

**Clark v New York Community Hosp. of Brooklyn, Inc.**

2023 NY Slip Op 32831(U)

August 14, 2023

Supreme Court, Kings County

Docket Number: Index No. 519478/2018

Judge: Consuelo Mallafre Melendez

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At an IAS Term, Part 15 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14th day of August 2023.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
NADINE CLARK, As Administrator of the Estate of JOSEPH RAYMOND,

Plaintiff,

-against-

THE NEW YORK COMMUNITY HOSPITAL OF BROOKLYN, INC. and DITMAS PARK REHABILITATION & CARE CENTER, LLC,

Defendants.

-----X  
**HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.**

**DECISION & ORDER**

Index No. 519478/2018  
Mo. Seq. 6

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: 110 – 111, 112 – 126, 129, 130 – 152, 158 – 159

Defendant, DITMAS PARK REHABILITATION & CARE CENTER (hereinafter “DITMAS PARK”), moves this court for an order pursuant to CPLR § 3212 granting summary judgment to the moving defendant, dismissing plaintiff’s complaint with prejudice and, upon dismissal, amending the caption to remove the moving defendant and severing the claims asserted against the moving defendant, or in the alternative pursuant to CPLR § 3212 and § 3212(e), granting partial summary judgment as to the moving defendant on any theory of liability for plaintiff’s failure to raise an issue of fact.

This case involves treatment of Plaintiff at Ditmas Park Rehabilitation & Care Center for rehabilitation following a fall at home and hip surgery. Plaintiff’s Verified Bills of Particulars as to DITMAS PARK alleges negligence during the Decedent’s admissions to that facility between

April 8, 2016 and July 3, 2016. Plaintiff alleges that DITMAS PARK, their employees, and agents, were negligent in causing an ulcer on Decedent's left heel and that they failed to prevent the worsening of other decubitus ulcers.

MR. RAYMOND was transferred to DITMAS PARK on April 8, 2016, status post unilateral hip replacement. His primary diagnoses upon discharge from Kingsbrook Jewish Medical Center to DITMAS PARK included left hip fracture, diabetes mellitus, hypertension, benign prostatic hyperplasia, recurrent PE/DVT, and prostatitis. On April 19, 2016, the Decedent developed a closed blister of the left heel, which was noted to be fluid-filled. The Decedent was transferred and admitted to NEW YORK COMMUNITY HOSPITAL from May 5th through May 27, 2016. Upon his readmission to DITMAS PARK, the facility noted the presence of a Stage II ulcer of the sacrum (5cm x 1cm) and a Stage III ulcer of the left buttock (3cm x 3cm x 0.1cm)—both of which are claimed to have developed at NEW YORK COMMUNITY HOSPITAL. Plaintiff claims that Ditmas' failures caused the exacerbation of these ulcers as well.

“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].

In the instant matter, Plaintiff’s expert, Karim J. Khimani, M.D., a physician board-certified in Internal Medicine, with a sub certification in Geriatrics, established they are qualified to opine as to the care and treatment rendered to the plaintiff by Ditmas Park Rehabilitation & Care Center. An affidavit of conformity has been submitted on behalf of Plaintiff’s expert and has been received and uploaded to NYSCEF. Defendant’s expert, Vincent P. Garbitelli, M.D., a physician board-certified in Internal Medicine, established they are qualified to opine as to the care and treatment rendered to the plaintiff by Ditmas Park Rehabilitation & Care Center in this case.

Through defendant’s submissions and the affirmation of their expert Dr. Vincent Garbitelli, defendant establishes a prima face showing to support summary judgment. Among other stated opinions, Dr. Garbitelli opines that the failure of the left heel ulcer to resolve was secondary to the Decedent’s history of vascular compromise. Further he opines that the wound care rendered to the Decedent by DITMAS PARK over the course of his admission in no manner caused or contributed to his demise or death as the Decedent was admitted to DITMAS PARK in

terminal condition with a poor prognosis. Defendant's expert fails to discuss and to opine as to the alleged violations of the Public Health Law.

In response, however, plaintiff raises an issue of fact precluding summary judgment as to the claims of negligence and/or medical malpractice. Plaintiff's expert, Dr. Khimani, notes that Mr. Raymond was admitted to defendant Ditmas Park on April 8, 2016 with his skin intact. A wound care plan and the turning and positioning sheets were initiated, however the turning and positioning was not documented. He opines that the facility's failure to turn and position Mr. Raymond was negligent. Dr. Khimani states that although the record notes "all measures done" there is no documentation in the chart describing what "all measures done" indicates, or what measures, if any, were done. The expert relies on the absence of any turning and positioning records from Ditmas Park and the testimony of Nurse Baler to opine that the staff at the nursing home failed to follow its own Care Plans. Furthermore, he states that Mr. Raymond was identified as high risk for developing skin breakdown based on the Braden Scale score. He opines that while the decedent's vascular compromise was significant, the staff had the responsibility to provide a level of care that would effectively prevent the breakdown of an already compromised and high-risk area and preventative measures should have been followed for Mr. Raymond. The expert noted that the record shows that the sacral and buttocks/coccyx ulcers deteriorated to a Stage 3 and Stage 2 respectively and did not improve until June of 2016 when additional interventions were put into place. He states that despite being identified as being at risk for skin breakdown on admission and the development of breakdown noted shortly thereafter, turning and positioning, an air mattress, and pressure relief devices were not implemented until the wounds had developed. The expert opines that Mr. Raymond overall physical needs were inaccurately assessed which resulted in the development of the left heel and

progression of the sacral and left buttock pressure ulcers. Interventions were not timely implemented for pressure relief. He opines that based on the record Mr. Raymond did not receive the appropriate preventative skin integrity prevention interventions and that the care provided at Ditmas Park was substandard and lacked continuity. These failures resulted in the development of the left heel ulcer and the condition of the sacrum and coccyx ulcers. Thus, the expert opines that the staff at Ditmas Park failed to meet the standard of care.

Dr. Khimani also notes that new “CNA Accountability Record and Resident Plan of Care” should have been completed with each readmission and significant change in the patient’s condition. Yet only one CNA Accountability Record and Resident Plan of Care form for the initial admission in April 2016 was included with the record. The form for April 2016 failed to include any mattress type or indicate if a special mattress was provided to prevent breakdown. No heel pads were checked off as being provided. The “fragile skin” alert was not checked off either. A new form was not filled out for the readmission. The expert also opines that the record support Plaintiff’s claims of violations rights pursuant to the Public Health Law.

Moreover, Dr. Kimani opines that the fact that Mr. Raymond’s sacral and buttock ulcers improved indicates that with proper interventions he had the ability to heal. The expert states that this undermines defendant’s expert opinion that the pressure ulcers were unavoidable and developed solely due to his co-morbidities. The expert opines in detailed manner that this claimed negligence and violations of Mr. Raymond’s rights as a nursing home resident were each a proximate cause of the development of the left heel pressure ulcer and the worsening of the condition of the sacral/coccyx pressure ulcers while at Ditmas Park. The court notes that although the sacral and coccyx ulcers worsened for a time, they subsequently improved, the extent of the sacrum and coccyx injury/exacerbation shall be determined at trial.

As to experts' opinions, case law is clear that "mere conclusions, expressions of hope or unsubstantiated allegations are insufficient" to raise a triable issue of fact to defeat a motion for summary judgment on the issue of liability. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]. "General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment." *Salvia v. St. Catherine of Sienna Med. Ctr.*, 84 A.D.3d at 1054, citing *Heller v. Weinberg*, 77 AD3d 622, 623 [2d Dept. 2010]. Considering the conflicting opinions submitted herein, which are detailed and not speculative, summary judgment is denied as to the injuries of the left heel pressure ulcer and the sacral and coccyx ulcers claims sounding in medical malpractice and for violations of the Public Health Law relating to DITMAS PARK. *Shields v. Baktidy*, 11 AD3d 671, 672 [2d Dept. 2004].

As defendant establishes its prima facie entitlement to summary judgment as to the claims of malpractice and plaintiff submits a well detailed non conclusory or speculative expert affirmation, as discussed above, an issue of fact is raised, and summary judgment is Denied.

Summary judgment is also denied as to the request for summary judgment on the claims of violation of the Public Health Law. Defendant fails to establish its prima facie showing by failing to address these claims in their expert's affidavit.

Defendants also seek summary judgment and dismissal of claims that the alleged the alleged failures and violations of the Public Health Law caused decedent's death. Although no immediate cause of death was documented, the Decedent was noted to have suffered gastrointestinal blood loss, leukocytosis, cholecystitis, and acute renal failure in the days preceding his demise. Dr. Garbitelli opines that the Decedent's death was in no manner caused or contributed to as a result of any of the care rendered by DITMAS PARK. Rather, it is his opinion

that the Decedent's death was secondary to his gastrointestinal bleed. The expert states that there is simply no evidence within any of the records that the Decedent's death was secondary to his skin conditions. While defendant establishes their prima facie burden, plaintiff does not raise an issue of fact as to this item of damage. Plaintiff's expert does not address this sufficiently to raise an issue of fact nor discusses the manner in which the ulcers contributed to the decedent's demise. See, *Vissichelli v. Glen-Haven Residential Health Care Facility, Inc.*, 136 AD3d 1021 [2d Dept 2016]. Therefore, summary judgment is granted only to the extent of dismissing the wrongful death cause of action and the death as an element of damages in this action.

Further, it is noted that in the Bill of Particulars, Plaintiff claims that defendant's alleged failures caused a series of additional injuries. However, the only injuries discussed in opposition to this motion, to the extent of raising an issue of fact, are the injury to the left heel and the exacerbation of the ulcers on the sacrum and coccyx. These remain viable as each party sustained their respective burdens, with plaintiff establishing a causal connection between the claims and the injuries. The burden has not been met as to any other claimed injury. Therefore, summary judgment is granted as to all injuries claimed in the Bill of Particulars, with the exception of injury to the left heel and worsening of the sacrum and coccyx ulcers (as discussed above) and are dismissed.

Summary judgment is granted as to the claims for punitive damages under common law and the Public Health Law. No evidence of reckless, willful, or wanton conduct is contained in the submissions of the parties. Defendant met their initial burden by establishing "the absence of any conduct that could be viewed as so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others" (internal citations omitted). *Vissichelli v. Glen-Haven Residential Health Care Facility, Inc.*, 136 AD3d 1021, 1023 [2d Dept 2016]. In

opposition plaintiff failed to raise an issue of fact as no evidence to support these claims are contained in their submissions.

Summary judgment is Granted as to the cause of action for negligence per se as duplicative of the claims under the Public Health Law.

Accordingly,

Summary judgment is DENIED as to claims of negligence and/or medical malpractice; and

Summary judgment is also DENIED as to the request to dismiss claims of violation of the Public Health Law; and

Summary judgment is GRANTED only to the extent of dismissing the wrongful death cause of action and death as an element of damages in this action; and

Summary judgment is GRANTED as to all injuries claimed in the Bill of Particulars (except the left heel and worsening of the sacrum and coccyx ulcers as discussed above) and these are dismissed; and

Summary judgment is GRANTED as to the claims for punitive damages under common law and the Public Health Law; and

Summary judgment is GRANTED as to the cause of action for negligence per se as duplicative of the claims under the Public Health Law.

This constitutes the decision and order of the court.

**ENTER.**



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**Hon. Consuelo Mallafré Meléndez  
J.S.C.**