

Johnson v Harlem Hosp.

2023 NY Slip Op 34271(U)

December 8, 2023

Supreme Court, New York County

Docket Number: Index No. 452191/2020

Judge: Erika Edwards

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This opinion is uncorrected and not selected for official publication.

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

<p>PRESENT: <u>HON. ERIKA EDWARDS</u></p> <p align="right"><i>Justice</i></p> <p>-----X</p> <p>VALERIE McBRIDE JOHNSON, as the Administratrix of the Estate of ANNIE McBRIDE,</p> <p align="center">Plaintiff,</p>	<p>PART 10M</p> <p>INDEX NO. <u>452191/2020</u></p> <p>MOTION DATE <u>04/10/2023</u></p> <p>MOTION SEQ. NO. <u>001</u></p>
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<p>HARLEM HOSPITAL, and NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,</p> <p align="center">Defendants.</p> <p>-----X</p>	<p align="center">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 43, 44, 45, 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

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, the court grants in part Defendants Harlem Hospital’s and New York City Health and Hospitals Corporation’s (collectively, “Defendants”) motion for summary judgment dismissal of Plaintiff Valerie McBride Johnson, as Administratrix of the Estate of Annie McBride’s (“Plaintiff”) complaint, filed under motion sequence 001, to the extent that the court grants the portion of the motion seeking dismissal of Plaintiff’s Second Cause of Action for Defendants’ negligent hiring, retention and supervision, Plaintiff’s Third Cause of Action for lack of informed consent, and Plaintiff’s claims related to a failure to diagnose and properly treat the deceased Plaintiff Annie McBride’s stroke. The court denies the remainder of the motion.

Plaintiff filed this action against Defendants alleging wrongful death, medical malpractice, negligent hiring, retention and supervision, lack of informed consent and negligence regarding Defendants’ treatment of the deceased Plaintiff during two admissions at Defendant

Harlem Hospital between June 12, 2018, until September 22, 2018. The claims primarily involve allegations that Defendants failed to properly prevent and treat the deceased Plaintiff's pressure ulcers and failure to timely diagnose and treat her perforated bowel. Plaintiff also alleged that they failed to timely diagnose a stroke and failed to obtain her informed consent.

Defendants now move for summary judgment dismissal of Plaintiff's complaint, under motion sequence 001. Defendants rely on the expert opinions of Dr. Alexander Merkler, a colorectal surgeon, Dr. Jerald Wishner, a wound care specialist, and Nurse Lena Rome. They argue in substance that Defendants' treatment and care of the deceased Plaintiff was well within the accepted standards of care and that no alleged departure could have proximately caused the deceased Plaintiff's injuries or death.

Defendants argue in substance that the deceased Plaintiff had severe pre-existing comorbidities, including chronic vascular disease, diabetes mellitus, stage three chronic kidney disease, hypertension, Bell's Palsy and other conditions prior to her admission to Harlem Hospital on June 12, 2018. Defendants argue that her symptoms improved and she was discharged on June 15, 2018. On June 26, 2018, she was readmitted and found to have a bowel perforation secondary to diverticulitis. She underwent a procedure to repair a 5-millimeter perforation due to ischemia, three additional abdominal surgeries to clear contaminated matter from her abdomen, resect all necrotic bowel and create two ostomies. Defendants further argue in substance that during her second admission, the deceased Plaintiff was bedridden, she had a feeding tube, a tracheostomy, and was unable to reposition herself without assistance.

Defendants further argue in substance that the pressure injuries were unavoidable and caused by her severely compromised health, vascular issues and inability to timely heal. Defendants argue that they provided her with appropriate consultations, dressings, specialty

mattresses, and surgical and bedside debridement. They further argue that none of their acts or omissions caused or contributed to the deceased Plaintiff's rapid deterioration or her death.

Defendants further argue in substance that Plaintiffs' stroke-related claim and lack of informed consent must be dismissed as Plaintiffs failed to include them in their notice of claim and that Plaintiff failed to support these claims.

Plaintiff opposes the motion and argues in substance that the court should deny the motion because Defendants failed to establish their prima facie entitlement to judgment in their favor as a matter of law and because material issues of fact remain to be tried. Plaintiff relies on the expert opinions of a New York licensed gastroenterologist and a Maryland licensed geriatrician.

Plaintiff alleges in substance that Defendants deviated from good and accepted medical standards of care and that such deviations resulted in the deceased Plaintiff's injuries and untimely death. Plaintiff argues in substance that when the deceased Plaintiff was admitted to Harlem Hospital with stomach pains on June 26, 2018, no pressure ulcers were noted on her chart and she was assessed at 14 on the Braden scale. After a series of diagnostic tests, it was determined that she had a partial small bowel obstruction versus ileus and she had surgery to repair a 5-millimeter perforation in the secum. On June 28, 2018, it was noted that the deceased Plaintiff was admitted with deep darken discoloration to sacrum and bilateral heel, indicative of DTU at very high risk of progressing. Plaintiff states in substance that during the course of her admission, Defendants permitted her condition to rapidly decline until her untimely death.

Plaintiff further argues in substance that Defendants failed to timely and appropriately diagnose and manage the deceased Plaintiff's bowel perforation during her second admission, they delayed surgical intervention and prescribed improper medications which led to an

additional surgery and multiple complications. Plaintiff also argues that Defendants failed to timely and appropriately prevent and treat the deceased Plaintiff's pressure ulcers and failed to provide proper nutrition and hydration. Plaintiff argues that they failed to develop an adequate skin care/ulcer plan and failed to appropriately document the deceased Plaintiff's treatment for her conditions. Plaintiff also argues in substance that the remaining claims should not be dismissed.

In reply, Defendants argue in substance that they established a prima facie case of entitlement to summary judgment and Plaintiff failed to submit competent expert proof to oppose the motion. Defendants further argue that Plaintiff's expert affidavits are insufficient because one or both failed to demonstrate that they possessed sufficient knowledge or expertise to testify out of their specialty, and they were conclusory, vague, and ignored relevant facts and the opinions of the defense experts. Therefore, they are insufficient to defeat the motion.

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 or dental 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 or dental 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 [1st Dept 2003] [internal quotations omitted]; see *Cregan v Sachs*, 65 AD3d 101, 108 [1st 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 or dental 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 [1st 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 [1st 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 [5th 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 [1st Dept 1984]; CPLR 3212[b]).

Here, the court finds that Defendants met their burden of establishing their entitlement to summary judgment in their favor as a matter of law and Plaintiff failed to raise disputed material

issues of fact as to Plaintiff's stroke-related claims, the lack of informed consent claim and the negligent hiring, retention and supervision claim. Therefore, the court grants dismissal of these claims.

Additionally, the court finds that Plaintiff's expert's opinions were sufficiently based on facts adequately supported in the record to raise material factual issues as to the remainder of Plaintiff's claims regarding the alleged departures and proximate causation.

Therefore, the court grants in part Defendants' motion as set forth herein.

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

As such, it is hereby

ORDERED that the court grants in part Defendants Harlem Hospital's and New York City Health and Hospitals Corporation's motion for summary judgment dismissal of Plaintiff Valerie McBride Johnson, as Administratrix of the Estate of Annie McBride's complaint, filed under motion sequence 001, to the extent that the court grants the portion of the motion seeking dismissal of Plaintiff's Second Cause of Action for Defendants' negligent hiring, retention and supervision, Plaintiff's Third Cause of Action for lack of informed consent, and alleged departures related to Plaintiff's stroke-related claims; and it is further

ORDERED that the court denies the remainder of the motion; and it is further

ORDERED that the parties are directed to appear for a settlement/status conference and to set a trial date on March 7, 2024, at 9:30 a.m., in Part 10, located in Room #412 at 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

12/8/2023

DATE


ERIKA EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE