Piparo v Coney Is. Hosp.
2025 NY Slip Op 30804(U)
March 10, 2025
Supreme Court, Kings County
Docket Number: Index No. 507520/2019
Judge: Consuelo Mallafre Melendez

At an IAS Term, Part MMESP-7 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10th day of March 2025.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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GERI PIPARO,

Plaintiff,

-against-

CONEY ISLAND HOSPITAL, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendants.

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DECISION & ORDER

Index No. 507520/2019
Mo. Seq. 1

HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:
NYSCEF #s: 45 – 47, 48 – 73, 76 – 78, 79 – 80

Defendant New York City Health and Hospitals Corporation ("NYCHHC"), also sued herein as Coney Island Hospital, moves (Seq. No. 1) for an Order, pursuant to CPLR 3212, granting summary judgment in their favor and dismissing Plaintiff's complaint in its entirety, and pursuant to CPLR 3211 (a) (7), dismissing all claims, lack of informed consent, negligent hiring and retention, and Public Health Law violations.

Plaintiff commenced this action on April 4, 2019, asserting claims of medical malpractice in connection with the prevention and treatment of pressure ulcers.

On January 21, 2018, at approximately 5:30 a.m., 65-year-old Plaintiff presented to Coney Island Hospital (now known as South Brooklyn Health) with fever, vomiting, and diarrhea for 3-4 days, which was watery and green. She had recently tested positive for influenza at an urgent care. Due to repeated episodes of diarrhea while in the emergency department, she was noted to be "covered with feces" and needed to be changed and washed multiple times. At approximately 7:00 p.m., discoloration and eschar on the left and right buttocks was documented by Svitlana Tyshkova, R.N., an emergency department nurse. Plaintiff was admitted on isolation precautions with a primary diagnosis of pneumonia.

On January 22, wound care nurse Nataliya Borys, R.N., performed a wound care assessment, noting unstageable pressure ulcers on both the left and right buttocks. She recommended Versa Care bed, skin care protocols, and referral to the doctor for surgical debridement consult. Nursing staff applied collagenase, saline, and dry dressings to the area.

On January 23, a surgery consult was ordered for possible debridement. Plaintiff was evaluated as having stage II decubitus ulcer with no signs of infection or necrotic tissue. The doctor recommended continuation of local wound care and no debridement at that time. On January 25, sharp debridement of the right gluteal fold was recommended and performed.

On January 26, Plaintiff was discharged with orders for follow-up dressing changes and wound care by Visiting Nurse Service.

Plaintiff alleges that Coney Island Hospital, through its physicians, nurses, and staff, departed from the standard of care by failing to timely and properly treat her pressure injuries during her several hours in the emergency department and upon admission. Plaintiff further alleges that those departures proximately caused the worsening of her buttocks pressure injuries, resulting in skin breakdown that was initially noted as "small" but later required surgical debridement.

In evaluating a summary judgment motion in a medical malpractice case, the Court applies the burden shifting process as summarized by the Second Department:

> "The elements of a medical malpractice cause of action are a deviation or departure from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries. When moving for summary judgment, a defendant provider has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. In order to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars. In opposition, the plaintiff must demonstrate the existence of a triable issue of fact as to the elements on which the defendant has met his or her initial burden" (*Barnaman v Bishop Hucles Episcopal Nursing Home,* 213 AD3d 896, 898-899 [2d Dept 2023] [internal quotation marks and citations omitted]).

In any summary judgment motion, the initial burden rests on the movant to "make a prima facie showing

of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York University Medical Center,* 64 NY2d 851, 853 [1985]).

In support of the motion, Defendant NYCHHC submits an affidavit from Mary Brennan, R.N. ("RN Brennan"), a registered nurse board certified in ostomy and wound care nursing.

An expert opinion need not be provided by a specialist, but the expert must demonstrate that they are "possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable" (*DiLorenzo v Zaso,* 148 AD3d 1111, 1112-1113 [2d Dept 2017]). The Second Department has held that while a registered nurse is qualified to render an opinion on departures from the standard of nursing care, they are not qualified to offer a medical opinion on whether those departures proximately caused the patient's injuries (*see Zak v Brookhaven Mem. Hosp. Med. Ctr.,* 54 AD3d 852, 853 [2d Dept 2008]). A nurse also may not render an opinion with respect to the decisions and treatment of a physician beyond the scope of their nursing expertise (*see Boltyansky v New York Community Hosp.,* 175 AD3d 1478, 1479 [2d Dept 2019]; *Novick v South Nassau Communities Hosp.,* 136 AD3d 999, 1001 [2d Dept 2016])). Thus, RN Brennan has established the relevant background to render opinions *only as to the standard of care for nursing staff* and lacks the qualifications to opine as to any physician-prescribed wound treatment or debridement.

To the extent that RN Brennan renders opinions as to the care of NYCHHC nursing staff, she opines that Plaintiff was "monitored closely and changed numerous times" while she was in the emergency department waiting for an inpatient bed, in accordance with the standard of care for a patient with severe diarrhea. RN Brennan opines that a nurse in the emergency department timely documented her two existing buttocks pressure injuries with discoloration and eschar and notified the attending physician.

RN Brennan opines that once Plaintiff was admitted to the medical floor, pressure injury prevention measures were implemented as directed by the physician and wound care consult, including a pressure-relieving mattress and daily skin care protocols documented in the nursing flowsheets. She notes that the patient was able to move on her own and did not require turning and repositioning. RN Brennan opines that the wound care nurse

practitioner appropriately evaluated Plaintiff's pressure injuries on January 22 and recommended topical ointment, dry dressings, and physician/surgical consult referrals.

As a registered nurse without the required medical background to opine on any treatment directed by the attending physicians, the movants' expert has not met their prima facie burden as to the treatment and care rendered at Coney Island Hospital. Because the expert lacks sufficient background to opine on the physicians' decisions and treatment, the movants fail to meet their prima facie burden on such issues as the timeline of Plaintiff's treatment, the use and removal of the Flexi-seal fecal management device, or the recommendations and performance of debridement by the physicians.

RN Brennan also cannot establish a foundation of experience and education to opine as to whether the medical treatment and care at issue was a proximate cause or substantial factor in causing Plaintiff's alleged injuries. The expert's opinions on proximate causation are conclusory and not supported by her area of expertise. For this reason, the nursing expert's opinions are insufficient to eliminate issues of fact and establish entitlement to summary judgment as a matter of law, regardless of Plaintiff's opposition papers.

Notwithstanding the insufficient moving papers, Plaintiff submits an affidavit in opposition from Sarah E. Lebovits ("RN Lebovits"), a registered nurse practitioner and board certified wound, ostomy, and continence nurse. Based on her experience and education, she has laid a foundation to opine on the standard of nursing care, but not as to physician-directed treatment, surgical consult, debridement, or proximate causation.

RN Lebovits opines that the nurses and staff at NYCHHC/Coney Island Hospital departed from the standard of care in their treatment of Plaintiff. RN Lebovits does not dispute the record that Plaintiff had "two alterations in skin integrity" which existed when she presented at Coney Island Hospital and that no new pressure injuries developed during her admission. However, she opines that these existing pressure injuries were not timely and properly assessed, documented, and treated.

RN Lebovits opines that the Coney Island Hospital staff failed to manage Plaintiff's diarrhea and failed to assess and clean the area appropriately during the several hours she spent in the emergency department. She opines that the standard of care is to perform a skin assessment promptly upon admission, yet there are multiple

nursing notes of Plaintiff being changed and placed on a stretcher without reporting any existing pressure injuries. RN Lebovits notes that Plaintiff's first skin assessment which made any mention of discoloration and eschar was at 7:22 p.m., over 12 hours after she arrived at Coney Island Hospital.

RN Lebovits also opines that the nurse's evaluation and documentation of these wounds was not only delayed but "unclear and non-specific," describing only redness, discoloration, and "small eschar," but not evaluating the "location, stage, size, depth, undermining, tunneling, drainage, and odor" as required by the standard of care.

She further opines that the nursing staff failed to timely apply topical ointment or barrier cream to the wounds, noting that the first use of topical treatment and collagenase was after the wound care consult on January 22. RN Lebovits opines that Plaintiff was placed on a stretcher for multiple hours without any pressure-reducing devices as required by the standard of care.

Additionally, RN Lebovits opines that the nursing staff departed from the standard of care by failing to properly assist Plaintiff with the Flexi-seal fecal management device. RN Lebovits counters the movants' expert that it was appropriate to discontinue the catheter system after Plaintiff removed it. Plaintiff's expert opines that in the absence of bleeding, the system should have been reinserted and continued, or if Plaintiff was non-compliant, there should have been documented attempts to educate and discuss its benefits with her.

In reply, the movants argue that Plaintiff's expert is not qualified as a registered nurse to opine on the decisions that were made by physicians, such as the replacement of the Flexi-seal device. However, the movants themselves offered opinions on these claims from a non-physician, who established the same limited qualifications held by Plaintiff's expert. As stated above, regardless of the sufficiency of the opposition papers, the movants failed to meet their prima facie burden and eliminate issues of fact as to the medical treatment and care rendered to Plaintiff which was directed by physicians.

As to the movants' prima facie showing as to the standard of *nursing care* only, the opposing party has raised issues of fact on the same treatment (e.g., the nurses' assessment and documentation of Plaintiff's wounds), which preclude summary judgment. For these reasons, summary judgment as to medical malpractice claims as

well as claims against defendant's nursing staff must be denied.

On the lack of informed consent issue, the movants make a legal argument that this cause of action should be dismissed because Plaintiff did not provide notice of any basis of this claim in the Bill of Particulars and because it is inapplicable to the underlying facts.

It is well established that an alleged failure to diagnose and treat does not constitute an "affirmative violation of physical integrity" as required in a lack of informed consent claim (*S.W. v. Catskill Regional Med. Ctr.*, 211 AD3d 890, 891 [2d Dept. 2022]). Here, Plaintiff's claims arise entirely from alleged failure to properly and timely monitor, document, and treat her pressure ulcers. There is nothing in the record to support a claim for lack of informed consent, which relates only to disclosing the risks, benefits, and alternatives of an affirmative treatment or procedure, which a reasonably prudent person in the plaintiff's position would not have undergone if they had been fully informed (*see* Public Health Law § 2805-d; *Parrilla v Saphire*, 149 AD3d 856, 858 [2d Dept 2017]). As a matter of law, lack of informed consent is not applicable to cases, as here, where the alleged injuries resulted from a "failure to undertake" treatment or delay in treatment (*S.W.*, at 891, quoting *Ellis v Eng*, 70 AD3d 887, 892 [2d Dept 2010]). Thus, the Court agrees with the movants' argument that Plaintiff's informed consent claims must be dismissed.

Plaintiff also broadly alleged violations under Public Health Law § 2801-d in the Bill of Particulars, asserting that she was deprived of her rights as "a patient of a residential health care facility." The movants argue these claims should be dismissed as inapplicable in this action, on the grounds that Coney Island Hospital is not a residential health care facility. Hospitals do not fall under the scope of the private right of action created by Public Health Law § 2801-d (*see Dray v Staten Island University Hospital*, 160 AD3d 614, 619-620 [2d Dept 2018]). For this reason, based on submissions, the movants have established their entitlement to summary judgment on the Public Health Law claims.

Finally, the movants argue any claims for negligent hiring should be dismissed as a matter of law. "Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for

negligent hiring, retention, supervision or training," except where the plaintiff alleges "gross negligence in the hiring or retention of the employee" (*Talavera v Arbit,* 18 AD3d 738 [2d Dept 2005]). It is undisputed that the Plaintiff's claims against NYCHHC are based in respondeat superior, i.e., vicarious liability for the acts and omissions of their employees. There are no allegations of gross negligence in the hiring or retention of a particular employee. Therefore, the movants have made a prima facie showing that the negligent hiring and retention claims should be dismissed.

Notwithstanding the movants' prima facie showing of entitlement to summary judgment on the aforementioned claims, Plaintiff does not oppose the part of NYCHHC's motion seeking dismissal of the informed consent, negligent hiring/retention, and Public Health Law claims asserted in the Complaint and/or Bill of Particulars. Accordingly, summary judgment is granted to the movants on those causes of action only.

It is hereby:

ORDERED that Defendant NYCHHC/Coney Island Hospital's motion (Seq. No. 1) for an Order, pursuant to CPLR 3212, granting summary judgment in their favor and dismissing Plaintiff's Complaint, is **granted to the extent** of dismissing Plaintiff's claims for lack of informed consent, negligent hiring/retention, and violations of Public Health Law, and the motion is otherwise **denied.**

This constitutes the decision and order of this Court.

ENTER.

Hon. Consuelo Mallafre Melendez

J.S.C.