Druss v Scher
2023 NY Slip Op 35337(U)
December 15, 2023
Supreme Court, Rockland County
Docket Number: Index No. 032166/2020
Judge: Thomas P. Zugibe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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STACEY DRUSS,

Plaintiff,

-against-

DR. MARK SCHER, AMANDA F. BANKS, and MONTEFIORE NYACK HOSPITAL

Defendants.
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MONTEFIORE NYACK HOSPITAL,

Third-Party Plaintiff,

-against-

NYACK EMERGENCY MEDICAL ASSOCIATION, PLLC, and EMERGENCY MEDICAL ASSOCIATION OF NEW YORK, P.C.,

Third-Party Defendants.
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DECISION AND ORDER
Index No.: 032166/2020

Mot. Seq. #s: 4-6

ZUGIBE, J.

The Court has pending before it three applications: a motion on behalf of DR. MARK SCHER ("Dr. Scher"), AMANDA F. BANKS ("Ms. Banks"), and MONTEFIORE NYACK HOSPITAL ("Montefiore Nyack") (collectively referred to as "Defendants") seeking an Order granting summary judgment on their behalf and dismissing the Complaint as well as any cross-claims asserted as against them pursuant to N.Y. CIV. PRAC. L&R ("CPLR") § 3212; a motion on behalf of NYACK EMERGENCY MEDICAL ASSOCIATION, PLLC ("NEMA") and EMERGENCY MEDICAL ASSOCIATION OF NEW YORK, P.C. ("EMA") (collectively referred to as "Third-Party Defendants") seeking dismissal of the Third-Party Complaint against them pursuant to CPLR 3212; and a motion on behalf of STACEY DRUSS ("Plaintiff") granting summary judgment in her favor pursuant to CPLR 3212. In connection with these three motions,

the Court has read and considered NYSCEF documents numbered 131- 213, 219-292, and 297-304, and hereby renders the following Decision and Order:

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed the Complaint that is the subject of these motions with the Rockland County Clerk on June 10, 2020. NYSCEF Doc. 1. It is alleged in the Complaint that on July 22, 2019, the Plaintiff was removed from her home and taken to Montefiore Nyack for admission into their psychiatric unit. *Id.* It was further alleged that Plaintiff was illegally detained at Montefiore Nyack due to "gross misconduct" by Dr. Scher, a psychiatrist employed by the Hospital, by purportedly falsifying medical records and intentionally misdiagnosing the Plaintiff. *Id.* These actions allegedly resulted in Plaintiff being unnecessarily medicated against her will. *Id.* There are five (5) causes of action asserted in the Complaint: wrongful imprisonment, assault and battery, two medical malpractice claims, and intentional infliction of emotional distress. As a result of the foregoing allegations, Plaintiff is seeking compensatory and punitive damages, as well as an Order from the Court "expunging" the false records maintained by Montefiore. *Id.*

The named parties joined issue. On June 16, 2022, Defendants filed a Third-Party Complaint as against NEMA and EMA based on allegations made by Plaintiff that indicated a portion of her claims arose from care and treatment provided by two emergency medicine physicians in the emergency department. NYSCEF Doc. 105. The Third-Party Complaint sounds in indemnification and contribution. *Id.* The parties named in the Third-Party Complaint also joined issue. Discovery was eventually completed, and a Note of Issue was filed by Plaintiff on May 2, 2023. NYSCEF Doc. 130. The instant motion practice ensued.

DEFENDANTS' MOTION

The Defendants contend that the record evidence supports the general facts as follows: On July 22, 2023, Plaintiff was transported by the Town of Clarkstown Police to Montefiore on July 22, 2019, at 11:20 p.m. The transporting officers reported that the Plaintiff's sister had called the Rockland County Behavioral Health Response Team ("BHRT") to inform them that Plaintiff, who was previously diagnosed with bi-polar disorder, was off her medications and experiencing a manic episode. As a result, she requested a wellness check. The BHRT records, along with a Notice to Admit same, are attached to the motion papers. NYSCEF Docs. 158, 159.

Following this call, Clarkstown police apparently went to Plaintiff's home to conduct a wellness check. As per the certified police report, when the police arrived, Plaintiff answered the door, partially dressed, and told police to leave her property. NYSCEF Doc. 160. Police attempted to gain access to assess her mental health condition, at which time Plaintiff retreated to the second floor of the home and attempted to barricade herself. *Id.* During the minutes that ensued, as per the report, Plaintiff struck one of the officers in the face. *Id.* Based on the events described in the report, police made the determination Plaintiff was a threat to herself and others, and she was transported to Montefiore for a psychiatric evaluation. *Id.*[1]

Upon arrival to Montefiore Nyack, Plaintiff was evaluated by medical staff. Certified copies of the Montefiore records are attached to the moving papers. NYSCEF Doc. 157. Nurse Alina Nieves-Pacheco was unable to assess whether Plaintiff was homicidal or suicidal, and patient supervision was implemented. *Id.* at p. 44. Plaintiff was agitated, defensive, labile and speaking fast, however her thought process appeared to be normal at that time, and her insight and judgment appeared to be reality-based. *Id.* at p. 46. The attending physician that evening in the emergency room, Dr. Raymond Marcovici, M.D., assessed the Plaintiff as well. He noted that Plaintiff was unable to contribute to her medical history and unable to communicate in a meaningful way. *Id.* at p. 33. Dr. Marcovici spoke to the police who transported the Plaintiff to obtain any background information that may have had. Dr. Marcovici, during his examination of the Plaintiff, noted she was restless, pacing, with rapid and tangential speech. *Id.* at p. 31. These symptoms, as per Dr. Marcovici, were consistent with a diagnosis of a bipolar manic episode. In response, Dr. Marcovici prescribed Plaintiff 5 mg of Haldol and 2mg of Ativan. *Id.* at p. 35. Plaintiff did not consent to the administration of this medication.

The following morning of July 23, 2019, Defendant Ms. Banks, a social worker employed by Montefiore Nyack, testified at her deposition that she performed another screening and assessment of the Plaintiff. NYSCEF Doc. 155, p. 10-12. Ms. Banks' assessment notes indicate that she found the Plaintiff to be "delusional, disorganized and paranoid." *Id.* at p. 24.

[1] By way of information, Plaintiff has also commenced suit against the Clarkstown Police Department and various Clarkstown police officers. NYSCEF Docs. 146, 147. This matter was removed to, and ultimately remains pending in, the U.S. District Court, Southern District of New York, under the caption *Stacey Druss v. Town of Clarkstown, Anthony Muscatella, et al*. [7:20-cv-06341- PMH].

Ms. Banks also noted that the Plaintiff's behaviors with the police and upon entering the hospital were aggressive, and therefore dangerous and impulsive. *Id.* at p. 39. In addition, Ms. Banks noted Plaintiff was suffering from delusional and paranoid thoughts. Following her assessment, Ms. Banks spoke to Dr. Scher, the on-call psychiatrist. The Plaintiff's diagnosis after the assessment was bi-polar disorder. NYSCEF Doc. 157, p. 92. It was, as per Ms. Banks, Dr. Scher's determination that Plaintiff was suffering from an acute psychiatric condition requiring 24 hours skilled medical care overnight. NYSCEF Doc. 155, p. 41-42. It was also Dr. Scher who concluded that Plaintiff was a potential danger to herself or others. *Id.* at p. 42. The recommendation of Dr. Scher was, therefore, to set-up an emergency admission for observation pursuant to MHL § 9.39. Dr. Scher testified that he based this determination on the circumstances and events leading up to her transport to the hospital, and the report of social worker and mental health professional, Ms. Banks. NYSCEF Doc. 156, p. 62. Dr. Scher did not, as per his deposition, order any medications for the Plaintiff. His role was limited to recommending the patient either be discharged or admitted for further treatment. *Id.* at p. 63-72. In this instance, he recommended Plaintiff be admitted for further treatment, at which time his involvement with the Plaintiff concluded. *Id.* at p. 85-86.

Also on July 23, 2019, Montefiore Nyack's records demonstrate that the Plaintiff was evaluated by emergency medicine physician Natalie Brewster, M.D., NYSCEF Doc. 157, p. 66-38. Dr. Brewster determined that based on her initial encounter with the Plaintiff, her clinical impression was "acute schizoaffective disorder." *Id.* at p. 40. Dr. Brewster subsequently completed an Emergency Admission Form with respect to the Plaintiff. *Id.* at p. 20. Later on July 23, 2019, Plaintiff was involuntarily committed to the behavioral health unit, under the diagnosis of bipolar disorder, by psychiatrist Dr. Maryam Rakhmatullina, M.D. *Id.* at p. 60. Dr. Rakhmatullina performed an evaluation/assessment of the Plaintiff, the findings of which are also contained in the medical records. *Id.* at p. 94-99. Dr. Rakhmatullina felt the Plaintiff's prognosis at that time was good, with an estimated length of stay being five (5) days, and noted Plaintiff could be discharged once no longer acutely a danger to herself or others. *Id.* at p. 99. Dr. Rakhmatullina entered orders for psychotropic medications, specifically Haloperidol and Seroquel. Subsequently, on July 24, 2019, Dr. Rakhmatullina signed orders indicating that the Plaintiff was expected to require two or more midnights of hospital care. *Id.* at p. 68. Ultimately, after a discharge plan was put in place with the assistance of social worker Brittany Browning,

the Plaintiff was discharged on July 25, 2019. *Id.* at p. 168. Plaintiff was picked up by her mother. *Id.*

The day of Plaintiff's discharge, the records demonstrate that she was acting impulsive, euphoric and overly friendly and elated, but that she refused Seroquel. *Id.* at p. 169. Plaintiff insisted that she only take Ativan, which was administered with "good effect." Plaintiff was given follow up care instructions prior to her discharge, including her scheduled appointment with a Mental Health Associates of Westchester. *Id.*

In further support of Defendants' motion, they submit the following affidavits: (1) Dr. Robert Silverman, a licensed physician who is board certified in emergency medicine and internal medicine; (2) Dr. Sandra Antoniak, M.D., a licensed physician who is board certified in psychiatry; and (3) Amanda Banks, LMCW. NYSCEF Docs. 133, 135-36.

Dr. Silverman affirmed after his review of the entire record that the care rendered in the emergency department at Montefiore Nyack Hospital, specifically by Dr. Marcovici and Dr. Brewster, was within the confines of good and acceptable practice. Dr. Silverman stated that Plaintiff's history and the initial management of Plaintiff was "based upon multiple sources, such as family members (sister), the police who brought the patient to the emergency department, the emergency department nursing staff and a detailed valuation by Dr. Marcovici." NYSCEF Doc. 136, p. 10. Dr. Marcovici's evaluation was appropriate, as Plaintiff was experiencing an "acute psychiatric emergency[.]" *Id.* The "pharmacological therapy" administered was, in Dr. Silverman's opinion, an appropriate combination of medication used to treat such an emergency, inasmuch as the medication is safe, effective, works quickly and does not require placement of an intravenous line. *Id.* At p. 11. By administering these medications as quickly as Dr. Marcovici did, it prevented escalation, and the need for use of physical restraints. *Id.* At p. 12. Dr. Silverman also opines that the emergency department has the duty and obligation to provide treatment pursuant to the standard of care to all patients - even those who may not be able to consent due to a psychiatric emergency. *Id.* at p. 13. There was ample evidence available to indicate to the emergency room physician that Plaintiff lacked decision making capacity, which is not unusual in similar cases. *Id.*

Dr. Silverman also determined that Dr. Brewster appropriately signed the MHL § 9.39 form after her evaluation of the Plaintiff and review of the file and consultation with the on-call

psychiatrist, as indicated in the medical records. *Id.* at p. 14-15. The recommendation that Plaintiff be admitted over objection was supported by multiple medical professionals as set forth in the medical records. The care provided to Plaintiff in the emergency department comported with good and accepted medical practices and was in compliance with the standard of care. *Id.* at 15-16.

Dr. Antoniak, a psychiatrist, supports the opinion of Dr. Silverman. The facts demonstrated that Plaintiff was behaving in a manner that posed a threat to herself or others, and therefore, Dr. Marcovici was permitted to administer medications to Plaintiff via injection over her objection pursuant to 14 NYCRR § 527.8(a)(4). NYSCEF Doc. 135, p. 6. Informed consent is not, as per Dr. Antoniak, required in an emergency situation such as what was described in the medical records. The administration of the medication was made based on Dr. Marcovici's observations of Plaintiff's behavior and psychosis at the time of administration. *Id.* at p. 7. Dr. Marcovici testified at his deposition he was not aware the Plaintiff had a prior diagnosis from Dr. Scher, but, in any event, the hospital was legally required to maintain patient records for a period of at least six (6) years. Thus, any claim that Plaintiff was only medicated because Dr. Scher diagnosed her with bipolar disorder back is 2016 is inaccurate and misplaced. *Id.* at p. 8-9.

To the extent Ms. Banks is named, Dr. Antoniak points out that she had no involvement with the administration of medication to Plaintiff's on the date of her admission to the hospital. *Id.* at p. 9. Ms. Banks became involved in this case the day after Plaintiff's admission, when she performed a screening and assessment of the Plaintiff on July 23, 2019. Ms. Banks, as per Dr. Antoniak, properly completed the screening and assessment wherein she noted based on the report of Plaintiff's sister, that Plaintiff had a previous diagnosis of bipolar disorder. *Id.* at p. 10. All of Ms. Banks' notations in her assessment were supported by either statements Plaintiff made directly, or collateral source information collected during the assessment process. *Id.* In reaching this conclusion, Dr. Antoniak reviewed each entry in Ms. Banks' assessment and supported her contention that the assessment was wholly supported by the facts presented. Therefore, Ms. Banks' conclusion that Plaintiff presented a risk of harm to herself or others, and that coupled with her presentation as delusional, disorganized and paranoid, hospitalization and stabilization were required for a safe discharge was in accord with accepted standards of psychiatric care. *Id.* at 11-12.

In terms of Plaintiff's claims regarding Dr. Scher, Dr. Antoniak describes his role as an on-call remote licensed psychiatrist at Montefiore Nyack. In this role, which Dr. Antoniak contends is a role that falls well within the applicable standard of accepted psychiatric care, Dr. Scher would receive telephone requests for consultations for patients presenting to the emergency department. *Id.* at p. 14. Based on the information provided to him by the qualified mental health professional on staff, he would recommend whether the patient should be admitted or discharged. *Id.* The record evidence in this case indicates that Dr. Scher was on call at the time Plaintiff was brought into the emergency department. Dr. Antoniak affirms that Dr. Scher's participation in the Plaintiff's assessment and his ultimate recommendation she be admitted for further care were appropriate and within the standard of care. *Id.* at p. 15. Dr. Antoniak details the reasoning that Dr. Scher's impression and diagnosis was accurate and in line with accepted medical/psychiatric standards based on Plaintiff's symptoms and the information in the record. *Id.* at p. 16-17. Dr. Scher had no further involvement with Plaintiff, did not order any medications, and had no role in her subsequent discharge. *Id.* at p. 17-18.

Dr. Antoniak reviewed the standard for admission pursuant to MHL § 9.39 and, based thereon, she supported her opinion that the record evidence demonstrates Plaintiff's admission was within the accepted standard of medical care. *Id.* at p.18-19. Plaintiff presented with observed and reported signs of mental illness. *Id.* Plaintiff made threats even once in the emergency department. *Id.* She demonstrated she was dangerous to herself or others. All of the required elements for an involuntary admission were met. Plaintiff was, as required by MHL §9.39, examined within 48 hours of admission, whereby it was determined Plaintiff was no longer a danger to herself or others. *Id.* at p. 20. Once a safe discharge plan was confirmed by hospital staff, Plaintiff was discharged pursuant in accordance with the MHL. *Id.* at p.21. Therefore, "[i]n summary, the care and treatment provided by the defendants in this action was consistent with the standard of accepted medical and psychiatric care, as well as the dictates of the [MHL], and did not cause any injury to the patient." *Id.* at p. 22.

Ms. Banks' affidavit also supports, in significant detail, Defendants' contention that the opinion to admit Plaintiff was based on Plaintiff's condition and the information available at the time the recommendation was made and met all of the requirements of an MHL § 9.39 involuntary admission. NYSCEF Doc. 133.

Based on the foregoing, and all the record evidence submitted in support, Defendants contend that they have demonstrated *prima facie* entitlement to summary judgment with respect to each cause of action asserted in the Complaint.

THIRD-PARTY DEFENDANTS' MOTION

With respect to the Third-Party Defendants' motion, the Court notes that same is predicated on generally the same facts and supporting documentation as the Defendants' motion, including the expert submissions referenced, *supra*. The Third-Party Defendants do not appear to dispute the hospital's entitlement to indemnification or contribution to the extent it is found liable to Plaintiff based on the acts or omissions of Drs. Brewster and Marcovici. Rather, Third-Party Defendants argue that there should be no finding of liability as against anyone based on the reasons set forth therein. The Court will, therefore, consolidate its analysis of these two summary judgment motions.

OPPOSITION TO DEFENDANTS AND THIRD-PARTY DEFENDANTS' MOTIONS

Plaintiff, in opposition, argues that the expert submissions relied upon by Defendants (and Third-Party Defendants) are hearsay, and therefore, inadmissible. Specifically, Plaintiff points to the Rockland County BHRT records, the Clarkstown Police Department records, and the statements made by Plaintiff's sister as inadmissible. NYSCEF Doc. 289. Plaintiff's counsel attempts to discredit Defendants' expert affidavits by asserting that the records relied upon contained too many inconsistencies or gaps in information to be able to draw the conclusions set forth therein. *Id.* Plaintiff's facts proffered in opposition are sufficient, in her opinion, to warrant denial of the motions. *Id.*

Plaintiff relied on the four (4) page affidavit of Dr. Calvin Chatlos, M.D. in both opposing the Defendants' and Third-Party Defendants' summary judgment motions, and in supporting her own motion for summary judgment. NYSCEF Doc. 196. Dr. Chatlos is board certified in the field of psychiatry, and is apparently licensed in the State of New Jersey. *Id.* Dr. Chatlos is currently a professor of psychiatry at Rutgers-Robert Wood Johnson Medical School, in New Jersey. *Id.* As per Dr. Chatlos' affidavit, the actions undertaken by the hospital staff were below medical standards in both committing Plaintiff and involuntarily treating her. *Id.* at p. 2. Dr. Chatlos contends the records of the hospital are insufficient and contradictory. *Id.* Dr.

Chatlos does not provide the Court with his assessment of what the appropriate standard of care is, and how each named Defendant's conduct deviated therefrom. Notwithstanding, Dr. Chatlos opines that the medication injection was medically unnecessary. *Id.* at p. 4. He does not elaborate medical reasons as to why. Dr. Chatlos concludes his brief affidavit with his conclusion that "[a]dmitting [Plaintiff] into a psych unit on the opinion of a doctor who was at the time being sued by [Plaintiff], a doctor who had either lied or grossly exaggerated her situation in a formal affidavit to a court to have her retained by the court, was also below the standards in the psychiatric unit and constituted malpractice." *Id.* Dr. Chatlos makes no mention of the other medical professionals who participated in Plaintiff's care and treatment during the relevant dates at issue.

Plaintiff also submits the signed letter of Dr. Ralph Shapiro, a licensed psychologist. NYSCEF Doc. 292. The letter is not in affidavit format, and is not notarized. *Id.* Dr. Shapiro opines that Plaintiff was placed in a situation of dread and panic as a result of being removed from her home, and that the reasons the hospital expressed for medicating her over objection were not persuasive. *Id.* Dr. Shapiro also points to the apparently confusing hospital records, and opines that the contents of said records did not justify holding Plaintiff for a period of time grater than what is allowed by law. *Id.* Dr. Shapiro does not identify what law he is referring to or what actions (or inactions) were taken by the named Defendants that violated the applicable standard of care, and how.

Plaintiff also has submitted the Affidavit of a Stephen Mitchell, a "friend" of the Plaintiff. NYSCEF Doc. 206. Mr. Mitchell submits this affidavit to inform the Court that he arrived at Plaintiff's residence in response from a call from her sisters requesting that he check in on Plaintiff on the night of the events that led to her hospitalization. *Id.* Mr. Mitchell arrived at the house after the police were already there. *Id.* Mr. Mitchell contends that he *did not see* Plaintiff strike anyone, or any police officer, *nor did he see* her throw anything. He did see police open Plaintiff's door with an iron bar, handcuff her, and leave with her once he obtained pants for her to put on. He described the events at that time as "very quick". *Id.*

Plaintiff also submits her own affidavit. NYSCEF Doc. 194. She denies having acted in any manner that posed a danger to herself or others at the time she involuntarily hospitalized on July 22, 2019. *Id.* She instead contends her demeanor was "temporarily impacted" by her

"PTSD, which [she] was previously diagnosed with, after [her] unlawful commitment in 2016". *Id.* Plaintiff denied essentially all the facts that Defendants have submitted in support of their respective motions. *Id.*

Based on the foregoing, Plaintiff submits that both summary judgment motions should be denied.

With respect to the Third-Party Defendants' motion for summary judgment, the Court notes that Defendants filed a limited opposition essentially indicating that should the Court deny Third-Party Defendants' motion, an Order be issued preserving Defendant Montefiore Nyack's claim for indemnification or contribution with respect to the Third-Party Defendants. To the extent that the Court were to grant Third-Party Defendants' motion regarding the actions of Dr. Brewster and Dr. Marcovici, the Defendants request that any claims for vicarious liability as against Montefiore Nyack regarding these doctors' conduct be dismissed as well. NYSCEF Doc. 261.

ANALYSIS

The remedy of summary judgment is a drastic one and it should only be granted when it is clear no triable issue of material fact exists. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974).

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 852, 487 N.Y.S.2d 316, 317 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). Once such a showing has been made, the burden of proof shifts such that an opponent to a motion for summary judgment must demonstrate the existence of a genuine triable issue of fact. *Alvarez, supra*. The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. *Dowsey v. Megerlan*, 121 A.D.2d 497, 503 N.Y.S.2d 591 (2d Dept. 1986); *Gitlin v. Chirkin*, 98 A.D.3d 561, 949 N.Y.S.2d 712 (2d Dept. 2012); *Mauriello v. Port Auth. of New York & New Jersey*, 8 A.D.3d 200, 779 N.Y.S.2d 199, 200 (2d Dept. 2004).

As summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where a material issue of fact is even "arguable", the motion must be denied. *Phillips v. Kantok & Co.*, 31 N.Y.2d 307, 338 N.Y.S.2d 882 (1982).

In a medical malpractice action, a defendant medical professional, in moving for summary judgment "must establish prima facie, either that there was no departure from community medical standards of medical malpractice, or that any alleged departure was not a proximate cause of the plaintiff's injuries" *B.G. v. Cabbad*, 172 A.D.3d 686, 687, 99 N.Y.S.3d 391 (2d Dept. 2019). Once such a showing has been made, this shifts the burden back to the plaintiff to submit evidence rebutting the *prima facie* showing, raising an issue of fact. *Id. at* 687; *see also*; *Attia v. Klebanov*, 192 A.D.3d 650, 651, 143 N.Y.S.3d 408, 410 (2d Dept. 2021). Specifically, "the plaintiff must submit a physician's affidavit attesting to defendant's departure from accepted practice, which departure was a competent producing cause of the injury[.]" *Anonymous v. Wyckoff Hgts. Med. Ctr., supra,* at 1105. Expert testimony is necessary to prove a deviation from accepted standards of care and to establish proximate cause. *Whitnum v. Plastic and Reconstructive Surgery, P.C.*, 142 A.D.3d 495, 497, 36 N.Y.S.3d 470, 473 (2d Dept. 2016). Such expert testimony proffered must prove the standard of care in the locality where the treatment occurred. *See, Navarro v. Ortiz*, 203 A.D.3d 834, 835 (2d Dept. 2022). Further, it is well established that when offering expert testimony, the party so offering must lay a foundation in order to establish the expert is has knowledge and experience with the specific condition or procedure at issue. *See, e.g., Behar v. Coren*, 21 A.D.3d 1045, 1047, 803 N.Y.S.2d (2d Dept. 2005). A failure of an expert to specify whether he or she has any specific training or expertise in the procedure at issue, or how he or she was (or is) familiar with the standard of care in the specialized area is fatal to a plaintiff trying to oppose a defendant's summary judgment motion. *Lavi v. NYU Hosps. Ctr.*, 133 A.D.3d 830, 831, 21 N.Y.S.3d 143 (2d Dept. 2015).

In the case at bar, Defendants support their motion with the affidavits of two physicians- Dr. Robert Silverman, a licensed physician who is board certified in emergency medicine and internal medicine and who presently works at Long Island Jewish Medical Center as an Associate Attending Physician in Emergency Medicine, and Dr. Sandra Antoniak, M.D., a state licensed physician who is board certified in psychiatry. NYSCEF Docs. 135, 136. The affidavits lay out the applicable standard of care, and address how each named Defendant acted in accordance therewith. The affidavits, along with the other documents submitted in support of

the motion, established, *prima facie*, that Defendants' actions did not depart from accepted medical practices.

In terms of the basis for Plaintiff's transport from the hospital, the certified police records are not, in and of themselves and when standing alone, a basis to grant summary judgment. However, hearsay can be used to support a motion for summary judgment when it is accompanied by other direct evidence. *See*, *AIU Ins. Co. v. American Motorists Ins. Co*., 8 A.D.3d 83, 778 N.Y.S.2d 479, (1st Dept. 2004) *relying on Zuckerman v. City of New York*, *supra*. Moreover, in the case at bar, the police report is certified and was prepared an officer who was present at Plaintiff's residence the evening she was transported to the hospital and contains his personal observations at the scene. NYSCEF Doc. 160. A properly certified police accident report is admissible where "the report is made based upon the officer's personal observations and while carrying out police duties." *Memenza v Cole*, 131 A.D.3d 1020, 1022 (2d Dept 2015). The statements contained in the report were also the subject of the reporting officer's sworn testimony at his deposition in the related federal court proceeding. NYSCEF Doc. 153. When all of the evidence submitted in Defendants' motion is considered *in its entirety*, this Court determines that said Defendants have established their *prima facie* entitlement to summary judgment on the malpractice causes of action.

In terms of the cause of action alleging wrongful imprisonment, this Court notes that "'[c]ommitment pursuant to Mental Hygiene Law article 9 is privileged in the absence of medical malpractice. Therefore, in order to prevail on [a] cause of action sounding in false imprisonment, the plaintiff must prove medical malpractice'" *Wray-Davis v. New York Methodist Hosp.*, 186 A.D.3d 537, 538, 126 N.Y.S.3d 376 (2d Dept. 2020) (internal citation omitted). Accordingly, a defendant can successfully establish his or her *prima facie* entitlement to summary judgment on such a wrongful imprisonment claim by submitting an expert affidavit from a psychiatrist who can opine that decision to involuntarily commit the patient did not deviate from accepted standards of medical practice. *Id.* at 538. The Defendants in this instant proceeding have established through the requisite expert affidavits that the decision to involuntarily commit the Plaintiff was not a deviation from accepted standards of medical practice.

The same holds true regarding Plaintiff's claim for assault and battery, same apparently predicated on non-party Dr. Marcovici's decision to administer medications to Plaintiff without

her consent on the night of her admission to Montefiore Nyack. The expert affidavits submitted in support of the instant motion, including an expert emergency medicine doctor, support Dr. Marcovici's decision based on the circumstances with which he was presented to administer medication. Dr. Marcovici noted in his records that Plaintiff was not able to meaningfully communicate or participate in her assessment. The administration of the medication was made based on Dr. Marcovici's observations of Plaintiff's behavior and psychosis at the time of administration, as well as the facts that led up to her transport to Montefiore Nyack. Dr. Antoniak opined that the facts at hand demonstrated that Plaintiff was behaving in a manner that posed a threat to herself or others, and therefore, Dr. Marcovici was permitted to administer medications to Plaintiff via injection over her objection pursuant to 14 NYCRR § 527.8(a)(4). Dr. Antoniak's twenty-three (23) page affidavit supports this contention with citations to record evidence. NYSCEF Doc. 135.

In sum, Defendants have established their *prima facie* entitlement to summary judgment. In opposition, this Court determines Plaintiff has failed to raise a triable issue of fact. The issue turns on whether Plaintiff submitted evidence rebutting the *prima facie* showing, thus raising an issue of fact. This Court determines that she has not.

Starting with the affidavit of Dr. Chatlos, this Court notes that there is no indication that the affiant has any familiarity with the applicable standard of care in New York State. NYSCEF Doc. 297. Indeed, Dr. Chatlos has not apparently been licensed to practice in this state for nearly forty (40) years. Also of note, Dr, Chatlos is not board certified in emergency medicine, and has not attested to any knowledge of emergency admissions pursuant to MHL § 9.39. As per the case law cited by the Court, *supra*, no foundation has therefore been established by the Plaintiff such that the Court could rely on this opinion.

To the extent the Court were to consider the opinion of Dr. Chatlos, Defendants and Third-Party Defendants point out that much of said opinion consists of vague, conclusory allegations that are not supported by record evidence and fail to review the evidence in its totality. Specific instances of this are recited by Defendants and Third-Party Defendants in their papers. *See*, NYSCEF Doc. 297, 304. In sum, Plaintiff has not demonstrated Dr. Chatlos is qualified to opine in opposition to the instant motion, and to the extent he was, his four (4) page affidavit lacks specificity regarding the appropriate standard of care that should have been complied with, and is rife with conclusory statements not supported by the record in its entirety.

With respect to the letter submitted from psychologist Dr. Shapiro (NYSCEF Doc. 292), the Court points out that same is not notarized, and fails to comply with CPLR 2106. Psychologists are not authorized under the CPLR to affirm the truth of their statements in lieu of submitting a sworn affidavit. *See*, CPLR 2106. Even if the Court was to overlook this fatal insufficiency, Dr. Shapiro is not a medical doctor, and does not indicate anywhere in his two-page letter that he has familiarity with the standard of care applicable in this situation. Therefore, there are no explanations from Dr. Shapiro as to how any Defendant's conduct specifically departed from the applicable standard of care. Again, the Court is left with conclusions such as "[t]he reasons given for [Plaintiff's] lack of signature is [sic] unpersuasive"; "[t]he absurdity of these contradictory evaluations taken minutes apart are self evident"; "the "neglect and abject disregard by the hospital staff…..served to further [Plaintiff's] panic and PTSD symptoms and painful feelings of being ignored after hospitalization." NYSCEF Doc. 292. These types of conclusory allegations that are devoid of support in the record are insufficient, especially when pared against the detailed and specific affidavits submitted in support of the motion, to rebut Defendants' *prima facie* showing of entitlement to summary judgment on the malpractice, wrongful imprisonment and assault and battery causes of action.

With respect to the Plaintiff's claim for intentional infliction of emotional distress, the Court determines that same is entirely duplicative of the malpractice, wrongful imprisonment and assault/battery causes of action. *See*, *Leonard v. Reinhardt*, 20 A.D.3d 510, 799 N.Y.S.2d 118 (2d Dept. 2005). Therefore, the Court grants Defendants' motion for summary judgment with respect to the intentional infliction of emotional distress, as well.

Based on the Court's determination, the summary judgment motions submitted by both the Defendants and the Third-Party Defendants are granted. Further and as a result of this Decision, any claims of vicarious liability against Defendant Montefiore Nyack with respect to care and treatment rendered by Drs. Brewster and/or Marcovici are also deemed dismissed.

PLAINTIFF'S MOTION

As set forth, *supra*, the Court has granted the motions of Defendants and Third-Party Defendants. This decision results in the dismissal of the Complaint in its entirety as against the Defendants, and the Third-Party Complaint, as against the Third-Party Defendants. Therefore,

Plaintiff's motion for summary judgment (which appears to be predicated on the same arguments raised in opposition to the Defendants' motion) is denied as moot.

The Court has considered the remaining requests of Plaintiff and finds them to be without merit.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED, that Defendants' motion for summary judgment and Third-Party Defendants' motion for summary judgment are granted; and the Complaint that forms the basis of this action is dismissed; and it is further

ORDERED, that Plaintiff's motion for summary judgment is denied; and it is further

ORDERED, that the Clerk of the Court shall terminate motion sequences 4-6 and close this case.

Date: December 15, 2023
New City, New York

ENTER

THOMAS F. ZUGIBE, J.S.C.