

Torres v North Shore Univ. Hosp.

2024 NY Slip Op 34794(U)

August 29, 2024

Supreme Court, Queens County

Docket Number: Index No. 706734/2020

Judge: Tracy Catapano-Fox

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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MICHAEL TORRES as Power of Attorney for
MERCEDES TORRES,

Index No. 706734/2020

Plaintiff,

Part MDP

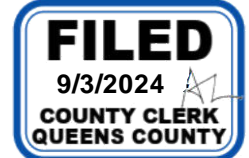
Motion Date: August 7, 2024

-against-

Calendar No. 22

Sequence No. 1

NORTH SHORE UNIVERSITY HOSPITAL and
NORTHWELL HEALTH, INC. d/b/a NORTH SHORE
UNIVERSITY HOSPITAL,



Defendants.

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The following papers numbered EF-21 to EF-40 read on this motion by defendants NORTH SHORE UNIVERSITY HOSPITAL and NORTHWELL HEALTH, INC. d/b/a NORTH SHORE UNIVERSITY HOSPITAL for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212.

Papers
Numbered

- Notice of Motion, Affirmation, Exhibits.....EF21-EF33
- Affirmation in Opposition, Exhibits.....EF35-EF39
- Reply Affirmation.....EF40

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

Defendants North Shore University Hospital and Northwell Health, Inc. d/b/a North Shore University Hospital's motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is denied, as there are issues of fact with respect to whether they departed from good and accepted standards of care and proximately caused or contributed to Mercedes Torres' injuries. (*See generally M.C. v. Huntington Hosp.*, 175 A.D.3d 578 [2d Dept. 2019].)

Plaintiff commenced this medical malpractice action arising out of Mercedes Torres' hospital admission at defendants' facility from November 17, 2017 through December 1, 2017. Plaintiff filed the Summons and Complaint with a Certificate of Merit on June 4, 2020, and issue was joined via the filing of defendants' Verified Answer on September 23, 2020.

Defendants argue that they are entitled to summary judgment and present the pleadings, the parties' deposition testimony, Mercedes Torres' medical records, and the expert affidavit of Nurse Meg Warren in support of their motion. Defendants argue that they did not depart from the standard of care, but rather rendered treatment at all times within the standards of good and accepted nursing practice. They assert that Ms. Torres presented to defendant hospital on November 17, 2017 for a scheduled closure of a tracheocutaneous fistula, and on November 20, 2017 she fell, fracturing her left hip and requiring an open reduction internal fixation. Defendants further argue that despite timely assessments and appropriate fall precautions, Ms. Torres sustained a fall while attempting to get out of bed unassisted at 3:00am. Defendants further argue that plaintiff has neither alleged a cause of action regarding negligent hiring or supervision, nor can plaintiff maintain such an action against defendants.

Defendants present the expert affidavit of Nurse Meg Warren in support of their motion. Meg Warren attested she is a Registered Nurse licensed in New York and familiar with the accepted standard of nursing care in New York during the relevant time period. She also attested to reviewing Ms. Torres' medical records, plaintiff's Bill of Particulars, and the deposition testimony in rendering nursing opinions. Nurse Warren opined to a reasonable degree of nursing certainty that Mercedes Torres received appropriate nursing care and treatment throughout her hospital admission. Nurse Warren reviewed Ms. Torres' medical records and noted that on November 18, 2017 following the tracheostomy, Ms. Torres was identified as a fall risk and safety measures were implemented, including keeping the bed in a low position with wheels locked, alarms on, side rails up, and a call light and telephone in reach. Additionally, Nurse Warren noted that safety checks were completed every hour and the call bell was in Ms. Torres' reach. She noted that the safety implementations were continued on November 19th and November 20, 2017, and Ms. Torres was instructed to call for assistance before getting out of bed. Nurse Warren noted that on November 20, 2017, at approximately 3:05am, Nurse Alison Barrow heard a noise from Ms. Torres' room and observed her on the floor. Nurse Warren noted that Ms. Torres' vital signs were normal but she complained of left hip pain, and an X-ray revealed an acute left supcapital femoral fracture. Nurse Warren noted that a progress summary report by Nurse Barrow showed that prior to the fall, Ms. Torres was asleep in bed and did not ring the call bell or seek verbal assistance. Nurse Warren noted that on November 22, 2017, Ms. Torres underwent a left total hip replacement and was discharged from defendant hospital on December 1, 2017.

Nurse Warren opined to a reasonable degree of nursing certainty that defendant nursing staff did not depart from the standard of care. She opined that defendant staff consistently monitored Ms. Torres and applied appropriate interventions consistent with Ms. Torres' level of required assistance. She also opined to a reasonable degree of nursing certainty that the hospital staff appropriately assessed Ms. Torres following her fall, obtained the appropriate imaging, timely advised the attending physician and Ms. Torres' family of her condition, and obtained informed consent for surgical intervention to timely operate on the fractured hip.

Nurse Warren reviewed the medical records and reasoned that Ms. Torres was assessed and appropriately noted as being a fall risk with an unsteady gait. She further reasoned that Ms. Torres' medical records document ongoing safety precautions and interventions including maintaining the bed in the lowest position with the wheels locked, having a call button within reach, keeping the upper side rails up, and instructing Ms. Torres to call for assistance before getting out of bed. She opined that these precautions and interventions were within the standard of care for a patient who presents as alert and oriented with the ability to make her needs known. Nurse Warren further noted that the medical records show Ms. Torres was alert and oriented and able to express her needs to defendant staff. She opined that defendants' care plans and nursing evaluations were within the standard of care and appropriate for Ms. Torres' level of assistance required after her surgical procedures.

Nurse Warren noted that on November 20, 2017 when Ms. Torres fell out of bed, she was not being assisted by hospital staff but rather attempted to get out of bed on her own without requesting assistance. She further noted that defendant advised Ms. Torres not to get out of bed alone and was provided with appropriate equipment to seek assistance. Nurse Warren opined to a reasonable degree of nursing certainty that once Nurse Barrow became aware of Ms. Torres' fall, the nursing staff timely and properly evaluated Ms. Torres, because a physical examination was completed by 3:49am, a pelvic x-ray was ordered and completed by 4:25am, and informed consent for the repair surgery was obtained by 9:00am. She also opined within a reasonable degree of nursing certainty that nothing defendants' staff did or did not do proximately caused or contributed to Ms. Torres' injuries. Based upon the foregoing, defendants argue that they are entitled to summary judgment and dismissal of plaintiff's Complaint.

Plaintiff opposes the motion and argues that defendants failed to establish a prima facie entitlement to summary judgment, and failed to eliminate all triable issues of fact with respect to whether they departed from accepted standards of care or proximately caused Ms. Torres' injuries. Plaintiff further argues that his expert sufficiently rebutted Nurse Warren's expert opinions, thereby warranting issues of fact that necessitate a jury trial.

Plaintiff presents the expert affirmation of a physician licensed in New York and board certified in internal medicine and geriatric medicine in opposition to defendants' motion. Plaintiff's expert affirmed to reviewing Ms. Torres' medical records, the pleadings, the parties' deposition testimony, and defendants' motion papers in rendering opinions. The expert opined within a reasonable degree of medical certainty that defendants departed from accepted standards of care and proximately caused Ms. Torres' left hip fracture, the ensuing surgical repair, and consequential injuries including decreased range of motion, emotional trauma, as well as pain and suffering.

Plaintiff's expert reviewed the medical records and noted Ms. Torres was documented as

“pleasantly forgetful at times” and required assistance with walking, standing and toileting. The expert also noted that the medical records show that some of the interventions were provided after Ms. Torres’ fall. Plaintiff’s expert opined within a reasonable degree of medical certainty that defendants’ lack of care departed from good and accepted medical and nursing care, resulting in the fall on November 20, 2017. Plaintiff’s expert noted that defendants’ expert failed to articulate what the relevant standard of care was during the subject time period. Plaintiff’s expert also disagreed with Nurse Warren’s opinion and opined that defendants failed to properly develop, implement and update an adequate and proper care plan necessary to prevent Ms. Torres from falling, considering her susceptibility to falling after the surgery. Plaintiff’s expert further reasoned that the bed alarm was not activated prior to Ms. Torres’ fall and she was not able to call for assistance to get out of bed. The expert also noted the medical records show Ms. Torres was not on 1:1 observation, and was not provided with red non-skid socks, a yellow wristband indicating fall risk and a functional bed alarm until after her fall. Plaintiff’s expert further reasoned the hospital records document concerns regarding Ms. Torres’ cognitive function and note that she had occasional forgetfulness in the days leading up to her fall.

Plaintiff’s expert opined within a reasonable degree of medical certainty that defendants departed from accepted practices of medicine and nursing by failing to provide a floor mat at Ms. Torres’ bedside and by her chair, and these departures proximately caused her fall. Plaintiff’s expert also disagreed with Nurse Warren’s contention that Ms. Torres got out of bed without requesting assistance. The expert noted Michael Torres’ sworn testimony showed he was informed by Ms. Torres’ spouse that Ms. Torres attempted to alert the nursing staff that she needed help but no one responded, and only then did she attempt to get out of her bed to use the bathroom. Plaintiff’s expert further argues that this testimony is supported by the medical records that document Ms. Torres’ frequent trips to the bathroom during the late hours of the night.

Plaintiff’s expert also opined that even if one-on-one monitoring was not required, defendants failed to properly monitor and supervise Ms. Torres because the medical records show the last “hourly rounding” prior to Ms. Torres’ fall was at 8:22pm, approximately seven hours before her fall. Plaintiff’s expert opined that this failure to monitor constituted a departure from good and accepted practices of medicine and nursing and proximately caused Ms. Torres’ injuries. The expert further opined that Ms. Torres’ fall was avoidable and was a result of defendants’ departures in properly developing, implementing and updating an adequate and proper care plan based upon Ms. Torres’ age, prior medical history and high risk for falls. The expert further opined that Ms. Torres was in pain from her fall-related injuries based upon the medical records and deposition testimony. Based upon the foregoing, plaintiff argues that defendants are not entitled to summary judgment and their motion should be denied.

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. Nicolina & 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 within the scope of employment under the doctrine of *respondeat superior*. (*See Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948, 949 [2d Dept. 2020].)

Defendants established a prima facie entitlement to summary judgment through their production of the documentary evidence and affirmation of Meg Warren that they rendered care and treatment to Ms. Torres in accordance with good and accepted standards of care and did not proximately cause or contribute to her injuries. (*See Murray v. Central Is. Healthcare*, 205 A.D.3d 1036 [2d Dept. 2022].) Defendants demonstrated that they properly identified Ms. Torres as being a fall risk and implemented an appropriate care plan by maintaining her bed in the lowest position with the wheels locked, putting up bed rails, having a call button within her reach, and instructing

Ms. Torres to call for assistance to get out of bed. They further demonstrated through Nurse Warren's expert affidavit that the care plan was appropriate for Ms. Torres' needs, as she was alert and oriented and able to express herself. Defendants further demonstrated that their staff was not assisting Ms. Torres when she fell, but rather Ms. Torres got out of bed alone, unattended, without calling for assistance as she had been instructed to do, and had been sleeping prior to her fall. Defendants further demonstrated that after Ms. Torres fell, hospital staff quickly responded and the subsequent measures were within the standard of care, as Ms. Torres was examined by 3:49am, an x-ray was done by 4:25am, and informed consent for surgical repair was obtained by 9:00am. Based upon the foregoing, defendants established a prima facie entitlement to summary judgment.

However, plaintiff raised triable issues of fact with respect to whether defendants departed from the accepted standards of care and proximately caused or contributed to Ms. Torres' injuries. Specifically, there are triable issues of fact with respect to whether defendants developed and implemented an adequate and proper care plan for plaintiff as a fall risk based upon her age, prior medical history, and risk of falling by failing to perform hourly observations and appropriate supervision as well as provide floor mats, non-skid socks, and a working bed alarm. While Nurse Warren opined that defendants took reasonable measures to address Ms. Torres being a fall risk, plaintiff's expert demonstrated that based upon the standard of care they should have implemented one-on-one observation or appropriate and timely supervision, and the failure to do so was a departure that proximately caused her injuries. Plaintiff also raised issues of fact whether defendants complied with their care plan, as the medical records show the last "hourly check" prior to Ms. Torres' fall at 3:00am was approximately seven hours earlier at 8:22pm. Plaintiff further demonstrated that while Ms. Torres may have had a bed alarm within reach, it was not working prior to her fall. (*See Currie v. Oneida Health Sys., Inc.* 222 A.D.3d 1284, 1290 [3d Dept. 2023].) Plaintiff further demonstrated that Ms. Torres was not given non-skid socks and did not have floor mats placed at her bedside or by her chair, and the expert opined this was a departure that proximately caused Ms. Torres' injuries. As there are conflicting expert opinions presented by defendants and plaintiff, there are material issues of fact necessitating a jury determination. (*See Mehtvin v. Ravi*, 180 A.D.3d 661, 664 [2d Dept. 2020][holding that summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions, as issues of credibility are properly left to a jury for its resolution].)

Defendants' argument that plaintiff's expert affirmation is vague or conclusory is without merit, as the expert's opinions were supported by the record, articulated the standard of care, and sufficiently addressed and rebutted Nurse Warren's opinions. Defendants' argument that plaintiff's expert affirmation is inadmissible because it is redacted is similarly without merit, notwithstanding the Second Department holding in *Richter v. Menocal*, 216 A.D.3d 823 (2d Dept. 2023). It is noted that plaintiff made an unredacted copy available for an *in-camera* inspection, said affirmation was submitted in opposition to defendants' motion, and there was no prejudice demonstrated, as the affirmation provided specific information about the qualifications of

plaintiff's expert. It is also noted that courts have acknowledged the legislative intent in permitting plaintiffs in medical malpractice actions to avoid disclosing the names of their experts until trial based upon a concern that "medical experts might be discouraged from testifying by their colleagues." (*Mercado v. Schwartz*, 209 A.D.3d 30, 38 [2d Dept. 2022], citing *Thomas v. Alleyne*, 302 A.D.2d 36, 45 [2d Dept. 2002].)

Accordingly, defendants North Shore University Hospital and Northwell Health, Inc. d/b/a North Shore University Hospital's motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is denied. It is noted that this matter is scheduled for a pretrial conference on Wednesday, September 11, 2024 at 9:30am in Courtroom 48.

This constitutes the decision and Order of the Court.

Dated: August 29, 2024



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

