

Cohen v Poughkeepsie Crossings LLC
2024 NY Slip Op 35341(U)
September 26, 2024
Supreme Court, Dutchess County
Docket Number: Index No. 2023-51757
Judge: Michael G. Hayes
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X
SANFORD COHEN,

Plaintiff,

DECISION and ORDER

Index No. 2023-51757

-against-

POUGHKEEPSIE CROSSINGS LLC, and
THE PINES AT POUGHKEEPSIE CENTER
FOR NURSING AND REHABILITATION,

Defendants.

-----X
HON. MICHAEL G. HAYES, Acting Supreme Court Justice

The Court read and considered the following documents upon
this motion and cross-motion:

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Plaintiff moves for an order, pursuant to CPLR 3212,
granting him summary judgment on the issue of liability and
awarding a judgment against the defendant in the amount of Seven
Million Dollars (\$7,000,000.00). Defendant Poughkeepsie
Crossings, LLC d/b/a The Pines at Poughkeepsie Center for Nursing

and Rehabilitation s/h/a Poughkeepsie Crossings, LLC and The Pines at Poughkeepsie Center for Nursing and Rehabilitation (the "Pines") cross-moves for an order, pursuant to CPLR 3212, dismissing the plaintiff's complaint.

Background

The complaint seeks to recover money damages for injuries and losses allegedly sustained as the result of defendant's alleged medical malpractice.

The complaint states that "during the months of December 1, 2021 and thereafter the defendants POUGHKEEPSIE CROSSINGS, LLC AND THE PINES AT POUGHKEEPSIE CENTER FOR NURSING AND REHABILITATION for a good and valuable consideration undertook and endeavored to perform and did perform certain surgical operations and procedures upon the person of the plaintiff and undertook and endeavored to treat and advise the plaintiff professionally prior to and subsequent to the performance of those surgical operations and procedures." The complaint further alleges that the surgical operations and procedures and the advice and treatment were given and rendered in an improper, negligent and careless manner. The complaint maintains that the Pines failed to properly advise and instruct the plaintiff concerning post-operative care and procedure, failed to properly diagnose, treat and prescribe and failed to employ reasonable and proper steps, procedures and practices to avoid injury to the

plaintiff. The certificate of merit attached to the pleading indicates that plaintiff intends to rely solely on the doctrine of *res ipsa loquitur*.

Plaintiff's amended bill of particulars alleges that the defendant was grossly negligent, as follows: (1) knowing that plaintiff needed assistance to get up and ignoring him; (2) knowing that plaintiff's mind was such that he would try to get up without assistance and become injured in trying to do so; (3) knowing plaintiff was on medication that could cause him to try to get up without assistance and become injured; (4) in failing to properly assess plaintiff's capabilities; (5) in knowing plaintiff was a high risk for fall and failing to properly attend to him so that he would not become injured; (6) in knowing that plaintiff needed constant and close supervision, yet failing to train employees to monitor him; (7) failing to provide appropriate visual aides; (8) in the administration of psychotropic medication; (9) monitoring/documenting for side effects of pain medication; (10) removing plaintiff's non-skid socks; and, (10) in failing to use a heightened level of supervision.

Plaintiff's Motion for Summary Judgment

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law

(see *Andre v Pomeroy*, 35 NY2d 361 [1974])). The movant must set forth a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (see *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986])). Once the movant sets forth a *prima facie* case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (see *Zuckerman v City of New York*, 49 NY2d 557 [1980])).

A review of the record before this Court indicates that plaintiff was admitted to the Pines on December 14, 2021, after a hospital admission, during which plaintiff underwent a spinal fusion. His hospital stay was complicated and elongated by a cardiac arrest. Plaintiff was seen by a physician at the Pines the evening of his admission. Plaintiff was admitted to short-term rehabilitation.

Plaintiff's allegations concerning the Pines are centered around the alleged negligent management of the plaintiff's medications and supervision and monitoring of the plaintiff. These alleged deviations resulted in an altered mental status. This altered mental status is alleged to have made plaintiff attempt to leave his bed without assistance, resulting in a fall in which he fractured his right femur.

Plaintiff did not file a certificate of merit in this

malpractice action, pursuant to CPLR §3012-a, as he intends to rely on the doctrine of *res ipsa loquitur*.

The doctrine of *res ipsa loquitur* permits a jury to infer negligence, based upon circumstantial evidence, from the mere occurrence of an event where the injury is of a character which would not ordinarily occur in the absence of negligence (see *Abbott v New Rochelle Hosp. Med. Ctr.*, 141 AD2d 589 [2nd Dept 1988]). As a general rule, submission of the case on the theory of *res ipsa loquitur* is warranted when the plaintiff can establish the following elements: (1) the event must be of a kind that would not occur absent someone's negligence; (2) the event must be caused by an agency or instrumentality within the defendant's exclusive control; and (3) the plaintiff must not have voluntarily contributed to the event (*id.*).

Since the doctrine concerns circumstantial evidence which allows, but does not require, the fact finder to infer that the defendant was negligent, *res ipsa loquitur* evidence does not ordinarily or automatically entitle the plaintiff to summary judgment or a directed verdict, even if the plaintiff's circumstantial evidence is unrefuted (see *Simmons v Neuman*, 50 AD3d 666 [2nd Dept 2008]). Rather, only in the rarest of *res ipsa loquitur* cases may a plaintiff win summary judgment or a directed verdict (*id.*). That would happen only when the plaintiff's circumstantial proof is so convincing and the

defendant's response so weak that the inference of defendant's negligence is inescapable (*id.*). Here, on the limited record provided by the plaintiff, this standard was not met, particularly as to the second and third elements of the doctrine.

Plaintiff has failed to establish his *prima facie* entitlement to summary judgment as a matter of law.

Defendant's Cross-Motion for Summary Judgment

On a motion for summary judgment, defendant has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Heller v Weinberg*, 77 AD3d 622 [2nd Dept 2010]).

In support of its cross-motion, the Pines submits the affirmation of Dr. Barbara C. Tommasulo, Board Certified in Internal Medicine and Geriatrics. Dr. Tommasulo opines that the care and treatment provided to the plaintiff by the Pines from December 14, 2021 through December 15, 2021 was at all times within the applicable standard of care.

Upon presentation to the Pines, Dr. Tommasulo notes that a nursing assessment was performed, which demonstrated that the plaintiff was alert, oriented and could make his needs known. Plaintiff was cognitively assessed by a speech therapist, and it was determined that he had no cognitive impairments at the time of admission, according to Dr. Tommasulo. Dr. Tommasulo notes that at the time of admission plaintiff was seen by a physician

at the facility who completed a history and physical. The physician noted that plaintiff was alert and oriented. The physician ordered that the Pines continue the plaintiff's medications. Dr. Tommasulo noted that no new medications were ordered by the Pines at the time of this patient's admission. Dr. Tommasulo states that Seroquel or Quetiapine, which the plaintiff alleges were the mind-altering drugs which caused him to get up without assistance, were never administered at the Pines. Dr. Tommasulo notes that plaintiff also alleges Oxycodone contributed to him getting up without assistance. Dr. Tommasulo states that Oxycodone was not given to the plaintiff until after the fall. Dr. Tommasulo notes that plaintiff's deposition testimony mentioned Trazodone and Haldol, however, neither was administered to the plaintiff at the Pines. According to the doctor, the only medication mentioned by the plaintiff in his deposition and bill of particulars received prior to his fall was Depakote or Divalproex. Dr. Tommasulo states that one dose of Divalproex was administered to the plaintiff in the evening at 7:00 p.m. on December 14, 2021. Dr. Tommasulo states that this medication is administered to prevent seizures and migraines and treat certain mood disorders. Dr. Tommasulo states that it is not the type of medication which would have resulted in the plaintiff getting up without requesting assistance, as it does not have that kind of mind-altering effect.

Dr. Tommasulo states that the history and physical completed at the time of plaintiff's admission was thorough, comprehensive and at all times within good and accepted medical practice. Dr. Tommasulo asserts that the orders issued for the plaintiff at the time of admission were all appropriate and in accordance with good and accepted medical practice. Dr. Tommasulo states that the medical records from the Pines clearly indicate that there were no departures from the applicable standard of care on the part of the facility in their care and treatment of the plaintiff. Dr. Tommasulo states that there were no acts or omissions on the part of the Pines which caused or contributed to the plaintiff's fall and injury.

Dr. Tommasulo states that plaintiff's claims with respect to the medication provided to him are not accurate, not supported by the medical records or by the manner in which the one medication he was administered operates.

Dr. Tommasulo concludes that it is her opinion that the staff and providers at the Pines acted at all times within the standard of care during its treatment of the plaintiff from December 14, 2021 through December 15, 2021.

The defendant has established, *prima facie*, that it did not deviate from good and accepted medical practice in its treatment of plaintiff (see generally *McCarthy v Northern Westchester Hosp.*, 139 AD3d 825 [2nd Dept 2016]; *Germaine v Yu*, 49 AD3d 685

[2nd Dept 2008]; *Williams v Sahay*, 12 AD3d 366 [2nd Dept 2004]).

Since defendant has made a *prima facie* showing of entitlement to judgment as a matter of law (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]), the plaintiff must show that genuine triable issues of material fact exist in order to defeat defendant's motion (*id.*).

In opposition, the affirmation of plaintiff's counsel fails to raise an issue of fact.

Based upon the foregoing, it is hereby

ORDERED, plaintiff's motion for summary judgment is denied, it is further

ORDERED, the defendant's cross-motion for summary judgment is granted and the plaintiff's complaint is dismissed.

This constitutes the decision and order of the Court.

Dated: September 26, 2024
Poughkeepsie, New York


HON. MICHAEL G. HAYES, AJSC