

Fernandez v New York City Health & Hosps. Corp.
2024 NY Slip Op 35383(U)
June 17, 2024
Supreme Court, Richmond County
Docket Number: Index No. 150639/2020
Judge: Judith N. McMahon
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

-----X **IAS Part 6**
PAMELA FERNANDEZ, as Administrator of the
Estate of LORRAINE ZORN, deceased and
Individually,

Present:**HON. JUDITH N. MCMAHON****Plaintiff,****DECISION AND ORDER****-against-****Index No: 150639/2020****NEW YORK CITY HEALTH & HOSPITALS
CORPORATION and SEA VIEW HOSPITAL,
REHABILITATION CENTER and HOME,****Motion Seq. Nos: 002, 003****Defendants.**
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The following e-filed documents, listed by NYSCEF document number (Motion 002) 32 through 57, and 64 were read on this motion for SUMMARY JUDGMENT pursuant to CPLR 3212

The following e-filed documents, listed by NYSCEF document number (Motion 003) 58 through 63, were read on this CROSS MOTION TO AMEND THE COMPLAINT

Upon the foregoing papers, the motion by defendant New York City Health and Hospitals Corporation s/h/a New York City Health and Hospitals Corporation and Sea View Hospital Rehabilitation Center (hereinafter "NYCH&H") for summary judgment dismissing plaintiff's complaint pursuant to CPLR 3212 is denied. Plaintiff's cross motion to amend the complaint to add claims under New York State Public Health Law §2801-d and §2803-c is also denied.

This medical malpractice action arises out of the care and treatment rendered to plaintiff's decedent, Lorraine Zorn, who sustained a fracture of the right femur while a resident at Sea View on February 4, 2019. Decedent had resided at Sea View since 2012 and was non-ambulatory for most of that time, and she was noted to be at increased risk for falls due to tremors and related-injuries secondary to Parkinson's disease. She was twice found on the floor on the right side of her bed during 2018, and numerous fall interventions, which included both siderails remaining upright,

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were in place. Ms. Zorn was placed on palliative comfort care (*i.e.*, two-person movement and gentle care) on October 17, 2018, four months before sustaining the fracture to her femur.

On February 4, 2019, decedent complained of pain to her right thigh and lower extremity. Her right leg was swollen and tender on palpation, and there was no record of a fall. X-rays revealed the fractured right femur, and decedent underwent an open reduction with internal fixation at Staten Island University Hospital. The hospital record stated that this was “likely a contracture fracture,” and no evidence of bruising or any other finding consistent with a fall or abuse was noted in the hospital chart.

Defendant moves for summary judgment on the grounds that all admissible evidence establishes that the care and treatment rendered to Lorraine Zorn was in accordance with accepted standards of care and practice, and that no proximate causation exists between any alleged departures from the standard of care and the claimed injuries and resulting death. Sea View maintains that nothing in the record points to negligent care and treatment on its part, and that decedent may have sustained the fracture by hanging both lower extremities over the foot of the bed, which was known to do (*see, e.g.*, NYSCEF Doc. No. 35, para. 40). Plaintiff opposes the motion arguing that a fracture of the femur (the largest bone in the body) does not occur spontaneously and further, that the hospital record’s notation that decedent sustained the fracture from a fall raises a triable issue of fact. Plaintiff cross moves to amend the complaint to add several new theories of liability under the Public Health Law which expand the dates of negligence back to Ms. Zorn’s original date of admission to Sea View, September 19, 2012. Defendant opposes the cross motion on the grounds that any claims preceding January 15, 2019, are time barred, since the 90-day Notice of Claim was served on April 15, 2019.

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To prevail on a motion for summary judgment, the proponent must make *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact (*see Klein v. City of New York*, 89 NY2d 833 [1996]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

“The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice, and evidence that such deviation or departure was a proximate cause of injury or damage” (*Castro v. New York City Health & Hosps. Corp.*, 74 AD3d 1005 [2d Dept. 2010]).

A defendant seeking summary judgment in a medical malpractice action must establish, *prima facie*, that he or she did not depart from accepted standards of medical care or that his or her acts were not a proximate cause of any injury to the plaintiff (*see Tsitrin v. New York Community Hosp.*, 154 AD3d 994, 995 [2d Dept. 2017]; *Stukas v. Streiter*, 83 AD3d 18, 24 [2d Dept. 2011]). “In response, it is the plaintiff’s burden to raise a triable issue of fact ‘regarding the element or elements on which the defendant has made *prima facie* showing’” (*Tsitrin v. New York Community Hosp.*, 154 AD3d at 995, *quoting Feuer v. Ng.*, 136 AD3d 704, 706 [2d Dept. 2016]).

Defendant submits an affirmation from Lawrence Diamond, M.D., (*see* NYSCEF Doc. No. 35) which demonstrates *prima facie* entitlement to judgment as a matter of law (*see Lefkowitz v. Kelly*, 170 AD3d 1148 [2d Dept. 2019]). In opposition, the plaintiff has successfully raised a triable issue of fact as to the way in which the claimed injuries occurred. “The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of a triable issues or the issue is even ‘arguable’” (*De Paris v. Women’s Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept. 2017]).

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Plaintiff's cross motion to amend the complaint to add causes of action pursuant to the Public Health Law is denied as untimely.

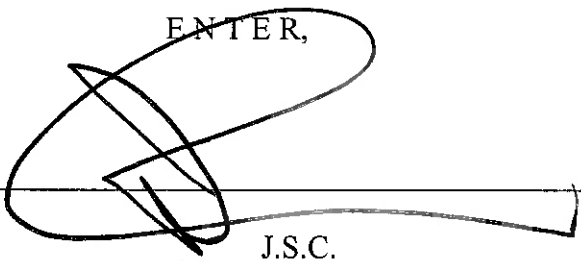
Accordingly, it is

ORDERED that the motion of defendant New York City Health & Hospitals Corporation and Sea View Hospital, Rehabilitation Center and Home for summary judgment is denied; and it is further

ORDERED that the cross motion of plaintiff for leave to amend the complaint pursuant to CPLR 3025 and CPLR 203(f) is denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference via Microsoft Teams on **September 17, 2024 at 10:00 a.m.**

Dated: June 17 2024

ENTER,

J.S.C.

Hon. Judith N. McMahon
J.S.C.