

Perez v Kings Harbor Multi Care Ctr.

2023 NY Slip Op 35047(U)

June 13, 2023

Supreme Court, Bronx County

Docket Number: Index No. 22317/2018E

Judge: Michael A. Frishman

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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 34

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NILDA PEREZ,

Index No. 22317/2018E

Plaintiff,

- against -

Hon. MICHAEL A. FRISHMAN
Acting Justice of the Supreme Court

KINGS HARBOR MULTICARE CENTER a/k/a
KINGS HARBOR HEALTH SERVICES, LLC,
POURRAT MONAHEMI, M.D., LENA VERNON, and
MONTEFIORE MEDICAL CENTER,¹

Defendants.

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The following papers numbered 91-102 and 105-110 were read on this Motion for Summary Judgment (Seq. No. 004).

Sequence No. 004	NYSCEF Doc. Nos.
Notice of Motion, Affirmation in Support – Exhibits and Affidavits Annexed	91-102
Affirmation in Opposition, Counter Statement of Material Facts - Exhibits and Affidavits Annexed	105-109
Reply Affirmation	110

The motion of defendant POURRAT MONAHEMI, M.D. (“Dr. Monahemi,” “movant,” or “defendant”) seeking summary judgment dismissing the Complaint against him is granted, in part.

Plaintiffs commenced this medical malpractice action alleging that defendants failed to order and implement appropriate fall precautions and proper safety instructions to prevent her from falling during her admission to Kings Harbor MultiCare Center (“Kings Harbor”) and thereby resulting in plaintiff suffering a broken femur requiring surgery and rehabilitation. Specifically, as to Dr. Monahemi, plaintiff claims that his failure to properly assess her, including diagnosis and treatment of a urinary tract infections (“UTI”), failing to conduct a falls risk assessment, and ordering proper fall prevention measures, proximately caused her to fall out of bed thereby fracturing her right distal femur. Plaintiff also asserts a cause of action for lack of informed consent.²

Movant seeks summary judgment dismissing the Complaint against him arguing that, inter alia, as a consulting physician who treated plaintiff at Kings Harbor, he is not responsible for performing a fall risk assessment. Rather, the responsibility for assessing, implementing, and carrying

¹ This action was previously discontinued as against Montefiore Medical Center via So Ordered Stipulation dated July 30, 2019 (see NYSCEF Doc. No. 43).

² There are two additional causes of action as against non-movant Kings Harbor.

out fall precautions at Kings Harbor rests with the nursing staff; that he was entitled to rely on the fall risk assessment and patient monitoring carried out by the staff and, irrespective, that all appropriate fall precautions were instituted. Movant further asserts that no basis exists for plaintiff's allegation that she suffered from a UTI that caused or contributed to her fall on September 29, 2015.³ Generally, movant argues that plaintiff was appropriately treated and no act or omission on his part caused or contributed to plaintiff's injury.

Movant's motion is supported, among other things, by the affirmation of Dr. Diamond who is Board Certified in Family Medicine, with a sub-certification in Geriatric Medicine.

In opposition to Dr. Monahemi's motion for summary judgment, plaintiff argues that movant has failed to meet his *prima facie* burden regarding plaintiff's claims surrounding her allegations that defendants were negligent in their care and treatment, including failures to properly assess plaintiff regarding her fall risk and to implement the proper fall prevention procedures, thereby causing plaintiff to fall out of bed while attempting to go to the bathroom and breaking her femur bone. Specifically, as to movant, plaintiff argues that he, as the internal medical physician supervising and attending to patients, was ultimately responsible for her care. Alternatively, plaintiff argues that even if the Court finds that defendants have met their burden,⁴ plaintiff's expert raises triable issues of fact as to whether movant departed from good and accepted medical practice by, inter alia, failing to perform a fall risk assessment; failing to ensure the fall risk assessment was correct; failing to order a bed alarm during this admission; failing to consider plaintiff's urgency to use the bathroom; failing to ensure the bed's side rails were fully raised on all sides at all times; and whether these departures were the cause of plaintiff's injuries, thereby necessitating denial of movant's motion. In support of her motion, plaintiff submits the affirmation of an undisclosed physician who is Board Certified in Internal Medicine and Oncology and has experience working in skilled nursing facilities and treating fall-risk patients, patients with altered mental states and patients with infections, including UTIs.

As an initial matter, plaintiff does not oppose that portion of Dr. Monahemi's motion seeking dismissal of her second cause of action alleging lack of informed consent. As such, plaintiff's cause of action for lack of informed consent as to Dr. Monahemi is dismissed without opposition.

A defendant in a medical malpractice action establishes *prima facie* entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries (*Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 2 [1st Dept 2015]). If a defendant in a medical malpractice action establishes *prima facie* entitlement to summary judgment, by a showing either that he or she did not depart from good and accepted medical practice or that any departure did not proximately cause the plaintiff's injuries, plaintiff is required to rebut defendant's *prima facie* showing "with medical evidence that defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged" (*Pullman v Silverman*, 125 AD3d 562, 562 [1st Dept 2015], *aff'd* 28 N.3d 1060 [2016]).

"A plaintiff's expert opinion must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 307 [1st

³ Specifically, that plaintiff never exhibited signs or complained of urinary urgency prior to her fall on September 29, 2015.

⁴ Plaintiff also asserts that movant's papers are defective for various reasons. For reasons discussed, *infra*, some assertions by plaintiff are moot and will not be discussed.

Dept 2007] [internal citation omitted]). If “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” (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Giampa v Marvin L. Shelton, M.D., P.C.*, 67 AD3d 439 [1st Dept 2009]). Further, the plaintiff's expert must address the specific assertions of the defendant's expert with respect to negligence and causation (*see Foster-Sturup v Long*, 95 AD3d 726, 728-729 [1st Dept 2012]).

At the outset, the Court rejects plaintiff's contention that Uniform Form Rules 202.8-g (c) requires the Court to deem Dr. Monahemi's motion defective thereby requiring outright denial thereof. The current language of 22 NYCRR 202.8-g (c) contains language that “[t]he court may allow any such admission to be amended or withdrawn on such terms as may be just.” In addition, subsection (e) gives the court discretion to “...take such other action as may be just and appropriate.” The Court will not base its decision upon a procedural discretionary defect.

Additionally, it appears undisputed that plaintiff had a working call button within reach at the time of the incident but that no one immediately responded.⁵ It also appears undisputed that Dr. Monahemi was not present at Kings Harbor on September 29, 2015 at approximately 11:00 P.M. when plaintiff's fall occurred. It is further undisputed that Dr. Monahemi was not the attending physician on duty upon plaintiff's transfer and intake from Montefiore Medical Center (“MMC”) to Kings Harbor, and he never performed a falls risk assessment of plaintiff.

In support of movant's motion, Dr. Diamond opines, generally, that Dr. Monahemi's care and treatment of plaintiff adhered to the standard of care at all times and no act or omission on his part caused or contributed to plaintiff's injury. Specifically, Dr. Diamond refers to Dr. Monahemi as one of the consulting physicians at Kings Harbor responsible for overseeing the patients' medical treatment and opines that it was the responsibility of the nursing staff to assess, implement and carry out fall precautions, not a physician responsibility. Dr. Diamond also opines that, irrespective, the Kings Harbor staff performed an appropriate admission assessment upon plaintiff's transfer from MMC; that she was noted to be a fall risk and appropriate fall precautions were instituted, to wit, bed siderails were instructed to be in the raised position. Dr. Diamond further opines that even assuming movant was responsible, no additional measures were indicated and no additional measures, including a bed sensor,⁶ would have prevented plaintiff from getting out of bed. Dr. Diamond additionally points to the medical records and deposition testimony opining that such establishes that plaintiff was “regularly rounded on every few hours for toileting checks,” that her bed was low to the ground and equipped with side rails, and that plaintiff had a call bell within reach.

Plaintiff's expert generally supports plaintiff's opposition and states numerous actions and omissions by Dr. Monahemi in his care and treatment of plaintiff during this Kings Harbor admission that he opines represent deviations from acceptable standards of care and that, but for such deviation, the subject fall out of her bed would not have occurred. Plaintiff's expert opines that Dr. Monahemi, as an attending physician, oversees the nursing staff team attending to plaintiff and had the responsibility to ensure that orders are communicated and followed. In addition, he opines, that movant's failing to discover that plaintiff was neither assigned a numeral value nor given a fall risk

⁵ According to her testimony, plaintiff waited ten to fifteen minutes before she tried to get out of bed.

⁶ Dr. Diamond opined that a bed sensor would have been contraindicated because, inter alia, plaintiff was on regular toileting checks, had a call bell within reach, her bed was low to the ground and equipped with siderails. However, some of these issues appear to be at issue based on the records.

level label was a deviation. Plaintiff's expert further opines that movant's disregard of plaintiff's abnormal urinalysis was a deviation as well as failing to order full side rails on all sides.

In view of the record on this motion, even assuming, *arguendo*, that movant established his entitlement to judgment as a matter of law, plaintiff has demonstrated the existence of material issues of fact.

Despite movant's assertion that plaintiff's expert is merely speculative and conclusory, plaintiff's expert points to the testimony of Dr. Monahemi, where he states that he was an "attending physician" at Kings Harbor. In addition, Dr. Diamond ignores pertinent and contradictory testimony by both plaintiff and Nurse Vernon, that call into question whether plaintiff was provided with diapers or was, in fact, on a regular toileting schedule. Specifically, plaintiff denies wearing a diaper during this admission at Kings Harbor and Nurse Vernon states that simply by the presence of a checkmark upon plaintiff's intake next to toileting, it is not dispositive of whether or not the person uses a toilet, commode, or diaper.⁷ Moreover, irrespective of movant's arguments in support of dismissal,⁸ including that movant was only called to consult, there exists questions of fact as to the breadth of Dr. Monahemi's duty of care and treatment as to plaintiff as one of the attending physicians employed by Kings Harbor during her admission and whether alleged deviations from his attending physician responsibilities were a factor in plaintiff's injury. In other words, irrespective of the presence of a UTI or plaintiff's mental state, there are questions of fact as to whether Dr. Monahemi should have more appropriately overseen plaintiff's care and treatment, including but not limited to ensuring a proper falls risk assessment was completed whether by him or another staff member, whether her abnormal urine analysis results were indicative of urgency to urinate, and whether the nursing staff was apprised of plaintiff's needs and potential risks, that had such deviations not occurred, proper precautions would have been in place to prevent plaintiff's fall and consequential injuries. Although, Dr. Diamond correctly opines that a bed sensor would not have stopped plaintiff from getting out of bed, defendants cannot establish as a matter of law that such a measure would not have prevented plaintiff's injuries or that failure to order such a measure was not a deviation.⁹

We have considered the parties' remaining arguments and find them to be without merit.

Accordingly, it is hereby,

ORDERED that the portion of defendant's motion seeking dismissal as to plaintiff's second cause of action for lack of informed consent as against named defendant, POURRAT MONAHEMI, M.D., is granted; And it is further

ORDERED that the motion is otherwise denied.

⁷ Nurse Vernon does state that "toileting rounds" at Kings Harbor during 2015 are done every two, three or four hours but frequency would depend upon the patient's needs. However, there is no proof of this as to plaintiff as a matter of law.

⁸ Some of which may arguably be ranked as speculation

⁹ The Court recognizes that attached Kings Harbor records are incomplete and uncertified, but such issue is moot as the provided pages illustrate that although plaintiff was assessed upon admission, she was not assigned a fall risk level; and her urine analysis was abnormal on September 23, 2015.

ORDERED that the Clerk of the Court, Bronx County, is directed to amend the caption in this action to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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NILDA PEREZ,

Index No. 22317/2018E

Plaintiff,

- against -

KINGS HARBOR MULTICARE CENTER a/k/a
KINGS HARBOR HEALTH SERVICES, LLC, POURRAT
MONAHEMI, M.D., LENA VERNON,

Defendants.

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ORDERED that counsel for movant shall serve a copy of this Order with Notice of Entry on all parties within thirty (30) days of the entry of this Order.

This constitutes the Decision and Order of the Court.

Dated: 6/13/2023



Hon. Michael A. Frishman, A.J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER