

Perez v Metropolitan Jewish Home Care, Inc.

2025 NY Slip Op 34352(U)

May 8, 2025

Supreme Court, Queens County

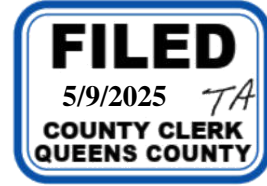
Docket Number: Index No. 704196/2020

Judge: Tracy Catapano-Fox

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This opinion is uncorrected and not selected for official publication.

Short Form Order
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS



-----X
FRANCISCO PEREZ as Administrator of the Estate of
SUSIE PEREZ, AND FRANCISCO PEREZ,
Individually,

Index No. 704196/2020

Part MDP

Plaintiff,

Motion Date: April 2, 2025

-against-

Calendar No. 15

Sequence No. 2

METROPOLITAN JEWISH HOME CARE, INC.,
METROPOLITAN JEWISH HOME CARE, INC. d/b/a
MJHS HOME CARE, and NEW YORK-
PRESBYTERIAN/QUEENS,

Defendants.

-----X

The following papers numbered EF-49 to EF-90 read on this motion by defendant NEW YORK-PRESBYTERIAN/QUEENS for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212.

Papers
Numbered

- Notice of Motion, Affirmation, Exhibits.....EF49-EF60
- Affirmation in Opposition, Exhibits.....EF74-EF85
- Reply Affirmation, Exhibits.....EF87-EF90

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendant New York-Presbyterian/Queens (hereinafter referred to as "NYPQ")'s motion for summary judgment and dismissal of plaintiff's Complaint is granted as to plaintiff's wrongful death claim, but denied as to plaintiff's medical malpractice and negligence claims. (*See Vargas v. Barnabas Hosp.*, 168 A.D.3d 596 [2d Dept. 2019].)

Plaintiff commenced this action for medical malpractice, wrongful death and negligence against defendant NYPQ for care and treatment rendered intermittently to decedent Susie Perez from September 25, 2017 through March 10, 2018. Plaintiff filed the Summons and Complaint on March 10, 2020, and issue was joined by moving defendant via the filing of its Verified Answer

on June 12, 2020. It is noted decedent Susie Perez passed away on March 10, 2018.

Defendant NYPQ argues it is entitled to summary judgment and presents the pleadings, parties' deposition testimony, decedent's medical records, and the affirmation of Gisele Wolf-Klein, M.D. in support of its motion. Defendant argues there are no issues of fact based upon the above evidence, as it is undisputed decedent had many pressure ulcer risk factors due to her medical condition and comorbidities and decedent's pressure ulcer was unavoidable. Defendant further argues it did not depart from good and accepted medical standards and no act or omission was a substantial factor in causing decedent's injuries and death.

Defendant NYPQ presents the affirmation of Dr. Gisele Wolf-Klein in support of its motion. Dr. Gisele Wolf-Klein affirmed to be a physician licensed to practice medicine in New York who is board certified in Geriatric Medicine and Internal Medicine. She affirmed to be fully familiar with the applicable standard of care as it existed in 2017 and 2018 and rendered opinions based upon her medical training and experience, as well as a review of the medical records, deposition testimony and pleadings.

Dr. Wolf-Klein opined within a reasonable degree of medical certainty that defendant NYPQ's care and treatment of decedent was at all times within the standards of care, and none of its acts or omissions proximately caused decedent's injuries. She opined decedent had many pressure ulcer risk factors that were noted and carefully documented. Dr. Wolf-Klein opined decedent was a terminal cancer patient with advanced metastatic breast cancer since 2013, and underwent multiple rounds of chemotherapy. Dr. Wolf-Klein noted decedent had cerebral shunt placement following a brain tumor resection in 2016 and opined by January 25, 2018, decedent had reached end of life. She noted palliative care consultants had several meetings with decedent's family to prepare them for decedent's inevitable passing, and decedent was on comfort care, cachectic, bedbound, lethargic and incontinent. Dr. Wolf-Klein opined decedent's stage IV sacral ulcer was unavoidable and was unlikely to heal despite aggressive skin care interventions by NYPQ.

Dr. Wolf-Klein opined NYPQ's treatment of decedent was within good and accepted standards of medical practice, and its staff adequately supervised, monitored, assisted and provided care to decedent during all hospital admissions. She opined decedent developed a stage IV sacral ulcer despite decedent's proper care plan, supervision, observation, monitoring and management, including multidisciplinary medical and nursing assessments. Dr. Wolf-Klein opined no further, other, or different management was required, nor would it have changed decedent's outcome.

Dr. Wolf-Klein opined NYPQ staff performed appropriate nursing assessments upon admission, and appropriately assessed, monitored, and took all appropriate skin care precautions and measures in accordance with the standard of care. She opined any skin changes during NYPQ

admissions were unavoidable, as standard of care implementations and assessments were performed, and skin changes were a result of decedent's multiple significant medical comorbidities and conditions, including the natural progression of decedent's pre-existing illnesses. Dr. Wolf-Klein further opined plaintiff's claims of malnutrition, dehydration, infection and sepsis were unavoidable given decedent's end of life condition. She opined decedent was appropriately examined by the nursing staff and assessed with Braden scale scores, decedent was placed on a specialized Versacare air mattress, and pressure reducing techniques were in place throughout her hospital admissions in accordance with the standard of care. Dr. Wolf-Klein opined decedent's skin was still intact as of December 13, 2017, and throughout her admission, wound care consulted along with infectious diseases, physical therapy, palliative care and other subspecialists, with a multidisciplinary team approach throughout her hospital admissions in accordance with the standard of care.

Dr. Wolf-Klein opined decedent's sacral ulcer developed at home between January 25, 2018 and January 29, 2018, and its progression was unavoidable, as decedent had entered end-of-life stage after years of battling an advanced metastatic breast cancer. She further opined NYPQ and its agents promptly and diligently met the standards of care in implementing proper pressure ulcer prevention during decedent's multiple NYPQ admissions preceding the actual development of a sacral ulcer. Dr. Wolf-Klein opined NYPQ took appropriate and timely interventions and measures to prevent its progression when decedent was admitted with a community-acquired Stage IV sacral ulcer from January 29, 2018 until her passing on March 10, 2018. She opined the sacral ulcer did not result from any alleged malpractice, but was documented at the time of the last readmission and was unavoidable due to decedent's terminal condition. Dr. Wolf-Klein opined NYPQ adhered to the standard of care in timely and properly keeping the sacral wound area clean and dry, and timely turned and positioned decedent in accordance with the care plan and standard of care. Dr. Wolf-Klein opined within a reasonable degree of medical certainty that plaintiff's allegations as to the assessment, evaluation, diagnosis and treatment of decedent's skin integrity, management of her nutrition and hydration status, evaluation and treatment of her functional ability and failure to prevent a fall are meritless, as NYPQ adhered to the standard of care in treating decedent throughout her admissions. Based upon the above, defendant argues summary judgment is warranted.

Plaintiff opposes defendant's motion and argues defendant NYPQ failed to meet its burden with respect to whether it departed from accepted standards of care and proximately caused or contributed to the injuries. Plaintiff presents a memorandum of law, the medical records, parties' deposition testimony and expert affirmation in support of his opposition. Plaintiff argues defendant failed to present a prima facie case, and there are issues of fact that warrant a jury trial. Plaintiff presents the affirmation of a physician licensed to practice medicine in New York who is board certified in Internal Medicine and Geriatric Medicine. Plaintiff's expert affirmed to be familiar with the medical standards of accepted practice in internal medicine and geriatrics as

existed in 2017 and 2018. The expert reviewed decedent's medical records, pleadings, the parties' deposition testimony and defendant's moving papers in rendering opinions.

Plaintiff's expert opined NYPQ's care and treatment was not in accordance with good and accepted medical practice, and there were departures and deviations from the accepted standards of care that proximately caused decedent's injuries, including a sacral pressure ulcer, deep tissue injury, infection, necrosis, sepsis, dehydration, malnutrition, emotional trauma, pain and suffering and death. The expert opined during decedent's admissions to NYPQ from December 23, 2017 through January 24, 2018, decedent was not turned and repositioned in accordance with her care plan on multiple occasions.

Plaintiff's expert opined decedent was readmitted to NYPQ on January 29, 2018 due to a pressure injury on her left buttock which measured 7cm x 7cm, stage III with areas of necrotic tissue, no drainage and mild odor. The expert noted on January 29th the emergency department attending noted the sacral pressure ulcer as stage IV, and on January 30th, the initial nutrition assessment noted the sacral pressure ulcer as unstageable. Plaintiff's expert noted decedent passed away at NYPQ on March 10, 2018, and the immediate cause of death was noted as advanced metastatic breast carcinoma due to or as a consequence of klebsiella urinary tract infection and bacteremia and sacral decubitus ulcer.

Plaintiff's expert opined decedent's skin breakdown was not properly documented or not documented at all in NYPQ's medical records, and NYPQ staff failed to evaluate, assess and properly/accurately document those assessments of the sacral pressure ulcer on multiple occasions. The expert further opined defendant's departures in failing to properly evaluate and document the pressure ulcers were a proximate cause of their substantial deterioration. Plaintiff's expert disagreed with defendant's expert and opined proper turning and positioning was not being performed every two hours by NYPQ staff, and the records demonstrate decedent was not turned and repositioned in accordance with her care plan. The expert noted decedent's family testified to continued complaints about the lack of turning and positioning during her admission. Plaintiff's expert opined defendant's failure to maintain documentation consisting of a usable record constituted a deviation from good and accepted medical practice and was a proximate cause of decedent's pressure ulcer deterioration and deep tissue injuries. The expert opined decedent's skin breakdowns and/or deteriorations were caused by unrelieved pressure, rather than her medical comorbidities and clinical medical conditions. Plaintiff's expert disagreed with defendant's expert and noted the medical records show decedent's skin with good turgor on multiple occasions. The expert opined the comorbidities and clinical medical conditions did not prevent decedent's skin from being able to heal, as the medical records show decedent had a healed sacral ulcer on December 23, 2017. The expert further opined decedent's development and deterioration of her pressure ulcer could have been avoided with the proper medical and nursing care provided by and under NYPQ staff's supervision.

Plaintiff's expert opined NYPQ was aware of decedent's medical history and decedent was dependent upon NYPQ to provide her with proper care and treatment of her underlying conditions, which did not happen. The expert opined decedent's risk of pressure ulcers and wounds required greater attention be paid to her care and treatment, including but not limited to turning and positioning at least every two hours. Plaintiff's expert further opined defendant needed to provide proactive and preventative care to avoid the development and deterioration of skin breakdowns, and NYPQ's deviations from good and accepted medical practice proximately caused her injuries. The expert noted despite the plan of care instructions, no pressure relieving devices were noted from December 23, 2017 through January 24, 2018 admission.

Plaintiff's expert opined defendant NYPQ should have timely, appropriately, and on an ongoing basis evaluated decedent's risk for pressure ulcers, evaluated and implemented the frequency and strict compliance with repositioning, and evaluated all pressure ulcer interventions, and the failure to do so led to the development and deterioration of decedent's injuries. The expert further opined based upon the medical records and decedent's family deposition testimony that the sacral pressure ulcer did not exclusively develop and deteriorate while decedent was at home from January 25, 2018 through January 29, 2018. Plaintiff's expert opined within a reasonable degree of medical certainty that the care rendered to decedent by NYPQ was inconsistent with the applicable state and federal regulations and caused and contributed to the development and subsequent deterioration of decedent's skin breakdowns. The expert opined NYPQ failed to take all reasonable and necessary steps to prevent and limit the development and deterioration of decedent's skin breakdowns. Based upon the above, plaintiff argues there are issues of fact and summary judgment is not warranted.

Pursuant to CPLR §3212, a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (*Smith v. City of New York*, 210 A.D.3d 53, 68 [2d Dept. 2022].) The 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. (*Morejon v. New York City Tr. Auth.*, 216 A.D.3d 134, 136 [2d Dept. 2023].) If there is any doubt as to the existence of a triable issue of fact, the motion must be denied. (*Id.*) The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers. (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *see also Antonyuk v. Brightwater Towers Condo Homeowners' Assn., Inc.*, 147 A.D.3d 711, 712 [2d Dept. 2017].) In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party. (*Matter of New York City Asbestos Litig.*, 33 N.Y.3d 20, 25 [2019].) Additionally, the court's function in determining a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. (*Reyes v. S.*

Nicolia & Sons Realty Corp., 212 A.D.3d 851, 852-853 [2d Dept. 2023].) Once the moving party has demonstrated a prima facie entitlement to summary judgment, the burden then shifts to the non-moving party to demonstrate the existence of material issues of fact. (*See generally Coscia v. Mosca*, 203 A.D.3d 695 [2d Dept. 2022].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].) In general, a hospital may be vicariously liable for the negligence or malpractice of its employees acting with the scope of employment under the doctrine of *respondeat superior*. (*See Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].)

In an action to recover damages for wrongful death, the decedent's personal representative must establish that the defendant's wrongful act, neglect or default caused the decedent's death. (*Eberts v. Makarczuk*, 52 A.D.3d 772, 772-773 [2d Dept. 2008].)

Defendant NYPQ established a prima facie entitlement to summary judgment. Defendant demonstrated through its production of the documentary evidence and affirmation of Dr. Wolf-Klein that it rendered treatment to decedent in accordance with good and accepted standards of care and did not proximately cause or contribute to decedent's injuries or death. Defendant demonstrated through Dr. Wolf-Klein's affirmation that NYPQ created and implemented a proper skin plan to address and prevent skin impairment, through proper care and treatment throughout her admissions. Defendant demonstrated decedent's pressure ulcer was a result of her end-of-life skin breakdown, and not due to any negligent actions or inactions by defendant. Defendant further demonstrated through Dr. Wolf-Klein's affirmation that decedent's skin integrity was impacted by her cancer and other medical conditions, and was not the proximate cause of decedent's death. Based upon the above, defendant demonstrated it did not depart from the applicable standard of care and none of its actions or inactions proximately caused decedent's injuries and death.

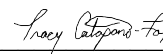
Plaintiff failed to raise triable issues of fact in dispute as to wrongful death, as plaintiff's expert opinions were conclusory, vague and failed to demonstrate issues of fact with regard to plaintiff's claim for wrongful death. (*See Bradley v. St. Barnabas Hosp.*, 227 A.D.3d 521 [1st Dept. 2024].)

However, plaintiff raised triable issues of fact with regard to medical malpractice and negligence during decedent's admission at NYPQ from December 23, 2017 through March 10, 2018. Plaintiff demonstrated issues of fact through the expert affirmation whether defendant NYPQ departed from the applicable standard of care by failing to implement and follow the skin integrity care plan by implementing proper pressure relieving methods and regularly turning and positioning decedent every two hours, and whether these departures proximately caused decedent's pain and suffering injuries. Plaintiff's expert adequately addressed and refuted defendant's expert with regard to whether the pressure ulcer was unavoidable due to decedent's underlying medical condition and comorbidities, and raised issues of fact whether defendant NYPQ's departures proximately caused the development and deterioration of decedent's pressure ulcer. However, plaintiff's argument that defendant NYPQ departed from the standard of medical care by failing to properly document the medical records is not availing. (*Braunstein v. Maimonides Med. Ctr.*, 161 A.D.3d 675, 675 [1st Dept. 2018][“A failure to document each element of the skin care protocol does not equate to a failure to perform each element or to a cause of the ulcer itself”].)

Accordingly, defendant New York-Presbyterian/Queens' motion for summary judgment and dismissal of plaintiff's Complaint is granted as to plaintiff's wrongful death claim, but denied as to plaintiff's medical malpractice and negligence claim. The parties are directed to appear at a pretrial conference on Wednesday, June 25, 2025 at 9:30am in Courtroom 48.

This constitutes the decision and Order of the Court.

Dated: May 8, 2025



Hon. Tracy Catapano-Fox, J.S.C.

