

**Public Admr. of Bronx County v  
New York City Health & Hosps. Corp.**

2023 NY Slip Op 34445(U)

December 18, 2023

Supreme Court, New York County

Docket Number: Index No. 452724/2021

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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PUBLIC ADMINISTRATOR OF BRONX COUNTY AS THE ADMINISTRATOR OF THE ESTATE OF WILLIE STACY, DECEASED,

Plaintiff,

- v -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendant.

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INDEX NO. 452724/2021

MOTION DATE 11/09/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 163, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the court denies Plaintiff Public Administrator of Bronx County as Administrator of the Estate of Willie Stacy, Deceased's ("Plaintiff") motion for summary judgment as to liability in Plaintiff's favor.

Plaintiff brought this medical malpractice action against Defendant New York City Health and Hospitals Corporation ("Defendant") alleging Defendants were negligent in their care and treatment of the Deceased Plaintiff by failing to prevent and treat pressure ulcers during the Deceased Plaintiff's admission to Harlem Hospital from September 20, 2018 to October 25, 2018. Plaintiff alleges in substance that on October 25, 2018, the Deceased Plaintiff was discharged to hospice care at Goldcrest Care Center, where he died because of his injuries.

Plaintiff now moves, under motion sequence 003, for summary judgment in Plaintiff's favor on the issue of liability. Plaintiff relies on the expert affidavit of Mary Stein, who is a Registered Nurse, licensed in New York, and she is a former director of a skilled nursing facility

with a Master of Nursing degree. Plaintiff argues in substance that Defendant departed from good and accepted practice by failing to properly evaluate the condition of the Deceased Plaintiff's skin by using the criteria of the Braden Scale upon admission and repeating the evaluation at least once each nursing shift; by failing to create and implement a Nursing Care Plan for the prevention of skin breakdown and pressure ulcers; by failing to properly treat the Deceased Plaintiff to prevent skin breakdown and pressure ulcers, including turning him every two hours, providing pressure reducing devices and skin protective ointment; by failing to properly care for and treat the skin breakdown and pressure ulcers; by failing to accurately document the examinations, care and treatment provided; and by failing to properly provide and document perianal care when he defecated and urinated in his bed. Plaintiff further argues that such departures are evident in the hospital record and that there are no triable issues of fact.

Defendant opposes Plaintiff's motion and argues that Plaintiff failed to establish a prima facie showing on any basis for entitlement to summary judgment. Defendant argues in substance that Plaintiff's motion is patently deficient as a matter of law because it fails to include an expert affirmation from a duly licensed physician to support Plaintiff's claim that there is a causal nexus between the alleged departures and Plaintiff's alleged injuries.

If the court declines to deny Plaintiff's motion based on Nurse Stein's affidavit, then Defendant relies on the expert affirmation of Dr. Alan Pollack, a geriatric care, wound care and infectious diseases expert to argue that there were no departures from the applicable standards of care and that that Defendant did not proximately cause any of the Deceased Plaintiff's alleged injuries. Defendant argues in substance that at the time of the Deceased Plaintiff's admission to Harlem Hospital, he was a long-term resident of Gold Crest Care Center nursing home with degenerative dementia, end stage renal disease, and he had a history of numerous comorbidities,

including, but not necessarily limited to, aortic aneurysm, chronic obstructive pulmonary disease, diabetes, and hypertension. He was incontinent and needed assistance eating, moving and repositioning. The Deceased Plaintiff's admission was due to his significant seizure after dialysis which caused a severe deterioration of his medical condition.

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]).

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]).

To establish a prima facie case of liability in a medical malpractice action, a plaintiff must prove 1) the standard of care in the locality where the treatment occurred, 2) that the defendant breached that standard of care, and 3) that the breach of the standard was the proximate cause of the injury (*Berger v Becker*, 272 AD2d 565, 565 [2d Dept 2000]). Unless a

plaintiff demonstrates that a matter is within the experience and observation of the ordinary juror; i.e. that it involves *res ipsa loquitur*, a plaintiff in a medical malpractice case requires an expert's opinion to establish a *prima facie* case (*Rodriguez v Saal*, 43 AD3d 272, 276 [1<sup>st</sup> Dept 2007]). It has been held that an expert opinion from a nurse, even when supported by hospital records and deposition testimony, "is insufficient to establish a causal link between the hospital's alleged breach of duty and the decedent's deterioration and eventual death" (*Zak v Brookhaven Mem. Hosp. Med. Ctr.*, 54 AD3d 852, 853 [2d Dept 2008]). Even when a plaintiff includes an expert opinion from a duly licensed physician, if such affirmation is insufficient, it has been held that a nurse's affidavit is insufficient to demonstrate proximate causation because it offered medical opinions and conclusions that the expert was not competent to render (*Abalola v Flower Hosp.*, 44 AD3d 522, 522 [1<sup>st</sup> Dept 2007] [internal citations omitted]).

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 Plaintiff failed to satisfy its initial burden of establishing *prima facie* entitlement to judgment in its favor as to liability as a matter of law. The court agrees with Defendant and finds that Plaintiff failed to meet its burden of demonstrating that the alleged departures caused or contributed to Plaintiff's alleged injuries and death. Plaintiff's expert, Nurse Stein, who is not a duly licensed physician, is not competent to opine on proximate causation. Therefore, Plaintiff failed to satisfy its initial burden and the burden never shifted to Defendant.

Alternatively, even if Plaintiff made such initial showing, then the court finds that Defendant demonstrated disputed issues of fact requiring a trial in this matter.

Therefore, the court denies Plaintiff's motion for summary judgment as to liability.

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

As such, it is hereby

ORDERED that the court denies Plaintiff Public Administrator of Bronx County as Administrator of the Estate of Willie Stacy, Deceased's motion for summary judgment in Plaintiff's favor as to liability.

This constitutes the decision and order of the court.

*Erika M. Edwards*  
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<u>12/18/2023</u>			<u>ERIKA M. EDWARDS, J.S.C.</u>
<b>DATE</b>			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE