Deckert v Steven C. De Sousa, P.T., P.C.

2024 NY Slip Op 34896(U)

September 20, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 615467/2021

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX No. 615467/2021
CAL. No. 202301374OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE 2/15/24
ADJ. DATE 5/16/24
Mot. Seq. # 001 MotD

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TORI DECKERT,

Plaintiff,

- against -

STEVEN C. DE SOUSA, P.T., P.C. and PROVIDENT PHYSICAL AND OCCUPATIONAL THERAPY, PLLC d/b/a PROVIDENT PHYSICAL THERAPY & REHABILITATION,

Defendants.

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by defendants, filed January 11, 2024; Notice of Cross-Motion and supporting papers ___; Answering Affidavits and supporting papers____; Replying Affidavits and supporting papers____; Other __; it is

ORDERED that the motion of defendants Steven C. De Sousa, P.T., P.C. and Provident Physical and Occupational Therapy, PLLC d/b/a Provident Physical Therapy & Rehabilitation pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint is denied; and it is further

ORDERED that plaintiff shall file a certificate of merit in accordance with CPLR 3012-a within 60 days after the entry date of this order (*see* CPLR 3012-a); and it is further

ORDERED that defendants' counsel shall serve a copy of this order with notice of entry upon counsel for plaintiff within 20 days of the date hereof and thereafter file the affidavit of service with the Clerk of the Court.

The plaintiff, Tori Deckert, commenced this action to recover damages for the alleged negligence of defendants. Plaintiff alleges, inter alia, that from May 1, 2020 through October 22, 2020, she was a patient under the care and treatment of defendants Steven C. De Sousa, P.T., P.C. and Provident Physical

and Occupational Therapy, PLLC d/b/a Provident Physical Therapy & Rehabilitation ("Provident") and that she sustained injuries as a result of their failure to treat her in the accepted and proper manner, including, but not limited to their failure to provide proper physical therapy services, failure to employ proper skill and judgment, failure to properly treat and care for her, improperly advising her to run, and causing and allowing her to fall. She complains that as a result of defendants' failures, she sustained various injuries, including a labral tear and dislocation of the left hip.

Defendants now move for summary judgment dismissing the complaint against them, arguing that the complaint sounds in medical malpractice, and that the plaintiff's failure to comply with CPLR 3012-a warrants dismissal. Defendants further argue that even assuming there was negligence or medical malpractice, plaintiff cannot establish causation. In support of their motion for summary judgment, they submit, inter alia, the parties' deposition transcripts, and the affirmation and report of Dr. Craig H. Sherman, a physician board certified in radiology, with certification and additional qualifications in neuroradiology. The court notes that the deposition testimony of nonparty witness Elsie Guncay, also submitted by defendants in support of their motion, was not in admissible form, as it was unsigned and unsworn, and therefore was not considered (*see* ***McDonald v Mauss***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]). The court further notes that plaintiff failed to submit opposition papers prior to the return date for the motion. Submissions filed after the return date were not considered by the court (*see* ***Deutsche Bank Natl. Trust Co. v McEnery***, 197 AD3d 1238, 154 NYS3d 99 [2d Dept 2021]; ***Risucci v Zeal Mgt. Corp.***, 258 AD2d 512, 685 NYS2d 280 [2d Dept 1999]; ***Romeo v Ben-Soph Food Corp.***, 146 AD2d 688, 567 NYS2d 52 [2d Dept 1989]).

It is well established that the proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). The movant has the initial burden of proving entitlement to summary judgment. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Martinez v Orange Regional Med. Ctr.***, 203 AD3d 910, 165 NYS3d 573 [2d Dept 2022]). On summary judgment, the court must view the evidence in the light most favorable to the non-moving party (***Vega v Restani Constr. Corp.***, 18 NY3d 499, 503, 942 NYS2d 13, 15 [2012]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Defendants argue that plaintiff's action sounds in medical malpractice and should be dismissed for her failure to file a certificate of merit in accordance with CPLR 3012-a. "In distinguishing whether conduct should be deemed medical malpractice or ordinary negligence, the critical factor is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached" (***Snow v Gotham Staffing, Inc.***, 227 AD3d 1029, 1031, 212 NYS3d 169 [2d Dept 2024], quoting ***Rabinovich v Maimonides Med. Ctr.***, 179 AD3d 88, 92-93, 113 NYS3d 198 [2d Dept 2019]). "A negligent act or omission by a health care provider that constitutes medical treatment or bears a substantial relationship to the rendition of

medical treatment by a licensed physician to a particular patient constitutes medical malpractice" (***Kelty v Genovese Drug Stores, Inc.***, 214 AD3d 776, 777, 185 NYS3d 250 [2d Dept 2023], quoting ***Rabinovich v Maimonides Med. Ctr.***, 179 AD3d 88, 92-93, 113 NYS3d 198). By contrast, when the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the defendant's failure in fulfilling a different duty, the complaint sounds in negligence (***Rivera v Advanced Allergy & Asthma Assessment & Diagnostics, P.C.***, 211 AD3d 759, 761, 180 NYS3d 221 [2d Dept 2022]).

Here, plaintiff's claims, which include, among other things, that her injuries were caused by defendants' failure to provide proper physical therapy services, failure to employ proper skill and judgment, failure to properly assess her fall risk, and failure to exercise reasonable care in safeguarding her given her physical condition, sound in medical malpractice (*see e.g.* ***Snow v Gotham Staffing, Inc.***, 227 AD3d 1029, 212 NYS3d 169; ***Amendola v Brookhaven Health Care Facility, LLC***, 150 AD3d 1061, 55 NYS3d 348 [2d Dept 2017]; ***Ryan v Korn***, 57 AD3d 507, 868 NYS2d 735 [2d Dept 2008]). As to whether plaintiff's action should be dismissed for failure to comply with CPLR 3012-a, as sought by defendants, "CPLR 3012-a does not contain language authorizing the dismissal of an action for the failure of the plaintiff's attorney to file a certificate of merit" (***Rabinowich v Maimonides Med. Ctr.***, 179 AD3d 88, 95, 113 NYS3d 198; *see* ***Russo v Pennings***, 46 AD3d 795, 848 NYS2d 678 [2d Dept 2007]), and dismissal is not the appropriate sanction for failure to file a certificate of merit (*see* ***Rabinowich v Maimonides Med. Ctr.***, 179 AD3d 88, 113 NYS3d 198; ***Grant v County of Nassau***, 28 AD3d 714, [2d Dept 2006]; ***Rice v Vandenebossche***, 185 AD2d 336, 586 NYS2d 303 [2d Dept 1992]). Rather, now that it has been determined that the statute applies, plaintiff's attorney is directed to serve a certificate of merit within 60 days after the entry of this order (*see* ***Rabinowich v Maimonides Med. Ctr.***, 179 AD3d 88, 96, 113 NYS3d 198).

Turning to that portion of defendants' motion for summary judgment based upon a lack of causation, a plaintiff in a medical malpractice action must prove that the defendant deviated or departed from the accepted community standards of medical care, and that the deviation or departure proximately caused the alleged injury (*see* ***E.K. v Tovar***, 185 AD3d 803, 127 NYS3d 580 [2d Dept 2020]; ***Messeroux v Maimonides Med. Ctr.***, 181 AD3d 583, 121 NYS3d 136 [2d Dept 2020]). To meet their prima facie burden on summary judgment, a defendant in a medical malpractice action must show that they either did not deviate from the applicable standard of care, or that the deviation did not proximately cause the injury to the plaintiff (*see* ***Joyner v Middletown Med., P.C.***, 183 AD3d 593, 123 NYS3d 169 [2d Dept 2020]; ***Castillo v Surasi***, 181 AD3d 786, 121 NYS3d 291 [2d Dept 2020]). The defendant must address, and rebut, all specific allegations of malpractice contained in the plaintiff's bill of particulars in order to satisfy their initial burden (*see* ***Hiegel v Orange Regional Med. Ctr.***, 219 AD3d 910, 195 NYS2d 720 [2d Dept 2023]; ***Wagner v Parker***, 172 AD3d 954, 100 NYS3d 280 [2d Dept 2019]). Once a defendant has made such a showing, the burden then shifts to the plaintiff to submit admissible evidence, beyond conclusory allegations of malpractice, that raises a triable issue of fact (*see* ***Aliosha v Ostad***, 153 AD3d 591, 61 NYS3d 55 [2d Dept 2017]; ***Neyman v Doshi Diagnostic Imaging Servs., P.C.***, 153 AD3d 538, 59 NYS3d 456 [2d Dept 2017]).

Defendants failed to demonstrate their entitlement to summary judgment as a matter of law (*see* ***Hiegel v Orange Regional Med. Ctr.***, 219 AD3d 910, 195 NYS2d 720; ***Amendola v Brookhaven Health Care Facility, LLC***, 150 AD3d 1061, 55 NYS3d 348; ***Fotiou v Goodman***, 74 AD3d 1140, 905 NYS2d 626 [2d Dept 2010]). Defendants do not address the issue of whether there was a deviation or departure from good and accepted standards of medical practice in the medical treatment that they rendered to plaintiff. Instead, defendants move on the grounds that even assuming there was negligence or medical malpractice, plaintiff cannot establish causation. By his affirmation, defendants' expert, Dr. Sherman, opined that based upon his review of the radiographic X-ray film studies of plaintiff's left hip taken October 23, 2020, the day following the relevant treatment rendered by defendants, there are no imaging findings of the left hip indicating a dislocation causally related to an alleged fall on October 22, 2020. Dr. Sherman further opined to a reasonable degree of radiological and medical certainty that any alleged left hip dislocation existing on October 22, 2020, would have been reflected on the October 23, 2020 film studies, and that, based upon his professional training, he would expect the October 23, 2020 "film studies to show a left dislocation if in fact there was a left hip dislocation present the day before." While Dr. Sherman's affirmation addressed claims of a left hip dislocation, it failed to address all allegations of injuries asserted in the bill of particulars (*see* ***Hiegel v Orange Regional Med. Ctr.***, 219 AD3d 910, 195 NYS2d 720; ***Ojeda v Barabe***, 202 AD3d 808, 158 NYS3d 870 [2d Dept 2022]; ***Huichun Feng v Accord Physicians, PLLC***, 194 AD3d 795, 148 NYS3d 234 [2d Dept 2021]; ***Refuse v Wehbeh***, 167 AD3d 956, 89 NYS3d 302 [2d Dept 2018]). Further, defendants cannot meet their burden by pointing to gaps in plaintiff's proof (*see* ***Post v County of Suffolk***, 80 AD3d 682, 915 NYS2d 124 [2d Dept 2011]; ***Fotiou v Goodman***, 74 AD3d 1140, 905 NYS2d 626).

Accordingly, the motion by defendants is denied.

Dated: 9/20/2024

A.J.S.C.

____ **FINAL DISPOSITION** _X_ **NON-FINAL DISPOSITION**