

**Fertig v Chateau at Brooklyn Rehabilitation & Nursing**

2023 NY Slip Op 34917(U)

December 7, 2023

Supreme Court, Kings County

Docket Number: Index No. 526889/2019

Judge: Ellen M. Spodek

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 7<sup>th</sup> day of Dec., 2022.

PRESENT: HON. ELLEN M. SPODEK,  
JSC

-----X  
JOEL FERTIG, as the Administrator of the Estate of;  
MARK FERTIG, Deceased,  
  
Plaintiff,  
  
- against -  
  
CHATEAU AT BROOKLYN REHABILITATION  
AND NURSING and MT. SINAI BROOKLYN  
HOSPITAL,  
  
Defendants.  
-----X

Index Number: 526889/2019

**DECISION/ ORDER**

Motion No.: 9

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	<u>NYSCEF Nos.</u>
Notice of Motion/ Cross Motion/ Order to Show Cause and Affidavits (Affirmations) Annexed	128
Opposing Affidavits (Affirmations)	129 - 143
Reply Affidavits (Affirmations)	157 - 161
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Defendant, CNH OPERATING, LLC d/b/a CHATEAU AT BROOKLYN REHABILITATION AND NURSING (hereinafter, "The CHATEAU"), having moved for an order (a) pursuant to CPLR 3212, granting summary judgment dismissing the Complaint with prejudice as against it, or in the alternative (b) pursuant to CPLR 3212 (e, g), granting partial

summary judgment dismissing the claims of (i) negligence; (ii) malpractice; (iii) PHL/ statutory/ regulatory violations; (iv) wrongful death; (v) negligent hiring and credentialling; (vi) lack of informed consent; and (vii) punitive damages, and after oral argument on November 30, 2023, and upon due deliberation, the Court grants the motion as follows.

The essential facts are as follows. Plaintiff's decedent, 69-year-old Mark Fertig resided at The CHATEAU from 1/11/18 - 3/19/18. He was transferred from codefendant Mt. Sinai. The movant's expert established that the facility initiated a detailed multi-intervention pressure ulcer prevention care plan; and that its staff fully and regularly implemented that plan and performed weekly wound care team rounds. Movant's expert, citing the record, opined that the pressure ulcers either healed or significantly improved. Plaintiff's expert opined the wounds did not improve or heal at all and that an "appropriate" care plan should have been in place; but said expert did not cite the record or delineate what intervention standard of care required should have been implemented that was not.

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 643, 487 N.Y.S.2d 316, 317 (1985). Based upon the affidavit of movant's geriatric expert the Court finds that defendant has established its *prima facie* entitlement to summary judgment. Defendant established through the expert that CHATEAU's care was within good and accepted nursing home and medical standards, that proper care plans were in place and implemented, that the resident was properly and regularly assessed by the wound care team, and that care plan interventions and doctors' orders were carried out.

Once the movant defendant makes this *prima facie* showing, the burden shifts to plaintiff and plaintiff can only defeat summary judgment by submitting competent evidence that raises a triable issue of fact. *Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833, 11 N.E.3d 159 (2014); *Alvarez v Prospect Hospital*, 68 N.Y.2d 320, 324 (1986); *Bacani v. Rosenberg*, 74 A.D.3d 500, 502, 903 N.Y.S.2d 30, 32 (1st Dept. 2010).

The Court finds that plaintiff's out-of-state expert was unqualified to render his opinions in that he failed to establish that he was familiar with nursing home standards of practice, and particularly those in the local New York community; and that he failed to identify whether he had performed any research or studies so as to familiarize himself with New York standards of practice. *See, e.g., Behar v Coren*, 21 A.D.3d 1045, 803 N.Y.S.2d 629 (2d Dept. 2005), *lv. app. den.* 6 N.Y.3d 705, 812 N.Y.S.2d 34 (Table) (2006); *Mustello v Berg*, 44 A.D.3d 1018, 1019, 845 N.Y.S.2d 86 (2d Dept 2017), *lv. app. den.* 10 N.Y.3d 711 (2008).

In addition, an expert opinion, as with plaintiff's expert's herein, which is general, conclusory, and unsupported by the evidence is insufficient to defeat summary judgment. *Volovar v. Catholic Health System of Long Island, Inc.*, 58 A.D.3d 830, 872 N.Y.S.2d 198 (2d Dept. 2009). Further, plaintiff's opposition, as demonstrated herein, cannot consist of mere conclusions, expressions of hope, or unsubstantiated allegations or assertions. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). Further, plaintiff's expert affidavit fails to reference the record or the movant's arguments is unworthy of belief. *See, Schwartz v Partridge*, 179 A.D.3d 963, 117 N.Y.S.3d 300 (2d Dept. 2020); *Wagner v Parker*, 172 A.D.3d 954, 100 N.Y.S.3d 280 (2d Dept 2019); *Bowe v. Brooklyn United Methodist Church Home*, 150 A.D.3d 1067, 1068, 56 N.Y.S.3d 180 (2d Dept. 2017). "An expert opinion that is contradicted by the record cannot defeat

summary judgment" *Bartolacci-Meir v Sassoon*, 149 A.D.3d 567, 572, 50 N.Y.S.3d 395 (1st Dept. 2017).

Plaintiff's expert, in opposition, improperly relies upon contingent, speculative, or merely possible foundation of material facts; and creates "facts" upon which to base his opinions. See, e.g., *Coppolla v City of New York*, 302 A.D.2d 547, 755 N.Y.S.2d 100 (2d Dept. 2003), *lv. app den.* 100 N.Y.2d 511, 766 N.Y.S.2d 165 (2003); *Quinn v Aircraft Construction*, 203 A.D.2d 444, 610 N.Y.S.2d 598 (1994); *Cillo v Resjefal Corporation*, 16 A.D.3d 339, 792 N.Y.S.2d 428 (1<sup>st</sup> Dept. 2005); *Kirker v Nicolio*, 256 A.D.2d 865, 681 N.Y.S.2d 689 (3d Dept. 1998); *Wright v N.Y.C. Housing Authority*, 208 A.D.2d 327, 624 N.Y.S.2d 144, 146 (1<sup>st</sup> Dept. 1995); *Neidert v Austin S. Edgar, Inc.*, 204 A.D.2d 1030, 1031, 612 N.Y.S.2d 529 (4<sup>th</sup> Dept. 1994); *Huffman v Linkow Institute*, 35 A.D.3d 214, 826 N.Y.S.2d 229 (Sup. NY Co. 2005).

Plaintiff's expert claims defendant failed to enact an "appropriate" care plan or update it with additional interventions after the ulcers were found "not to be healing." First, plaintiff's expert fails to reference the record in support of his contention that the ulcers were not improving or healing, while Movant's expert, Dr. Goldberg, conversely, does cite the record for evidence demonstrating they were healing and significantly improving. See, *Schwartz v Partridge, supra*; *Wagner v Parker, supra*; *Bowe v. Brooklyn United Methodist, supra*. Putting that aside, plaintiff's expert conclusorily fails to identify what were the purported interventions which should have been included in the care plan that were not included and that these interventions were the standard of care in New York under the circumstances of Mr. Fertig. See, e.g., *Zuckerman v. City of New York, supra*; *Volovar v. Catholic Health, supra*.

PHL sec. 2801-d states that a nursing home is not liable for injuries from depriving a resident's rights if it "exercised all care reasonably necessary to prevent and limit the deprivation and injury." 10 NYCRR § 415.12 (e)(1) In the instant case, Movant established, via, e.g., its detailed care plans and implementation of same, that it "exercised all care reasonably necessary to prevent and limit the deprivation and injury;" and that the resident's clinical condition and comorbidities demonstrates that they were unavoidable despite every reasonable effort to prevent them." Plaintiff's expert fails to viably refute same in this case.

To successfully oppose summary judgment in a malpractice action, plaintiff must not only show a departure, but his expert must demonstrate how that departure proximately caused an injury. *Murray v Hirsch*, 58 A.D.3d 70, 871 N.Y.S.2d 673 (2d Dept. 2009), *dism. app.* 12 N.Y.3d 883 (2009), *reconsid. den.* 13 N.Y.3d 810 (2009). See also *Steginsky v Gross*, 46 A.D.3d 671, 847 N.Y.S.2d 593 (2d Dept. 2007); *Dellacona v Dorf*, 5 A.D.3d 625, 774 N.Y.S.2d 776 (Mem) (2d Dept. 2004). Plaintiff failed to meet this burden.

Based on the foregoing, it is ORDERED that The CHATEAU's motion for summary judgment, dismissing the Complaint with prejudice, is granted.

The Court did not need to address the remainder of the motion for the alternate relief of partial summary judgment in view of granting full summary judgment to The CHATEAU.

The Judgment Clerk of the Court is directed to enter Judgment dismissing, with prejudice, the Complaint and action as against The CHATEAU, without costs or disbursements against any party and it is further ordered that,

The caption is hereby deemed amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

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JOEL FERTIG, as the Administrator of the Estate of:  
MARK FERTIG, Deceased,

Index Number: 526889/2019

Plaintiff,

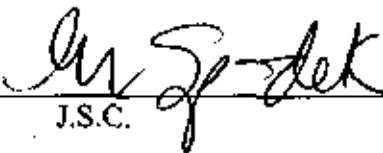
- against -

MT. SINAI BROOKLYN HOSPITAL,

Defendant.  
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This constitutes the Decision and Order of this Court.

ENTER:

  
\_\_\_\_\_  
J.S.C.

HON. ELLEN M. SPODEK

2023 DEC 13 A 11: 29

KINGS COUNTY CLERK  
FILED

