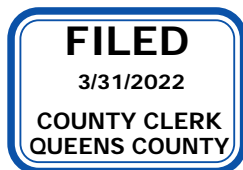
Plaintiff, in opposition, submits among other things an affirmation from his counsel and an affirmation from Thomas T. Perls, a physician licensed in the States of Massachusetts and Maine, who is board certified in internal medicine and geriatrics medicine. Dr. Perls states that based upon his training and experience, as well as keeping current on the medical literature related to patients similar to plaintiff, he is fully aware of the standard of care owed to a resident such as plaintiff and the conditions he presented with to Trump Pavilion,

Although Dr. Perls opines, within a reasonable degree of medical certainty that the medical staff and other staff at Trump Pavilion were negligent in the treatment and prevention of pressure ulcers, he fails to opine as to each and every departure set forth in the bill of particulars and addressed by Dr. Wolf-Klein. Moreover, to the extent that Dr. Perls makes certain statements under a general heading entitled “Opinion as to Trump Pavilion” said statements are insufficient to constitute an opinion made within a reasonable degree of medical certainty. As Dr. Perls’ affirmation is conclusory and speculative, and not supported by the evidence in the record, plaintiff has failed to raise a triable issue of fact.

To the extent that plaintiff contends in his pleadings that Trump Pavilion failed to use reasonable care in the staffing, training and supervision of its employees, an employer may be liable for a claim of negligent hiring, training or supervision if an employee commits an “independent act of negligence outside the scope of employment” and the employer “was aware of, or reasonably have foreseen, the employee's propensity to commit such an act” (*Seiden v Sonstein*, 127AD3d 1158, 1160-1161 [2d Dept 2015]). Here, as plaintiff fails to allege that anyone employed by Trump Pavilion committed an act outside of the scope of his or her employment (*Lamb v Baker*, 152 AD3d 1230 [4th Dept 2017]), this claim must be dismissed.

In view of the foregoing, the motion by defendant Jamaica Hospital Nursing Home Company Inc. (Trump Pavilion) for summary judgment dismissing the complaint, with prejudice, is granted, and the Clerk of the Court is directed to enter a judgment in favor of said defendant.

Dated: March 31, 2022




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