Townsend v Willoughby Rehabilitation & Health Care Ctr. LLC
2023 NY Slip Op 32651(U)
July 25, 2023
Supreme Court, Kings County
Docket Number: Index No. 507845/2020
Judge: Genine D. Edwards

At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25th day of July 2023.

P R E S E N T:

HON. GENINE EDWARDS
Justice.

----------X Decision and Order

JEAN TOWNSEND as Administratrix of the Estate of PERCY TOMPKINS, and JEAN TOWNSEND Individually,

Plaintiffs

-against- Index No.: 507845/2020

WILLOUGHBY REHABILITATION AND HEALTH CARE CENTER LLC d/b/a SPRING CREEK REHABILITATION AND NURSING CARE CENTER,

Defendant.

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The following e-filed papers read herein: NYSEF Nos.:

Notice of Motions/Orders to Show Cause/
Petition/Cross Motions and
Affidavits (Affirmations) Annexed.....38-39
Opposing Affidavits (Affirmations)..... 44
Affidavits/ Affirmations in Reply.....45

In this medical malpractice action, plaintiffs allege that defendant's failure to provide proper care, treatment, and nutrition to decedent Percy Tompkins, from August 31, 2017 to July 27, 2018, caused the development and deterioration of decedent's pressure ulcers, inter alia. The complaint sets forth four causes of action asserting violations of the Public Health Law, medical malpractice, negligence and wrongful death. Following plaintiffs' filing of the note of issue, defendant moved for summary judgment dismissing the complaint. Plaintiffs opposed the motion.

BACKGROUND

Mr. Tompkins first presented to defendant Spring Creek Rehabilitation and Nursing Care Center ("Spring Creek"), on August 30, 2017, with a past medical history including diabetes mellitus complicated by neuropathy, end-stage renal disease requiring hemodialysis, hypertension, valvular heart disease (severe mitral regurgitation, moderate mitral stenosis and moderate aortic insufficiency), congestive heart failure, atrial fibrillation, atrial flutter, status post ablation, status post automated implantable cardiac defibrillator (AICD), atherosclerosis, status post cerebrovascular accident (CVA, stroke), coronary artery disease (CAD), status-post coronary artery bypass grafting (CABG), status post myocardial infarction (NSTEMI, heart attack), anemia, chronic pain, avascular necrosis of the left hip (head of the left femur), osteoarthritis as well as alcohol and tobacco use disorders. Upon admission, Mr. Tompkins was noted to be at risk for falls, increased pain, decline in function, and increased dependency upon caregivers. The next day he was also noted to be at high risk for skin breakdown. Decedent fell the following day and was transferred to Kings County Hospital ("KCH"). He was re-admitted to Spring Creek on September 12, 2017. Upon that re-admission, his skin was noted as dry and intact. But he was noted to have a pink scar on his posterior scrotum. Care plans for the risk of falls were put into place during the October 5, 2017 through December 20, 2017 and January 16 through January 24, 2018 admissions.

During the time decedent resided at Spring Creek, he was hospitalized at KCH intermittently for varying health concerns. In one such hospitalization, he was admitted for influenza, from January 24, 2018 to through January 30, 2018. Upon his re-admission to Spring Creek, on January 31, 2018, the chart documents that he underwent a full re-admission examination, which included a head-to toe skin assessment, and his skin was found to be intact. He was able to return to his home with home care on May 25, 2018, but within three days decedent was sent back to KCH and hospitalized from May 28, 2018 through June 2, 2018. Decedent was transferred from KCH to Spring Creek on June 2, 2018. Upon admission, he was debilitated and in poor nutritional status. Physical and Occupational Therapy noted muscle weakness, poor balance, need for assistance with

all activities of daily living (e.g., eating, toileting, hygiene, dressing) and inability to walk or propel a wheelchair. In addition, he was noted to have a Stage 2 pressure injury on his right lower buttock. Defendant avers that proper care was provided and the right lower buttock pressure injury healed quickly.

Mr. Tompkins was assessed in triage at KCH on June 7, 2018, and admitted with a diagnosis of sepsis/unspecified organism and maintenance hemodialysis. The KCH records state that decedent's skin was intact on June 8th and June 9th. On June 10th a "reassessment" took place and decedent's skin was described as "not intact", a pressure ulcer was located on his sacrum. It was unstageable as the base of the wound was covered with eschar (necrotic [dead] tissue, typically black or brown in color). He returned to Spring Creek on June 15, 2018 with, among his other health disorders, the unstageable pressure wound to his right buttock/sacrum and a deep tissue injury on his right heel. On July 27, 2018, Mr. Tompkins was hospitalized, and remained at KCH until his death from sepsis on September 6, 2018.

ARGUMENT

In its motion to dismiss, defendant presents the affirmation of Barbara Tommasulo, MD., board certified in internal medicine and geriatric medicine and a certified wound specialist, who opined within a reasonable degree of medical certainty that proper care was provided by defendant to Mr. Tompkins throughout his admissions; no Public Health Laws were violated; no medical malpractice or negligence occurred; and that the pressure ulcers he sustained did not arise during the times that he was in Spring Creek, but rather during his hospitalizations at KCH; that proper wound care was provided by defendant: and the comprehensive care plans put in place during his residency appropriately addressed his multiple care needs.

In opposition, plaintiffs proffered the affirmation of a physician duly licensed in the State of New York, and board certified in internal medicine and geriatric medicine. Plaintiffs' expert reviewed the records of Spring Creek and KCH, the pleadings and plaintiff Jean Townsend's deposition transcript. Plaintiffs' expert concluded within a

reasonable degree of medical certainty that there were departures and deviations from the accepted standards of care by defendant, violating decedent's rights under the Public Health Law, and that the deviations and departures were the proximate cause of Mr. Tompkins' injuries, including but not limited to, the development and deterioration of his pressure ulcers.

The records cited by plaintiffs show the likelihood of gaps in treatment; late and/or lax implementation of protocols to prevent the formation of pressure ulcers; and the failure to have noticed that decedent was developing pressure ulcers. Plaintiffs' expert indicated that Mr. Tompkins was admitted to Spring Creek and assessed as being at a high risk for falls and for skin breakdown, yet a mere day after his admission he fell trying to transfer himself from the wheelchair to the toilet seat. Mr. Tompkins was found on the floor near his bed on October 7, 2017, and fell in the bathroom on November 14, 2017 and December 16, 2017. In 2017, while defendant noted that decedent's skin was intact, there was a pink scar on his posterior scrotum, and two weeks later, after again noting that his skin was intact, he was sent to KCH with a clogged rue-av fistula. Upon return from KCH nine days later, he was noted to have black discoloration on his feet. A pre-dialysis assessment done on October 6, 2017 mentions that Mr. Tompkins' skin turgor was normal. On October 26th, Mr. Tompkins was experiencing pain in his feet, which were dry and scaling. An x-ray found some mild arthritis. The record continues to show that possible signs of skin breakdowns were occurring, while notations that decedent's skin was intact were still being made.

On admission to defendant's facility on June 2, 2018, Mr. Tompkins was noted to have a stage 2 right lower buttock (old pressure ulcer site). This is the first time that any reference is made to the right lower buttock "old pressure ulcer site," despite decedent being in Spring Creek's care for approximately ten (10) months. During this admission, it appears that the wound was only measured once, the day before he was discharged to KCH, where he was diagnosed with sepsis secondary to a UTI.

Plaintiffs' expert notes that on June 6, 2018, decedent's skin turgor was found to be normal. However, on the same day, the wound on his scrotum was assessed by a

wound care specialist and was noted to measure 2 x 0.5 x 0.1 cm with a surface area of 1.00 cm. The treatment plan included dry protective dressing to be applied 3 times a day for 30 days, along with silver sulfadiazine. Offloading the wound and repositioning decedent as per facility protocol were recommended. Mr. Tompkins received Tylenol 30 minutes prior to his scrotum wound dressing change as a form of pain management. Despite the recommendation to reposition him, plaintiffs' expert opines that the Resident CNA Documentation Record indicates that he was neither turned nor repositioned from the first day of this admission, June 2, 2018 through June 7, 2018, and that the records indicate that turning and positioning was "not scheduled" for this entire admission.

In addition, on July 10, 2018, Dr. Hanan Miller performed a physical exam on Mr. Tompkins and noted that no edema or rashes were present on his extremities – yet the doctor failed to notate the existence of any pressure ulcers on his body despite having referred Mr. Tompkins for a wound care assessment on June 27, 2018 and July 4, 2018. Mr. Tompkins was discharged from defendant's facility for the last time on July 27, 2018. However, upon discharge to KCH, his pressure ulcer wounds were not measured.

Mr. Tompkins died at KCH on September 6, 2018, at age 79, from sepsis secondary to a urinary tract infection. Plaintiffs' expert pointed out that the septic pressure ulcers could not be ruled out as a contributing cause of his death.

In reply, defendant reiterates its contentions that Mr. Tompkins' pressure ulcers were unavoidable given his co-morbidities, and that they developed at an outside facility, not Spring Creek. Defendant argues that plaintiffs' expert did not refute these contentions. Moreover, defendant asserts that the deficiencies in the chart (*ie* gaps in time between notes that Mr. Tompkins was turned or seen by staff) are immaterial, since the deficiencies in record-keeping did not cause any injuries. Defendant seeks dismissal of the action, positing that the care plan implemented at Spring Creek and the care provided do not give rise to any claims of violation of the Public Health Law, particularly as plaintiffs' expert did not explain with specificity any particular acts linked to any specific statutes.

LAW

The elements of a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage. A defendant's negligence is the proximate cause when it is a substantial factor in the events that produced the injury *See Mazella v. Beals*, 27 N.Y.3d 694, 706, 37 N.Y.S.3d 46 (2016); *Templeton v. Papathomas* , 208 A.D.3d 1268, 175 N.YS.3d 544 (2d Dept. 2022); *Stukas v. Streiter,* 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011). "When moving for summary judgment, a defendant... must establish the absence of any departure from good and accepted medical practice or that... plaintiff was not injured thereby." *Barnaman v. Bishop Hucles Episcopal Nursing Home,* 213 A.D.3d 896, 184 N. Y.S.3d 800 (2d Dept. 2023). To sustain the burden, a defendant "must address and rebut any specific allegations of malpractice set forth in plaintiff's bill of particulars." *Mackauer v. Parikh,* 148 A.D.3d 873, 49 N.Y.S.3d 488 (2d Dept. 2017).

In opposition, plaintiff must "raise a triable issue of fact regarding the element or elements on which defendant has made its prima facie showing." *Aliosha v. Ostad,* 153 A.D.3d 591, 61 N.Y.S.3d 55 (2d Dept. 2017). To do so, plaintiff must submit an affidavit of "a[n expert] physician attesting to a departure from good and accepted practice, and stating the physician's opinion that the alleged departure was a competent producing cause of plaintiff's injuries." *Shectman v. Wilson,* 68 A.D.3d 848, 890 N.Y.S.2d 117 (2d Dept. 2009). *See Burns v. Goyal,* 145 A.D.3d 952, 44 N.Y.S.3d 180 (2d Dept. 2016) ("Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause.").

Here, defendant established its prima facie entitlement to judgment as a matter of law dismissing the action insofar as asserted against it by submitting the affirmation of an expert, who opined that decedent's skin breakdown, ulcers and death were inevitable due to his underlying conditions, and arose during decedent's hospitalizations or home care, and not while he was admitted to defendant's facility.

In opposition, plaintiffs' expert raised triable issues of fact. Among other things, plaintiffs' expert opined within a reasonable degree of medical certainty that defendant failed to note the development of pressure ulcers during decedent's admissions, failed to execute its plan for the prevention and treatment of pressure ulcers upon decedent's admission and during his residency, failed to stage or size decedent's pressure ulcers correctly, and did not turn and/or position decedent according to accepted medical standards. Plaintiffs' expert also opined that these failures constituted violations of decedent's rights under the Public Health Law. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions." *Cerrone v. North Shore-Long Is. Jewish Health Sys., Inc.*, 197 A.D.3d 449, 152 N.Y.S.3d 147(2d Dept. 2021).

Accordingly, defendant's motion for summary judgment is denied.

ENTER

Genine D. Edwards
J.S.C.