Adusei v Bronxcare Health Sys.
2024 NY Slip Op 35213(U)
May 9, 2024
Supreme Court, Bronx County
Docket Number: Index No. 24509/2020E
Judge: Michael A. Frishman
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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 34

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GIFTY ADUSEI as Administratrix of the Estate of MIKE BADU, and GIFTY ADUSEI, Individually,

Index №. 24509/2020E

Plaintiffs,

- against -

Hon. MICHAEL A. FRISHMAN
Justice of the Supreme Court

BRONXCARE HEALTH SYSTEM d/b/a BRONX-LEBANON HOSPITAL CENTER,

Defendant.

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The following papers numbered, 55-81, 85-91 and 93-95 were read on this Motion for Summary Judgment (Seq. No. 003).

Sequence No. 003	NYSCEF Doc. Nos.
Notice of Motion, Affirmation in Support, Statement of Material Facts, Memorandum of Law in Support – Exhibits and Affirmations Annexed	55-81
Affirmation in Opposition, Counterstatement of Material Facts - Exhibits and Affirmation Annexed	85-91
Reply Affirmation – Exhibits Annexed	93-95

The motion of defendant BRONXCARE HEALTH SYSTEM d/b/a BRONX-LEBANON HOSPITAL CENTER (hereinafter "defendant" or "the hospital"), seeking summary judgment dismissing the Complaint against them (Motion Seq. No. 003) is granted in part and denied in part.

Plaintiffs commenced this action to recover damages for medical malpractice alleging that from August 2016 through October 2017, defendant was negligent in their care and treatment of plaintiffs' decedent, Mike Badu (hereinafter "decedent"), after he was admitted to defendant's hospital with stroke-like symptoms and was diagnosed with a brain tumor and subacute ischemic stroke. Specifically, that the development of a sacral pressure ulcer and a left shoulder pressure ulcer while decedent was bedbound, defendant did not have proper preventative measures and protocols in place for prevention of pressure ulcers and that, once developed, were not properly treated, thereby not only allowing these to develop but causing them to worsen resulting in decedent's pain and suffering therefrom. Plaintiffs also assert causes of action for negligence and wrongful death. However, plaintiffs have withdrawn the latter two causes of action in their opposition and only a cause of action for medical malpractice claims surrounding decedent's pressure ulcers remain.

Defendants seek summary judgment dismissing the Complaint against them arguing, *inter alia*, that the care and treatment rendered to plaintiff did not depart from good and accepted standards of care

and that nothing defendants did or failed to do caused or contributed to plaintiff's claimed injuries. Defendant asserts that decedent's pressure ulcers were unavoidable due to his extensive comorbidities and requisite treatment including bed elevation and chronic ventilated state, amongst others, that led to skin breakdown. Their motion is supported, among other things, by the affirmation of Dr. Hernandez, who is Board Certified in Internal and Geriatric Medicine.

In opposition to defendant's motion for summary judgment, plaintiffs assert that their expert has shown that fundamental questions of fact exist requiring a jury to decide. In support, plaintiff relies on the affirmation of an undisclosed physician, who is Board Certified in Internal Medicine who completed a Fellowship in Geriatrics with related work experience and who is currently in private practice of internal and geriatric medicine.[1]

A defendant in a medical malpractice action establishes *prima facie* entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries (*Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 2 [1st Dept 2015]). If a defendant in a medical malpractice action establishes *prima facie* entitlement to summary judgment, by a showing either that he or she did not depart from good and accepted medical practice or that any departure did not proximately cause the plaintiff's injuries, plaintiff is required to rebut defendant's *prima facie* showing "with medical evidence that defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged" (*Pullman v Silverman*, 125 AD3d 562, 562 [1st Dept 2015], *aff'd* 28 N.3d 1060 [2016]).

"A plaintiff's expert opinion must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 307 [1st Dept 2007][internal citation omitted]). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Giampa v Marvin L. Shelton, M.D., P.C.*, 67 AD3d 439 [1st Dept 2009]). Further, the plaintiff's expert must address the specific assertions of the defendant's expert with respect to negligence and causation (*see Foster-Sturrup v Long*, 95 AD3d 726, 728-729 [1st Dept 2012]).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]).

Proximate cause is almost invariably a factual issue (*see Turturro v City of New York*, 28 NY3d 469, 485 [2016]; *Kriz v Schum*, 75 NY2d 25, 33-34 [1989]; *Eiseman v State of New York*, 70 NY2d 175 [1987]; Restatement [Second] of Torts § 433B, Comment *b*). Ordinarily, it is for the trier of fact to determine the issue of proximate cause (*see Howard v Poseidon Pools*, 72 NY2d 972, 974 [1988]). However, the issue of proximate cause may be decided as a matter of law " 'where only one conclusion

[1] The Court acknowledges defendant's argument that plaintiff's expert affirmation is redacted, unsigned, unnotarized and an unredacted copy has not been provided to the Court. However, plaintiff noted that one would be provided to the Court upon request. The Court has not made such request. Additionally, CPLR § 2106 was amended, effective October 25, 2023, and no longer requires notarization. Plaintiffs' opposition was filed after the effective date.

may be drawn from the established facts' " (*id.* at 974, quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). Additionally, it is the jury's function to assess conflicting evidence and determine the credibility of the witnesses and the weight to be accorded expert testimony *(see e.g. Kallenberg v Beth Israel Hosp.*, 45 AD2d 177, 180 [1st Dept 1974], *aff'd* 37 NY2d 719 [1975]).

At the outset, it is undisputed that decedent had extensive medical issues during his admission to defendant's hospital that included a brain tumor, subacute ischemic stroke, hypertension, hyperlipidemia, syphilis, kidney disease, and hypothyroidism, as well as undergoing surgery. It is also undisputed, and the records support, that decedent was known to be at risk for pressure ulcer development early on in his admission but after his brain surgery. It is further undisputed and supported by the records that decedent's bed was kept elevated for optimal oxygenation and ventilation and that he required a percutaneous endoscopic gastrostomy ("PEG") procedure for a feeding tube to facilitate his nutrition. Additionally, the records are replete with references to turning and repositioning; pressure ulcer prevention protocol maintained; and continuing monitoring. It is also undisputed that despite these measures, decedent developed a sacral pressure ulcer which emerged, healed, and re-emerged between Stage II and Stage IV (and sometimes unstageable) throughout his admission to defendant's hospital. At the time of transfer to Long Island Care Center's facility in October of 2017, decedent's sacral pressure ulcer was a Stage IV ulcer measuring 6 cm x 4.6 cm x 2 cm.

With respect to plaintiffs' remaining asserted claims, defendant has met their *prima facie* burden that the care and treatment they provided to decedent comported with accepted medical practice, and that nothing they did or failed to do proximately caused decedent's injuries, to wit, development of pressure ulcers and pain and suffering therefrom.

In opposition, plaintiffs raise triable issues of fact as to their medical malpractice claims against defendants. While the Court recognizes that "failure to document each element of skin care protocol does not equate to a failure to perform each element or to a cause of the ulcer itself" (*see Braunstein v Maimonides Med Ctr.*, 161 AD3d 675 [1st Dept 2018]), here defendant's arguments that these were unavoidable due to decedent's comorbidities and that he was incapable of healing therefrom are contradicted by the record, to wit, decedent's sacral ulcer continually decreased in size up until his death at Long Island Care Center. Additionally, although plaintiffs' expert states no authority for his opinion that two hours is the standard of care for turning and repositioning, the records do have different turning time procedures noted on different dates and it cannot be known from the record which would have been sufficient preventative and treatment measures (*see e.g. Reape v NCRNC, LLC*, 213 Ad3d 538 [1st Dept 2023] [plaintiff's expert sufficiently raised issues of fact as to turning and repositioning and whether specialty mattress use was in compliance with the standard of care]). In summary, although the Court acknowledges that despite decedent's lengthy admission to defendant's hospital, he only developed two pressure ulcers, one of which was healed upon his discharge, the Court finds that it cannot be known at this stage whether defendant's actions or inactions proximately caused the development of his ulcers irrespective of decedent's comorbidities or whether appropriate preventative measures were taken to resolve them. While it is quite possible that decedent's ulcers were purely a result of his existing comorbidities and condition, that is not definitively shown by the evidence and cannot be determined as a matter of law based on this record.

The parties' remaining arguments are without merit.

Accordingly, it is hereby,

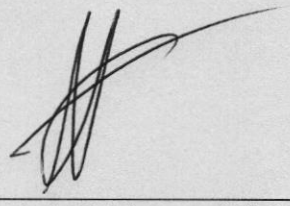
ORDERED that defendant's motion seeking summary judgment is granted only to the extent that plaintiffs' causes of action for negligence and wrongful death are dismissed, And it is further

ORDERED that the motion is otherwise denied; And it is further

ORDERED that counsel for defendant shall serve a copy of this Order with Notice of Entry on all parties within thirty (30) days of the entry of this Order.

This constitutes the Decision and Order of the Court.

Dated: May 9, 2024



Hon. Michael A. Frishman, J.S.C.

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY X CASE STILL ACTIVE
2. MOTION IS.....	☐ GRANTED ☐ DENIED X GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER ☐ SUBMIT ORDER