

Lindberg v McKinsey

2023 NY Slip Op 32515(U)

July 20, 2023

Supreme Court, New York County

Docket Number: Index No. 805233/2020

Judge: Judith N. McMahon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH N. MCMAHON PART 30M

Justice

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UTE DELUCA LINDBERG, AS THE ADMINISTRATRIX OF THE ESTATE OF HENRY HEY, UTE DELUCA LINDBERG, INDIVIDUALLY, DONNA BECKER, INDIVIDUALLY,

Plaintiff,

- v -

JAMES MCKINSEY, M.D., DARRYL BROWN, M.D., JANET HONG, D.O., ROSANNA POMPEY, R.N., MORALES VIALOU, R.N., DJOVANNIE PETIT-FRERE, R.N., MOUNT SINAI WEST

Defendant.

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Table with 2 columns: INDEX NO., MOTION DATE, MOTION SEQ. NO. and a large text box containing 'DECISION + ORDER ON MOTION'.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that defendants' motion for summary judgment pursuant to CPLR 3212 is granted to the extent that the complaint is severed and dismissed against the defendant-interns Darryl Brown, M.D., and Janet Hong, D.O.1 and the individually named nurses, Rosanna Pompey, R.N., Morales Vialou, R.N., and Djovannie Petit-Frere, R.N. The balance of the motion is denied. Mount Sinai West (hereinafter "MSW") may be held vicariously liable for the negligence of its employees at the time of trial.

This medical malpractice action arises out of treatment received by plaintiff's decedent, 62-year-old Henry Hey, during his admission to Mount Sinai West (MSW) from February 5, 2018, through March 10, 2018. Mr. Hey, a bilateral above the knee amputee, was admitted to MSW by his attending vascular surgeon, Dr. James McKinsey, for treatment of non-healing,

1 It is undisputed that Dr. Brown and Dr. Hong were interns doing a rotation as part of the anesthesia team.

necrotic and foul-smelling wounds on the right residual limb. Imaging revealed almost complete blockages throughout the arteries of decedent's lower limbs, and Dr. McKinsey admitted decedent for antibiotic therapy, pain management and CT angiogram for operative planning.

During the relevant time-period, Dr. McKinsey performed multiple complex vascular procedures to clear Mr. Hey's blockages. In addition, Mr. Hey was treated for cardiac arrest, respiratory failure requiring intubation, anemia, extensive antibiotic therapy to combat the infection in the stump wound, acute kidney injury and anasarca during his hospital stay.

The only claims in this case are for injuries arising from pressure ulcers (*i.e.*, "sepsis, infection, necrosis, inability to perform activities of daily living, inability to care for family and/or loved ones, loss of enjoyment of life, emotional distress, fear of impending death, anxiety, conscious, physical and emotional pain and suffering, shock terror and wrongful premature death" [*see* NYSCEF Doc. No. 53]), which developed on Mr. Hey's buttocks during his month-long admission to MSW. It is undisputed that Mr. Hey did not have pressure ulcers/wounds on his buttocks until after he arrived at MSW. He passed away on April 9, 2018, with the death certificate citing cardiopulmonary arrest, leg infection, and peripheral artery disease as the cause(s) of death (*see* NYSCEF Doc. No. 65). No autopsy was performed.

Defendants move for judgment dismissing the complaint on the grounds that the wounds on Mr. Hey's buttocks were not caused by negligent care and treatment, but rather because of skin failure from lack of perfusion due to his chronic peripheral artery disease and severe and chronic comorbidities. Plaintiff opposes the motion, maintaining that the wounds were definitively pressure ulcers that developed and worsened because of defendants' failures to (1) diagnose and treat the breakdown in tissue of decedent's bilateral stumps and groin; (2) recognize that decedent was at risk for pressure ulcers; (3) prevent pressure ulcers; (4) timely

diagnose and treat the pressure ulcers; (5) provide pressure ulcer prevention measures (offloading pressure); (6) improve decedent's nutrition; (7) use antibiotic cream and bandages; (8) use negative pressure wound therapy and a wound vac, and (9) remove dead or infected tissue through debridement (*see* Plaintiff's Verified Bill of Particulars; NYSCEF Doc. No. 53).

Plaintiff claims that the three individually named nurses failed to keep a clean environment, failed to timely change her late brother's hospital linen, failed to adequately check for pressure ulcers, and failed to report pressure ulcers to the wound care nurse or to the State of New York (*id.*). Plaintiff also alleges that decedent was discharged from MSW too soon.

To prevail on a motion for summary judgment, the proponent must make *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact (*see Klein v. City of New York*, 89 NY2d 833 [1996]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). "Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Ostrov v. Rozbruch*, 91 AD3d 147 [1st Dept. 2012]).

In support of the motion, defendants submit, *inter alia*, the expert affirmations of a vascular surgeon, Dr. Mark Iafrati (*see* NYSCEF Doc. No. 49), and an internist and geriatrician, Dr. Barbara Tommasulo (*see* NYSCEF Doc. No. 50). Dr. Iafrati opines to a reasonable degree of medical certainty that: (1) no act or omission by the defendants caused or contributed to the injuries alleged in this case; (2) the vascular surgery provided by Dr. McKinsey was "exemplary" (NYSCEF Doc. No. 49, para. 13), and Dr. McKinsey successfully fulfilled his role of improving perfusion "with the highest level of skill and in a way that comported with the

standard of care” (*id.*, para. 14); (3) it is “not the standard of care for an admitting physician [to] take on responsibility for each and every aspect of a patient’s care while in the hospital” (*id.*, para 16), and therefore, it was appropriate for Dr. McKinsey to rely on and defer to the nurses and wound care team to monitor decedent’s skin integrity, manage pressure ulcer prevention, and provide wound care for additional skin breakdowns. Dr. Iafrati concludes that there were no departures made by the surgical defendants in this case, and that decedent’s skin breakdown “was a result of the extremely poor perfusion in the patient’s pelvis, along with his precarious medical state” (*id.*, para. 20).

Dr. Tommasulo opines to a reasonable degree of medical certainty that the care provided by the defendants and the nursing staff at MSW was appropriate and consistent with the standard of care, and that no act or omission on the part of defendants caused or contributed to the injuries alleged (*see* NYSCEF Doc. No. 50, para. 4). It is Dr. Tommasulo’s opinion that “these wounds were not considered pressure injuries” but rather, “surgical and ischemic wounds, which are not staged or routinely measured” (*id.*, para. 17). According to Dr. Tommasulo, the defendant nurses² and other nurses/wound care specialists at MSW correctly (1) assessed Mr. Hey as being at risk for skin breakdown upon admission to MSW; (2) implemented the appropriate plan of care based on his Braden score; (3) provided pressure redistribution devices during admission; (4) regularly turned and repositioned decedent when he was unable to do so on his own; (5) ensured that hygiene needs were met, and (6) monitored decedent’s skin integrity. The doctor concludes that urgent surgical debridement was not indicated, since the wounds on decedent’s buttocks were evolving and did not show clinical signs of infection (*id.*, para. 18). Dr.

² The involvement of the named nurses was limited: Nurse Pompey-Whitley and Nurse Petit-Frere each treated decedent for one day, and Nurse Morales treated him on two consecutive days.

Tommasulo is unequivocal that the decedent's wounds were unrelated to pressure, but developed due to his severe vascular disease, other comorbidities, and incontinence.

Defendants' expert affirmations are detailed, specific and factual in nature, and are based upon the facts in the record (*see Roques v. Noble*, 73 AD3d 204, 206 [1st Dept. 2010]; *see also Pascocello v. Jibone*, 161 AD3d 516 [1st Dept. 2018]; [internal citations omitted]). Accordingly, "[t]he affirmations of defendants' expert were sufficient to meet defendants' *prima facie* burden of establishing the absence of a departure from good and accepted medical practice, or that any such departure was not a proximate cause of plaintiff's alleged injuries" (*Einach v. Lenox Hill Hosp.*, 160 AD3d 443 [1st Dept. 2018]).

"Where a defendant makes a *prima facie* case of entitlement to summary judgment dismissing a medical malpractice action by submitting the affirmation from a medical expert establishing that the treatment provided to the injured plaintiff comported with good and accepted practice, the burden shifts to the plaintiff to present evidence in admissible form that demonstrates the existence of a triable issue of fact" (*Bartolacci-Meir v. Sassoon*, 149 AD3d 567, 570 [1st Dept. 2017]; *see also DeCintio v. Lawrence Hosp.*, 25 AD3d 320 [1st Dept. 2006]; *Ducasse v. New York City Health & Hosps. Corp.*, 148 AD3d 434 [1st Dept. 2017]).

Here, plaintiff submits the redacted expert affirmation of a vascular surgeon (*see* NYSCEF Doc. No. 71), who opines to a reasonable degree of medical certainty that the defendants deviated from the standard of care in this case, and that these deviations were substantial contributing factors to Mr. Hey's infected pressure ulcers and death. Specifically, plaintiff's expert attests that Dr. McKinsey deviated from the standard of care in, *inter alia*, failing to debride Mr. Hey, which led to the progression and worsening of his pressure ulcers: "[T]he lack of accountability and responsibility by all of the medical providers was a deviation in

the standard of care and a substantial contributing factor to the horrific bedsores [decedent] developed and his death” (*id.*, para. 18). Plaintiff’s expert further opines, based on an extensive review and recitation of the hospital record, that the defendants departed from the standard of care by failing to (1) ensure that Mr. Hey was turned every two hours to prevent excess pressure to certain areas of the skin; (2) keep the skin and the pressure ulcers clean from feces and food; (3) monitor and prophylactically treat the pressure ulcers to the unacceptable extent that they were diagnosed as Stage IV, and (4) perform surgical debridement to remove the dead and infected tissue. Plaintiff’s expert is emphatic that “the standard of care required Dr. McKinsey, as the attending vascular surgeon, to perform a debridement at various times in March when Mr. Hey’s pressure ulcer was getting worse and worse to stem the tide of its progression” (*id.*, para. 22).

The Court notes at the outset that the complaint is dismissed as against Drs. Brown and Hong. It is well settled that an intern or resident “who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment cannot be held liable for malpractice so long as the doctor’s directions did not so greatly deviate from normal practice that the resident should be liable for failing to intervene” (*Tsochanos v. Zaidman*, 180 AD3d 841 [2d Dept. 2020][*citing Quille v. New York City Health & Hosp. Corp.*, 152 AD3d 808, 809 [2d Dept. 2017]; *see also Irizarary v. St. Barnabas Hosp.*, 145 AD3d 529 [1st Dept. 2016]). Here, plaintiff’s expert affidavit is silent as the conduct of the interns, and plaintiff has accordingly failed to raise a triable issue of fact as to the liability of Dr. Brown and Dr. Hong.

Likewise, the complaint is dismissed against the three individually named nurses, two of whom were never deposed. Plaintiff’s expert did not discuss the treatment rendered by any of the three named nurses, and they too are entitled to an award of summary judgment

The plaintiff's expert affirmation does, however, raise clear questions of fact sufficient to defeat summary judgment in favor of Dr. McKinsey, who admitted decedent to the hospital on February 5, 2019. "The medical experts' conflicting opinions...raise issues of fact that must be resolved at trial" (*Hendricks v. Transcare New York, Inc.*, 158 AD3d 477, 478 [1st Dept. 2018]). As such, Dr. McKinsey's motion for summary judgment is denied.

Accordingly, it is

ORDERED that the motion for summary judgment by the defendants James McKinsey, M.D., Darryl Brown, M.D., Janet Hong, D.O., Rosanna Pompey, R.N., Morales Vialou, R.N., Djovannie Petit-Frere, R.N., and Mount Sinai West is granted to the extent that the complaint is severed and dismissed as against Darryl Brown, M.D., Janet Hong, D.O., Rosanna Pompey, R.N., Morales Vialou, R.N., and Djovannie Petit-Frere, R.N.; and it is further

ORDERED that Mount Sinai West may be held vicariously liable for any negligence that the jury may find relative to any of the employees of Mount Sinai West including by any of the individually named defendants; and it is further

ORDERED that the balance of the motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Dr. Brown, Dr. Hong, Nurse Pompey, Nurse Vialou and Nurse Petit-Frere dismissing plaintiff's complaint; and it is further

ORDERED that the parties shall appear for a virtual pre-trial conference via Microsoft

Teams on September 18, 2023 at 9:30 a.m.

7/20/2023
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE

JUDITH N. McMAHON
J.S.C.