

Thorne v Jackson Hgts. Care Ctr., LLC
2024 NY Slip Op 35436(U)
April 18, 2024
Supreme Court, Queens County
Docket Number: Index No. 702018/2019
Judge: Maurice E. Muir
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

CORALENE THORNE, AS EXECUTRIX OF
THE ESTATE OF JOHN GRANT and
CORALENE THORNE, Individually,

Plaintiffs,

-against-

JACKSON HEIGHTS CARE CENTER, LLC
d/b/a REGAL HEIGHTS REHABILITATION
DOES 1-10, The names being fictitious, the
persons intended being the individual health
care personnel on duty between January 3, 2019
and January 16, 2019, AKRAM TAWDROUS
KHALIL, and SVETLANA SHEVELEVA,

Defendants.

JACKSON HEIGHTS CARE CENTER, LLC d/b/a
REGAL HEIGHTS REHABILITATION AND
HEALTH CARE CENTER,

Third-Party Plaintiff,

-against-

AKRAM TAWDROUS KHALIL AND SVETLANA
SHEVELEVA,

Third-Party Defendants.

IAS Par - 42

Index No.: 702018/2019

Motion Dates: 08/10/23
10/12/23

Motion Cal. Nos.

Motion Seq. Nos. 6 & 7



The following electronically filed ("EF") documents read on this motion by Svetlana Sheveleva ("Ms. Sheveleva") for an order: a) pursuant to CPLR § 3212 granting summary judgment in her favor and dismissing plaintiff's and third-party plaintiff's complaints in its

entirety on the merits, with prejudice; and b) directing the Clerk of the Court to enter judgment against plaintiff and third-party plaintiff, and in favor of defendant accordingly; and c) granting such other and further relief as this Court deems just and proper. Moreover, Akram Tawdrous Khalil ("Mr. Khalil") moves for an order: a) pursuant to CPLR § 3212 granting summary judgment in favor of the defendant/third-party defendant, Akram Tawdrous Khalil, and dismissing the plaintiffs' complaint in its entirety as against this defendant; b) pursuant to CPLR § 3212 granting summary judgment in favor of the defendant/third-party defendant, Akram Tawdrous Khalil, and dismissing the third-party plaintiff's third-party complaint in its entirety as against this defendant; and c) granting such other, further, and different relief as this Court deems just and proper.

	<u>Papers Numbered</u>
Notices of Motion - Affirmations - Exhibits	E169 - 211
Answering Affirmations - Exhibits	E218 - 226, E228
Reply Affirmations	E227, 229

Upon the foregoing papers, it is ordered that the motions are combined herein for disposition, and determined as follows:

This is an action to recover damages for personal injuries that John Grant ("Mr. Grant" or "decedent") allegedly sustained at Jackson Heights Care Center, LLC, d/b/a Regal Heights Rehabilitation and Health Care Center ("Regal Heights Rehab.") between January 3, 2019 and January 16, 2019. As a result, on February 4, 2019, Coralene Thorne the Executrix of Mr. Grant's Estate ("Ms. Thorne" or "plaintiff") commenced the instant action; and on March 15, 2019, issue was joined. On February 2019, Mr. Grant and Coralene Thorne ("Ms. Thorne"), his wife, commenced this action by the service of a summons and complaint on JHCC, alleging causes of action for negligence, among other things, in the treatment and care of Mr. Grant. On March 15, 2019, Regal Heights Rehab interposed an answer; and on April 4, 2019, the plaintiffs served an amended summons and complaint, wherein Coralene Thorne was substituted as the Executrix of the Estate of John Grant. Moreover, on February 20, 2020, Regal Heights Rehab. impleaded Ms. Sheveleva and Mr. Khalil, claiming that they were responsible for Mr. Grant's

injuries; and on March 20, 2020, plaintiff amended the complaint to join those parties in the complaint in chief. All parties appeared, depositions were held, and a note of issue was filed in December 2022.

The testimony revealed that Mr. Grant, a 94-year-old man with a history of Alzheimer's Disease and Dementia, was admitted to New York Hospital Queens ("NYHQ") with a diagnosis of syncope and collapse with possible seizure. On January 3, 2019, he was transferred to Regal Heights Rehab. Part of his treatment at Regal Heights Rehab consisted of physical therapy, performed by Ms. Sheveleva, a Physical Therapy Assistant ("PT"), working "under the supervision" of Mr. Khalil. Since, 2016, Ms. Sheveleva was practicing, pursuant to a contract with Regal Heights Rehab, to provide therapy services "as requested by the facility and per a licensed physician's order." Upon his admission to Regal Heights Rehab, Mr. Grant received an "initial Physical Therapy screening and evaluation" by Mr. Khalil, who drew up a treatment plan, which, allegedly, did not include "hot packs, electrical stimulation or ultrasound." On January 4, 2019, Ms. Sheveleva proceeded to perform physical therapy for Mr. Grant; and seven more times, up to January 15th. Moreover, on January 11th, Mr. Grant was observed as having "fluid filled blister(s)" on both feet, and was seen by a dermatologist, on January 13th, and vascular doctor, on January 14th. Ms. Sheveleva alleges that she was unaware of such blisters, as her treatment was performed with Mr. Grant's feet covered with footwear.

Ms. Sheveleva asserts that, at the outset of her January 14th appointment to treat Mr. Grant, he complained of "right thigh pain." She, immediately, notified Mr. Khalil, who spoke to Mr. Grant and received the same complaint of pain. Both Ms. Sheveleva and Mr. Khalil notified the nursing staff at Regal Heights Rehab. of the complaint, and, allegedly, recommended X-rays be taken (as physical therapists are not permitted to order X-rays). The nursing staff did not request that physical therapy treatment be suspended, and, at Mr. Khalil's direction, Ms. Sheveleva treated Mr. Grant, on that day and the next, with Mr. Grant seated in a wheelchair, and without any treatment involving his right side. The last physical therapy session with Mr. Grant was on January 15th, at which time he still complained of the same pain in his right thigh; he denied "falling;" and he showed no signs of trauma. Regal Heights Rehab. did not x-ray Mr. Grant until later that day, and such films, along with a subsequent CT Scan, revealed a fracture, which required a "right hip hemiarthroplasty."

Defendants/third-party defendants, Ms. Sheveleva (Seq. 6) and Mr. Khalil (Seq. 7) seek

summary judgment dismissing plaintiffs' complaint, by asserting, generally, "that there was no departure from good and accepted "physical therapy" practice, or that the plaintiff was not injured thereby" (*Stukas v. Streiter*, 83 AD3d 18, 24 [2d Dept 2011]; see *Huichun Feng v. Accord Physicians, PLLC*, 194 AD3d 795 [2d Dept 2021]). It is well settled that "[t]he 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" (*Ayotte v. Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; see *Schmitt v. Medford Kidney Center*, 121 AD3d 1088 [2d Dept 2014]; *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]). Only if a *prima facie* demonstration has been made, does the burden shift to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (see *Alvarez v. Prospect Hospital*, 68 NY2d 320; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Roos v. King Constr.*, 179 AD3d 857 [2d Dept 2020]). On defendants' motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving plaintiff (see *Monroy v. Lexington Operating Partners, LLC*, 179 AD3d 1053 [2d Dept 2020]; *Rivera v. Town of Wappinger*, 164 AD3d 932 [2d Dept 2018]; *Boulos v. Lerner-Harrington*, 124 AD3d 709 [2d Dept 2015]).

The court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v. Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v. Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented. . . . This drastic remedy should not be granted where there is any doubt as to the existence of such issues . . . or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; see also *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact (see *Ayotte v. Gervasio*, 81 NY2d 1062; *Khadka v. American Home Mortg. Servicing, Inc.*, 139 AD3d 808 [2d Dept 2016]). Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v. Jiacono*, 126 AD3d 927, 928 [2d Dept 2014]),

citing *Scott v. Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; see *Charlery v. Allied Transit Corp.*, 163 AD3 914 [2d Dept 2018]; *Chimbo v. Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

In the case at bar, despite the language employed, the allegations of the causes of action in the complaint, seeking “to recover damages for personal injuries the plaintiff contends he sustained during a physical therapy session conducted by a physical therapist at (Regal Heights Rehab.)” (*Amendola v. Brookhaven Health Care Facility, LLC*, 150 AD3d 1061, 1062 [2d Dept 2017]), “sound in medical malpractice, not ordinary negligence” (*Jean-Paul v. Jamaica Hosp. Med. Ctr.*, 208 AD3d 464, 466 [2d Dept 2022]; see *Mendoza v. Maimonides Med. Ctr.*, 203 AD3d 715 [2d Dept 2022]). The distinction between ordinary negligence and malpractice depends on whether the acts or omissions complained of involve acts of professional science or art, “requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts” (*Miller v. Albany Med. Ctr. Hosp.*, 95 AD2d 977, 978 [3d Dept 1983]; see *Jeter v. New York Presbyt. Hosp.*, 172 AD3d 1338 [2d Dept 2019]; *Rojas v. Tandon*, 208 AD3d 702 [2d Dept 2022]). As such, the claims against the defendants/third-party defendants herein “sound[] in professional malpractice; and in order to establish their entitlement to judgment as a matter of law, the defendants are required to make a prima facie showing that they did not deviate from good and accepted standards of physical therapy practice, or that any such deviation was not a proximate cause of the plaintiff’s injuries” (*Shank v. Melling*, 84 AD3d 776, 777 [2d Dept 2011]; see *Losak v. St. James Rehabilitation & Healthcare Ctr.*, 199 AD3d 671, 672 [2d Dept 2021]). By submitting the affidavits or affirmations of experts, who through review of the medical records conclude that defendants’ treatment of plaintiff were consistent with the good and accepted standards of physical therapy care, and that no lack of care or alleged omission was a proximate cause of, or contributing factor to, plaintiff’s injuries, defendants can meet their prima facie burden (see *Larcy v. Kamler*, 185 AD3d 564 [2d Dept 2020]; *Williams v. Nanda*, 177 AD3d 938 [2d Dept 2019]; *Michel v. Long Island Jewish Medical Center*, 125 AD3d 945 [2015]). Here, Ms. Sheveleva submitted the affidavit of Brian V. Becker (“Mr. Becker”) a Physical Therapist licensed in the State of New York since 1994; and he is the Director of Physical Therapy at Excel Rehabilitation & Sports Therapy (“Excel Rehab”), since 2001. Mr. Becker opined “based on a reasonable degree of physical therapy certainty,” along with a review

of the medical and therapy records, the pleadings, and the deposition testimony of the parties, that Ms. Sheveleva “was qualified to render physical therapy”; that she met the standard of care of a physical therapy assistant in her treatment of Mr. Grant; that she did not depart from “good and accepted physical therapy practice” in such treatment; that she did not “act in a reckless manner” in such treatment; that she “did not cause or contribute to the injuries or damages claimed” in the pleadings; and that Mr. Grant’s injuries “could not have been caused” by Ms. Sheveleva’s treatment. Mr. Becker concluded that no issues of fact as to Ms. Sheveleva’s alleged malpractice/negligence remained to be decided by a jury herein.

Furthermore, Mr. Kahlil, permissibly submitted his own affidavit in support of his prima facie motion (*see Shank v. Melling*, 84 AD3d 776), opining “to a reasonable degree of physical therapy certainty,” and “which detailed, specific, and factual in nature indicating that his treatment of ... plaintiff did not depart from good and accepted physical therapy practice (*Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *see Marine v. Camissa*, 107 AD3d 672 [2d Dept 2013]; *Makinen v. Torelli*, 106 AD3d 782 [2d Dept 2013]). Mr. Becker’s opinion also stated a prima facie case for Mr. Kahlil’s contention that he, too, is entitled to summary judgment dismissing the action against him, by articulating how, and opining why, “the physical therapy was not a proximate cause of” Mr. Grant’s stated injuries, *i.e.*, the blisters on his feet and the fracture of his hip (*id.* at 778).

In opposition, in this case involving physical therapy malpractice, “[e]xpert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause” (*Novick v. South Nassau Communities Hosp.*, 136 AD3d 999, 1000 [2d Dept 2016]; *see Aaron v. Raber*, 188 AD3d 967 [2d Dept 2020]). “Establishing proximate cause in . . . malpractice cases require a plaintiff to present sufficient medical evidence from which a reasonable person may conclude that it was more probable than not that the defendant’s departure was a substantial factor in causing the plaintiff’s injury” (*Berger v. Shen*, 185 AD3d 539, 541 [2d Dept 2020] quoting *Gaspard v. Aronoff*, 153 AD3d 795, 796 [2d Dept 2017]; *see Hilt v. Carpentieri*, 198 AD3d 625 [2d Dept 2021]; *Bacchus-Sirju v. Hollis Women’s Ctr.*, 196 AD3d 670 [2d Dept 2021]). While “[s]ummary judgment may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts, which present a credibility question requiring a jury’s resolution” (*Berger v. Hale*, 81 AD3d 766, 766 [2011]; *see Pistone v. American Biltrite, Inc.*, 194 AD3d 1085 [2d Dept 2021]; *Elstein v.*

Hammer, 192 AD3d 1075 [2d Dept 2021]; *Cox v. Herzog*, 192 AD3d 757 [2d Dept 2021]; *Macancela v. Wyckoff Hgts. Med. Ctr.*, 175 AD3d 795 [2d Dept 2019]), such is not the factual situation herein. “In opposition, the plaintiff (and third-party plaintiff) failed to raise a triable issue of fact, as the plaintiff failed to submit an expert affidavit” (*Jean-Paul v. Jamaica Hosp. Med. Ctr.*, 208 AD3d at 465). As such, plaintiffs “failed to rebut the defendants’ expert’s specific assertions; and the opposition arguments are otherwise speculative, conclusory, and unsupported by the record” (*Van DeVeerdonk v. North Westchester Restorative Therapy & Nursing Ctr.*, 223 AD3d 702, 705 [2d Dept 2024]; see also *Lagatta v. Rivera*, 217 AD3d 757 [2d Dept 2023]; *Barnaman v. Bishop Hules Episcopal Nursing Home*, 213 AD3d 896 [2d Dept 2023]; *Losak v. St. James Rehabilitation & Healthcare Ctr.*, 199 AD3d 671).

Lastly, the plaintiff’s contention that it can be circumstantially inferred that Mr. Grant suffered his hip fracture during the physical therapy treatment, and, therefore, “the *Noseworthy* doctrine (see *Noseworthy v. City of New York*, 298 NY 76 [1948]) is applicable here to impose a lighter burden of persuasion on the plaintiffs” (*Hayes v. County of Suffolk*, 222 AD3d 950, 953 [2d Dept 2023]), is without merit herein. The lesser degree of proof conferred by *Noseworthy* pertains to the weight which circumstantial evidence may be afforded by a jury, not to the standard of proof that plaintiff must meet (see *Dombadze v. Chwatt*, 7 AD3d 563 [2d Dept 2004]; *Oginsky v. Rosenberg*, 115 AD2d 463 [2d Dept 1985]). For such doctrine to apply, plaintiff must be able to establish causation “with circumstantial evidence . . . [and] the record must render the other possible causes sufficiently remote to enable the trier of fact to reach a verdict based upon the logical inferences to be drawn from the evidence, not upon speculation” (*Buckstine v. Schor*, 213 AD3d 730, 731 [2d Dept 2023] quoting *Grande v. Won Hee Lee*, 171 AD3d 877, 878 [2d Dept 2019]). Plaintiffs have failed to proffer any such circumstantial evidence herein; thus, the defendants’ knowledge of the cause of Mr. Grant’s injuries “is no greater than that of plaintiffs” (*Atehortua v. Jaramillo*, 195 AD3d 670, 672 [2d Dept 2021]) and plaintiffs are not entitled to the benefits of *Noseworthy*.

Plaintiffs’ remaining contentions are either without merit, or need not be addressed in light of the foregoing determinations.

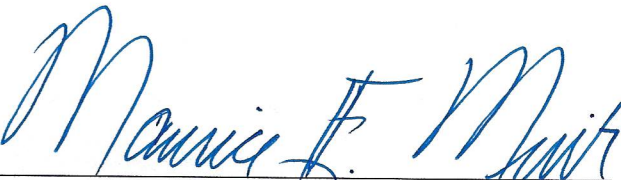
Accordingly, it is hereby

ORDERED, the motions by defendants, Svetlana Sheveleva and Akram Tawdrous Khalil, for summary judgment dismissing plaintiffs' and third-party plaintiffs' complaints against them, are granted; and it is further,

ORDERED that Defendant Svetlana Sheveleva and Akram Tawdrous Khalil shall serve a copy of this decision and order with notice of entry upon all parties, via first class mail and NYSCEF, on or before May 10, 2023.

The foregoing constitutes the decision and order of the court.

Dated: April 18, 2024
Long Island City, New York


MAURICE E. MUIR, J.S.C.

