

**Schlager v Hospital for Special Surgery**

2023 NY Slip Op 33554(U)

October 11, 2023

Supreme Court, New York County

Docket Number: Index No. 805230/2017

Judge: Erika M. Edwards

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ERIKA M. EDWARDS**

**PART 10M**

*Justice*

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HERBERT SCHLAGER and LEAH SCHLAGER,  
Plaintiffs,

**INDEX NO.** 805230/2017

**MOTION DATE** 07/27/2023

**MOTION SEQ. NO.** 003

- v -

HOSPITAL FOR SPECIAL SURGERY,  
Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the court grants Defendant Hospital for Special Surgery’s (“Defendant”) motion for summary judgment dismissal of Plaintiffs Herbert Schlager’s and Leah Schlager’s (collectively “Plaintiffs”) complaint.

Plaintiffs brought this medical malpractice action against Defendant and alleged in substance that Defendant departed from accepted standards of practice during its care and treatment of Plaintiff Mr. Schlager following the performance of a right total knee replacement at Defendant’s facility on June 24, 2015. Plaintiff Mr. Schlager alleges in substance that on June 25, 2015, the day after the surgery, while he was recovering in the Post Anesthesia Care Unit (PACU) he used a urinal to urinate and gave it to a physical therapist to dispose of it. Mr. Schlager further alleges that he was left alone sitting on the edge of an elevated bed with his legs dangling over the edge of the bed when he slid off of the bed and fell onto the floor. At the time of the fall, the curtains had been shut by the hospital staff. Mr. Schlager alleges that he was left sitting on a blanket, wearing compression socks and tubing on both legs, a bandage on his right knee and he was connected to a surgical drain attached to a fluid bag from his knee and an IV.

In their Bill of Particulars, Plaintiffs further allege in substance that Mr. Schlager's fall was caused by the hospital staff's negligence by failing to install, maintain, or otherwise utilize proper guardrails which would have prevented him from falling onto the floor; failing to properly supervise him; failing to properly monitor him while he was still under anesthesia; failing to properly examine him; failing to appreciate the limitations of his ability to support himself and/or maintain his balance following the surgery; failing to heed the results of examinations and tests that were performed; failing to secure the bedrails by placing them in an upright position; failing to follow protocols for providing patients with assistance in leaving their beds; failing to appreciate the significance of his need for supervision; failing to follow proper protocols and failing to recognize that he was at a severely heightened risk to fall and injure himself given his symptomology upon presentation to hospital. Plaintiffs further allege that Defendant's negligence caused Mr. Schlager's injuries, including injury to his quadriceps tendon, which required a surgery to repair the damage on June 29, 2015.

Defendants now move for summary judgment in their favor. They rely on the expert affirmations of Dr. Ran Schwarzkopf, an orthopedic surgeon, and Evan Marx, a physical therapist. Defendants argue in substance that none of the hospital staff deviated from the accepted standard of care. They further allege in substance that Plaintiff Mr. Schlager was properly instructed to not get out of bed prior to his fall, that he had to ring the call bell if he needed something. Defendant further argues that Mr. Schlager was properly supervised at the time of his fall; that a proper Fall Risk Assessment was performed a little over four hours prior to his fall; that appropriate fall interventions were in place; that he was alert, wide awake and his vital signs and neurological status were normal. Therefore, there was no indication that he was dizzy or unable to follow instructions as given.

Defendants further argue in substance that Mr. Schlager was properly advised about fall prevention protocols, as he was provided with a Fall Prevention Pamphlet, which included instructions to always call for help before getting out of bed, a Knee Replacement Booklet, which advised that a physical therapist would assist him in transferring in and out of the bed safely, and he was instructed to not jump or put sudden stress on his knee. He was also provided with a Patient Safety Brochure, where he was instructed to use a cane, crutches, or a walker as directed by his physical therapist.

Therefore, Defendants argue that the care and treatment of Plaintiff was appropriate at all relevant times.

Plaintiffs oppose the motion and they rely on their expert affidavit from Danielle Hill, R.N., whom Plaintiffs describe as a nursing, PACU, care and procedures expert. Plaintiffs argue in substance that Defendant's deviations from accepted nursing practice by hospital personnel were a substantial causative factor leading to Mr. Schlager's injury. Plaintiffs argue in substance that the hospital staff should not have left Mr. Schlager alone sitting on the edge of the bed, with his legs dangling and the bed in an elevated position with the guardrails lowered because of the heightened risk of falling since he had just had a total knee replacement and had been under anesthesia.

In reply, Defendants argue in substance that Plaintiff failed to dispute that Defendant established its prima facie entitlement to summary judgment in its favor as a matter of law. Defendant further argues that Plaintiff only purported to raise a triable issue of fact as to whether Defendant was negligent by failing to supervise Mr. Schlager when the physical therapist left his bedside to dispose of the urine bottle and failing to maintain the bed in its lowest position. Therefore, Defendant argues that the court should dismiss all other claims in their Bill of

Particulars. Additionally, Defendants argue in substance that Plaintiff's expert affidavit was insufficient to defeat the motion and that the expert's opinions were misleading and unsupported by the record.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

In a medical malpractice action, a defendant doctor or provider moving for summary judgment must establish that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]). It is well settled that expert opinion must be detailed, specific, based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). If a defendant's expert affidavit contains "[b]are conclusory denials of negligence

without any factual relationship to the alleged injuries” and “fails to address the essential factual allegations set forth in the complaint” or bill of particulars, then it is insufficient to establish defendant’s entitlement to summary judgment as a matter of law (*Wasserman v Carella*, 307 AD2d 225, 226 [1<sup>st</sup> Dept 2003] [internal quotations omitted]; see *Cregan v Sachs*, 65 AD3d 101, 108 [1<sup>st</sup> Dept 2009]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant’s papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In medical malpractice actions, to defeat the motion, a plaintiff must rebut the defendant’s prima facie showing by submitting an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Roques*, 73 AD3d at 207). An expert affidavit which sets forth general allegations of malpractice or conclusions, misstatements of evidence or assertions unsupported by competent evidence is insufficient to demonstrate that defendants failed to comport with accepted medical practice or that any such failure was the proximate cause of a plaintiff’s injuries (*Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1<sup>st</sup> Dept 2008]; *Alvarez*, 68 NY2d at 325).

Competing expert affidavits alone are insufficient to avert summary judgment since experts almost always disagree, but the question is whether plaintiff’s expert’s opinion is based

upon facts sufficiently supported in the record to raise an issue for the trier of fact (*De Jesus v Mishra*, 93 AD3d 135, 138 [1<sup>st</sup> Dept 2012]). “Ordinarily, the opinion of a qualified expert that a plaintiff’s injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants” (*Diaz v New York Downtown Hospital*, 99 NY2d 542, 544 [2002] [internal quotations omitted]). However, “[w]here the expert’s ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment” (*id.*).

Summary judgment is “often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue” (Siegel, NY Prac § 278 at 476 [5<sup>th</sup> ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Summary judgment should be awarded when a party cannot raise a factual issue for trial (*Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1<sup>st</sup> Dept 1984]; CPLR 3212[b]).

Here, the court finds that Defendant demonstrated prima facie evidence of its entitlement to judgment in its favor as a matter of law and that Plaintiffs failed to raise any triable issues of fact based upon admissible, competent evidence. The court also finds that Plaintiffs’ expert’s opinions are insufficient to defeat the motion as they were general, conclusory, speculative, and unsupported by competent evidence. They also failed to address many of the assertions made by Defendant’s experts.

Defendant demonstrated that prior to his fall, Mr. Schlager had properly been advised about the risks of falling and that he had to press the call bell for assistance if he needed anything or had to move about. Defendant demonstrated that Mr. Schlager was properly supervised at all times as it was appropriate to help Mr. Schlager to sit up on the side of the bed so that he could urinate and appropriate to close the curtains around the bed and leave him alone for privacy. It

was also appropriate to leave him unattended for the brief period of time that it took to dispose of the urine. There was no indication in the evidence that Mr. Schlager was dizzy, that he was unable to understand the instructions provided to him, including that he should remain in the bed and to call out when he was finished. The evidence demonstrated that the physical therapist only stepped away from the bedside for a brief period to dispose of the urine.

Additionally, there is nothing in the evidence to raise an issue of material fact as to whether Mr. Schlager was properly supervised, whether the bed rails should have been raised while he was urinating or while the physical therapist was disposing of the urine, or that the bed was not locked or in its lowest position at the time of the fall. Therefore, there is no issue of fact supported by the record remaining to be tried.

Therefore, the court grants Defendant's motion for summary judgment in its favor.

The court has considered any additional arguments raised by the parties which were not specifically discussed herein and the court denies any additional requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court grants Defendant Hospital for Special Surgery's motion for summary judgment dismissal of Plaintiffs Herbert Schlager's and Leah Schlager's complaint; and it is further

ORDERED that the court directs the Clerk of the Court to enter judgment in favor of Defendant Hospital for Special Surgery as against Plaintiffs Herbert Schlager and Leah Schlager.

