SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----------X

NAZILENE ALLY LEWIS, as Administratrix of the Estate of AUSTIN LEWIS, deceased,

Plaintiff,

-against-

MAIMONIDES MEDICAL CENTER, RESORT NURSING HOME, and MICHAEL TENENBAUM,

Defendants.

----------X

Index No. 709531/2019

Part MDP
Motion Date: August 21, 2024

Calendar No. 16
Sequence No. 2

The following papers numbered EF-49 to EF-80 read on this motion by defendant RESORT NURSING HOME for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits……	EF49-EF71
Affirmation in Opposition, Exhibits……...	EF74-EF79
Reply Affirmation……...	EF80

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendant Resort Nursing Home's motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is denied, as there are issues of fact in dispute regarding whether it departed from accepted standards of care, proximately caused or contributed to decedent's injuries, deprived decedent of his rights under the Public Health Law, or acted with gross negligence. (*See generally M.C. v. Huntington Hosp.*, 175 A.D.3d 578 [2d Dept. 2019].)

Plaintiff commenced this action for medical malpractice, wrongful death and Public Health Law violations arising out of pressure ulcers decedent Austin Lewis sustained during admissions at defendant's facility. Plaintiff filed the Summons and Complaint with a Certificate of Merit on May 31, 2019, and filed an Amended Certificate of Merit on September 18, 2019. Issue was joined by moving defendant via the filing of its Verified Answer on October 25, 2019.

Defendant Resort Nursing Home argues that it is entitled to summary judgment and

presents the pleadings, a memorandum of law, decedent's medical records, decedent's nursing home records and the expert affidavit of Bruce Silver, M.D. in support of its motion. Defendant argues that the evidence shows it did not depart from accepted standards of care or proximately cause decedent's injuries. It also argues that it did not deprive decedent of his rights under the Public Health Law, and did not act with gross negligence. Defendant further argues that decedent's injuries were unavoidable in light of his comorbidities, noting decedent was admitted to Resort Nursing Home on March 1, 2017 with pre-existing pressure injuries. Defendant also argues that the wrongful death claim must be dismissed, as there is no evidence that decedent's pressure injuries caused his death.

Defendant presents the affidavit of Dr. Bruce Silver in support of its motion. Dr. Silver attested to being a physician licensed in California, a Certified Medical Director in Long Term Care, and board-certified in Internal Medicine with a Certificate of Added Qualifications in Geriatric Medicine. Dr. Silver further attested he is familiar with the standards of care as they existed in skilled nursing and rehabilitation facilities in New York during the relevant time period. Dr. Silver further attested that he reviewed plaintiff's Bill of Particulars and decedent's medical records in rendering his opinions. Dr. Silver opined within a reasonable degree of medical certainty that defendant rendered care and treatment to decedent in accordance with the standard of care, defendant' treatment was not a substantial factor in causing injury to decedent, and defendant did not deprive decedent of his rights or violate any state or federal statute, code, rule, or regulation.

Dr. Silver reviewed and outlined decedent's pertinent medical history, noting Mr. Lewis was a 71 year old man who was admitted to co-defendant Maimonides Medical Center due to injuries sustained in an automobile accident. He noted that decedent had a history of underlying conditions, including diabetes, PEG tube and tracheostomy, acute deep venous thrombosis, severe sepsis, tracheobronchitis, acute respiratory failure and a stage III pressure ulcer. Dr. Silver noted that on March 1, 2017, decedent was admitted to Resort Nursing, where he had a PEG tube and tracheostomy, and an unstageable sacral ulcer. On March 7, 2017, decedent was sent to Mount Sinai to replace his PEG tube, and was readmitted to Resort Nursing on March 15, 2017. Upon readmission, decedent's sacral ulcer was noted to be stage IV and a care plan was created and implemented, including continuous monitoring of the sacral wound and regular turning and repositioning. On May 22, 2017, decedent was sent to Queens Hospital with a fever to rule out sepsis/osteomyelitis.

Dr. Silver opined to a reasonable degree of medical care that defendant's care of decedent was appropriate and within the proper standard of nursing care. He opined to a reasonable degree of medical certainty that decedent's pre-existing sacral ulcer was properly identified upon his admission to Resort Nursing Home. Dr. Silver noted decedent's underlying conditions and opined decedent was appropriately supervised and monitored throughout his admission to defendant's

facility. Dr. Silver opined that decedent's pre-existing comorbidities including the PEG tube and tracheostomy, diabetes, poor nutritional health, and inability to move or turn himself prevented his condition from improving. Dr. Silver further opined that while at defendant's facility, decedent was properly provided with comprehensive care including routine turning, treatment of pressure injuries, physician evaluation, and timely responses and assessments by the nurses and staff that were within the standard of care. He opined that defendant's nurses and staff timely responded and treated decedent properly and within the standard of medical practice in treating decedent's pressure injuries. Dr. Silver opined to a reasonable degree of medical certainty that decedent's pressure injuries were pre-existing and were not caused, nor exacerbated by Resort Nursing Home's treatment and care. Dr. Silver further opined that any skin deterioration and new injuries that occurred at defendant's facility were unavoidable because of decedent's pre-existing comorbidities, and his pre-existing sacral pressure ulcer was not able to heal due to poor nutritional health. Dr. Silver further opined that decedent's infection was hidden underneath the skin surface and was impossible for defendant's staff to detect in the absence of fever, tachycardia, or other signs of sepsis. Dr. Silver further opined that defendant's staff properly treated decedent's fever by acting immediately and continuously monitoring him and treating him with medication.

Dr. Silver opined to a reasonable degree of medical certainty that defendant did not deprive decedent of his rights under state or federal law and did not demonstrate wanton disregard of his rights. He argued that decedent's worsening condition was not defendant's fault, but the natural result of decedent's underlying medical conditions. Dr. Silver opined that there is no evidence to suggest that defendant's staff was incompetent or improperly trained, nor were they inexperienced. He opined that there is no evidence defendant's staff failed to properly supervise or monitor decedent, and opined to a reasonable degree of medical certainty that defendant's care and treatment did not cause or contribute to decedent's death. Dr. Silver opined that defendant's conduct was not wanton, intentional, or in reckless disregard of decedent's rights. Based upon the foregoing, defendant argues it is entitled to summary judgment and dismissal of plaintiff's Complaint.

Plaintiff opposes the motion and argues that defendant Resort Nursing Home failed to establish a prima facie entitlement to summary judgment. She presents decedent's medical records and the expert affidavit from Charlotte Sheppard, DNP, RN-BC, LHRM, WCC, CNEcl, in opposition to defendant's motion. Plaintiff argues that defendant exacerbated decedent's pressure ulcers through violations of Public Health Law §2801-d, and failed to take necessary actions to prevent decedent's pre-existing pressure ulcers from deteriorating and becoming infected, ultimately causing his death. She argues that defendant failed to establish a prima facie case because the medical records do not contain evidence of decedent's turning and position during April 2017. Further, plaintiff argues that her expert affidavit raises triable issues of fact that warrant denial of the summary judgment motion.

Plaintiff presents the affidavit of Charlotte Sheppard, DNP, RN-BC, LHRM, WCC, CNEcl in opposition to defendant's motion. Nurse Sheppard attested to being a registered nurse licensed in Florida and familiar with the standard of care that should have been exercised by defendant and its staff in this case. Nurse Sheppard further attested to reviewing decedent's medical history and Death Certificate in rendering her opinions. Nurse Sheppard reviewed and outlined decedent's pertinent medical history and noted that upon admission to Resort Nursing Home, decedent's sacral pressure ulcer was documented as stage IV. She noted that the nursing records identified decedent's risk for pressure related skin breakdown but did not identify the type of care and services that were to be put in place to prevent further skin breakdown and promote healing. Nurse Sheppard noted that a care plan was developed at admission that included interventions such as skin checks every shift, incontinent care every 3-4 hours and as needed, proper skin care, dietary supplements, turning and repositioning every two hours and vitamins A and D as skin barrier. Nurse Sheppard noted that on March 2, 2017, decedent's pressure ulcer was stage IV with slough, necrotic tissue and moderate serous exudate, and additional interventions were added to the care plan to prevent infection. She also noted that on decedent's admission to Queens Hospital on May 22, 2017, the records show decedent's sacral pressure ulcer was large, stage IV and exhibited copious foul smelling and purulent discharge. Nurse Sheppard noted that on June 5, 2017, decedent suffered a cardiopulmonary arrest secondary to sepsis secondary to infected sacral ulcer and passed away.

Based upon her review, Nurse Sheppard opined to a reasonable degree of nursing certainty that defendant and its staff violated state and federal regulations and deviated from the standard of care in the treatment rendered to decedent. Nurse Sheppard opined that defendant failed to provide care and services to promote healing of decedent's unstageable left buttock pressure ulcer, which was present at decedent's admission to Resort Nursing Home. She further opined that defendant's failure to prevent infection with osteomyelitis caused decedent to suffer sepsis and death. Nurse Sheppard further opined that defendant failed to maintain a written and individualized turning and repositioning schedule, based upon the lack of CNA Accountability Sheets for April 2017. She further opined that defendant failed to obtain a wound culture despite symptoms of infection, and failed to consistently and accurately identify and document decedent's symptoms related to the pressure ulcer, including copious foul smelling and purulent discharge. Nurse Sheppard opined that the medical records show defendant failed to provide wound care within the standard using adequate cleansing and removal of prior dressing, because Queens Hospital noted decedent had retained gauze packing that was foul smelling and purulent within the sacral wound bed on May 22, 2017. She opined that defendant failed to timely identify, monitor, provide intervention for, and document decedent's worsening symptoms including recurrent and persistent fevers and white blood count elevation. Nurse Sheppard further opined that defendant breached the standards of care with respect to prevention, identification, assessment, management and treatment of decedent's pressure ulcers, incontinence management, wound infection protection and resident

safety. Based upon the foregoing, plaintiff argues that defendant is not entitled to summary judgment.

Pursuant to CPLR §3212, a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (*Smith v. City of New York*, 210 A.D.3d 53, 68 [2d Dept. 2022].) The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*Morejon v. New York City Tr. Auth.*, 216 A.D.3d 134, 136 [2d Dept. 2023].) If there is any doubt as to the existence of a triable issue of fact, the motion must be denied. (*Id.*) The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers. (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *see also Antonyuk v. Brightwater Towers Condo Homeowners' Assn., Inc.*, 147 A.D.3d 711, 712 [2d Dept. 2017].) In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party. (*Matter of New York City Asbestos Litig.*, 33 N.Y.3d 20, 25 [2019].) Additionally, the court's function in determining a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. (*Reyes v. S. Nicolia & Sons Realty Corp.*, 212 A.D.3d 851, 852-853 [2d Dept. 2023].) Once the moving party has demonstrated a prima facie entitlement to summary judgment, the burden then shifts to the non-moving party to demonstrate the existence of material issues of fact. (*See generally Coscia v. Mosca*, 203 A.D.3d 695 [2d Dept. 2022].)

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 with the scope of employment under the doctrine of *respondeat superior*. (*See Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].)

In an action to recover damages for wrongful death, the decedent's personal representative must establish that the defendant's wrongful act, neglect or default caused the decedent's death.

(*Eberts v. Makarczuk*, 52 A.D.3d 772, 772-773 [2d Dept. 2008].) Public Health Law contemplates liability when a patient is injured due to 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.' (*Public Health Law §2801-d*; *Gold v. Park Ave. Extended Care Ctr. Corp.*, 90 A.D.3d 833, 834 [2d Dept. 2011].)

Defendant Resort Nursing Home failed to establish a prima facie entitlement to summary judgment. Defendant's expert affirmation was insufficient to establish a prima facie case as to medical malpractice, wrongful death, or Public Health Law violations, as it was speculative and conclusory. (*See Longhi v. Lewit*, 187 A.D.3d 873, 878 [2d Dept. 2020].) Dr. Silver stated he was familiar with the standard of care in New York during the relevant time period, but failed to articulate the relevant standard of care with respect to nursing and medical care, pressure ulcers and individualized care plans. Dr. Silver also rendered unsupported opinions in a conclusory fashion that were inconsistent with the medical records and deposition testimony. He opined that defendant created an appropriate care plan for decedent and rendered care within accepted standards, but failed to specify whether the care plan was properly executed to address the development and exacerbation of decedent's pressure ulcers. He failed to acknowledge and explain gaps in the medical records with regard to turning and positioning, and failed to state what the standard of care would be for a patient with decedent's comorbidities and declining condition. Dr. Silver failed to specifically address the decline in decedent's condition, stating in conclusory fashion that it was unavoidable. Further, while he noted the nursing records show an adaptation to the care plan, he failed to show how defendant implemented decedent's care plan to address his needs in accordance with federal and state guidelines.

Dr. Silver's opinion that defendant did not cause decedent's injuries but rather they were caused by plaintiff's comorbidities was also speculative and conclusory, as Dr. Silver did not explain how the comorbidities caused or contributed to decedent's injury rather than the alleged departures by defendant. Dr. Silver's opinion that defendant did not deprive decedent of his rights under the Public Health Law was also speculative and conclusory, as it failed to address the lack of a continued wound care assessment, lack of appropriate records to show timely and appropriate positioning and turning and continual new dressing to replace old dressing in the wound. Dr. Silver's opinion that it was impossible for defendant to be unaware of decedent's infection and the extent of the sacral wound is conclusory, speculative and unsupported by the medical records or the applicable standard of care. As Dr. Silver's affidavit was conclusory and speculative, and inconsistent with the deposition and medical records, it was insufficient to establish a prima facie entitlement to summary judgment, notwithstanding the sufficiency of plaintiff's opposition papers. (*See Henry v. Sunrise Manor Ctr. for Nursing & Rehabilitation*, 147 A.D.3d 739 [2d Dept. 2017].)

Accordingly, defendant Resort Nursing Home's motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is denied. The parties are directed to

appear on Wednesday, October 2, 2024 at 9:30 am in Courtroom 48 for a pretrial conference.

This constitutes the decision and Order of the Court.

Dated: September 16, 2024

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