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 11th day of December 2023.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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WANDA CORBETT, as Administrator of the Estate of JEANETTE PENNY,

Plaintiff,

-against-

BORO PARK CENTER FOR REHABILITATION AND HEALTHCARE and BORO PARK OPERATING CO, LLC d/b/a BORO PARK CENTER FOR REHABILITATION AND HEALTHCARE,

Defendants.

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DECISION & ORDER

Index No. 504961/2021
Mo. Seq. 2

HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.
Recitation, as required by CPLR §2219 [a], of the papers considered in the review:
NYSCEF #s: 34 – 37, 38 – 65, 68 – 70, 71 – 73

Defendant BORO PARK CENTER FOR REHABILITATION AND HEALTHCARE ("Boro Park") moves pursuant CPLR § 3212 for summary judgment of all claims against them, or in the alternative, granting partial summary judgment of the negligence, malpractice, statutory, wrongful death, gross negligence, and punitive damages claims (Sequence # 2).

This action arises out of alleged acts of malpractice and negligence committed by Boro Park in the care and treatment of the decedent, Jeanette Penny. The decedent was admitted to Boro Park on July 7, 2017, on transfer from Maimonides Medical Center ("Maimonides"). At issue is a fall that decedent sustained on August 18, 2017 at approximately 9:25am while in her room at Boro Park. The fall was unwitnessed, and employees of Boro Park responded to the decedent's shouts after the alleged incident. Decedent was found on the floor in her room, sitting between her recliner and wheelchair. The decedent indicated she was trying to walk with the

wheelchair, as she claimed the doctor instructed, when she bumped into her wheelchair and fell. The decedent was observed wearing sneakers, and the wheelchair was in a locked position. The report of the incident indicates the decedent fell as a result of attempting to ambulate independently without seeking assistance. Decedent complained of pain in her hip and was transferred to Maimonides where she was treated with a right hip arthroplasty as a result of the fall. She was readmitted to Boro Park on August 24, 2017. Decedent remained at Boro Park until she was discharged on November 30, 2017. Decedent died on September 10, 2019.

Plaintiff, the decedent's daughter, alleges that the fall on August 18, 2017 did not occur as a result of the decedent attempting to independently ambulate without assistance. Rather, plaintiff alleges that upon arriving to Boro Park on the date of the incident, the decedent told her she had fallen while in the bathroom. Plaintiff testified the decedent told her a "lady" pushed her wheelchair to the bathroom, where she stood up by the sink. The lady left the decedent standing by the sink and told her she would be right back. According to the plaintiff, decedent then allegedly fell in the bathroom and hit her head on her wheelchair. It is noted that all reports and documentation of the fall indicate that decedent fell on the floor in her room and was found sitting between her recliner and wheelchair.

As a preliminary matter, defendant argues that such statements are hearsay and violative of the Dead Man Statute, therefore cannot be used to create an alternate factual scenario such as to raise an issue of fact to defeat summary judgment. *See e.g., Rallo v. Man-Dell Food Stores, Inc.*, 117 A.D.3d 705, 706 [2d Dept 2014]. Plaintiff has failed to address or dispute this argument. Defendants, however, have established that such statements of the plaintiff, allegedly made by the decedent, are hearsay and are not corroborated by any evidence in the record. As such, the plaintiff's hearsay testimony is insufficient to raise a triable question of fact as to how

the fall occurred. "Where a party fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists." *144 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 A.D.3d 757, 761-62 [2d Dept 2019].

Defendant moves for summary judgment as to the plaintiff's claim for medical malpractice. "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." *Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept 2011]. "In moving for summary judgment dismissing a complaint alleging medical malpractice, a 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." *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 AD3d 959, 960 [2d Dept 2015]. "Once a showing has been made, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact." *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].

As to the expert testimony, "[E]xpert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact." *Wagner v. Parker*, 172 A.D.3d 954, 955 [2d Dept 2019]. "An expert opinion submitted in opposition should address specific assertions made by the movant's experts, setting forth an explanation for the reasoning and relying on specifically cited evidence in the record" *Murray v. Central Island Healthcare*, 205 A.D.3d 1036, 1037 [2d Dept 2022].

Defendant submits the expert affirmation of Roy Goldberg, M.D., a physician licensed to practice medicine in New York. Dr. Goldberg is board certified in Internal Medicine and Geriatric Medicine. Dr. Goldberg opines that Boro Park did not deviate from the accepted standard of care. Dr. Goldberg outlined the protocols that were in effect and updated before the decedent's fall and opined that these were within the standard of care. Defendant's expert noted that Plaintiff testified her mother always used the call bell when she needed to summon assistance. Additionally, the records indicate that the decedent was educated on the use of the call bell and that it was within reach of the patient. He opines that the decedent was properly assessed, and the fall prevention care was properly implemented. Further, he opines that additional safety measures, such as a lap belt, chair alarm, bed alarms or 1:1 continuous monitoring were not needed and were not the standard of care required for the decedent. Dr. Goldberg specifically opines that bed alarms and chair alarms are only used when the resident has a history of non-compliance, which based on the record, the decedent did not have a history of attempting to ambulate unassisted. Further, 1:1 supervision is not standard at nursing homes, even for high-risk fall residents. Dr. Goldberg opines that lap belts are a method of restraint, only used in emergency situations. Dr. Goldberg opines that Boro Park properly responded to the decedent's fall and timely transferred the decedent to the hospital.

In opposition, plaintiff submits the affirmation of a physician licensed to practice medicine in New York, who is board certified in Internal Medicine and Geriatric Medicine. Plaintiff's expert opines that defendant deviated from the standard of care by failing to properly develop, implement and update an adequate care plan to prevent decedent from falling. Plaintiff's expert opines that defendant should have implemented precautions such as a bed alarm, chair alarm, floor mat and 1:1 observation.

Plaintiff's expert does not address defendant's claim that bed and chair alarms are only used for residents with a history of noncompliance, and 1:1 monitoring is only used in exceptional circumstances. Plaintiff's expert simply states, in a conclusory manner, that defendant's failure to implement such measures was a departure from the standard of care. Furthermore, plaintiff's expert opinion that defendants failed to provide a comprehensive fall prevention care plan is contradictory, unsupported by the facts, and speculative. Although Plaintiff's expert opines that the plan was not properly implemented, the record indicates otherwise. Indeed the plaintiff's expert states that the decedent was instructed to use the call bell, as per the fall prevention care plan. Plaintiff's expert opinion that the decedent was improperly assessed is further contradicted by the record, as the evidence indicates the decedent was assessed upon intake and the plan was regularly updated.

Plaintiff's expert claims that Boro Park staff determined that decedent was assessed as a no fall risk despite a prior fall. The expert attempts to claim that the nursing home, and its nurses/ CNAs told decedent, to walk. However, it is noted that the physician concedes that this assessment was by Dr. Lock, a non-party physician. Indeed, as a matter of law, Defendant nursing home's legal responsibility extends only to its nurses/ CNAs as caregivers, and not to the independent physician.

Furthermore, many of plaintiff's expert opinions rely on the hearsay statements made by the decedent to the plaintiff after the fall. As discussed above, such statements are unsupported by the evidence, uncorroborated, and contradicted by the decedent's own statements to the defendant. Opinions based on these statements have no basis in the record and may not be considered to defeat a motion for summary judgment. These opinions are conclusory and fail to adequately address the defendant's expert opinion that such measures were not the standard of care. While defendant has established its prima facie burden for summary judgment with detailed opinions supported by the evidence, plaintiff has failed to raise a triable issue of fact as its opinions are speculative and conclusory. Accordingly, summary judgment is granted as to the claims of medical malpractice.

Defendant further moves for summary judgment as to the claims of violation of the Public Health Law. Plaintiffs allege that defendants failed to take all steps reasonable and necessary to prevent and limit decedent's fall, injury from such fall, and deprived her of her rights afforded under PHL § 2801-d. "The basis for liability under the statute is neither deviation from accepted standards of medical practice nor breach of a duty of care. Rather, it contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule" *Novick v. South Nassau Communities Hosp.,* 136 A.D.3d 999, 1001 [2d Dept 2016] *quoting Zeides v. Hebrew Home for Aged at Riverdale,* 300 A.D.2d 178, 179 [2d Dept 2002] [internal citations omitted]. PHL § 2801-d(1) states that a nursing home may not be held liable for injuries from depriving a resident's rights if it "exercised all care reasonably necessary to prevent and limit the depravation and injury."

Defendant's expert affirmation sets forth that the defendant did not violate any applicable federal and state regulations. As previously explained, Dr. Goldberg opines that defendant

facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the plaintiff.

In opposition, plaintiff has failed to raise a triable issue of fact. As aforementioned, plaintiff's expert opinion is conclusory, speculative, and unsupported by the evidence. Plaintiff's expert opinion as to defendant's alleged violations PHL § 2801-d offers no basis in the record for such opinions. Plaintiff's expert opines that defendant's failure to properly assess, evaluate, and plan for the care of the decedent was in violation of numerous regulations underlying the Public Health Law. However, the expert does not refute Dr. Goldberg's opinion or the evidence which indicates the defendants adequately assessed and implemented a fall prevention plan. Plaintiff's expert opinion as to such violations are conclusory and speculative and offer no details. Plaintiff's expert further opines that defendants failed to take all steps reasonable and necessary to prevent injury to the decedent, however, provides no evidence to support such allegations. The expert fails to address Dr. Goldberg's specific assertation that defendants took all steps reasonable and necessary, as evidenced by the record.

Finally, plaintiff's expert opines that defendant was neglectful in the treatment and care of decedent, by failing to provide appropriate care. The expert states that the record indicates that decedent was experiencing a period of forgetfulness prior to the fall, and the defendant was negligent in treating her. The expert does not address the records indicating that the decedent's mental status was alert, and all safety precautions were in place. Further, the expert does not provide any explanation as to the defendant's alleged neglect beyond stating, in a conclusory manner, that the decedent had periods of forgetfulness. Accordingly, as plaintiff does not raise an issue of fact to rebut defendant's prima facie entitlement, summary judgment as to the claim for violation of Public Health Law is granted.

Defendant further argues that the plaintiff's claim for negligence must be dismissed, as such claims sound in and merge into the plaintiff's claim for medical malpractice. When the conduct at issue constitutes medical treatment or bears a substantial relationship to medical treatment by a licensed physician, the claim is grounded in medical malpractice. When the gravamen of the complaint is not negligence in rendering medical treatment, but the failure to fulfill a different duty, the claim constitutes ordinary negligence. *Rabinovich* 179 A.D.3d at 93; *see also Jeter* 172 A.D.3d at 1340; *Davis v. South Nassau Communities Hosp.*, 26 N.Y.3d 563, 580 [2015]; *Spiegel v. Goldfarb*, 66 A.D.3d 873, 874 [2nd Dept 2009]. Defendant argues that the gravamen of plaintiff's complaint is medical malpractice. Defendant has established that such claim is grounded in medical malpractice, as the issue complained of is the defendant's medical facility's care, supervision, and assessment of the decedent. However, plaintiff has failed to address or refute the defendant's argument. As such, the plaintiff's cause of action for ordinary negligence is dismissed. *See 144 Woodbury Realty,* 178 A.D.3d at 176-62.

Defendant moves for summary judgment as to the claim for wrongful death. Plaintiff has failed to refute this argument, as such summary judgment is granted. *See 144 Woodbury Realty,* 178 A.D.3d at 176-62.

In sum, the defendant has made a showing of entitlement to summary judgment as to all causes of action against them. Accordingly, the motion for summary judgment for all claims is GRANTED (Seq. 2). The clerk is directed to enter judgment in favor of BORO PARK.

This constitutes the decision and order of the Court.[1]

ENTER,

Hon. Consuelo Mallafre Melendez
J.S.C.

[1] This decision was drafted with the assistance of legal intern Heather Herndon, Brooklyn Law School.