

Corselli v Westchester Park, LLC
2023 NY Slip Op 35274(U)
March 31, 2023
Supreme Court, Westchester County
Docket Number: Index No. 61694/2019
Judge: Janet C. Malone
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To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

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GAYLE CORSELLI as Administrator of the Estate
of PEARL JACKSON, deceased,

Index No. 61694/2019

Motion Sequence. No. 9

Plaintiff,

DECISION AND ORDER

-against-

WESTCHESTER PARK, LLC, WESTCHESTER
PARK LLC /d/b/a SANS SOUCI REHABILITATION
AND NURSING CENTER, SANS SOUCI
REHABILITATION AND NURSING CENTER.

Defendants.

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MALONE, J.

Upon the papers filed with NYSCEF Doc. Nos. 171-207; 217-221, Defendants Westchester Park LLC, Westchester Park, LLC d/b/a Sans Souci Rehabilitation and Nursing Center and Sans Souci Rehabilitation and Nursing Center (hereinafter “San Souci”) move for an order granting partial summary judgment pursuant to CPLR R. 3212 (b), dismissing Plaintiff’s cause of action sounding in wrongful death. Plaintiff opposes such relief upon papers filed with NYSCEF Doc. Nos. 209-216.

On or about February 27, 2007, Pearl Jackson was admitted to San Souci, where she was a resident under the care of the San Souci until her death on August 24, 2017. While Ms. Jackson was a resident at San Souci, plaintiff alleges that she developed bedsores and other injuries which resulted in her suffering, medical expenses, and ultimately, in her death. Plaintiff claims these injuries were caused by San Souci’s negligence and violations of New York Public Health Law. As a result, plaintiff, the administrator of Ms. Jackson’s estate, brought this suit and made claims against San Souci pursuant to New York Public Health Law (PHL) §§ 2801-d, 2803-c; against San Souci for negligence, the failure to provide reasonable care, and failure to properly hire, train, and

supervise employees; against San Souci for gross negligence; and against San Souci and St. Joseph's for wrongful death.¹

Now, as the proponent of this summary judgment motion, San Souci "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact." *Winegrad v. New York University Medical Center*, 64 N.Y.S.2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 N.Y.S.2d 557, 562 (1980); *see also* CPLR §3212. The Court must initially examine the moving papers for sufficiency before turning to any opposition submitted. Only after the movant establishes their initial burden does the burden shift to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he [or she] rests his [or her] claim" (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 [1980]). However, when the submissions of the moving party are insufficient to demonstrate entitlement to judgment as a matter of law, the motion for summary judgment should be denied, without regard to the sufficiency of the opposing papers. *Rentz v. Modell*, 262 A.D.2d 545 (2d Dept. 1999) citing *Winegard v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985). Conclusory assertions, or unsubstantiated allegations, will not defeat a motion for summary judgment. Rather, the opponent must present proof in admissible form as to "evidentiary facts sufficient to raise a triable issue of fact." *Freedman v. Chemical Construction Corp.*, 43 N.Y.2d 260, 264 (1977).

In a wrongful death action, plaintiff must show that "defendant's wrongful act, neglect or default caused the [plaintiff's] death" *Eberts v. Makarczuk*, 52 A.D.3d 772, 772-773 (2d Dept. 2008). "[Th]e concept of proximate cause . . . has proven to be an elusive one, incapable of being precisely defined to cover all situations because the determination of proximate cause [which is a question for the factfinder] involves, among other things . . . that [] the chain of causation must have an endpoint in order to place manageable limits upon the liability that flows from negligent conduct." *Hain v. Jamison*, 28 NY3d 524, 526, 528 (2016) (internal citations omitted). Yet, when the parties' experts offer conflicting medical opinions, summary judgment is not appropriate as

¹ Pursuant to Decision and Order dated March 29, 2022 (*Id.*), Plaintiff's cause of action pursuant to Public Health Law 2801-d and in negligence was dismissed as far as they relate to treatment prior to August 6, 2021; plaintiff's negligence cause action was dismissed; plaintiff's cause of action seeking punitive damages and alleging gross negligence were dismissed without prejudice; ; plaintiff's cause of action against St. Joseph's Medical Center for wrongful death was dismissed with prejudice and the caption was amended to reflect the removal of St. Joseph's Medical Center.

the conflict raises credibility issues that can only be resolved by a jury. *See, Dandrea v. Hertz*, 23 A.D. 3d 332 (2d Dept 2005); *DiGeronimo v. Fuchs*, 101 A.D.3d 933 (2d Dept. 2012).

San Souci submits in support of its motion *inter alia*, the Affirmation of Courtney Kane, Esq., Expert Affirmation of Dr. Lawrence Diamond dated June 13, 2022, Plaintiff's Bills of Particulars, Transcripts of Examinations Before Trial of Gaye Corselli dated August 5, 2021, Nebuchadrezzar Alday, RN dated January 7, 2022, and medical records from Sans Souci and St. John's Riverside Hospital; and Ms. Jackson Death Certificate² (see NYSCEF Doc. Nos. 171-207). San Souci argues that the care and treatment Jackson received at its facility was not the proximate cause of Jackson's death and that Jackson, "who was 96 years-old at the time, expired of natural causes, namely hypoxic respiratory failure" (Kane Affirmation in Support at ¶ 41 at NYSCEF Doc. No. 172). San Souci further argues that Jackson's death was not caused by any negligent act or omission by San Souci or its employees. Defendants contend that the fact that an injury occurred does not in and of itself establish defendants' liability.

In opposition, Plaintiff argues San Souci's motion should be denied because San Souci submits numerous items, in an inadmissible format and as such Plaintiff's disputes their accuracy and should not be considered by the Court. Plaintiff states that Defendants failed to serve the Plaintiff and the nonparty witness, with copies of the deposition transcripts and that the depositions transcripts are unsigned in direct contravention to the requirements in CPLR R. 3116. Second, the medical records submitted for San Souci Rehabilitation and Nursing Center are not certified and the affirmation of Dr. Diamond is not subscribed nor affirmed to be true under penalties of perjury. Finally, San Souci's motion fails to address the medical records that show Ms. Jackson was assessed "to have sustained a partially obstructed -foreign body object in her airway at Defendants' facility" (Steve Fils-Aime Affirm. at ¶45 NYSCEF Doc. No. 209). Plaintiff submits *inter alia* the Affirmation of Dr. Marc Sheppard dated October 3, 2022, and medical records from SeniorCare Emergency Medical Services and St. John's Riverside Hospital to show that San Souci negligence was the proximate cause of Jackson's death. (NYSCEF Doc. Nos. 209-216).

In reply, Defendant submits *inter alia* the Reply Affirmation of Courtney F. Kane, Esq., a certification for San Souci's Medical Records and an Amended Expert Affirmation of Dr.

² Affirmations and affidavits "shall be for a statement of relevant facts" and briefs and/or memoranda of law "shall be for a statement of the relevant law" (22 NYCRR 202.8 [c]). The Court notes that neither counsel has adhered to the Chief Judge's Rules and both cite law in their respective Affirmations.

Diamond (NYSCEF Doc. Nos. 217-221). Defendants argue that the accuracy and admissibility of the deposition transcripts³ are irrelevant and need not be considered since the defendants did not rely on them in its moving papers. Defendants contend that the San Souci medical records and Dr. Diamond's Affirmation are admissible since the defects have been cured with the submission of a Certification for the San Souci medical records and an amended Expert Affirmation of Dr. Diamond in compliance with CPLR R. 2106. Finally, Defendant argues that Plaintiff has raised a new theory regarding the proximate cause of Plaintiff's death not plead in the complaint or bill of particulars.

While evidence submitted for the first time in reply papers should not be considered by the Court, evidence submitted in response to opposition papers can be considered. *Citimorgage, Inc. v. Espinal*, 134 A.D.3d 876 (2d Dept 2015) citing *David v. Chong Sun Lee*, 106 A.D.3d 1044, 1045 (2d Dept. 2013)(other internal citations omitted). The Court finds the amended Affirmation of Dr. Diamond admissible. While Plaintiff challenges the accuracy or veracity of the uncertified medical records, Dr. Sheppard relied on a certified version of those same medical records in rendering his opinion.⁴ Thus, the Court can consider this evidence in reviewing this motion for summary judgment. See *Tomio v. Beccia*, 127 A.D.3d 1071 (2d Dept. 2015) citing *Carlton v. St. Barnabas Hosp.*, 91 A.D.3d 561 (1st Dept. 2012).

Dr. Diamond opines that to a reasonable degree of medical certainty, San Souci did not proximately cause of Jackson's death. He reviewed Jackson's medical records at San Souci and at St. John's Riverside Hospital and found that on August 16, 2017 and August 22, 2017, she was seen for a physical and she had no sign of infection. Jackson was found in respiratory distress on August 24, 2017 during lunch and the EMS transported Jackson to St. John's Riverside Hospital at 1:43pm. (Diamond Affirm. at ¶¶ 6-9, at NYSCEF Doc. No. 174).

In opposition, Dr. Sheppard opines to a reasonable degree of medical certainty that the negligence in the care and treatment of Ms. Jackson was the proximate cause of her death. Reviewing medical records from San Souci and St. John's Riverside Hospital, Dr. Sheppard noted that on July 7, 2017, a Care Plan Note stated that Ms. Jackson needed total assistance with bathing,

³ Defendants did not attempt to cure the deposition transcripts submitted in support of its motion, nor did Defendants dispute that it had not forwarded those transcripts to Plaintiff's counsel or to the non-party for signature pursuant to the CPLR 3116(a).

⁴ Plaintiff, however, failed to submit the certified version of those medical records with its opposition papers.

hygiene, bed mobility, toileting, dressing and eating. (Dr. Sheppard Affirm. at ¶7, at NYSCEF Doc. No. 215). He further cites to a July 13, 2017 Care Plan Note which states that “Ms. Jackson required 24-hour care and supervision” (*Id.* at ¶ 8). He then refers to a Physician’s Progress Note which stated that Ms. Jackson, was found lying in bed with audible congestion and tachypnea, and that RN staff stated that “[patient] was being fed suspected aspiration.” (*Id.* at ¶9). Dr. Sheppard also referred to the “Patient Care Report created by SeniorCare Emergency Medical Services, which indicated that Ms. Jackson was assessed to have sustained a “Partially Obstructed - Foreign Body” to her airway” (*Id.* at ¶ 11). Dr. Sheppard opined that San Souci’s failure to abide by the July 7, 2017 and July 13, 2017 Care Plan Notes to assist Ms. Jackson with eating and provide 24-hour care and supervision caused Ms. Jackson to ingest a foreign object, which blocked her airway. This failure, he opined, caused Ms. Jackson to sustain hypoxic respiratory failure and sepsis and ultimately caused her death (*Id.* at ¶15-16).

Upon a review of the evidence submitted and viewing this matter in the light most favorable to the non-moving party, Plaintiff has raised a triable issue of fact as to whether San Souci exercised reasonable care in supervising and caring for Ms. Jackson. Dr. Sheppard cited to specific instances in the medical records, and he opined that it was San Souci’s failure to follow the Care Plan Notes in regard to the care and treatment of Ms. Jackson on August 24, 2017 was the proximate cause of her death. Given the conflicting medical opinions regarding whether the care provided by San Souci was the proximate cause of Plaintiff’s death, (*Henry v. Sunrise Manor Ctr. for Nursing & Rehab*, 147 A.D.3d 739, 741 [2d Dept. 2017]), summary judgment is not appropriate, and Defendants’ motion has to be denied.

Additionally, the Court finds Defendants’ argument that the proximate cause of Ms. Jackson’s death this is a newly raised theory, to be without merit. Plaintiff specifically alleges “during ... Pearl Jackson’s stay at ... [San Souci]..., she developed numerous injuries ... resulting in her death caused by defendant.” (see Amended Complaint at ¶71, NYSCEF Doc. No. 220). Moreover, Plaintiff’s Bill of Particulars states “[t]he following injuries sustained by... [Ms. Jackson] were caused, ... and/or precipitated by the negligence of ... defendants: - Hypoxic respiratory failure ... -Hypoxia ... -Severe Respiratory Distress.” (see Bill of Particulars ¶7, NYSCEF Doc. No 221).

The Court having considered the additional contentions of the parties, deems them to lack merit or to be moot in light of the foregoing. Accordingly, it is hereby

ORDERED, that Defendant's motion for summary judgment on the issue of liability is DENIED; and it is further

ORDERED, that the parties shall appear for a Settlement Conference on **April 26, 2023 at 11:15 a.m.** [Click here to join the videoconference](#);

This constitutes the Order of the Court.

Dated: March 31, 2023
White Plains, New York

ENTER:



HON. JANET C. MALONE, J.S.C.