Hendricks v Wayne Ctr. for Nursing & Rehabilitation
2024 NY Slip Op 35347(U)
June 6, 2024
Supreme Court, Westchester County
Docket Number: Index No. 60594/2021
Judge: Lewis J. Lubell
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:
HON. LEWIS J. LUBELL
JUSTICE OF THE SUPREME COURT

SHANNON C. HENDRICKS, as Administrator of the Estate of MARY HENDRICKS,

Plaintiff(s),

-against-

DECISION & ORDER
Index No.: 60594/2021

WAYNE CENTER FOR NURSING AND REHABILITATION, MONTEFIORE MEDICAL CENTER and WORKMEN'S CIRCLE MULTICARE CENTER,

Defendant(s).

Defendant Montefiore Medical Center (MMC) moves (**Motion #5**) for summary judgment.

The following papers were read:

Notice of Motion, Affirmation, and Exhibits (11)	1-13
Affirmation in Opposition and Exhibit	14-15
Affirmation in Reply	16

By way of background, decedent Mary Hendricks (Ms. Hendricks) was a resident of defendant Wayne Center for Nursing and Rehabilitation and was then admitted to MMC from March 5, 2017 to March 27, 2017. Ms. Hendricks was then transferred to defendant Workmen's Circle Multicare Center. Ms. Hendricks passed away on November 11, 2019. This action ensued. In particular, plaintiff alleges, among other things, that MMC failed to prevent the development and failed to properly treat Ms. Hendricks' pressure ulcer(s). Defendants interposed answers and the parties engaged in discovery. On November 15, 2023, plaintiff filed the note of issue. Now, MMC moves for summary judgment.

On a motion for summary judgment, the Court is to determine whether genuine issues of material fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The

movant makes a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any genuine issue of material fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Swezey v Montague Rehab & Pain Mgt., P.C.*, 59 AD3d 431, 433 [2d Dept 2009]).

In support of the motion, MMC proffers, among other things, the expert affirmation of Vincent Marchello, M.D., who is board certified in geriatric medicine. Dr. Marchello indicates that he reviewed documents and medical records pertaining to the above-captioned matter, including, but not limited to, plaintiffs' bill of particulars, the deposition testimony of all parties and nonparties, and relevant medical records, including the records from MMC, Bainbridge Nursing and Rehabilitation, Wayne Center for Nursing & Rehabilitation, and Workmen's Circle Multicare Center. Based thereon as well as experience, Dr. Marchello opines that all appropriate pressure ulcer prophylaxis measures were put in place by MMC and, to the extent that Ms. Hendricks developed any ulcers while under the care of MMC, it was only a stage II sacral ulcer and was unavoidable. Dr. Marchello explains that the development of this ulcer was not due to any malpractice but was because Ms. Hendricks was at very high risk of developing skin breakdown, and this was unavoidable given her multiple comorbidities including hypertension, end stage renal disease, diabetes, difficulties ambulating, and poor vascular perfusion. In addition, MMC contends that plaintiff's claims for negligent hiring and retention, lack of informed consent, and allegations of recklessness are without any factual support.

MMC has made a *prima facie* showing and, as such, the burden of going forward shifts to the opponent of the motion to produce a physician's affidavit of merit attesting that there was a departure from the standard of care and attesting that, in the physician's opinion, said departure or departures were a competent producing cause of the injury (*see Swezey*, 59 AD3d at 433).

In opposition, plaintiff proffers, among other things, the expert affirmation of a physician, who is board certified in family, geriatric, and emergency medicine (Plaintiff's Expert). Plaintiff's Expert indicates that s/he reviewed the deposition and medical records in the above referenced matter, including defendants' records; Dr. Marchello's affirmation, and all deposition transcripts. Based thereon as well as experience, Plaintiff's Expert asserts that pressure ulcers do not develop absent an improperly developed, followed, or revised care plan. Plaintiff's Expert asserts that Ms. Hendricks should have been provided with a pressure reducing mattress upon admission, but was not provided with one until 48 hours after admission. In addition, Plaintiff's Expert opines that Ms. Hendricks was not timely turned and repositioned; in one instance, Plaintiff's Expert asserts that MMC's failure to turn and reposition Ms. Hendricks every two hours was the proximate cause of the development of the pressure ulcer.

In reply, MMC puts forth several arguments. Initially, MMC notes that plaintiff's opposition papers were due on March 9, 2024, but were not filed until March 26, 2024

without explanation. MMC asserts Plaintiff's Expert has failed to lay a proper foundation for her/his opinions in that Plaintiff's Expert is a physician in Maryland, who fails to state that s/he is familiar with the standard of care in New York or that s/he is familiar with the standard of care for diagnosing, managing, or treating pressure ulcers or that s/he is familiar with appreciating the significance of underlying medical conditions that result in certain patients being at heightened risk of development of ulcers. MMC asserts that Plaintiff's Expert fails to explain how any "delay" of 48 hours in providing Ms. Hendricks with a pressure reducing mattress caused her to develop a sacral ulcer 22 days after admission. In addition, MMC asserts that Plaintiff's Expert fails to explain how pressure ulcers will "never" occur absent a pressure ulcer prevention plan. Lastly, MMC notes that plaintiff has not opposed the dismissal of the claims for negligent hiring, lack of informed consent, and the allegations of recklessness.

Overlooking the untimeliness of plaintiff's opposition papers and assuming that Plaintiff's Expert is familiar with the appropriate standard of care, plaintiff has failed to raise a genuine issue of material fact. It is well settled that where conflicting affidavits and other contradictory evidence is submitted, summary judgment is not appropriate (*see Webar, Inc. v Capra*, 212 AD2d 594, 596 [2d Dept 1995]). The reasoning is that it is not within the purview of the Court to resolve issues of credibility on a motion for summary judgment (*see Halkias v Otolaryngology-Facial Plastic Surgery Associates, P.C.*, 282 AD2d 650, 651 [2d Dept 2001] ["Resolution of issues of credibility of both expert and lay witnesses and the accuracy of their testimony are matters within the province of the jury."]). However, "expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact" (*Elstein v Hammer*, 192 AD3d 1075 [2d Dept 2021]). "In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on 'specifically cited evidence in the record' " (*Tsitrin v New York Community Hosp.*, 154 AD3d 994, 996 [2d Dept 2017]). Here, Plaintiff's Expert fails to address the specific assertions by Dr. Marchello and is conclusory. Dr. Marchello asserted that Ms. Hendricks developed a pressure ulcer due to her medical condition and comorbidities and not because of any malpractice. Plaintiff's Expert does not assert that, given her medical condition and co-morbidities, Ms. Hendricks should not have developed a pressure ulcer with a properly implemented care plan; Plaintiff's Expert merely asserts that pressure ulcers should never occur, which appears to be an untenable position (*see, e.g., Vargas v St. Barnabas Hosp.*, 168 AD3d 596, 597 [1st Dept 2019]; Dept of Health Regs [10 NYCRR] § 415.12 [c] [1]; 42 CFR § 483.25 [b] [1] [i]). Dr. Marchello, citing to the medical records, asserts that Ms. Hendrick was timely turned and repositioned during her admission at MMC. Plaintiff's Expert, without reference to the medical records, merely states that Ms. Hendricks was not turned and repositioned every two hours. As such, the opinions of Plaintiff's Expert are insufficient to raise triable issues of fact.

To the extent not specifically addressed herein, the Court finds plaintiff's remaining arguments to be without merit. Based on the foregoing, it is hereby

ORDERED that **Motion #5** is GRANTED and the action against MMC is DISMISSED.

Dated: June 6, 2024
White Plains, New York

HON. LEWIS J. LUBELL
Justice of the Supreme Court