Ray v Crown Nursing Home Assoc., Inc.
2023 NY Slip Op 35148(U)
January 30, 2023
Supreme Court, Bronx County
Docket Number: Index No. 26340/2018E
Judge: Kim Adair Wilson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART IA-12

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KORITA RAY, As Administrator of the Estate of CLARA MALLORY, Deceased, and KORITA RAY, Individually,

Plaintiff,

-against-

CROWN NURSING HOME ASSOCIATES, INC. d/b/a THE CHATEAU AT BROOKLYN REHABILITATION AND NURSING CENTER, and, CROWN NURSING AND REHABILITATION CENTER,

Defendants.

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DECISION AND ORDER
Index №. 26340/2018E

Hon. KIM ADAIR WILSON
Justice Supreme Court

HON. KIM ADAIR WILSON

Upon the foregoing papers, it is ordered that this motion (Mot. Seq. 2) by defendants CROWN NURSING HOME ASSOCIATES, INC., formerly d/b/a CROWN NURSING and REHABILITATION CENTER, s/h/a CROWN NURSING HOME ASSOCIATES, INC., d/b/a THE CHATEAU AT BROOKLYN REHABILITATION AND NURSING CENTER, and CROWN NURSING AND REHABILITATION CENTER (hereinafter "CROWN"), for an Order pursuant to CPLR 3212, granting summary judgment to Defendants, CROWN, dismissing Plaintiff's complaint in its entirety and directing the Clerk to enter judgment in Defendants' favor; or alternatively, granting partial summary judgment, dismissing Plaintiff's claims for punitive damages pursuant to CPLR 3212, is decided in accordance herewith.

FACTS & PROCEDURAL BACKGROUND

In this nursing home negligence, medical malpractice, and deprivation of rights action pursuant to Public Health Law § 2801-d, Plaintiff's Complaint asserts claims arising out of Defendants' care and treatment of the decedent, Clara Mallory.

In January of 2016, the decedent, Clara Mallory, then 71-years old, was admitted to St. John's Episcopal Hospital, where she was diagnosed with glioblastoma multiforme. On January 11, 2016, the decedent was transferred to New York Presbyterian Hospital and on January 18, 2016, she underwent a craniotomy for resection of the brain tumor. After the surgery, the decedent's motor skills were affected and she required help with feeding, toileting, grooming and was bedridden. On April 15, 2016, decedent was admitted to St. John's Episcopal Hospital with a blocked percutaneous endoscopic gastronomy ("PEG") feeding tube. The admission information noted the decedent's medical conditions including glioblastoma multiforme and cerebral edema, hypomagnesemia,

dehydration, hyperkalemia, major depression, seizures, hypertension, right sided hemiplegia, chronic obstructive pulmonary disease, asthma, gastrostomy malfunction, dysphagia, and a history of malignant breast neoplasm. The decedent was started on palliative care and intravenous steroids to reduce brain swelling, and PEG tube feedings were resumed. On May 6, 2016, decedent was discharged and transferred to Crown. On September 14, 2016, decedent was noted with a Stage III pressure ulcer on the left buttock, measuring 6cm x 4.5cm x 0.1cm, and a left outer ankle deep tissue injury measuring 1cm x 1.2cm x 0.2cm. On September 14, 2016, decedent was transferred to NY Methodist Hospital to assess her wounds. A blood culture was performed, which came back gram-positive for cocci. On September 15, 2016, the decedent was discharged to Crown.

On October 12, 2016, the decedent was noted with, *inter alia*, a stage III sacral ulcer measuring 7cm x 5.8 x 4cm with serosanguineous drainage. On October 19, 2016, the decedent was sent to NYMH from Crown. Upon admission, the decedent was noted with sepsis secondary to an infected sacral ulcer, pneumonia, and C-difficile infection. On October 20, 2016, the decedent underwent a bedside debridement of the sacral ulcer. On November 2, 2016, the decedent was discharged to Four Seasons Nursing Home, but was re-admitted to NYMH through the Emergency Department. Upon admission, the decedent was noted with pneumonia, cerebral edema, respiratory failure, compression of the brain, congestive heart failure, anemia, dysphagia, and quadriplegia. A stage IV sacral ulcer, unstageable left heel ulcer, and stage II left ankle ulcer were identified. On November 9, 2016, the decedent was discharged to Four Seasons Nursing Home. Shortly after her arrival, the decedent passed away.

On May 31, 2018, Plaintiff commenced this action against Defendants asserting claims for Public Health Law violations, medical malpractice, negligence, lack of informed consent, punitive damages, loss of services and wrongful death. Plaintiff alleges, generally, that Defendants were negligent in, *inter alia*, failing to care for, monitor, and treat plaintiff's decedent, resulting in pressure ulcers and sepsis while the decedent was admitted to Defendants' facility from on or about May 6, 2016, and continuing through on or about November 2, 2016.

LEGAL STANDARD & ANALYSIS

In a medical malpractice action, a defendant establishes prima facie entitlement to summary judgment by showing either (i) that in treating the plaintiff there was no departure from good and accepted medical practice, or (ii) that any departure was not the proximate cause of the injuries alleged (*Bahnyuk v Reed*, 174 AD3d 481 [1st Dept 2019] [citation and quotations omitted]). 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 attesting that defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged (*Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]).

It must be noted that Plaintiff's Public Health Law cause of action is distinct from the medical malpractice claim. Liability under Public Health Law § 2801-d is not predicated on a deviation from accepted standards of medical practice nor a breach of a duty of care. Instead, it is a deprivation of a right conferred by contract, statute, regulation, code or rule, subject to the defense that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient (*see Zeides v Hebrew Home*, 300 AD2d 178 [1st Dept 2013]).

In moving for summary judgment, Defendants rely on the affirmation of Sharon Brangman, M.D., board-certified in internal medicine, geriatric medicine, and hospice and palliative medicine. Defendants' expert opines that the decedent's multiple risk factors for pressure ulcer development were properly assessed upon admission, and a care plan for pressure ulcer prevention was devised and implemented. Defendants' expert opines that the care plan for the treatment of decedent's sacral ulcer, right inner buttock ulcer, left buttock ulcer, and deep tissue injuries of the right and left ankle, was properly devised and implemented, and conformed to accepted standards of care. Defendants' expert opines that the decedent was adequately turned and positioned, appropriate interventions and nutrition were in place, the decedent was continually monitored, and the Pressure Ulcer Care Plan was revised when appropriate throughout her admission. Defendants' expert opines that the care plan devised conformed to accepted standards of medical care, was reasonable, and complied with 42 CFR § 483.25 (c) and 10 NYCRR § 415.12 (c), the respective Federal and New York State regulatory provisions applicable to nursing homes regarding pressure ulcers. Defendants' expert opines that the decedent was provided proper nutrition while admitted to Defendants' facility in conformity to the above referenced regulations, and the facility was not a proximate cause of any of decedent's injuries.

Defendants' expert opines that in view of decedent's medical co-morbidities, including terminal brain cancer, CVA with right sided residual hemiparesis, low Albumin of 1.9g/dL, peripheral vascular disease, dysphagia, aphasia and seizures, chronic obstructive pulmonary disease, asthma and hypertension, complete healing of the ulcers during the alleged timeframe of negligence was not going to occur. Defendants' expert notes that the decedent was taking Decadron, a steroid medication utilized to reduce brain swelling, which causes the skin to become more friable and thin, thereby increasing the risk of pressure ulcer development. Additionally, decedent was taking medication for myoplastic anemia, which compromises the immune system, increasing the risk of infection and skin breakdown. Furthermore, since decedent was receiving a PEG feeding tube, she needed to be kept in bed at a 45-degree angle during most of the day, which places pressure on the sacrum. Defendants' expert opines that the development of decedent's lesions was clinically unavoidable and proximately caused by decedent's myriad of risk factors and medical comorbidities, and not any wrongdoing by Defendants.

Based on lack of proximate cause, Defendants' expert seeks dismissal of the cause of action sounding in wrongful death. She also opines that there is no evidence of intentional or reckless conduct by Defendants in its

care of decedent, and there is likewise no evidence of intentional or reckless disregard of the decedent's rights as a nursing home resident. Finally, she opines that there was no obligation to obtain informed consent in this case as decedent did not undergo any procedures at Defendants' facility, and there is no merit to any claim of lack of informed consent with respect to the treatment rendered and/or procedures performed at Defendants' facility.

Through submission of the affirmation of Defendants' expert, Defendants have established *prima facie* entitlement to summary judgment dismissing Plaintiff's claims for medical malpractice, wrongful death, lack of informed consent, punitive damages, and claims under the Public Health law. Defendant having met its burden of producing evidentiary proof in admissible form sufficient to establish entitlement to summary judgment (*Zuckerman v City of New York*, 49 NY2d 557 [1980]), the burden shifts to Plaintiff to submit proof in admissible form sufficient to create issues of fact to warrant a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]).

Plaintiff opposes the motion and submits the redacted affirmation of Plaintiff's expert, a plastic surgeon board-certified in aesthetic medicine. Plaintiff's expert opines that Defendants' records demonstrate that preventative measure such as turning the patient every two hours, providing pressure relief devices, and proving nutritional supplementation were not implemented, and opines that Defendants' failure to implement said measures substantially contributed to the decedent developing pressure ulcers "in house." Plaintiff's expert opines that Defendants departed from the standard of care by failing to properly diagnose, appreciate, and treat an infection, and by failing to properly complete the course of antibiotics. Plaintiff's expert opines that Defendants' deviations are violations of Public Health Law § 2803-c (3) (e), 10 NYCRR 415.12 (c), 42 C.F.R. § 483.25 (b), and 42 C.F.R. § 483.25 (g) (3). Plaintiff's expert opines that, had Defendants properly treated the infection, the decedent would not have developed sepsis, which caused her health to deteriorate and led to her death on November 9, 2016.

In reply, Defendants argue that Plaintiff's expert is not competent to proffer an opinion on these issues, as he or she lacks the qualifications and experience required, and contend that Plaintiff's expert's affirmation misrepresents the records, is speculative and conclusory, and fails to address contentions raised by Defendants' expert.

"A physician need not be a specialist in a particular field if he nevertheless possesses the requisite knowledge necessary to make a determination on the issues presented. Once the expert professes such knowledge, the issue of the expert's qualifications to render such an opinion must be left to the trial" (*Almeyda v Concourse Rehabilitation & Nursing Ctr., Inc.*, 195 AD3d 437, 437 [1st Dept 2021] [internal citation omitted]). Plaintiff's expert claims that he or she (1) has treated hundreds of patients with pressure ulcers, deep tissue injuries and decubitus ulcers; (2) has assessed and treated patients who developed pressure ulcers after long term admission to hospital and/or nursing homes and has determined the best course of action to prevent pressure wounds and

worsening of existing wounds; (3) is familiar with the protocols required for the prevention of pressure ulcers, deep tissue injuries and decubitus ulcers for patients with decreased mobility and admitted on a long-term basis at a healthcare facility; and (4) is familiar with the standard of care for prevention and treatment of decubitus ulcers, pressure ulcers, and deep tissue injuries in New York in 2016. Plaintiff's expert having affirmed that he or she possessed sufficient knowledge or expertise to testify outside of his or her specialty, such that it can be assumed the opinion rendered is reliable (*Cerrone v N. Shore-Long Is. Jewish Health Sys., Inc.*, 197 AD3d 449, 451 [2d Dept 2021]), the Court finds that the Plaintiff's expert is qualified to render an opinion on the issues presented (*Fortich v Ky-Miyasaka*, 102 AD3d 610 [1st Dept 2013]).

In opposition to Defendants' expert, Plaintiff's expert asserts that Defendants' failure to turn and position the decedent every two hours contributed to the formation and worsening of the decedent's skin ulcers, taking direct issue with Defendants' expert's conclusion that the formation of pressure ulcers was "unavoidable" given decedent's co-morbidities (*Pichardo v St. Barnabas Nursing Home, Inc.*, 134 AD3d 421 [1st Dept 2015]). It should be noted that on the issue of treatment of the decedent's infection, the experts disagree as to what exactly is contained in the various medical records.

While decedent's co-morbidities may have played a role in her decline, viewing the evidence in a light most favorable to Plaintiff (*O'Sullivan v Presbyterian*, 217 AD2d 98 [1st Dept 1998]), Plaintiff raised triable issues of fact as to whether Defendants failed to properly implement a protocol for the prevention of pressure ulcers, and failed to properly treat the decedent's consequent infection and sepsis – which precipitated her death. (*Carey v St. Barnabas Hosp.*, 162 AD3d 435, 436 [1st Dept 2018]).

Neither Plaintiff's attorney affirmation nor expert affirmation address or oppose those portions of the Defendants' motion seeking dismissal of Plaintiff's informed consent. Accordingly, that claim is deemed abandoned and dismissed (*Saidin v Negron*, 136 AD3d 458 [1st Dept 2016]).

Punitive damages are available under Public Health Law § 2801–d (2) where the patient has been deprived of a right or benefit and the deprivation "is found to have been willful or in reckless disregard of the lawful rights of the patient" (*Hairston v Liberty Behavioral Mgt. Corp.*, 138 AD3d 467, 468 [1st Dept 2016]). The violation of rights must be "so flagrant as to transcend mere carelessness" (*Valensi v Park Ave. Operating Co., LLC*, 169 AD3d 960, 962 [2d Dept 2019] [internal citation omitted]). Upon review of the evidence submitted, including the records and affidavits of the experts, the facts in this case do not demonstrate any conduct that could be viewed as so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others (*Vissichelli v Glen-Haven Residential Health Care Facility, Inc.*, 136 AD3d 1021, 1023 [2d Dept 2016]). Therefore, Plaintiff's claim for punitive damages is dismissed.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the parties was not addressed by the Court, it is hereby denied.

Accordingly, it is hereby

ORDERED that Defendants CROWN's motion (Mot. Seq. 2) for summary judgment is **GRANTED TO THE EXTENT** that Plaintiff's claims for punitive damages and informed consent are dismissed as against Defendants CROWN; and it is further

ORDERED that the remaining branches of Defendants' motion are **DENIED**.

ORDERED that Defendants are directed to serve a copy of this Decision and Order with notice of entry by first class mail upon all parties within 30 days of receipt of copy of same; and it is further

This constitutes the Decision and Order of this Court.

Dated: JAN 30 2023

Hon. _____
KIM ADAIR WILSON, J.S.C.