

<b>Ellis v Episcopal Health Servs., Inc.</b>
2024 NY Slip Op 35023(U)
September 3, 2024
Supreme Court, Queens County
Docket Number: Index No. 715059/2020
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

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CLARENCE G. ELLIS, AS ADMINISTRATOR OF  
THE ESTATE OF JOHN KIRBY, deceased,

Index No. 715059/2020

Part MDP

Plaintiff,

Motion Date: August 14, 2024

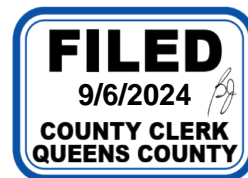
-against-

Calendar No. 11

Sequence No. 3

EPISCOPAL HEALTH SERVICES, INC. d/b/a ST.  
JOHN’S EPISCOPAL HOSPITAL and WEST  
LAWRENCE CARE CENTER, LLC,

Defendants.  
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The following papers numbered EF-31 to EF-55 read on this motion by defendant WEST LAWRENCE CARE CENTER for summary judgment and dismissal of plaintiff’s Complaint pursuant to CPLR §3212.

Papers  
Numbered

- Notice of Motion, Affirmation, Exhibits.....EF31-EF47
- Affirmation in Opposition, Exhibits.....EF49-EF53
- Reply Affirmation.....EF55

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

Defendant West Lawrence Care Center’s (hereinafter referred to as “West Lawrence”) motion for summary judgment and dismissal of plaintiff’s Complaint pursuant to CPLR §3212 is denied, as defendant failed to eliminate all triable issues of fact regarding whether it departed from accepted standards of care, proximately caused or contributed to decedent’s injuries, or deprived decedent of his rights under the Public Health Law.

Plaintiff commenced this action for medical malpractice, wrongful death and Public Health Law violations arising out of decedent John Kirby’s admission to defendant West Lawrence’s facility. It is noted that decedent passed away on March 29, 2018. Plaintiff filed the Summons and Complaint with a Certificate of Merit on September 4, 2020 and issue was joined via the filing of co-defendant Episcopal Health Services Inc. d/b/a St. John’s Episcopal Hospital’s Verified

Answer on December 17, 2020, followed by the filing of moving defendant's Verified Answer on January 15, 2021.

Defendant West Lawrence argues that it is entitled to summary judgment and presents the pleadings, medical records, and the affidavit of Bruce Silver, M.D. in support of its motion. Defendant argues that the evidence demonstrates that the care and treatment rendered to decedent did not depart from good and accepted standards of care and did not proximately cause his injuries. Defendant further argues that the injuries decedent sustained were unavoidable pressure injuries for which defendant cannot be liable. Defendant also argues that plaintiff's claim of Public Health Law violations should be dismissed, because decedent was not deprived of his rights under applicable federal and state laws. Finally, defendant argues that plaintiff's cause of action for wrongful death must be dismissed because decedent's death cannot be attributed to any action or inaction by defendant West Lawrence.

Defendant presents the affidavit of Dr. Bruce Silver in support of its motion. Dr. Silver attested to being a physician licensed in California and Pennsylvania. Dr. Silver further attested that he holds a Certificate of Added Qualifications in Internal Medicine and Geriatric Medicine and is a Certified Medical Director in Long Term Care. Dr. Silver also attested to being familiar with the standards of care in skilled nursing and rehabilitation facilities in New York during the relevant time period. Dr. Silver attested to reviewing the pleadings, the parties' deposition testimony, plaintiff's Bill of Particulars, and decedent's medical records and death certificate.

Dr. Silver opined within a reasonable degree of medical certainty that defendant West Lawrence did not depart from good and accepted standards of care in rendering treatment to decedent, West Lawrence's actions or inactions were not a substantial factor in causing injury to decedent, and West Lawrence did not deprive decedent of any of his resident's rights or violate any state or federal statute, code, rule, or regulation. In rendering his opinions, Dr. Silver reviewed decedent's medical history and noted decedent had a history of underlying conditions including cardiac disease with decreased ejection, fraction, diabetes mellitus, foot ulcer, bipolar disorder, Parkinsonism, atrial fibrillation, seizure disorder, multiple strokes, renal insufficiency, and malnutrition. Dr. Silver noted that decedent was admitted to defendant West Lawrence's facility in 2015 after being discharged from St. John's Episcopal Hospital, and had a history of hospitalization. He further noted that upon admission to West Lawrence on December 22, 2015, decedent had excoriations of the sacrum, buttocks, inner thighs and bilateral groin, as well as a diabetic ulcer of the left great toe.

Dr. Silver noted that upon readmission, defendant West Lawrence assessed decedent and created a care plan, but on December 18, 2017, decedent was unresponsive with a fever and was transferred to St. John's Episcopal Hospital. He noted that on January 2, 2018, decedent returned to West Lawrence, and had a right anterior shin wound, right medial knee wound, right lateral knee

wound, left shoulder wound, and sacral wound. Dr. Silver noted that decedent had MRSA in his urine and was on intravenous fluids and antibiotics. On January 24, 2018, decedent had abnormal labs and was transferred to St. John's Episcopal Hospital, but returned to West Lawrence on February 8, 2018, with multiple pressure ulcers. On February 9, 2018, decedent was unresponsive and returned to St. John's Episcopal Hospital, and was readmitted to West Lawrence on February 13, 2018. On February 27, 2018, decedent was discharged from West Lawrence and sent to St. John's Episcopal Hospital because he was unable to swallow foods and he passed away at St. John's Episcopal Hospital.

Dr. Silver opined to a reasonable degree of medical certainty that decedent's underlying conditions caused his injuries and inability to recover. He opined to a reasonable degree of medical certainty that decedent had cardiac disease with decreased ejection fraction, multiple strokes, Parkinsonism, renal insufficiency and malnutrition which prevented him from improving his wounds while at West Lawrence. Dr. Silver reasoned that decedent was appropriately supervised and monitored during his residency and was properly provided with comprehensive care including routine turning, treatment of pressure injuries, and check-ups with a physician. Dr. Silver further opined that defendant cared for decedent within the standard of care in that the nurses and staff timely responded and assessed the incidents and properly treated decedent. Dr. Silver further opined that defendant's staff took appropriate precautions to treat decedent's pre-existing injuries and avoid the worsening of his injuries, but the pressure ulcers ultimately resulted from decedent's declining health and numerous comorbidities. Dr. Silver further reasoned that when decedent's Albumin dropped down below two, it became difficult if not impossible for his wounds to heal. He opined to a reasonable degree of medical certainty that decedent's pressure issues were pre-existing and were not caused by or exacerbated by West Lawrence's treatment and care, as West Lawrence implemented an adequate and sufficient care plan and appropriately assessed decedent's pre-existing pressure injuries and treatment plan. Finally, Dr. Silver opined that decedent was not deprived of his rights and there is no evidence of wilful or wanton disregard for these rights by West Lawrence. He further opined that there is no evidence that defendant's staff was incompetent or improperly trained. Based upon the foregoing, defendant West Lawrence argues that it is entitled to summary judgment and dismissal of plaintiff's Complaint.

Plaintiff opposes the motion and argues that defendant West Lawrence failed to eliminate all triable issues of fact regarding whether it departed from accepted standards of care or proximately caused or contributed to decedent's injuries. Plaintiff presents the death certificate, medical excerpts and an expert affidavit in support of his opposition. He argues that defendant's expert opinions are without merit and inconsistent with the facts and evidence, and notes the expert incorrectly claimed decedent passed away on February 29, 2018, when the death certificate showed he passed away on March 29, 2018. Plaintiff further argues that defendant's expert is based upon conclusory and speculative remarks regarding West Lawrence's care and treatment, and these general remarks are insufficient to establish a proper care plan to prevent pressure ulcers was in

place. He argues that plaintiff's expert affidavit presents issues of fact that warrant denial of the motion, as there are issues of fact whether defendant properly offloaded pressure on decedent and regularly turned and positioned decedent to prevent development or exacerbation of pressure ulcers. Plaintiff further argues that the evidence demonstrates that defendant deprived decedent of his resident's rights pursuant to the Public Health Law, as West Lawrence failed to provide decedent with a personalized care plan for his skin conditions. Plaintiff also argues that decedent's death can be attributed to defendant's actions and the wrongful death cause of action should therefore not be dismissed.

Plaintiff presents the affirmation of a physician licensed in New York and board certified in Internal Medicine in opposition to defendant West Lawrence's motion. Plaintiff's expert affirmed to reviewing decedent's medical records, the pleadings, and the parties' deposition testimony in rendering opinions. Plaintiff's expert opined within a reasonable degree of medical certainty that the care and treatment rendered by defendant West Lawrence to decedent was not in accordance with good and accepted medical practice, but rather defendant departed and deviated from accepted standards of care and proximately caused decedent's injuries. In rendering these opinions, plaintiff's expert reviewed and outlined decedent's medical history, and focused on the period of admission beginning October 2017. Plaintiff's expert noted that when decedent was readmitted to West Lawrence on October 10, 2017, he did not have pressure ulcers, but dark discoloration at the buttocks and buttocks fold areas. The expert noted that decedent subsequently developed a sacral pressure ulcer at St. John's Episcopal Hospital, and opined the ulcer continued to deteriorate at West Lawrence.

Plaintiff's expert opined that decedent's skin condition was not properly or accurately identified upon decedent's admission to West Lawrence, and his skin condition was not properly treated once it was identified. Plaintiff's expert reasoned that on December 1, 2017, decedent was evaluated and based upon the medical records it was determined he had no skin problems. However, decedent received a wound evaluation six days later and it was determined that he had a stage four sacral pressure ulcer. Plaintiff's expert opined that decedent did not receive individualized care tailored to his needs and was not given necessary treatment to promote his wound healing. Plaintiff's expert disagreed with defendant's expert, and argued defendant's expert provided no factual timeline between December 2015 and December 2017 but rather vaguely stated that a care plan was put in place upon decedent's admission.

Plaintiff's expert opined that despite decedent having a high risk for skin breakdown with impaired skin integrity, defendant West Lawrence failed to provide decedent with an appropriate care plan that included turning and positioning every two hours. The expert noted that despite the number of pressure injuries noted by defendant's expert, decedent's care plan did not call for a repositioning schedule until December 13, 2017. Plaintiff's expert described offloading and its importance, and opined that defendant's failure to turn and position decedent was a departure from

the standard of care of good and accepted medicine and nursing, and the departure proximately caused decedent's injuries. Plaintiff's expert also noted that while there was an order for a low air mattress, there is no notation that decedent received the mattress, which was a departure from the standard of care that proximately caused decedent's injuries. The expert noted that while decedent continued to have a fever on January 22, 2018 after five days of a fever of over 100, no infectious disease consults were placed to determine the source of the fever spike and infection.

Plaintiff's expert noted that the standard of care is to accurately document a patient's medical course and care. The expert opined within a reasonable degree of medical certainty that decedent's skin breakdown at defendant West Lawrence was not accurately or properly identified upon admission on November 30, 2017 and was not accurately or timely cared for once identified. The expert noted that decedent did not receive a wound evaluation until six days after admission, at which point the sacral pressure ulcer had deteriorated to a stage four wound. Plaintiff's expert also opined within a reasonable degree of medical certainty that because decedent's pressure ulcers were not properly or accurately identified and evaluated on admission, decedent did not receive an individualized care plan tailored to his needs, relevant to his condition and risk factors. The expert noted that defendant's delay was a departure from the standards of good and accepted medicine and nursing, hindered decedent's necessary treatment to promote healing of wounds, and violated decedent's rights under the Public Health Law.

Plaintiff's expert further opined within a reasonable degree of medical certainty that West Lawrence's departure was a proximate cause of the deterioration of decedent's pressure ulcers. The expert opined based upon a reasonable degree of medical certainty that decedent's skin breakdown and deterioration was caused by unrelieved pressure rather than his clinical medical conditions. The expert noted that defendant's expert failed to explain how decedent's clinical conditions caused pressure ulcers to develop, as opposed to being risk factors, and how the conditions prevented pressure ulcers from healing. Plaintiff's expert disagreed with defendant's expert regarding decedent's Albumin level, noting that the only time in decedent's admission at West Lawrence the Albumin levels went below 2 g/dL was one month prior to his death and four months after the development of pressure ulcers. Plaintiff's expert opined within a reasonable degree of medical certainty that decedent's Albumin levels and nutritional status on readmission to West Lawrence on November 30, 2017 did not create an unavoidable condition nor made it impossible for decedent's pressure ulcers to heal, contrary to defendant's expert opinion. The expert also opined within a reasonable degree of medical certainty that West Lawrence failed to evaluate and re-assess decedent and update his care plan as the sacral pressure ulcer deteriorated, which was a departure from the standard of care and a proximate cause of decedent's injuries. Plaintiff's expert further opined that West Lawrence's failure to implement a care plan that called for pressure relieving interventions such as pressure redistribution mattress and cushion was a departure from good and accepted medicine. The expert further opined within a reasonable degree of medical certainty that the care rendered to decedent by West Lawrence was inconsistent with

state and federal regulations applicable during decedent's admissions at West Lawrence, and caused and contributed to the development and deterioration of decedent's pressure ulcer. Based upon the foregoing, plaintiff argues that defendant's 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. Nicolio & 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 or employer 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 wrong fact, 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 West Lawrence's summary judgment motion is denied, as defendant failed to establish a prima facie entitlement to summary judgment, notwithstanding the sufficiency of plaintiff's opposition. Defendant failed to eliminate all triable issues of material fact regarding whether it departed from accepted standards of care, proximately caused decedent's injuries and death, or deprived decedent of his rights under the Public Health Law. It is noted that defendant's expert affidavit failed to address plaintiff's claim for wrongful death, but merely stated in conclusory fashion that defendant's actions or inactions were not the proximate cause of decedent's injuries.

Defendant's expert affirmation was insufficient to establish a prima facie case as to medical malpractice 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 that 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 what the care plan was, how it was executed, how often decedent was turned and repositioned, or what other methods were utilized such a pressure relieving mattress and/or boots, wound dressings, and ointments to address the development and exacerbation of decedent's pressure ulcers. Dr. Silver failed to address the decline in decedent's condition, and failed to show how defendant updated and adapted 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 timely wound care assessment, lack of appropriate records to show a low air mattress was provided, and failure to document timely and appropriate positioning and turning. Dr. Silver opined that decedent's declining medical condition made the pressure ulcers unavoidable, but failed to articulate the specific efforts made by West Lawrence to adapt and evaluate the

individualized care plan to address decedent’s changing medical condition and deteriorating skin condition. As Dr. Silver’s affirmation was inconsistent with the medical records, it was insufficient to establish a prima facie entitlement to summary judgment, and defendant West Lawrence’s motion is denied 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 West Lawrence Care Center’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, October 2, 2024 at 9:30 am in Courtroom 48.

This constitutes the decision and Order of the Court.

Dated: September 3, 2024

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

