Khan v Jamaica Hosp. Med. Ctr.
2022 NY Slip Op 35180(U)
December 1, 2022
Supreme Court, Queens County
Docket Number: Index No. 707229/2019
Judge: Peter J. O'Donoghue

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Peter J. O'Donoghue IA Part MDP
Justice

NAZEELA KHAN, individually, and as Administrator of the Estate of MEER KHAN, Deceased,

Plaintiffs

-against-

JAMAICA HOSPITAL MEDICAL CENTER,

Defendant.

Index Number 707229 2019

Motion Date June 1, 2022

Motion Seq. No. 2

The following numbered papers read on this motion by the defendant Jamaica Hospital Medical Center (JHMC) for an order (1) pursuant to CPLR 3212, granting summary judgment dismissing the action, (2) directing entry of judgment with prejudice in favor of JHMC, and (3) pursuant to CPLR 3212(e), granting partial summary judgment.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF 37-52
Answering Affidavit - Exhibits	EF 54-57
Reply Affirmation - Exhibits	EF 59

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

On February 21, 2017, Meer Khan (the decedent) was admitted to JHMC after falling and striking his head on the sidewalk. He suffered, among other injuries, a scalp laceration which was repaired in the emergency room using staples. He was admitted for further treatment of cervical spine and facial fractures. Facial reconstructive surgery was initially scheduled but was later canceled as the decedent's cervical spine was required to remain immobilized in a hard collar. On February 26, 2017, the decedent was discharged home. As is relevant here, the administration of heparin, an anticoagulant medication, that the decedent received during admission was discontinued at the time of discharge.

On March 2, 2017, the decedent was readmitted to JHMC after suffering cardiac arrest at home. He was intubated, unresponsive, and in a coma. He was admitted to the intensive care unit and a variety of medical consultations were conducted revealing, among other things, that he had extensive bilateral pulmonary emboli. The decedent remained hospitalized at JHMC until March 30, 2017, when he was discharged to Long Island Care Center (LICC), a skilled nursing facility. His discharge diagnosis included, among other things, cardiac arrest due to bilateral pulmonary embolism. The decedent was intermittently transferred from LICC to Flushing Hospital Medical Center (FHMC) from April 2017 through December 2017 for medical treatment, until he died at FHMC on December 7, 2017 following cardiac arrest.

The plaintiff, in her capacity as the Administrator of the decedent's estate, commenced this action against JHMC asserting causes of action for negligence, medical malpractice, wrongful death, lack of informed consent, negligent hiring/supervision, and loss of services. The plaintiff's bill of particulars alleges that JHMC was generally negligent and/or committed medical malpractice by prematurely discharging the decedent; negligently discharging him home rather to an inpatient rehabilitation facility; carelessly ignoring and rebuking his and his family's requests to transfer him to an inpatient rehabilitation facility; carelessly ignoring and rebuking his and his family's requests to remain in the hospital until he was more stable; neglecting to perform a thorough examination to ensure he was stable enough for discharge; neglecting to perform a proper discharge interview and planning to ensure he was ready for discharge and would be stable immediately following discharge from the hospital; negligently discharging him without anticoagulant medication despite him being at high risk to develop a pulmonary embolism; negligently discontinuing his anticoagulant medication despite him being at high risk to develop a pulmonary embolism; and failing to monitor his condition and prescribe necessary medication(s). The bill of particulars further alleges that the decedent suffered injuries including, but not limited to, wrongful death; cardiac arrest; tachycardia; atrial fibrillation; bilateral pulmonary embolism; myoclonic jerks; hypoxic/anoxic brain injury/damage; and acute respiratory failure. JHMC now moves for summary judgment dismissing this action, or partial summary judgment pursuant to CPLR 3212(e).

"The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standard of practice and evidence that such departure was a proximate cause of injury or damage" (*Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 842 [2d Dept 2008]). A defendant seeking summary judgment in a medical malpractice action must establish,

prima facie, that there was no departure from accepted medical practice or that any departure was not a proximate cause of the plaintiff's injuries (*see Cerrone v North Shore-Long Is. Jewish Health Sys., Inc.*, 197 AD3d 449 [2d Dept 2021]; *Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]). To sustain this prima facie burden, a "'defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars'" (*Kogan v Bizekis*, 180 AD3d 659, 660 [2d Dept 2020]), quoting *Sheppard v Brookhaven Mem. Hosp. Med. Ctr.*, 171 AD3d 1234, 1235 [2d Dept 2019]). 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 [2d Dept 2014]; *Couch v County of Suffolk*, 296 AD2d 194 [2d Dept 2002]). A defendant's failure to meet its prima facie burden requires a denial of a motion for summary judgment, regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

In opposing the motion, "a plaintiff must submit evidentiary facts or materials to rebut the defendant's prima facie showing, so as to demonstrate a triable issue of fact" (*Korzsun v Winthrop Univ. Hosp.*, 172 AD3d 1343 [2d Dept 2019]). To succeed in opposing a motion for summary judgment, where a defendant makes a prima facie showing that there was no deviation from the standard of care and an independent showing that any deviation therefrom was not a proximate cause of the plaintiff's injuries, the plaintiff must rebut this showing by raising a triable issue of fact as to both elements (*see Tsitrin v New York Community Hosp.*, 154 AD3d 994 [2d Dept 2017]).

In support of its motion, JHMC submits, among other things, the pleadings, the decedent's medical records, the transcripts of relevant deposition testimony, and an affirmation from its expert, Mark Silberman, M.D. (Silberman). Silberman is board certified in emergency medicine, critical care medicine, pulmonary medicine, and internal medicine. He is currently the Chief of Emergency Medicine at St. John's Riverside Hospital and avers that he has decades of experience in the fields of emergency medicine, pulmonary medicine, and critical care medicine. Based on his review of the pleadings, the decedent's medical records, and the deposition transcripts of three physicians who treated the decedent at JHMC, Silberman opined, within a reasonable degree of medical certainty, that JHMC's treatment of the decedent did not depart from the standard of care. He also opined that JHMC's treatment of the decedent did not cause or contribute to the development of decedent's pulmonary embolism.

At the outset, it is noted that Silberman's opinion is limited only to the decedent's hospitalization from February 21, 2017 through February 26, 2017. With respect to the patient's March 2017 hospitalization at JHMC, Silberman makes only the conclusory statement that it is his opinion that the decedent "was appropriately assessed and treated during his March 2017 admission to JHMC." The plaintiff's bill of particulars explicitly states that the alleged negligent acts and/or admissions of JHMC occurred from February 21, 2017 through February 26, 2017 *and* March 2, 2017 through March 30, 2017. As such, JHMC failed to establish that its treatment of the decedent during the March 2017 admission did not depart from the standard of care or that any departure during this time was not a proximate cause of the decedent's injuries.

JHMC established, prima facie, that its treatment of the decedent during his February 2017 admission did not depart from the standard of care (*see Bhim v Dourmashkin*, 123 AD3d 862 [2d Dept 2014]). Specifically, Silberman opined that JHMC appropriately administered heparin to the decedent during his February 2017 admission. He asserted that the decision to defer and facial reconstructive surgery reduced the decedent's risk of blood clots and pulmonary embolism had surgery been performed. Further, Silberman opined that, pursuant to the standard of care, when the decedent became ambulatory, and thus had a decreased risk for the development of blood clots or deep vein thrombosis (DVT), it was appropriate to discontinue heparin after the defendant was discharged on February 26, 2017 (*see Matos v Khan*, 119 AD3d 909 [2d Dept 2014]). Moreover, Silberman opined that the decedent was appropriately discharged home insofar as he was progressing nicely in physical therapy, was physically able to continue outpatient physical therapy, met his ambulation goal of ambulating 50 feet with a rolling walker, and was medically stable.

However, JHMC failed to establish, prima facie, that no claimed departure was a proximate cause of the decedent's injuries (*see Ojeda v Barabe*, 202 AD3d 808 [2d Dept 2022]). In his affirmation, Silberman merely asserted, in a conclusory fashion, that the development of the pulmonary embolism discovered during the March 2017 admission was not caused or contributed to by the treatment rendered to the decedent during his February 2017 admission. However, based on the plaintiff's allegations, she asserts that JHMC's failure to continue the decedent's anticoagulant medication and its allegedly premature discharge of the decedent to his home were proximate causes of his injuries. Thus, Silberman's conclusory assertions on this point are insufficient to establish prima facie entitlement to summary judgment (*id*).

In light of JHMC's failure to meet its prima facie burden with respect to proximate cause, to defeat the motion for summary judgment, the plaintiff is only required to raise a triable issue of fact as to whether JHMC departed from good and accepted medical practice (*see Matos*, 119 AD3d at 910).

Before turning to the merits of the plaintiff's opposition, the court will address JHMC's argument that the plaintiff failed to comply with 22 NYCRR 202.8-g(b) which sets forth that "the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph on the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried." Further, 22 NYCRR 202.8-g(c) provides that "[e]ach numbered paragraph in the statement of material facts required to be served by the moving party *may* be deemed to be admitted unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party" [emphasis added]). Here, the plaintiff submitted a counter statement of material facts, however, it contained independently numbered paragraphs that did not correspond to the numbered paragraphs set forth in JHMC's statement of material facts. JHMC argues that, as a result, its statement of material facts should be deemed admitted, and summary judgment in its favor is warranted. However, the court, in its discretion pursuant to 22 NYCRR 202.8-g(c), declines to deem JHMC's statement of material facts admitted. Moreover, CPLR 2001 and 22 NYCRR 202.1(b) give the court discretion to overlook procedural defects (*see Dowds v The City of New York*, 2021 NY Slip Op 32734[U] [Sup Ct, NY County 2021]). As such, the court will consider the merits of the plaintiff's opposition papers.

In opposition to JHMC's motion, the plaintiff relies on the affirmation of an expert whose name was redacted. The plaintiff's expert is board certified in surgical critical care, surgery, and vascular surgery, who avers that he or she worked in the surgical intensive care unit of a major metropolitan hospital for decades, and has thousands of hours of experience treating patients at risk of developing blood clots and DVT. The plaintiff's expert opined, among other things, that JHMC did not adhere to the standard of care in failing to screen for the presence of DVT before the decedent's discharge and in failing to supply the necessary prophylactic measures to prevent DVT after discharge. Specifically, the plaintiff's expert asserted that the decedent, upon his February 2017 admission, had high-risk factors for DVT including his age, immobilization due to the injuries he sustained, and traumatic injury to his face and neck with multiple severe

facial and cervical spine fractures. The plaintiff's expert also asserted that most pulmonary emboli are the result of lower extremity DVT that often begin early after trauma, and during periods of immobilization that occur while hospitalized. The plaintiff's expert opined that where, as here, the decedent's DVT risk factors continued upon his discharge, JHMC should not have discontinued anticoagulant medication. As such, the court finds that the plaintiff raises triable issues of fact as to whether JHMC departed from the standard of care by, including but not limited to, failing to screen the decedent for DVT via a venous ultrasound of the lower extremities prior to discharge, and failing to administer anticoagulant medication upon the decedent's discharge (*see Mehtvin v Ravi*, 180 AD3d 661 [2d Dept 2020]).

Moreover, the plaintiff's expert's opinion that JHMC failed to conduct a vascular ultrasound or venous duplex before discharge conflicts with Silberman's opinion that no indicated treatment beyond heparin prophylaxis that was provided would have prevented the development of the decedent's pulmonary emboli. Silberman further opined, in conflict with the plaintiff's expert's opinion, that there was no reason to order any further testing for DVT, such as a venous doppler ultrasound study. "'Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury'" (*Hutchinson v New York City Health and Hosps. Corp.*, 172 AD3d 1037, 1040 [2d Dept 2017], quoting *Feinberg v Feit*, 23 AD3d 517, 519 [2d Dept 2005]). Thus, JHMC is not entitled to summary judgment dismissing the plaintiff's complaint sounding in general negligence and medical malpractice.

Contrary to JHMC's assertion in its reply papers, the opinion of the plaintiff's expert that JHMC failed to provide physical therapy and/or venous compression devices upon the decedent's discharge does not present a new theory of liability (*see Mehtvin*, 180 AD3d at 663; *Schwartzberg v Huntington Hosp.*, 163 AD3d 736 [2d Dept 2018]). "If the theory is discernable from the pleadings, it may be considered, especially if the theory is referred to in the depositions" (*see Larcy v Kamler*, 185 AD3d 564, 566 [2d Dept 2020][internal citations omitted]). Here, the plaintiff's bill of particulars specifically alleges that JHMC was negligent "in neglecting to perform a proper discharge interview and planning to ensure [the decedent] was ready and would be stable during the days immediately following his discharge from the hospital." Moreover, the plaintiff's counsel, in deposing physicians that treated the decedent at JHMC in February 2017, asked questions regarding a referral for physical therapy upon discharge and any compression devices ordered for the decedent at discharge. Therefore, insofar as physical therapy compression devices constitute planning to

ensure the decedent's stability at home upon his discharge, and since they are referred to in the depositions, the plaintiff's assertion that JHMC failed to provide these is properly before the court (*see Mehtvin*, 180 AD3d at 663).

Finally, in addition to the causes of action for medical malpractice, the plaintiff's complaint also sets forth claims for wrongful death, lack of informed consent, negligent hiring/supervision, and loss of services. However, JHMC's moving papers failed to address these causes of action. Therefore, that branch of the motion for partial summary judgment dismissing "any and all causes of action...that ought to be dismissed as a matter of law," is denied, regardless of the sufficiency of the plaintiff's opposition papers (*see Winegrad*, 64 NY2d at 853). JHMC's contentions, made for the first time in reply, regarding dismissal of the causes of action alleging lack of informed consent and negligent hiring/supervision will not be considered (*see Grocery Leasing Corp. v P&C Merrick Realty Co., LLC*, 197 AD3d 625 [2d Dept 2021]).

Accordingly, it is

ORDERED, that JHMC's motion is denied in its entirety.

Dated: December 1, 2022

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

FILED
12/6/2022
COUNTY CLERK
QUEENS COUNTY