

**Siegel-Pirano v MJ-MC Home Health Care Agency,
Inc.**

2023 NY Slip Op 32492(U)

July 21, 2023

Supreme Court, Kings County

Docket Number: Index No. 509605/2016

Judge: Consuelo Mallafré Meléndez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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ROBIN SIEGEL-PIRANO, as the Administratrix of the Estate of
Sondra Siegel, deceased,

Petitioner,

Short Form Order

Index No. 509605/2016
Mo. Seq. 8, 9, 10, 11

-against-

MJ-MC HOME HEALTH CARE AGENCY, INC., VISITING
NURSE SERVICE OF NEW YORK, MJHS HOSPICE AND
PALLIATIVE CARE, INC., SHIRA BURNSTEIN, M.D.,
Respondents.

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HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.

Recitation, as required by CPLR §2219 [a], of the papers considered in the review: NYSCEF #s: 175-187, 240-241, 255; 188-201, 242-243, 252-254; 218-231, 233-234, 244-254, 256; 203- 217, 232, 246-247, 248-251.

Defendant MJ-MC HOME HEALTH CARE AGENCY, INC. moves this court for an Order pursuant to CPLR §3212, granting summary judgment in favor of defendant MJ-MC HOME HEALTH CARE AGENCY, INC, dismissing Plaintiff's Complaint as against them in its entirety, and in the alternative, pursuant to CPLR §3212 and §3212(e), granting partial summary judgment as to defendant MJ-MC HOME HEALTH CARE AGENCY, INC. on any theory of liability as to which the Court determines that Plaintiff has failed to raise an issue of fact; defendant MJHS HOSPICE AND PALLIATIVE CARE, INC. moves this court for an Order pursuant to CPLR §3212 granting Defendant's motion for summary judgment and dismissing Plaintiff's Complaint; defendant SHIRA BURNSTEIN, M.D. moves this court for an Order pursuant to CPLR §3212 granting defendant SHIRA BURNSTEIN, M.D. summary judgment and dismissing Plaintiff's Complaint on the grounds that the claims made against said defendant lack merit and there are no triable issues of fact for a jury to resolve; defendant VISITING NURSE SERVICE OF NEW YORK HOME CARE II d/b/a VISITING NURSE SERVICE OF NEW YORK HOME CARE s/h/i/a VISITING NURSE SERVICE O F NEW YORK ("VNS") moves this court for an Order pursuant to CPLR §3212 granting summary judgment in favor of

defendant VNS, dismissing Plaintiff's Complaint against them in its entirety. Plaintiff submitted oppositions to these motions.

In this medical malpractice and wrongful death action, Plaintiff is claiming that Sondra Siegel, a totally dependent, bedbound, obese 80 year old female who had been diagnosed with advanced Alzheimer's dementia and metastatic ovarian cancer prior to the care at issue, developed multiple pressure ulcers/bedsores which are alleged to have become infected, caused the decedent pain and suffering, and resulted in her death on July 8, 2014. Plaintiff claims that decedent developed these bedsores because the defendants failed to provide appropriate care in the prevention of bedsores and in the treatment of such bedsores once they formed and became infected.

“In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries [internal citations omitted].” *Hutchinson v. New York City Health and Hosps. Corp.*, 172 AD3d 1037, 1039 [2d Dept. 2019] citing *Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept. 2011]. “Thus, in moving for summary judgment, a physician defendant must establish, prima facie, ‘either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries.’” *Hutchinson*, 132 AD3d at 1039, citing *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 AD3d 959, 960 [2d Dept. 2015]. “Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause [internal citations omitted].” *Navarro v. Ortiz*, 203 AD3d 834, 836 [2d Dept 2022]. “When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution.” *Stewart v. North Shore University Hospital at Syosset*, 204 AD3d 858, 860 [2d Dept. 2022] citing *Russell v.*

Garafalo, 189 A.D.3d 1100, 1102, [2d Dept. 2020] [internal citations omitted]. “Any conflicts in the testimony merely raised an issue of fact for the fact-finder to resolve.” *Palmiero v. Luchs*, 202 AD3d 989, 992 [2d Dept. 2022] citing *Lavi v. NYU Hosps. Ctr.*, 133 A.D.3d 830, 832 [2d Dept. 2015]. However, “expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise a triable issue of fact [internal citations omitted].” *Wagner v. Parker*, 172 AD3d 954, 966 [2d Dept. 2019].

Defendant MJ-MC Home Health Care Agency’s expert, Jeffrey Levine, M.D, a physician board certified in Internal Medicine, with a sub-certification in Geriatric Medicine established that he is qualified to opine as to the care and treatment rendered to the plaintiff’s decedent in this case. Defendant MJHS Hospice and Palliative Care, INC.’s expert, Sharon Brangman, M.D., a physician board certified in Internal Medicine, Geriatric Medicine, and Hospice and Palliative care established that they are qualified to opine as to the care and treatment rendered to the plaintiff’s decedent in this case. Defendant Shira Burnstein, M.D.’s expert, Scott Gorenstein, M.D., a physician and Diplomate of the American Board of Emergency Medicine and Undersea/Hyperbaric Medicine, also established their expertise to opine as to the care and treatment rendered to the plaintiff’s decedent in this case. Defendant Visiting Nurse Service of New York Home Care II d/b/a Visiting Nurse Service of New York Home Care s/h/i/a Visiting Nurse Service of New York’s expert, Lawrence N. Diamond, M.D., a physician and Diplomate of the American Board of Family Practice with a Certificate of Added Qualifications in Geriatric Medicine also established their expertise to opine as to the care and treatment rendered in this case. Plaintiff’s expert, a physician certified by the American Board of Thoracic Surgery, established that they are qualified to opine as to the care the plaintiff’s decedent received in this case.

Defendant MJ-MC Home Health Care Agency (“MJ-MC”) assigned live-in home health aides (“HHAs”) to Ms. Siegel from October 28, 2013 until June 27, 2014. MJ-MC’s HHAs’ roles were to assist Ms. Siegel with her activities of daily living as directed by their plan of care. It is undisputed that they did not provide any medical care or wound care to Ms. Siegel. Defendant MJ-MC’s expert, Jeffrey Levine, M.D opines, within a reasonable degree of medical certainty, that MJ-MC did not depart from the standard of care at any point while providing services to Sondra Siegel. Defendant’s expert further opines that MJ-MC played no role in causing or contributing to the damages claimed in this case. It is the expert’s opinion to a reasonable degree of medical certainty that MJ-MC did not depart from accepted standards of care in assessing Ms. Siegel’s pressure ulcer risk status, in formulating and in implementing her plan of care. It is also the expert’s opinion that this patient was properly assessed and the care plan implemented by MJ-MC was appropriate to address Ms. Siegel’s risk for developing skin breakdown and pressure ulcers. It is also the expert’s opinion that MJ-MC’s care plan was complied with and the skin breakdown that Ms. Siegel was observed with on April 2, 2014 and which persisted until MJ-MC stopped providing services to this patient (on June 27, 2014) was not caused or exacerbated by MJ-MC’s care. Rather, the expert opines to a reasonable degree of medical certainty that the wounds the decedent developed during this period were manifestations of unavoidable skin ulceration, which can also be characterized as skin failure or terminal ulceration, and/or were further cancer metastasis. Further, there is no evidence that any of the wounds ever became infected, nor is there any evidence that the wounds played any role in Ms. Siegel’s death which, in the expert’s opinion was caused by metastatic cancer and advanced Alzheimer’s disease.

In opposition, Plaintiff's expert speculates and does not state what the standard of care is. Summary judgment is granted and any cause of action sounding in negligence and/or medical malpractice relating to Defendant MJ-MC Home Health Care Agency, INC. is dismissed. *Tsitrin v. New York Community Hosp.*, 154 A.D.3d 994 [2d Dept. 2017] [holding that summary judgment is warranted where "[t]he opinions of the plaintiff's experts were conclusory and failed to address specific assertions made by the experts of [the defendant], including those regarding proximate causation."]. With regards to claims sounding in negligence, Plaintiff does not raise an issue of fact in opposition to support denial of summary judgment.

The affirmation of Defendant MJHS Hospice and Palliative Care, INC.'s ("MJHS") expert, Dr. Brangman, established that MJHS's hospice care of the decedent, Sondra Siegel, conformed with the standard of care, and that no alleged act or omission on behalf of MJHS caused the injuries alleged herein. The expert has attested that MJHS properly assigned Home Health Aides 24 hours per day, 7 days per week to assist the decedent with palliative care in accordance with the orders of her physician. Further, MJHS's submissions establish prima facie that summary judgment is warranted on claims sounding in negligence.

While Plaintiff alleges that defendant MJHS was negligent and committed malpractice in failing to provide proper wound care to the decedent, Sondra Siegel, during Ms. Siegel's brief home hospice care with MJHS from June 26, 2014 until the date of her death on July 8, 2014, they do not raise an issue of fact with the affirmation of their expert which does not set forth the standard for the palliative service provided by this defendant.

Plaintiff also alleges that MJHS violated statutes: 10 NYCRR 415.1(b)(1); 10 NYCRR 415.1(b)(4); 10 NYCRR 415.12(c)(2); 10 NYCRR 763.4; 10 NYCRR 763.6; 10 NYCRR 766.2; 10 NYCRR 766.3; 10 NYCRR 766.4; 10 NYCRR 766.5; 42 C.F.R. §483.25(c)(1) & (2); and 42

C.F.R. §483.25(h)(2). Defendant established its *prima facie* showing that these statutes are inapplicable to this defendant and that they were not violated warranting summary judgment in their favor. Plaintiff fails to raise an issue of fact in opposition. Plaintiff also fails to raise an issue of fact as to claims of negligence. Therefore, summary judgment is granted as to all claims of medical malpractice and negligence against MJHS Hospice and Palliative Care, INC. and such claims are dismissed.

Defendant Shira Burnstein, M.D.'s expert, Dr. Gorenstein, opines that Plaintiff's decedent had metastatic ovarian cancer. As explained by Dr. Gorenstein, this causes an imbalance between protein synthesis and protein degradation and skeletal muscle resulting in catabolic signaling. A patient in catabolic status, such as decedent, is breaking down and losing overall mass, both fat and muscle. Here, the catabolic status was documented as early as February 2013 when decedent's albumin was noted to be 2.3. Supplements were appropriately recommended but decedent suffered from comorbidities existing prior to the dates of alleged malpractice, which included neurodegenerative disorders, dementia, chronic heart disease, metastatic cancer, peripheral vascular disease, incontinence, polypharmacy, frailty, bedbound status, obesity, pain, and disability led to the inevitable development of pressure injuries. Dr. Gorenstein opined that unavoidable pressure injuries develop despite optimal care and monitoring. Defendant's expert further opines that the care and treatment rendered by defendant Dr. Burnstein was in accordance with good and accepted medical practice. Defendant's expert further opines that there was no departure attributable to Dr. Burnstein that was the proximate cause of the alleged injuries.

Plaintiff alleges that defendant Shira Burnstein, M.D. was negligent, careless, and culpable of committing medical malpractice in the care, treatment and management of the

plaintiff's decedent while she was a patient of MJHS which provided home hospice care.

However, Plaintiff's expert does not raise an issue of fact as their opinions are conclusory and speculative. *Tsitrin*, 154 A.D.3d 994. Accordingly, summary judgment is granted to all claims of medical malpractice relating to Shira Burnstein, M.D. and these claims are dismissed.

Defendant VNS's expert, Lawrence N. Diamond, M.D., opines in a detailed affirmation that VNS complied fully with the standard of care during the entire period at issue. Further, it is their professional opinion, within a reasonable degree of medical certainty the patient's injuries, including the skin breakdown, were caused by the patient's declining medical status in May and June of 2014, attributable to her metastatic cancer, bed bound status, contractures, and poor intake, as previously described.

Plaintiff claims that defendant VNS, a certified home health agency ("CHHA"), failed to properly diagnose and treat pressure ulcers/bedsores that decedent, an 80 year old obese female who was bedbound with Stage 4 metastatic ovarian cancer (diagnosed in January, 2013) which was not treated, and advanced Alzheimer's dementia, developed in the last two months of her life, allegedly causing pain and suffering and resulting in her death on July 8, 2014. Plaintiff's expert alleges that defendant VNS failed to make recommendations or advocate for decedent without stating the standard of care or alleging that this was a deviation therefrom. The remainder of this expert's opinions are conclusory and speculative. Thus, Plaintiff fails to raise an issue of fact in opposition and summary judgment is granted as to all claims of medical malpractice relating to Visiting Nurse Service of New York Home Care II d/b/a Visiting Nurse Service of New York Home Care s/h/i/a Visiting Nurse Service of New York and such claims are dismissed.

With regards to the Wrongful Death cause of action, it is dismissed as all defendants established a *prima facie* case that Ms. Siegel's death was not caused by or contributed to by the defendants' care. Further, no pecuniary loss is even being claimed in this case. Plaintiff does not raise an issue of fact. As such, the wrongful death claim must be dismissed.

Plaintiff's Negligent Hiring claim similarly warrants summary judgment in defendants' favor. Where an employee is acting within the scope of his or her employment, the employer is liable under the doctrine of *respondeat superior*, and no claim may proceed against the employer for negligent hiring, retention, credentialing or supervision. *Ashley v. City of New York*, 7 A.D.3d 742, 779 N.Y.S.2d 502 [2nd Dept. 2004]. Here, Plaintiff does not allege that any of the defendants were acting outside the scope of their employment to counter Defendants' *prima facie* showing that each acted within the scope of their employment. To the extent Plaintiff alleges a cause of action for Negligent Hiring, summary judgment is granted to all defendants and all claims for negligent hiring are dismissed.

In conclusion, summary judgment is granted in its entirety and the action is dismissed in its entirety.

This constitutes the decision and order of the court.

Dated: July 21, 2023

ENTER.



Hon. Consuelo Mallafre Melendez,
J.S.C.