Fitzgerald-Murray v Mayo
2023 NY Slip Op 35289(U)
November 14, 2023
Supreme Court, Queens County
Docket Number: Index No. 706082/2017
Judge: Tracy Catapano-Fox

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----------X

MARY FITZGERALD-MURRAY,

Plaintiff,

-against-

PAUL MAYO, M.D., and LONG ISLAND JEWISH MEDICAL CENTER,

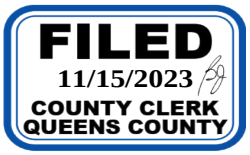
Defendants.

----------X

Index No. 706082/2017

Part MDP
Motion Date: October 11, 2023

Calendar No. 8
Sequence No. 6



The following papers numbered EF-85 to EF-114 read on this motion by defendants PAUL MAYO, M.D. and LONG ISLAND JEWISH MEDICAL CENTER for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits…….	EF85-EF103
Affirmation in Opposition, Exhibits…….......	EF104-EF112
Reply Affirmation……...,	EF113-EF114

Upon the foregoing papers, and after oral argument, it is ordered that this motion is determined as follows:

Defendants Paul Mayo, M.D. and Long Island Jewish Medical Center's motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted. Plaintiff commenced this action sounding in medical malpractice arising from the formation of eschar marks, blisters, and pressure ulcers during plaintiff's hospital stay at Long Island Jewish Medical Center from July 19, 2016, through August 16, 2016. Plaintiff filed the Summons and Complaint on May 5, 2017, and issue was joined via service of defendants Answers on June 7, 2017.

Defendants argue that summary judgment should be granted, and present the pleadings, plaintiff's medical records, parties' deposition testimony, and expert affirmation in support of their motion. They argue that the evidence shows there was no departure from acceptable standards of care that caused or contributed to plaintiff's injuries. They also argue that defendant Long Island

Jewish Medical Center should not be held vicariously liable for Dr. Mayo's care and treatment, as he did not depart from accepted standards of medical care.

Defendants presented the affirmation of Dr. Edward Eden in support of their motion. Dr. Eden attested that he is a licensed physician in New York who is board certified in Internal Medicine and Pulmonary Disease. He attested that he reviewed the pleadings, plaintiff's Verified Bill of Particulars, plaintiff's pertinent medical records, and transcripts of the parties' deposition testimony in rendering his opinions. Dr. Eden opined to a reasonable degree of medical certainty that defendants rendered care to plaintiff within good and accepted medical practices, defendants did not depart from accepted medical care during plaintiff's treatment, and that none of their claimed acts or omissions caused or contributed to plaintiff's injuries.

Dr. Eden opined that plaintiff's placement in the prone position within the Roto-prone bed would improve her prognosis and outcome from severe respiratory disease and distress and was most effective with a greater chance of survival when implemented earlier in the hospital admission, which was done here. Dr. Eden further attested that defendant Dr. Mayo only saw plaintiff two days during her hospital admission prior to her being placed in the prone position on the Roto-prone bed, and plaintiff's eschar marks, blisters, and pressure ulcers formed long after Dr. Mayo's care. Dr. Eden further attested with respect to plaintiff's claim of lack of informed consent that plaintiff was sedated and intubated when the prone position within the Roto-prone bed was ordered, Dr. Mayo was not involved in that decision, and the hospital staff member that made that order obtained informed consent from plaintiff's husband. Dr. Eden further attested that a reasonably prudent person in plaintiff's condition who was informed of all the risks and benefits would reasonably decide to be placed in the prone position within the Roto-prone bed to reduce the chance of respiratory arrest, as the risk of developing pressure ulcers was outweighed by the benefit of avoiding anoxic brain injury and death.

Dr. Eden opined that plaintiff being turned and positioned every two hours was within the standard of care. Dr. Eden also opined that plaintiff's cheek scarring was caused by her overall poor health including her being morbidly obese and a smoker. Based upon the foregoing, Dr. Eden opined that plaintiff's placement in the prone position within the Roto-prone bed was necessary to her treatment, the development of pressure ulcers was only a minor risk of her placement in that position, once the ulcers developed they were timely diagnosed and properly treated with cleanings and bacitracin, and to extubate plaintiff to check for potential ulcers would have compromised her oxygenation. Based upon the evidence presented, Dr. Eden opined that defendants did not depart from accepted standards of medical care, and plaintiff's injuries were a result of her morbid obesity and overall poor health rather than defendants' acts or omissions.

Plaintiff opposed defendants' motion and argued that defendants failed to establish a prima facie case. Specifically, plaintiff argued that there are issues of fact with respect to whether

defendants developed an adequate skin care/ulcer plan and maintained proper hydration and nutrition for plaintiff. Plaintiff further argues that defendant Long Island Jewish Medical Center is vicariously liable under the doctrine of *respondeat superior* for Dr. Mayo's malpractice. Finally, plaintiff argues that this is a classic "battle of the experts" wherein plaintiff's expert affirmation raises issues of fact with respect to defendants' expert conclusions, and therefore summary judgment is not warranted. Plaintiff also argues that the claims for negligent hiring and supervision should not be dismissed, as she contends that an employee who negligently performs medical work should have their qualifications challenged at trial, which could create an issue of fact. It is noted that plaintiff did not oppose defendants' motion with respect to the claim for lack of informed consent.

Plaintiff presented the affidavit of a licensed physician in Maryland who is board certified in General Medicine and Geriatric Medicine. Plaintiff's expert reviewed plaintiff's medical records, Dr. Eden's affirmation, and the transcripts of the parties' deposition testimony in rendering the opinions in the affidavit. Plaintiff's expert opined within a reasonable degree of medical certainty that defendants did not render care in accordance with good and accepted nursing and medical practice, and defendants' deviations caused plaintiff's injuries. Plaintiff's expert attested that plaintiff's chart does not indicate a care plan or measures to evaluate plaintiff until she began to develop ulcers and blisters just 24 hours after being placed within the Roto-prone bed. Plaintiff's expert opined within a reasonable degree of medical certainty that there should have been an adequate care plan in place from the time plaintiff was admitted and not just when the pressure ulcers began to develop, and that the pressure ulcers were a result of the defendants' failure to meet the appropriate standard of care. Plaintiff's expert also attested that in a high-risk patient like plaintiff, there should have been padding to prevent moisture and consequently prevent the ulcers. Plaintiff's expert also opined that defendants deviated from the standard of care by failing to take steps to ensure adequate hydration and nutrition. Based upon the foregoing, plaintiff's expert opined within a reasonable degree of medical certainty that defendants deviated from accepted medical practices and defendants' deviations proximately caused plaintiff's injuries.

Pursuant to CPLR §3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]; *Rodriguez v. City of New Yor*k, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also "show that there is no defense to the cause of action." (*Id*.). The party moving for summary judgment must make a prima facie showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; *see Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp*., 18 N.Y.3d 499, 505 [2012].) Once a prima facie showing has been made, however, the burden shifts to the non-moving party to prove that

material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires dismissal of the Complaint. (*Id*. At 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].) In general, a hospital may be vicariously liable for the negligence or malpractice of its employees acting within the scope of employment under the doctrine of *respondeat superior*. (*Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].)

Defendants established a prima facie entitlement to summary judgment through their expert affirmation, deposition testimony, and medical records. (*See Carradice v. Jamaica Hosp. Med. Ctr.*, 198 A.D.3d 863 [2d Dept. 2021].) Defendants demonstrated that plaintiff was properly placed in the prone position within the Roto-prone bed, which was necessary to address plaintiff's severe respiratory disease and distress. Defendants further demonstrated that Dr. Mayo only saw plaintiff twice at the beginning of her admission, prior to her placement in the prone position within the Roto-prone bed, and that Dr. Mayo did not order plaintiff's placement there. Defendants also demonstrated that plaintiff's blisters and pressure ulcers were not a result of defendants' alleged malpractice, but rather her poor overall health including being a smoker and morbidly obese. Based upon the foregoing, defendants established prima facie that they did not depart from good and accepted standards of care and that their acts and/or omissions did not cause plaintiff's injuries.

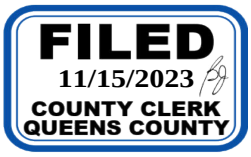
Plaintiff failed to raise a triable issue of fact, as plaintiff's expert presented conclusory and general opinions of defendants' deviations without specifying how Dr. Mayo departed from good and accepted care, and how the departures caused plaintiff's injuries. (*See Wijesinghe v. Buena Vida Corp.*, 210 A.D.3d 824 [2d Dept. 2022]; *see also Longhi v. Lewit*, 187 A.D.3d 873, 878 [2d Dept. 2020][holding that "In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record"].) Plaintiff's expert opined as to several deviations from the accepted standard of care by defendant Long Island Jewish Medical Center, but failed to specify how Dr. Mayo deviated from accepted medical care when he only saw plaintiff two times prior to her being placed in the Roto-prone

bed, and did not order her placement in the bed. Additionally, plaintiff's expert attested that plaintiff's chart did not include an adequate care plan, there should have been padding to prevent moisture in order to prevent the formation of the pressure ulcers, and there was a general failure to ensure adequate hydration and nutrition. However, plaintiff's expert failed to opine that any of these alleged departures were related to Dr. Mayo's acts or omissions. The expert opined that the Roto-prone bed was known to cause pressure ulcers, but did not refute defendants' expert opinion that the benefits of the Roto-prone bed outweighed the risk of pressure ulcers. The expert also opined that plaintiff's chart did not have an adequate care plan, but did not specify what was missing in the care plan that proximately caused plaintiff's injuries. The argument that defendants failed to include padding was conclusory and did not establish how that would have prevented the pressure ulcers. Further, plaintiff's expert's opinion with respect to the improper hydration and nutrition was not alleged in plaintiff's Bill of Particulars. Therefore, plaintiff's expert's affirmation is insufficient to raise a triable issue of fact in dispute. (*See Coscia v. Mosca*, 203 A.D.3d 695 [2d Dept. 2022].)

Accordingly, defendants' motion for summary judgment and dismissal of plaintiff's Complaint is granted. Plaintiff's Complaint is hereby dismissed.

This constitutes the decision and Order of the Court.

Dated: November 14, 2023



Tracy Catapano-Fox

Hon. Tracy Catapano-Fox, J.S.C.