

Rachmin v New York City Health & Hosps. Corp.

2023 NY Slip Op 33654(U)

August 14, 2023

Supreme Court, Kings County

Docket Number: Index No. 515795/2018

Judge: Consuelo Mallafre Melendez

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At an IAS Term, Part 7 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
GIDEON RACHMIN, As Administrator of the Estate of
MEYER RACHMIN, Deceased,

Plaintiffs,

-against-

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,

Defendants.

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

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

NYSCEF #s: 70 – 72, 73 – 82, 86 – 87, 89 – 90, 92

Defendant, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION (“NYCHHC”), moves this court for an order pursuant to CPLR § 3212 granting summary judgment to the moving defendants, dismissing the plaintiff’s complaint. Defendant NYCHHC also moves this court for an order pursuant to CPLR § 3211(a)(7) to dismiss plaintiff’s claims for failure to state a cause of action. Plaintiff submitted opposition to this motion.

This case involves treatment of Plaintiff at NYCHHC /Coney Island on May 27, 2017 to July 17, 2017 wherein patient developed pressure ulcers and a fungal rash. The patient was brought to the hospital on May 27, 2017 in cardiac arrest. Plaintiff claims that the patient developed necrotic and infected pressure ulcers from the lack of proper care and treatment.

“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, a physician board-certified in family medicine, geriatric, and emergency medicine, established that they are qualified to opine as to the care and treatment rendered to the plaintiff by NYCHHC. Defendant's expert, Lena Rome, RN, MSN,

CWOCN, a registered nurse board-certified in wound ostomy continence nursing, established that they are qualified to opine as to the care and treatment rendered to the plaintiff by NYCHHC.

As a preliminary matter, Plaintiff's opposition and expert affidavit do not dispute, discuss or in any way respond to defendant's motion for summary judgment seeking dismissal of the claims for lack of informed consent and negligent hiring, retention, and credentialing. Plaintiff's failure to address these allegations requires the Court to dismiss these claims in their entirety.

Plaintiff's expert in his/her affidavit based their opinion on the anecdotal testimony of the Plaintiff, Gideon Rachmin, the decedent's son rather than on the medical record. Indeed, much of the Plaintiff's testimony conflicts with the record. The records indicate that the decedent was turned on a regular schedule, his head was elevated at least at a 30 degree angle, bilateral heel protectors were in place, and the wound care nurses made regular observations using various ointments and medications to both prevent and treat any pressure ulcers. Plaintiff's expert concedes that these protocols are correct. However, Plaintiff's expert incorrectly accepts decedent's son's testimony as the basis for his/her opinion without pointing to direct medical evidence. Further, while defendant's expert notes that the ulcers that decedent developed on his ears is indicative that the patient was being turned, plaintiff's expert does not make any mention of this. See *Forrest v. Tierney*, 91 AD3d 707 [2d Dept. 2012].

Plaintiff's expert fails to appreciate or address the underlying severity of decedent's medical condition as a whole and how those co-morbidities were the main cause of the sacral pressure ulcer and his death, as explained by defendant's expert. Neurology diagnosed the decedent with severe anoxic encephalopathy post-cardiac arrest, his higher brain function ceased, he did not respond to deep pain, verbal or any physical stimuli, and was placed on a ventilator

permanently. Decedent had a significant, prior medical history including diabetes, congestive heart failure, COPD (lung disorder), end-stage renal disease on dialysis, and stroke. Decedent was also diagnosed with *C. difficile*, a bowel infection prior to the existence of any pressure sores. Plaintiff's expert's opinion fails to address defense expert's argument that decedent was basically brain dead and required a PEG, the delay in placing a PEG, and that nutrition is a key element in maintaining skin integrity.

Plaintiff's expert's affidavit is also conclusory and speculative as to the opinion that the sacrum ulcer was a "significant contributing factor" in causing decedent's death three months after his discharge from Coney Island Hospital, nor does the expert address the extent of decedent's brain injury and lack of response to painful stimuli, in discussing damages related to pain and suffering. Plaintiff's expert points to no medical evidence in the record for the conclusion that a pressure ulcer wound had anything to do with Mr. Rachmin's death. "Accordingly, because the opinions of the plaintiff's expert [are] merely speculative, [his/her] affidavit [are] properly accorded no probative force and [are] insufficient to raise a triable issue of fact (Internal citations omitted)." *Volovar v. Catholic Health Sys. of Long Is., Inc.*, 58 AD3d 830, 832 [2d Dept. 2009].

In sum, defendant establishes a prima facie entitlement to summary judgment however, plaintiff fails to raise an issue of fact through the opinions of his expert which are conclusory, speculative, and not supported by the record. *Forrest v. Tierney*, 91 AD3d 707 [2d Dept. 2012]; *DiMitri v. Monsouri*, 302 AD2d 420 [2d Dept. 2003].

Accordingly, Defendant's motion for summary judgment is GRANTED as to all claims sounding in medical malpractice relating to NYCHHC. Additionally, as aforementioned, as the

claims for lack of informed consent and negligent hiring, retention, and credentialing were not opposed these claims are dismissed. The complaint is dismissed in its entirety, with prejudice.

This constitutes the decision and order of the court.

ENTER.



Hon. Consuelo Mallafre Melendez

J.S.C.