

Romano v Flushing Hosp. & Med. Ctr.

2022 NY Slip Op 34874(U)

August 18, 2022

Supreme Court, Queens County

Docket Number: Index No. 708316/2018

Judge: Peter J. O'Donoghue

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE O'Donoghue
Justice

IA Part MD

RAQUEL ROMANO as Administrator of the
Estate of DAYSI FERNANDEZ, Deceased,

Index



Plaintiff,

Number 708316/2018

-against-

FLUSHING HOSPITAL AND MEDICAL CENTER,
NAEEM CHAUDHRY, M.D., NAEEM CHAUDHRY,
M.D., P.C., CLIFFSIDE NURSING HOME, INC.
d/b/a CLIFFSIDE REHABILITATION AND
RESIDENTIAL HEALTH CARE CENTER,

Motion

Date March 9, 2022

Motion Seq. Nos. 5, 6, 7

Defendants x

The following numbered papers read on these motions: (1) by the defendant Cliffside Nursing Home, Inc. d/b/a Cliffside Rehabilitation and Residential Health Care Center (Cliffside), pursuant to CPLR 3212, for summary judgment dismissing the complaint insofar as asserted against it, (2) by the defendants Naeem Chaudhry, M.D. and Naeem Chaudhry, M.D., P.C. (the Chaudhry defendants), pursuant to CPLR 3212, for summary judgment dismissing the complaint insofar as asserted against them, and (3) by the defendant Flushing Hospital Medical Center (FHMC), pursuant to CPLR 3212, for summary judgment dismissing the complaint insofar as asserted against it.

Papers
Numbered

Seq. #5
Notice of Motion - Affidavits - Exhibits..... EF 112-130
Answering Affidavits - Exhibits..... EF 169-218
Reply Affidavits..... EF 312

Seq. #6
Notice of Motion - Affidavits - Exhibits..... EF 133-150
Answering Affidavits - Exhibits..... EF 220-264
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Seq. #7

Notice of Motion - Affidavits - Exhibits..... EF 151-168
 Answering Affidavits - Exhibits..... EF 266-310
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Upon the foregoing papers it is ordered that the motions are consolidated for the purpose of a single order and are determined as follows:

On January 16, 2016, Daysi Fernandez (the decedent) was brought to the emergency department at FHMC by ambulance, after she was found unresponsive and hyperventilating in her home. The decedent was intubated and admitted to the ICU based on an initial diagnosis of hypoxic respiratory failure. The decedent's medical records note that, upon admission, she had a Stage I sacral pressure ulcer. Progress notes from January 19, 2016 also note the presence of the sacral ulcer and a deep tissue injury and recommended that the decedent be turned and positioned per facility protocol. The decedent remained at FHMC until March 3, 2016. During her initial stay at FHMC, the decedent was treated for, among other things, deep vein thrombosis, sepsis, and MRSA. The medical records further reflect that during her admission the decedent's sacral ulcer had progressed to Stage III and the decedent had developed a second pressure ulcer on her right calf.

On March 3, 2016, the decedent was transferred from FHMC to Cliffside, based on a referral from the defendant Naeem Chaudhry, M.D. At the time of her admission to Cliffside, the decedent was still on a ventilator. Notably, Cliffside's admission records show that the decedent had a Stage IV sacral ulcer, a Stage III ulcer on her right calf, and a Stage II ulcer behind her right ear. During her first admission at Cliffside, the decedent received treatment from, among others, a wound care specialist. However, on March 31, 2016, the decedent was readmitted to FHMC to test for sepsis and a urinary tract infection. During the second admission at FHMC, the decedent's sacral ulcer was noted as Stage IV with evidence of necrosis, and several debridement procedures were performed. The decedent was subsequently readmitted to Cliffside on April 12, 2016. During this second admission at Cliffside, the decedent's sacral ulcer was noted as Stage II, and several additional debridement procedures were performed. The decedent was subsequently readmitted to FHMC on May 4, 2016, where she remained until her death on June 7, 2016.

The plaintiff Raquel Romano, in her individual capacity and as administrator of the decedent's estate, subsequently commenced this action against the defendants. The amended complaint asserts causes of action for negligence, medical malpractice, and wrongful death. The plaintiff alleges that the defendants were negligent

in, among other things, failing to properly assess and document the skin condition of the decedent, failing to properly assess for the risk of pressure ulcers, failing to have a timely and proper care plan for skin integrity, failing to properly and adequately supervise staff, failing to provide proper pressure ulcer interventions to maintain skin integrity, failing to appropriately dress the pressure ulcer wounds, failing to properly and timely address signs and symptoms of pressure ulcer wound infections, failing to utilize positioning and pressure-relieving devices, failing to properly assess the decedent for the risk of malnutrition and dehydration and create a proper plan of care to address same, and failing to properly monitor fluid and caloric intake. The amended complaint further alleges a cause of action for violations of Public Health Law § 2801-d against all defendants. In particular, the plaintiff alleged that Cliffside's acts and omissions with respect to the decedent violated numerous sections of Title 42, Part 483 of the Code of Federal Regulations (CFR) and Title 10, Part 415 of the New York Codes, Rules, and Regulations (NYCRR), and that FHMC's acts and omissions with respect to the decedent violated various sections of Title 10, Part 405 of the NYCRR.

Discovery now having been completed, Cliffside, the Chaudhry defendants, and FHMC separately move for summary judgment dismissing the complaint insofar as asserted against each of them.

"[T]he requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of medical practice, and evidence that such deviation or departure was a proximate cause of injury or damage" (*Raucci v Shinbrot*, 127 AD3d 839, 841 [2d Dept 2015]; see *Dixon v Chang*, 163 AD3d 525, 526 [2d Dept 2018]). "[A] defendant physician seeking summary judgment must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Stukas v Streiter*, 83 AD3d 18, 24 [2d Dept 2011]; see *Matthis v Hall*, 173 AD3d 1162, 1163 [2d Dept 2019]). "In order to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars" (*Mackauer v Parikh*, 148 AD3d 873, 876 [2d Dept 2017]; see *Kogan v Bizekis*, 180 AD3d 659, 660 [2d Dept 2020]). However, where a defendant's expert merely recounts the treatment rendered and provides a conclusory opinion that this treatment did not represent a departure from good and accepted medical practice, a defendant has failed to meet its prima facie burden (see *Barlev v Bethpage Physical Therapy Assoc., P.C.*, 122 AD3d 794, 784 [2d Dept 2014]; *Couch v County of Suffolk*, 296 AD2d 194, 198 [2d Dept 2002]). A defendant's failure to meet their prima facie burden requires denial of their motion for summary

judgment, regardless of the sufficiency of the opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Motion Seq. #5

In support of its motion, Cliffside relies on the pleadings, the decedent's medical records from FHMC and Cliffside, and an affirmation from its expert in geriatric medicine, Vincent Marchello, M.D. Marchello is board certified in geriatric medicine, and is an Assistant Professor of Medicine at the SUNY Downstate School of Medicine. In his affirmation, Marchello asserted that he reviewed the pleadings, medical records, and deposition transcripts of the parties. Based on his training and experience and his review of these documents, Marchello opined, within a reasonable degree of medical certainty, that Cliffside and its employees did not depart from the standard of care in treating the decedent, and that their actions did not contribute to the decedent's injuries or death. In particular, Marchello asserted that Cliffside adhered to the standard of care in the prevention and treatment of the decedent's pressure ulcers, and that despite Cliffside's efforts, the decedent's various comorbidities prevented her pressure ulcers from healing and led to the unavoidable development of new pressure ulcers. Marchello further asserted that, based on his opinion regarding the standard of care and the lack of Cliffside's departures therefrom, the alleged statutory and regulatory violations alleged by the plaintiff have no merit.

The primary allegations of medical malpractice and wrongful death

Cliffside failed to establish, prima facie, that it did not depart from the standard of care in rendering treatment to the decedent (see *Martinez v Orange Regional Med. Ctr.*, 203 AD3d 910, 913 [2d Dept 2022]). In his affirmation, Marchello failed to address many of the specific allegations of negligence asserted against Cliffside, including allegations that Cliffside and its employees were negligent in failing to follow their facility's own policies, procedures, and protocols on skin integrity, failing to investigate significant or unintended weight loss, failing to timely perform wound and bone cultures, failing to provide adequate and timely toileting/diaper changes for the decedent, failing to properly and timely address exposed/palpable sacral/distal coccyx bone, and failing to properly and timely address signs and symptoms of anemia, MRSA, osteomyelitis, sepsis, and urinary tract infections (see *Oliver v New York City Health & Hosps. Corp.*, 178 AD3d 1057, 1058-1059 [2d Dept 2019]; *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1045 [2d Dept 2010]).

In addition, to the extent that Marchello addressed the plaintiff's remaining allegations of negligence, Marchello's opinions merely amount to conclusory assertions that each of Cliffside's actions during the decedent's treatment did not represent a departure from the standard of care, which are insufficient to rebut the plaintiff's specific allegations of negligence (see *Nodar v Pascaretti*, 200 AD3d 697, 699 [2d Dept 2021]; *Wei Lin v Sang Kim*, 168 AD3d 788, 788-789 [2d Dept 2019]). Notably, Marchello effectively asserted that adhering to the applicable standard of care for geriatric medicine requires a fact-sensitive inquiry into the individual circumstances of each patient. Here, however, Marchello failed to provide any substantive explanation as to what the decedent's specific requirements were or how Cliffside's actions did not deviate from the standard of care (see *Ojeda v Barabe*, 202 AD3d 808, 810 [2d Dept 2022]).

Cliffside also failed to establish, prima facie, that Cliffside's actions did not proximately cause the decedent's injuries or death (see *Smarkucki v Kleinman*, 171 AD3d 1118, 1119 [2d Dept 2019]). Marchello opined, within a reasonable degree of medical certainty, that the decedent's comorbidities, including hypertension, DVT, acute embolism and thrombosis of legs, and anemia, all reduce blood flow to the skin, which rendered skin tears unavoidable. However, Marchello failed to address many of the other injuries that the plaintiff alleged to have resulted from Cliffside's negligence, including infection of the decedent's pressure ulcers and the decedent's development of osteomyelitis, sepsis, MRSA, and E-coli infections. Finally, Marchello's assertion that the decedent's death was caused by "sudden respiratory failure stemming from her numerous terminal comorbidities" is speculative and conclusory (see *Wodzinski v Eastern Long Is. Hosp.*, 170 AD3d 925, 926-927 [2d Dept 2019]).

The plaintiff's remaining allegations

In addition to the primary allegations of medical malpractice, the plaintiff further alleged a cause of action under Public Health Law § 2801-d and Public Health Law § 2803-c based on alleged violations of Title 10, Part 415 of the NYCRR and Title 42, Part 483 of the CFR. To meet its prima facie burden in this regard, Cliffside relied on the decedent's medical records and Marchello's affirmation to assert that no statutory or regulatory violation took place while the decedent was under Cliffside's care. Notably, however, Marchello failed to address the alleged violations of 42 CFR §§ 483.10, 483.12, 483.13, 483.45, 483.60, 483.65, and 483.70 and 10 NYCRR 415.4, 415.13, 415.14, 415.16, 415.17, 415.18, 415.19, 415.20, 415.21, and 415.22. To the extent that Marchello addressed

the plaintiff's remaining statutory and regulatory violations, his assertions were conclusory, impermissibly pointed to gaps in the plaintiff's proof, or were otherwise insufficient to establish prima facie entitlement to summary judgment dismissing this claim (see *Henry v Sunrise Manor Ctr. for Nursing & Rehabilitation*, 147 AD3d 739, 741 [2d Dept 2017]).

The plaintiff also alleged claims of negligent hiring, negligent supervision, and failure to follow proper policies and procedures against Cliffside. With respect to the negligent hiring claim, Marchello merely pointed to gaps in the plaintiff's proof, which is insufficient to meet Cliffside's prima facie burden (see *Quantum Corporate Funding, Ltd. v Ellis*, 126 AD3d 866, 871 [2d Dept 2015]; *Post v County of Suffolk*, 80 AD3d 682, 685 [2d Dept 2011]). With respect to the claims of negligent supervision and failure to follow proper policies and procedures, neither the Marchello affirmation nor Cliffside's remaining submissions address these claims.

Based on the foregoing, Cliffside's motion is denied, regardless of the sufficiency of the plaintiff's opposition papers (see *Winegrad*, 64 NY2d at 853).

Motion Seq. #6

In support of their motion, the Chaudhry defendants submit the pleadings, the decedent's medical records from FHMC and Cliffside, and an affirmation from their expert in geriatric medicine, Jeffrey Levine, M.D. Levine is board certified in internal medicine, geriatric medicine, and is a board-certified wound care specialist. Based on his training and experience, Levine asserted that he is familiar with the standard of care regarding the care and treatment of geriatric patients exhibiting pressure ulcers. Levine asserted that he reviewed the pleadings and the decedent's medical records and opined, within a reasonable degree of medical certainty, that none of the actions taken by the Chaudhry defendants proximately caused the decedent's injuries or death. In particular, Levine opined that the decedent's development of pressure ulcers was unavoidable due to her multiple comorbidities, including anemia and DVT, which impair the skin's ability to heal. According to Levine, these conditions decrease the delivery of oxygenated blood and necessary nutrients which are necessary to maintain skin integrity and prevent breakdown. Thus, skin breakdown "is unavoidable because even a small amount of pressure for a short amount of time can lead to ulcers due to decreased perfusion of the area." Levine also opined "that decedent's death was caused by sudden respiratory failure stemming from her numerous terminal comorbidities and not by Dr. Chaudhry's medical care and treatment."

The Chaudhry defendants failed to establish, *prima facie*, that their actions in treating the decedent actions did not proximately cause her injuries or death (see *Smarkucki*, 171 AD3d at 1119). While Levine offered opinions regarding the decedent's pressure ulcers, he failed to address the remaining injuries, including infection of the decedent's pressure ulcers and the decedent's development of osteomyelitis, MRSA, and E-coli infections, which the plaintiff alleged were proximately caused by the Chaudhry defendants' actions. Moreover, Levine asserted that septic shock was one of the comorbidities which prevented the decedent's skin from fully healing. However, the plaintiff's bill of particulars alleged that the decedent developed sepsis as a result of the Chaudhry defendants' actions, and Levine failed to address this contention. Finally, when viewing the evidence in the light most favorable to the plaintiff, Levine's assertion that the decedent died from "sudden respiratory failure stemming from her numerous terminal comorbidities" is speculative and conclusory (see *Wodzinski*, 170 AD3d at 926-927). This branch of the Chaudhry defendants' motion is therefore denied, regardless of the sufficiency of the plaintiff's opposition papers (see *Winegrad*, 64 NY2d at 853).

With respect to the remaining allegations asserted against the Chaudhry defendants, including allegations that the Chaudhry defendants failed to follow the relevant policies, procedures and protocols on skin integrity and failed to adequately supervise nurses and staff, the Chaudhry defendants' moving papers fail to address these allegations. Moreover, the Chaudhry defendants' moving papers fail to address the plaintiff's allegation that she is entitled to wrongful death damages pursuant to Public Health Law § 2801-d. Thus, the branch of the Chaudhry defendants' motion for summary judgment dismissing these claims is denied.

Motion Seq. #7

In support of its motion for summary judgment, FHMC submits the pleadings, the decedent's medical records from FHMC and Cliffside, and an affirmation from its medical expert, Roy Goldberg, M.D. Goldberg is board certified internal medicine, sub-certified in geriatric medicine, and is a Clinical Professor of Medicine at Albert Einstein College of Medicine. Based on his training and experience. Goldberg asserted that he is familiar with the standards of care applicable to geriatrics, internal medicine, and end of life care and wound care for hospital and nursing home residents. As a result of his review of the pleadings and the decedent's medical records, Goldberg opined that FHMC did not depart from the standard of care in treating the decedent, and that FHMC's treatment of the decedent was not the proximate cause of the

decedent's injuries or death. With respect to proximate cause, Goldberg specifically opined that, at the time of her first admission to FHMC in January 2016, the decedent was terminally ill and had already developed a Stage I sacral pressure ulcer. Thus, Goldberg opined that the decedent's skin breakdown was an unavoidable consequence of the dying process and her other comorbidities.

The primary allegations of medical malpractice and wrongful death

FHMC failed to establish prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against it (see *Martinez*, 203 AD3d at 913). In asserting that FHMC and its agents did not depart from the standard of care, Goldberg failed to articulate the standard of care relevant to each of the plaintiff's allegations or describe how FHMC's treatment of the decedent did not depart from the standard of care. Rather, Goldberg merely asserted, in a conclusory fashion, that each of FHMC's actions in treating the decedent was proper (see *Wei Lin*, 168 AD3d at 788-789; *Kelly*, 164 AD3d at 891).

Goldberg's opinions regarding proximate cause were similarly insufficient. While Goldberg opined that the development of pressure ulcers was an inevitable part of the dying process, he failed to address the remaining injuries which allegedly resulted from FHMC's care of the decedent, including infection of the decedent's pressure ulcers and the decedent's development of osteomyelitis, MRSA, and E-coli infections. In addition, Goldberg opined that septic shock was one of the comorbidities which prevented the decedent's skin from fully healing, but failed to address the plaintiff's allegation that FHMC's actions caused the decedent to develop sepsis. This branch of FHMC's motion is therefore denied, regardless of the sufficiency of the plaintiff's opposition papers (see *Winegrad*, 64 NY2d at 853).

The remaining allegations of negligence

The plaintiff also alleged that FHMC was negligent in failing to properly hire, train, and supervise its employees, and failing to follow its own policies and procedures for skin integrity. With respect to the negligent training and supervision claims, Goldberg asserted that "[t]here is no evidence at any time that any employee of [FHMC] was not trained or properly supervised." This contention, however, is insufficient to establish prima facie entitlement to summary judgment dismissing these claims (see *Quantum Corporate Funding, Ltd.*, 126 AD3d at 871; *Post*, 80 AD3d at 685). With respect to the claim that FHMC failed to follow its

policies and procedures for skin integrity, neither the Goldberg affirmation nor FHMC's remaining submissions address this claim.

The plaintiff further alleged violations of Title 10, Part 405 of the NYCRR against FHMC, and asserted a cause of action under Public Health Law § 2801-d. Neither Goldberg nor FHMC's remaining submissions address the alleged regulatory violations. However, with respect to Public Health Law § 2801-d, FHMC correctly contends that this cause of action does not apply to hospitals (see *Dray v Staten Is. Univ. Hosp.*, 160 AD3d 614, 619-620 [2d Dept 2018]). In opposition, the plaintiff failed to raise an issue of fact as to whether FHMC is a "residential health care facility" subject to a private cause of action under Public Health Law § 2801-d.

Accordingly, it is

ORDERED that Cliffside's motion for summary judgment dismissing the complaint insofar as asserted against it is denied; and it is further,

ORDERED that the Chaudhry defendants' motion for summary judgment dismissing the complaint insofar as asserted against them is denied; and it is further,

ORDERED that FHMC's motion for summary judgment dismissing the plaintiff's cause of action predicated on FHMC's alleged violation of Public Health Law § 2801-d is granted; and it is further,

ORDERED that FHMC's motion for summary judgment is otherwise denied; and it is further,

ORDERED that all other relief not expressly addressed herein is denied.

Dated: August 18, 2022

PETER J. O'DONOGHUE, J.S.C.

