

Brill v Lenox Hill Hosp.

2023 NY Slip Op 34650(U)

January 13, 2023

Supreme Court, New York County

Docket Number: Index No. 805307/2018

Judge: John J. Kelley

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

PRESENT: HON. JOHN J. KELLEY **PART** **56M**

Justice

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DIANA BRILL,

Plaintiff,

- v -

LENOX HILL HOSPITAL, JACK RESNICK, M.D., DUANE
READE INC., and JOHN DOE R.Ph., also known as V.C.M.,
R.Ph., true name being fictitious and unknown at this time,

Defendants.

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INDEX NO. 805307/2018

MOTION DATE 11/16/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 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, 105, 106, 107, 108, 109, 112, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 147, 149, 152, 153, 154, 155, 156

were read on this motion to/for SUMMARY JUDGMENT.

In this action to recover damages for medical malpractice based upon alleged departures from good and accepted medical care and lack of informed consent, and for negligent hiring and training of hospital and pharmacy personnel, the defendant Lenox Hill Hospital (Lenox Hill) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against it. The plaintiff, Diana Brill, opposes the motion. The motion is granted only to the extent that Lenox Hill is awarded summary judgment dismissing the negligent hiring and training cause of action insofar as asserted against it, and the motion is otherwise denied.

The facts of this dispute are set forth in great detail in this court's January 11, 2023 order deciding MOTION SEQUENCE 002. Briefly, the plaintiff's claim against Lenox Hill is that, in, the course of her admission to that hospital from November 24, 2016 to November 28, 2016, hospital physicians prescribed her the antibiotic Levaquin (levofloxacin) to treat her for community acquired bacterial pneumonia, that she was more than 60 years old and on a

regimen of the corticosteroid Prednisone at the time, that it was known in the medical community as of 2016 that the administration of Levaquin to a person of her age who was on steroids presented a high risk of tendonitis and tendon rupture, and that, subsequent to the administration of Levaquin, she sustained bilateral gluteal tendon ruptures that left her permanently disabled. She further asserted that Lenox Hill failed to obtain her fully informed consent to the administration of Levaquin, as none of its personnel informed her about the known risks and dangers of that drug, particularly when prescribed at the same time as Prednisone, and failed to educate her about alternative, equally effective antibiotic treatments that posed lesser dangers.

In her complaint, the plaintiff asserted that, between November 24, 2016 and November 28, 2016, she was an inpatient at Lenox Hill for the treatment of pneumonia, and that between November 29, 2016 and early December 2016, the defendant Jack Resnick, M.D., an internist, provided her with follow-up treatment after her discharge from the hospital. She averred that Lenox Hill negligently treated her, failed timely and properly to take an accurate history from her, and failed to account for her prior medical and pharmaceutical history, thus negligently prescribing Levaquin at high doses despite being contraindicated for a patient who, like her, also was taking corticosteroids. She further alleged that Lenox Hill failed timely and properly to stop, change, or adjust her medication regimen. The plaintiff further alleged in her complaint that Lenox Hill committed malpractice in failing to inform her of the contraindicated nature of the use of Levaquin while simultaneously taking Prednisone, the risks and benefits inherent in taking those two drugs simultaneously, and the alternatives to the administration of Levaquin to treat the pneumonia. She asserted that a reasonable patient in her position would not have consented to the use of Levaquin had she known of the risks, benefits, and alternatives.

In her bill of particulars as to Lenox Hill, she made many of the same allegations of malpractice as she made against Resnick, which are detailed in the January 11, 2023 order. More specifically, she asserted that Lenox Hill, and “its agents, servants, staff members,

employees and/or independent contractors,” committed malpractice in administering an excessive amount of Levaquin to her during her admission, and in failing to take into consideration her age and other medications that she was taking when formulating a plan to administer Levaquin. She asserted that the persons formulating and executing the plan failed “to take into consideration the fact that the plaintiff was a long-term user of prescribed Prednisone at the time Levaquin was being administered,” failed “to take into consideration the consequences of simultaneously administering Levaquin and Prednisone to a patient of plaintiff’s age,” and failed “to realize and recognize that the administration of Levaquin in conjunction with Prednisone places a patient, and particularly elderly patients, at higher risk for developing tendon injury and rupture.” The plaintiff asserted that Lenox Hill and its employees and agents committed malpractice in failing appropriately to titrate the dosage of Levaquin that was ordered and administered her during her hospitalization, so as to prevent the development of tendon rupture, in failing to ensure that she was not “overdosed or overmedicated” with Levaquin, and thus in causing her to become overmedicated with Levaquin. She further asserted that Lenox Hill failed properly to document her chart as to the total amounts of medications that were administered to her.

The plaintiff further asserted in her bill of particulars that Lenox Hill departed from the good and accepted standards of medical care in failing timely and properly to consult with Resnick regarding the prescription and administration of Levaquin subsequent to her discharge, in failing timely and properly to consult with necessary specialists, including endocrinologists, regarding the prescription, dosage, and administration of Levaquin, and in failing to take all necessary steps to prevent the development of injuries such as tendon rupture.

In her bill of particulars as to Lenox Hill, the plaintiff reiterated her contention that its staff failed to obtain her fully informed consent to the administration of Levaquin, as they did not inform her of the known risks of the drug, the known risks of Levaquin usage to elderly patients

and patients on a maintenance regimen of corticosteroids such as Prednisone, the benefits of Levaquin as opposed to alternative treatments, and the risks and benefits of such treatments.

The plaintiff claimed that the same injuries that she enumerated in her bill of particulars as to Resnick were proximately caused by Lenox Hill's malpractice, including tendon ruptures, surgeries needed to repair them, severe adverse intraoperative and post-operative sequelae of those surgeries, and her ultimate inability to walk, as well as torn ligaments in her right ankle, necessitating surgical interventions under general anesthesia on March 6, 2018 and May 29, 2018, respectively, along with a hematoma and collapsed arch in the right foot.

In support of its motion, Lenox Hill submitted the pleadings, the bill of particulars, relevant medical, pharmacy, and hospital records, the parties' deposition transcripts, an attorney's affirmation, and the expert affirmation of internist and pulmonary and critical care specialist Mark S. Silberman, M.D. Dr. Silberman opined that Lenox Hill did not depart from good and accepted practice in prescribing Levaquin or in failing to consult with Resnick after the plaintiff's discharge from the hospital, and that nothing that Lenox Hill did or did not do caused or contributed to the plaintiff's injuries. Dr. Silberman essentially reiterated the arguments made by Resnick's expert, Mitchell H. Charap, M.D., that the patient was a proper candidate for Levaquin and that Levaquin was the most accepted first-line antibiotic for the treatment of community acquired bacterial pneumonia in 2016. He further opined that, notwithstanding the plaintiff's age, or the fact that she was on a 5 milligram (mg) per day maintenance dosage of Prednisone when she was admitted, 60 mg per day of Prednisone for two of the five days of her hospitalization, and 40 mg per day of Prednisone for one of those days, it was not a departure from good and accepted practice to prescribe 750 mg of Levaquin to the plaintiff every 48 hours during her hospitalization. Dr. Silberman also concluded that it was not a departure to decline to switch to another antibiotic once the plaintiff's fever had abated, and that other antibiotics nonetheless were inferior to Levaquin in the treatment of pneumonia. He also averred that

Lenox Hill's interactions with Resnick after the plaintiff's discharge did not constitute a departure from good and accepted care.

Dr. Silberman additionally averred that the administration of Levaquin, at the dosages prescribed by Lenox Hill over a five-day period, did not cause or contribute to the plaintiff's tendon ruptures or the need for surgeries. As did Dr. Charap, he attributed the plaintiff's tendon ruptures to a fall that she sustained on or around December 25, 2016, or to conditions that antedated her hospitalization. As he framed it, the plaintiff's "history of injuries as a dancer, combined with her pre-existing rheumatoid arthritis, pre-existing hip pain, and multiple falls are more likely the cause of her orthopedic issues, including her gluteal tendon and ligamentous ankle tears." Dr. Silberman attributed the plaintiff's ankle ligament tears to degenerative processes, including osteonecrosis, and asserted that the complications arising from her September 12, 2018 right hip surgery could not be attributed to the use of Levaquin.

Dr. Silberman further asserted that it was not necessary to obtain a patient's consent to the administration of individual medications, including antibiotics such as Levaquin, in order to comport with the applicable standard of care. He also asserted, in effect, that Lenox Hill did not fail properly to train its medical and pharmacy employees.

In opposition to Lenox Hill's motion, the plaintiff relied on the same documentation that the hospital had provided to the court, submitted the same personal affidavit that she had submitted in opposition to Resnick's motion, and submitted the same expert affidavit of internist Rebecca A. Andrews, M.D., that she had employed in connection with Resnick's motion. The contents of those affidavits are described in detail in this court's January 11, 2023 order. Dr. Andrews provided essentially identical opinions with respect to Lenox Hill's alleged departures from accepted practice as she did with respect to Resnick's alleged departures. She expressly disputed all of Dr. Silberman's opinions, concluding that Lenox Hill departed from good practice by prescribing Levaquin to the plaintiff in light of the fact that she was 73 years old and was on a maintenance regimen of Prednisone of 5 mg per day, with the dosage increased during her

admission, that it was known in the medical community as of 2016 that Levaquin posed an increased risk of tendon rupture in patients such as the plaintiff, that Levaquin was not the preferred front-line antibiotic treatment for community acquired bacterial pneumonia as of 2016, let alone the only one, that it was a departure from good practice to continue Levaquin rather than switching to other antibiotics after the plaintiff's initial good response to the drug, that Lenox Hill's medical staff should have consulted with specialists and with Resnick after the plaintiff's discharge in order to recommend that Levaquin be discontinued rather than continued, that even a small, short-term administration of Levaquin causes tendon ruptures in patients such as the plaintiff, and that the administration of Levaquin, rather than pre-existing rheumatoid arthritis or prior falls, caused the plaintiff's tendon ruptures, the concomitant surgeries leading to adverse sequelae, the hematoma, and the ankle ligament tears. With respect to Lenox Hill, Dr. Andrews also faulted its in-house pharmacy for failing to flag the contraindication involved in prescribing Levaquin to an elderly patient with a history of Prednisone use. As she phrased it,

“[t]he hospital pharmacy likely had an alert linked to fluoroquinolone use in patient also prescribed prednisone and therefore, should have been alerted to this error.

“Pharmacists, when filling a prescription, do a ‘drug utilization review’ which will identify any potential contraindications among the medications ordered for a particular patient. . . .

“It is my opinion to a reasonable degree of medical certainty that the failure by the Hospital pharmacy to question these orders was a departure from good and accepted standards of hospital care and practice. It is my further opinion that the failure by both the Defendant Hospital and defendant Dr. Resnick to timely recognize the harm they were doing to Ms. Brill and the greatly enhanced risk they were putting her at to develop tendon ruptures constitutes departures from good and accepted standards of medical care.”

She also unequivocally asserted that a physician must obtain a patient's fully informed consent to the administration of particular drugs.

In reply, Lenox Hill raised the same arguments that Resnick did with respect to departures from good practice, proximate cause, and lack of informed consent. It also argued that the plaintiff raised, for the first time in her expert's affidavit, her contention that the Lenox

Hill pharmacy was negligent for failing to undertake a drug utilization review. Hence, it contended that the plaintiff should not be permitted to pursue such a theory of recovery.

The law applicable to summary judgment motions, medical malpractice causes of action, and lack of informed consent claims was analyzed in detail in this court's January 11, 2023 order. As the court explained therein, the failure of the plaintiff and her expert to include certificates of conformity with their out-of-state affidavits was a mere irregularity that may be corrected nunc pro tunc by submitting the proper certificate, and those affidavits thus will nonetheless be considered in connection with this motion as well. (see *Parra v Cardenas*, 183 AD3d 462, 463 [1st Dept 2020]; *Bank of New York v Singh*, 139 AD3d 486, 487 [1st Dept 2016]; *DaSilva v KS Realty, L.P.*, 138 AD3d 619, 620 [1st Dept 2016]; *Diggs v Karen Manor Assoc., LLC*, 117 AD3d 401, 402-403 [1st Dept 2014]; *Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009]). For the same reasons as this court denied Resnick's motion for summary judgment dismissing the medical malpractice and lack of informed consent causes of action, those branches of Lenox Hill's motion seeking summary judgment dismissing those causes of action insofar as asserted against it are denied.

The court rejects Lenox Hill's contention that the plaintiff did not allege with sufficient specificity, in her complaint or bill of particulars, that it was negligent because its pharmacy failed to undertake a drug utilization review (DUR). A DUR is an authorized, structured, ongoing review of the prescription, dispensing, and use of medication, encompassing a drug review against predetermined criteria, that should result in changes to drug therapy when these criteria are not met. It involves a comprehensive review of a patient's prescription and medication data before, during, and after medications are dispensed to ensure appropriate medication decision-making and positive patient outcomes. A bill of particulars in a medical malpractice action "must provide a general statement of the acts or omissions constituting the alleged negligence" (*Contreras v Adeyemi*, 102 AD3d 720, 722 [2d Dept 2013], quoting *Toth v Bloshinsky*, 39 AD3d 848, 849 [2d Dept 2007]; see CPLR 3043[a][3]). The plaintiff's bill of particulars satisfied this

standard and sufficiently apprised Lenox Hill of her claim that the hospital was liable for the failure of its in-house pharmacy to undertake a DUR. The allegations in the plaintiff's bill of particulars that Lenox Hill's "agents, servants, staff members, employees and/or independent contractors" committed malpractice by failing "to take into consideration the fact that the plaintiff was a long-term user of prescribed Prednisone at the time Levaquin was being administered," failed "to take into consideration the consequences of simultaneously administering Levaquin and Prednisone to a patient of plaintiff's age," and failed "to realize and recognize that the administration of Levaquin in conjunction with Prednisone places a patient, and particularly elderly patients, at higher risk for developing tendon injury and rupture" were sufficiently specific to encompass her claim that it constituted malpractice for Lenox Hill to fail to undertake a DUR, the very purpose of which was to enable Lenox Hill's in-house pharmacist to take those factors into consideration before dispensing Levaquin without a warning to the prescribing physician.

Lenox Hill, however, demonstrated that it neither "knew, [n]or should have known," of its hospital or pharmacy staff's "propensity for the sort of conduct which caused the injury" (*Sheila C. v Povich*, 11 AD3d 120, 129-130 [1st Dept 2004]; see *Kuhfeldt v. New York Presbyt./Weill Cornell Med. Ctr.*, 205 AD3d 480, 481-482 [1st Dept 2022]). Inasmuch as the plaintiff did not address this issue in her opposition papers, she failed to raise a triable issue of fact in opposition to Lenox Hill's showing in this regard, and that branch of Lenox Hill's motion seeking summary judgment dismissing the negligent hiring and training cause of action against it must be granted.

Lenox Hill's remaining contentions are without merit.

Accordingly, it is

ORDERED that the motion of the defendant Lenox Hill Hospital is granted to the extent that it is awarded summary judgment dismissing the negligent hiring and training cause of action insofar as asserted against it, that cause of action is thereupon dismissed insofar as asserted against it, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

1/13/2023
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: