

Middleton v Jopal Bronx, LLC
2023 NY Slip Op 35109(U)
December 29, 2023
Supreme Court, Bronx County
Docket Number: Index No. 22778/20
Judge: Joseph E. Capella
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**NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 23**

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**ANDREW MIDDLETON, as Administrator of the
Estate of WILMA MIDDLETON,**

Index #: **22778/20**
DECISION/ORDER

Plaintiff,

- against -

Present:
Hon. Joseph E. Capella
J.S.C.

**JOPAL BRONX, LLC, d/b/a WORKMEN'S CIRCLE
MULTICARE CENTER, WORKMEN'S CIRCLE
MULTICARE CENTER, and ION OLTEAN, M.D.,**

Defendants.

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The following papers numbered 1 to 6 read on this motion.

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION & CROSS MOTION	1 - 2
ANSWERING AFFIRMATION	3 - 4
REPLY AFFIRMATION	5 - 6

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

Motion by defendant, Jopal Bronx, LLC, d/b/a Workmen's Circle Multicare Center (Workmen's Circle), for summary judgment (CPLR 3212) and dismissal of plaintiff's complaint, which alleges Public Health Law violations, medical malpractice and negligence, is granted in part. There is a cross-motion by co-defendant, Ion Oltean, M.D., who was decedent's attending physician at Workmen's Circle, which seeks the same relief as Workmen's Circle, and incorporates and adopts the arguments and expert opinions submitted by Workmen's Circle, that is likewise granted in part. Decedent was a resident of Workmen's Circle from August 25 through September 28, 2017, admitted to Lincoln Medical Center on September 28 through October 5, 2017, and returned to

Workmen's Circle on October 5, 2017, through December 12, 2022. Plaintiff's bill of particulars alleges, *inter alia*, that Workmen's Circle failed to perform proper risk assessment, and failed to prevent the development and deterioration of pressure ulcers. The initial burden is on defendants to make a *prima facie* showing of an entitlement to summary judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact. (*Alvarez v Prospect*, 68 NY2d 320 [1986].) If they do, then the burden shifts to plaintiff to produce evidentiary proof in admissible form sufficient to create issues of fact to warrant a trial (*Alvarez*, 68 NY2d 320), and denial of summary judgment.

Workman's Circle provides an expert affirmation by Dr. Matti-Orozco, who is board certified in internal, hospice and palliative medicine, and opines that there was no negligence, no failures to exercise reasonable care nor any deprivation of rights. Dr. Matti-Orozco notes that by the time decedent arrived at Workmen's Circle on August 25, 2017, she was suffering from, *inter alia*, a 7 x 4 x 3 cm pre-existing stage IV sacral ulcer, a stage II 8 x 8 cm occipital ulcer, as well as incontinence lesions. The following opinions are set forth by Dr. Matti-Orozco. Skin assessments were performed and decedent's risk for skin breakdown was properly evaluated. Care plans to treat her existing ulcers and attempt to prevent new ulcers from forming were put in place and implemented, including application of ointments/medications and dressing, offloading, use of an air mattress, use of moisture barriers and turning and positioning. Decedent's

nutritional status was evaluated, supplements/vitamins administered as needed and appropriate pain medication was administered.

According to Dr. Matti-Orozco, decedent was a terminal patient when first hospitalized in June of 2017, and that skin breakdown, including pressure ulcers, was unavoidable despite the best of care due to her multiple comorbidities including but not limited to diabetes, history of septic shock and stroke, obstructive nephropathy, cardiac instability, significant anemia, metastatic cancer and poor circulation. These conditions, in addition to decedent's limited mobility, incontinence and dysphagia and weakness rendered her skin breakdown an unavoidable consequence of her failure to thrive. Dr. Matti-Orozco opines that despite the appropriate and proper medical care rendered at Workmen's Circle, the decubiti that decedent arrived with would never heal, would ultimately get worse and she would develop further skin breakdown. Based on the aforementioned, the Court is satisfied that defendants have met their burden for summary judgment, (*Zuckerman v City of NY*, 49 NY2d 557 [1980]; *Kaffka v NY Hospital*, 228 AD2d 332 [1st Dept 1996]), which now shifts to plaintiff to demonstrate that issues of fact exist to warrant a trial.

In opposition, plaintiff provides an expert affirmation from a physician board certified in internal and geriatric medicine who opines that the care and treatment rendered to decedent at Workmen's Circle was not in accordance with good and accepted medical practice, and that there were departures and deviations from accepted standards

of care. Plaintiff's expert states that accurate and consistent staging and sizing of pressure ulcers is essential in ensuring that consistent and appropriate care is provided across different medical shifts, and in order to communicate amongst healthcare providers within the facility. This expert opines that Workmen's Circle departed from good and accepted practice in failing to accurately and consistently stage and/or size decedent's pressure ulcers. As an example, this expert notes that on November 14, 2017, the stage IV sacral pressure ulcer measured 9.5 x 10 x 5 cm; however, on the same day, Workmen's Circle notes that the sacral pressure ulcer measured 8 x 7 x 2.5 cm.

Plaintiff's expert also notes that the turning and positioning chart had several lengthy time gaps and omissions. As an example, this expert notes that there are no turning and positioning charts or records at all for the months of August 2017 and October 2017, indicating that turning and positioning was not done for these three months. The medical chart also does not indicate whether decedent was turned and repositioned every two hours from November 1, 2017, through November 9, 2017. On November 10, 2017, decedent was turned and repositioned once from 11 pm through 7 am, but was turned and repositioned four times from 3 pm to 11 pm. On November 12, 16, 19, 27 and 29, decedent was turned three times from 11 pm to 7 am, and on December 2, she was turned three times from 11 pm through 7 am. On December 3, 2017, decedent was not turned from 3 pm through 11 pm, and on December 6 and 11, 2017, decedent was turned three times from 11 pm through 7 am. Plaintiff's expert also opines that

Workmen's Circle failed to turn and position more frequently than every two hours where as here the two-hour turning failed. Besides being a departure from the standard of care, plaintiff's expert opines that the aforementioned gap in records was also a violation of decedent's rights under the Public Health Law 2802-d, which requires Workmen's Circle to maintain complete, and accurately documented records for patients.

Plaintiff's expert also states that the medical records fail to indicate that decedent was actually provided a pressure reduction mattress during her first admission. According to plaintiff's expert, there is a progression of bed-type interventions and mattresses that are available depending on level of risk a patient is to develop pressure ulcers. Plaintiff's expert opines that decedent should have been on pressure redistributing mattress and/or provided with other pressure relief safety devices during both of her admissions. According to plaintiff's expert, this was also a violation of Public Health Law 2801-d. This expert further opines that decedent was not properly nourished while under the care of Workmen's Circle. As an example, plaintiff's expert notes that during decedent's second admission, she lost approximately 20.6 pounds, yet throughout both admissions, decedent's nutritional care plan remained practically the same. Lastly, plaintiff's expert opines that decedent's skin breakdown was caused by unrelieved pressure, rather than her declining medical condition. This expert opines that decedent's pressure ulcers could have been avoided with the proper medical and nursing care. As an example, plaintiff's expert refers to records showing that decedent had wounds that had

resolved, which is evidence of decedent's ability to heal despite her medical conditions.

This expert notes that hypothyroidism, atrial fibrillation, anemia, thyroid gland cancer and colon cancer do not cause pressure ulcers.

Overall, viewing the evidence in a light most favorable to plaintiff, (*O'Sullivan v Presbyterian*, 217 AD2d 98 [1st Dept 1995]), the Court is satisfied that his expert raised sufficient issues of fact regarding whether a violation of the Public Health Law and malpractice occurred. However, the opposition papers do not address plaintiff's nuisance claim. As such, the motions by defendants for summary judgment are granted in part, but only to the extent of dismissing plaintiff's nuisance claim, and the clerk is directed to enter judgment accordingly. Workmen's Circle is directed to serve a copy of this decision with notice of entry by first class mail upon plaintiff within 30 days of receipt of copy of same. This constitutes the decision and order of this court.

____ 12/29/23 _____
Dated

Hon. _____
Joseph E. Capella, J.S.C.

