Cohen v Boro Parkcenter for Rehabilitation & Nursing
2025 NY Slip Op 35627(U)
January 3, 2025
Supreme Court, Dutchess County
Docket Number: Index No. 2022-53147
Judge: Christi J. Acker
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To commence the 30-day 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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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SANFORD COHEN,

Plaintiff,

-against-

BORO PARKCENTER FOR REHABILITATION AND NURSING, CENTERS HEALTHCARE,

Defendants.

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DECISION & ORDER

Index No.: 2022/53147
Motion Seq. Nos.: 3&4

ACKER, J.S.C.

Plaintiff Sanford Cohen (sometimes hereinafter referred to as "Mr. Cohen") moves for summary judgment against Defendants Boro Parkcenter for Rehabilitation and Nursing and Centers Healthcare (sometimes collectively referred to as "Boro Park"). Defendants oppose Plaintiff's motion, cross-move for summary judgment and seek dismissal of the complaint against them.

In deciding these motions, the Court considered NYSCEF documents numbered 27-74. Plaintiff did not file opposition to Defendants' motion, nor did he file a reply to their opposition to his motion. Plaintiff also did not file a Statement of Material Facts in accordance with this Court's Part Rules (see section IV (3)) and 22 NYCRR 202.8(g)(c).

Plaintiff commenced this negligence action by filing a summons and complaint on or about September 30, 2022. According to Plaintiff, the Defendants were negligent in the care they provided to him while he was a patient at Boro Park. Mr. Cohen was at Boro Park from December 31, 2021 to February 28, 2022.

Facts

The following facts are derived from the Defendants' statement of material facts which are supported by reference to records. Plaintiff did not submit a counter-statement of facts. Nonetheless, where appropriate, the Court has incorporated the allegations of

Plaintiff which are contained in his attorney's affirmation and which are supported by the record.

Plaintiff's past medical history includes history of aortic stenosis, benign prostatic hypertrophy, cervical radiculopathy, colon polyps, coronary artery disease, degenerative disc disease, hypertension, hyperlipidemia, peripheral vascular disease, right bundle branch block, anemia and a prior fall with a femur fracture, requiring ORIF. He was seventy-nine (79) years old at the time of his admission to Boro Park on December 31, 2021.

Prior to his admission to Boro Park, he was admitted to TISCH Hospital – NYU Langone on November 22, 2021 for a spinal fusion. He then was transferred to The Pines at Poughkeepsie Center for Nursing and Rehabilitation on December 14, 2021. The following day, December 15, 2021, he suffered a fall resulting in a right femur fracture and was transferred to Vassar Brothers Medical Hospital that same day.

The x-rays at Vassar revealed an acute spinal fracture of the mid-right femoral shaft. A CT of his right femur revealed an oblique, displaced fracture of the right femoral shaft just distal to Plaintiff's right hip prosthesis from his prior hip replacement.[1] On December 20, 2021, Plaintiff underwent an open reduction internal fixation of the displaced right periprosthetic femur at Vassar Hospital. On December 23, 2021, he was discharged to The Grand Rehabilitation and Nursing at River Valley for subacute rehab.

Upon admission to The Grand, Plaintiff was noted to have a suspected deep tissue injury ("DTI") to his bilateral heels, with the left measuring 3 x 3.5 cm and the right measuring 4 x 5 cm. Plaintiff was seen by an outside wound provider, Vohra Wound Physicians ("Vohra") on December 28, 2021. The provider noted the following two wounds: (1) unstageable (due to necrosis) of the left heel, full thickness, measuring 4.8 x 5.5 cm; and (2) unstageable DTI of the right heel, partial thickness, measuring 4.2 x 5.5 cm. The provider debrided the left heel to remove necrotic tissue.

Plaintiff remained at The Grand until December 31, 2021, at which time he was transferred to Boro Park upon his request.

Upon admission to Boro Park, Plaintiff was alert and oriented to person only. His

[1] Plaintiff had a total right hip replacement on July 17, 2017

cognition was noted with long-term memory problem. He denied pain and discomfort on assessment. He was noted to be non-ambulatory at this time. Plaintiff was noted to be continent of bladder and bowel. He was also evaluated for bed mobility on his admission assessment, which reflects that he was able to turn from side to side.

The admission skin assessment, which was performed on the day of his admission, revealed the following skin impairments: bruises to both hands, arms, both lower extremities, and abdomen; rash on his groin, abdominal fold, and scrotum; right hip and lower back surgical incisions; a left heel pressure ulcer with open blister, measuring 6 x 5cm, with a scant amount of exudate, but no odor; and a right heel pressure ulcer with open blister, measuring 4 x 3cm, with a scant amount of exudate, but no odor.

Further, Plaintiff was admitted to Boro Park with a Patient Review Instrument ("PRI"), which was prepared at the prior facility (The Grand). A PRI is a document that is required to be prepared by the prior facility necessary for transfers and admissions, and reflects, among other things, whether a resident has any pressure ulcers. Plaintiff's PRI from The Grand reflected that he had two (2) unstageable pressure ulcers upon his discharge.

A weekly wound assessment was also performed on the day of his admission to Boro Park. The assessment sets forth the same skin impairments and measurements as above. The bilateral heel pressure ulcers were classified as unstageable during this assessment, which is also consistent with the PRI prepared by The Grand on December 29, 2021.

Plaintiff's care plan was initiated on December 31, 2021, to include pressure ulcers on his bilateral heels related to his vascular problem. The following interventions were implemented: assess wound weekly, document wound measurements, wound bed appearance, odor, drainage, and surrounding tissues; monitor dressing daily to ensure it is clean/dry/intact; apply moisturizer to skin as needed; apply protective/preventative skin care; report any signs or changes to MD; skin observation; and notify nurse if dressing is soaked.

Treatment orders were given to start on the following day (January 1, 2022) including cleanse with normal saline, pat dry, cover with Xeroform and cover with dry dressing to bilateral heels. Treatment was administered throughout January with the exception of two days. Additionally, weekly skin assessments were performed routinely

throughout January and February 2022. Patient was also on a turning and positioning program.

Upon admission to Boro Park, an order was placed for Oxycodone HCl tablet 5mg every four (4) hours as needed for pain. As of January 2022, Plaintiff received only twelve (12) doses total of Oxycodone and only fifteen (15) doses in February 2022.

Plaintiff was assessed by Josephine Tang, PhD, following episodes of agitation. He was prescribed Seroquel and recommended for a further consultation by a psychiatrist. He was placed under the care of the psychiatric team at the facility on January 10, 2022.

On January 7, 2022, weekly skin monitoring was completed and the bilateral heel wounds were as follows: unstageable left heel pressure ulcer measuring 4 x 4 cm; and unstageable right heel pressure ulcer measuring 3 x 3 cm. No new skin alterations were noted. Interventions at this time also included: repositioning, heels raised while in bed, and resident education.

On January 14, 2022, the weekly wound assessment revealed bilateral unstageable pressure ulcers to his heels, with the left measuring 3 x 3.5 cm and the right measuring 3 x 3 cm. There was no exudate present, nor wound odor. The surrounding tissue was normal for the resident. On January 21, 2022, his wounds remained unchanged.

Plaintiff was also receiving Proform[2] as a supplement to aid in wound healing since January 3, 2022. On January 25, 2022, dietary recommended increasing Plaintiff's dose of Proform to further promote wound healing.

During his admission, Plaintiff had labs taken multiple time, partially due to his anemia. His right labs taken on January 7, 2022 2022 revealed: albumin 2.9, hemoglobin 8.7, hematocrit 28.0. Repeat labs were taken on February 2, 2020, which revealed: albumin 2.9, hemoglobin 8.6, hematocrit 28.7. His final labs were taken on February 18, 2022, revealing albumin 3.2, hemoglobin 9.9, and hematocrit 31.1.

On January 30, 2022, according to a monthly pain summary, Plaintiff reported that he had no pain or "hurting" over the past month.

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[2] Proform is a liquid protein drink used to aid in healing pressure ulcers and non-healing wounds.

On February 2, 2022, an in-house x-ray was repeated as a six (6) week follow-up post-op and due to his non-compliance. His orthopedic surgeon's recommendations were to weight bear as tolerated. However, Mr. Cohen had been non-compliant since admission and was putting weight on his legs and attempting to ambulate around, despite education on the risks of injury to his legs and potential falls.

On February 3, 2022, the Xeroform orders were changed to Santyl to both heels daily and as needed. The Medication Admission Record ("MAR") indicated treatment with normal saline wash, pat dry, apply Santyl, cover with dressing to the bilateral unstageable heel wounds and report any signs of deterioration or significant changes to the areas. This treatment began the following day.

The care plan was updated on this date to reflect ongoing assessments and interventions. As such, additional interventions were added: monitor dressing daily to ensure it is clean, dry, and intact; and monitor wound daily for signs and symptoms of infection.

Also, on February 4, 2022, Plaintiff attempted to leave the unit without permission with all of his belongings. He was upset and agitated when he was not allowed to leave. An interdisciplinary team (IDT) Restraint Evaluation was completed by nursing. He was oriented to time and place and ambulated via wheelchair with foot problems. The recommendation was to place a wander guard on his wrist and this was added to the MAR and care plan. The following day, the wander guard was missing from his wrist, as he stated he took it off. As such, a new wander guard was placed on his ankle.

On February 17, 2022, Plaintiff's care plan was modified due to his ongoing care and treatment to include bilateral heel protectors.

On February 18, 2022, nursing completed wound documentation and the wounds were as follows: (1) unstageable pressure ulcer to his right heel measuring 3 x 3 cm, scant amount of exudate present, no wound odor, and surrounding tissue wound edges were normal for resident; and (2) unstageable pressure ulcer to his left heel measuring 3 x 3.5 cm, small amount of exudate present, no wound odor, surrounding tissue wound edges were normal for resident.

On February 22, 2022, nursing noted treatment to the unstageable bilateral heel

wounds was to cleanse with normal saline wash and pat dry with gauze, apply Santyl to area and cover with dry dressing and to report any changes or deterioration.

On February 23, 2022, Plaintiff was seen by a Mikhail Shvarts, FNP, for a follow-up related to the bilateral heel wounds. The provider noted that Plaintiff was not very compliant with offloading. The provider did note that his mental status had significantly improved and he was alert and oriented x3.

The following day, Plaintiff was requesting to be discharged home. Per psychiatry, he was deemed capable of making his own decisions.

On February 28, 2022, Plaintiff was discharged home with services arranged through Fishkill Home Care. He was to continue wound care with Santyl daily and offloading at home.

Plaintiff was first seen by Fishkill Home Care on March 2, 2022. The nurse noted that he had bilateral heel wounds as follows: (1) a stage III pressure ulcer on his left heel measuring 5 x 6 x 3cm with 50% granulation and 50% slough and the surrounding tissue was normal; and (2) a stage III pressure ulcer to his left heel measuring 4 x 4 x 0.3cm with 80% granulation and 20% slough and the surrounding tissue was normal. The nurse also noted that Plaintiff was non-adherent with elevation of his limbs, off-loading and pressure ulcer prevention.

On March 4, 2022, Plaintiff presented to the Wound Clinic for his initial visit. The Wound Clinic noted the wounds as follows: (1) unstageable pressure injury to his left heel, measuring 3 x 2.6cm with no measurable depth, with eschar, but no slough nor granulation; and (2) stage III pressure injury to his right heel, measuring 1.7 x 1.5 x 0.1cm, with no eschar, slough, nor granulation. Both heel wounds were noted with an onset date of December 4, 2021. There were no signs or symptoms of infections on his heels.

A debridement was performed on March 4, 2022 to Plaintiff's bilateral heels. As for his left heel, the wound post-debridement measured 2.8 x 2.4 x 0.3cm and appeared to be stage III. As for his right heel, the wound post-debridement measured 1.7 x 1.5 x 0.1cm (no comment on staging). The treatment plan including cleaning the heel wounds with soap and water and to apply a primary dressing of puracol, abd, kerlix, and lite ace, which was to be changed every Monday by Fishkill and every Friday by the Wound Clinic.

On March 11, 2022 Plaintiff returned to the Wound Clinic. His left heel was classified as a stage III and measured 2.4 x 2.1 x 0.4cm. A debridement was performed. Treatment remained the same as his prior visit. As for his right heel, it was noted to be a stage III pressure injury measuring 1.1 x 1.3 x 0.1cm. The right heel did not need to be debrided at this appointment and was noted to be fairly small, superficial, and completely clean. The records noted he was improving already overall. He was to continue offloading and local wound care (by Fishkill Home Care).

Fishkill Home Care visited Plaintiff's home to provide care 2-3 times per week. On March 16, 2022, it was noted that Plaintiff was non-compliant with elevating his extremities throughout the day.

On March 18, 2022, the Wound Clinic noted that the wounds were continuing to improve.

On April 1, 2022, the Wound Clinic noted that Plaintiff's left heel made tremendous progress and that the wound was much smaller and completely granular. His right heel was now scabbed over. He was now to follow-up in two weeks, rather than one.

On April 15, 2022, Plaintiff presented to the Wound Clinic. Plaintiff told the doctor he was going to be playing tennis again soon and that his walking had improved. His right heel was noted to be healed at this appointment and the left heel continued to improve. The treatment for the left heel was changed to bacitracin.

Plaintiff presented to the Wound Clinic on April 29, 2022, at which time his left heel wound was noted to be healed.

Plaintiff treated with Fishkill Home Care for wound services until April 29, 2022, at which point the bilateral heel wounds were deemed healed.

Plaintiff was deposed on January 30, 2024. Plaintiff testified, in reference to his admission to Vassar Hospital in December 2021, that he remembered "basic treatment for my heels, which I had serious wounds on." He also testified that when he was admitted to Boro Park that the nurses "...were aware of [the heel wounds] when I got there."

Additionally, when asked whether he reviewed his medical records prior to his deposition, Plaintiff admitted that he thought he saw in his medical records that the heel

wounds developed prior to his admission to Boro Park. Plaintiff also testified that it was his understanding that the heel wounds developed prior to his admission to Boro Park due to neglect at a prior facility or nursing home.

Discussion

A party moving for summary judgment pursuant to CPLR 3212 must tender evidentiary proof in admissible form sufficient to show that there are no triable issues of material fact such that judgment should be directed in its favor as a matter of law. *See Giuffrida v. Citibank Corp.,* 100 NY2d 72 [2003] *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]. Only upon the movant's *prima facie* showing does the burden shift to the opponent to the motion to rebut such showing. *See Id*. If so, the opponent must submit evidence creating a triable issue of material fact. The motion must be denied if the opponent makes such a showing. *Id.*

Plaintiff's Motion

In support of his motion, Plaintiff submits his attorney's affirmation, the pleadings, his certified health care records and deposition testimony.[3] In her affirmation, counsel refers to those portions of Fishkill Home Care's records which contains records from Boro Park. According to counsel, these records indicate that the Plaintiff had a pressure ulcer on his left heel as of January 3, 2022 and a stage three pressure on his right heel as of March 1, 2022.[4] Plaintiff had limitations with walking and endurance. Counsel sets forth Plaintiff's complaints of pain regarding the ulcers through late April 2022. On April 29, 2022, it was noted Plaintiff had no pressure ulcers or injuries. Plaintiff, relying on testimony from a nurse, Andrea Schoonmaker, concludes that the Defendants deviated from standard of care by not repositioning and turning Mr. Cohen, which caused him pressure ulcers. It bears noting that Plaintiff also does not provide page citations from Nurse Schoonmaker's deposition transcript. Thus, the Court reviewed the entirety of the transcript.

Plaintiff fails to meet his *prima facie* burden sufficient to establish his entitlement to summary judgment. According to Plaintiff's pleadings, his claims against the Defendants

[3] Plaintiff does not explain who the witnesses are or what role they have in this matter.
[4] Counsel does not include any page references to the medical records.

are in the nature of medical malpractice in that they are based on a failure to properly treat. The essential elements of a medical malpractice cause of action are: "(1) deviation or departure from accepted medical practice and (2) evidence that such departure was a proximate cause of injury." *DiMitri v. Monsouri*, 302 AD2d 420, 421 [2d Dept. 2003]; *Duvidovich v. George*, 122 AD3d 666 [2d Dept. 2014]. "Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause." *Burns v. Goyal*, 145 AD3d 952, 954 [2d Dept. 2016] *citing Koehler v. Schwartz*, 48 NY2d 807 [1979].

While difficult to discern from Plaintiff's motion, given the convoluted manner in which it is written, it appears Mr. Cohen is claiming that the Defendants deviated from the standards of care by not turning and positioning him, causing pressure ulcers on both heels. They also failed to treat his heels. As support for this claim, Plaintiff submits deposition testimony of Nurse Schoonmaker, a licensed practical nurse who had been working with patients for two years. But, Plaintiff has failed to provide the Court with any foundation as to her ability to provide expert testimony. Review of the transcript reveals that Schoonmaker provided non-party deposition testimony in a different case involving Mr. Cohen. She gave limited testimony as to her experience and no testimony as to her education. She did not reference the medical records. Regardless of foundational issues, Plaintiff's failure to offer a more detailed expert opinion renders him unable to establish either a violation of the applicable standard of care or proximate cause as to his injury. *See Mendoza v. Maimonides Med. Ctr.*, 203 AD3d 715, 717 [2d Dept. 2022]; *Kelly v. Ahn*, 224 AD3d 673, 674 [2d Dept. 2024]; *Roy v. Lent*, 219 AD3d 525, 526 [2d Dept. 2023]. Notably, the Court has no indication from Plaintiff's motion as to when or how the wounds on his heels formed. Indeed, review of the medical records establishes that Plaintiff had wounds on both heels prior to his admission to Boro Park. His treatment plan shows that Defendants were aware of these wounds and treated the wounds during Plaintiff's admission. However, the records further indicate Mr. Cohen was not always compliant with treatment, he had pre-existing conditions and he had mental health issues. The nurse does not address these facts. The nurse's testimony is conclusory in that it states that sores can form when a patient is not moved for extended periods of time causing skin to breakdown. The nurse does not address the fact that Plaintiff had heel wounds on admission or how Boro Park caused Plaintiff's injury or failed to treat him. In short, Plaintiff failed to meet his burden of proof of setting forth that no material issues fact exist. *Winegrad, supra*.

Additionally, in the memorandum of law, counsel references the public health law

and requests punitive damages. As the complaint and bill of particulars fail to allege a public health law violation or request for punitive damages, the Court did not consider these claims.

Plaintiff's motion is denied.

Defendant's Motion

Boro Park seeks dismissal of Plaintiff's complaint alleging there are no material issues of fact. They also submit the pleadings, Plaintiff's medical records as well as an affirmation from Cameron R. Hernandez, M.D. Dr. Hernandez details Mr. Cohen's medical history, including the fact that he presented to Boro Park at 79 years old having recently undergone spinal fusion surgery and open reduction and internal fusion surgery as a result of a femur fracture. He suffered from anemia and peripheral vascular disease ("PVD"), both of which can impact the ability to heal. He was oriented to person only and was non-ambulatory. He had a left heel ulcer measuring 6x5 cm and right heel ulcer measuring 4x3 cm. Dr. Hernandez opines that based on the records the heel ulcers were "unstageable". The Plaintiff's care plan including treatment of the pressure ulcers which Dr. Hernandez describes. The plan was modified based on Plaintiff's condition during his admission. The patient was discharged, at his request, when psychiatry determined he was capable of making his own decisions.

Dr. Hernandez concludes that the heel wounds pre-existed the patient's admission at Boro Park and that the ulcers made some improvement despite the patient's non-compliance, anemia and PVD. Dr. Hernandez supports his conclusion with reference to Plaintiff's deposition testimony and medical reports. Boro Park did not cause the heel ulcers and these wounds did not progress or worsen during the patient's admission, as they would have if not properly treated. In fact, the wounds decreased in size during Mr. Cohen's admission.

According to Dr. Hernandez, the care provided by Boro Park, including weekly skin assessments, conformed to accepted standards of care. Notes indicate that the patient was adequately repositioned and his heels were elevated. Pain medication was "judiciously" prescribed and the patient did not develop gangrene while at the Defendant's facility. Finally, no act or omission by the Defendants caused the complained of injuries.

Based upon the foregoing, the Defendants have met their *prima facie* burden and it is incumbent upon the Plaintiff to establish a triable issue of material fact. The Plaintiff fails to do so. Indeed, the Plaintiff does not oppose the motion of the Defendant. Even if the Court were to consider Plaintiff's motion as opposition, the Plaintiff utterly fails to address the conclusions of the defense expert as to the lack of a departure from the standard of care, as well as lack of proximate cause. *Lowell v. Flom*, 195 AD3d 801, 802-803 [2d Dept. 2021] (on a defense motion for summary judgment, "the plaintiff's expert must specifically address the defense expert's allegations"). Plaintiff has not submitted any evidence that the treatment provided to Plaintiff during his admission at Boro Park deviated from the standards of care. The conclusory and unsupported statement of a licensed practical nurse, that ulcers typically form when a patient is not turned, are insufficient to counter the specific conclusions of the expert that Defendants' care and treatment of the Plaintiff was within the standard of care. *Bum Yong Kim v. North Shore Long Is. Jewish Health Sys., Inc.*, 202 AD3d 653, 656 [2d Dept. 2022] ("In opposition, the plaintiffs failed to demonstrate the existence of a triable issue of fact. The plaintiffs' expert's brief assessment of the treatment provided by Powers was conclusory and speculative, and failed to address the specific assertions of the defendants' expert"). *Mendoza v. Maimonides Med. Ctr.*, 203 AD3d 715 [2d Dept. 2022]; Myers *v. Ferrara*, 56 AD3d 78, 84 [2d Dept. 2008].

In fact, according to the defense expert, the medical records reflect that the patient was repositioned and his heel was elevated. Moreover, the defense expert, again relying on the medical records, indicates that the patient himself was capable of turning and repositioning himself. As a result, it cannot be said that the Defendants failed to reposition the Plaintiff and that this failure caused the Plaintiff injury. In addition, the nurse's opinion is contradicted by the record in that the patient's pressure ulcers pre-existed his stay at the Defendants' facility.

As such, Boro Park is entitled to judgment as a matter of law, and the claims against it must be dismissed.

The Court has considered the additional contentions of the parties not specifically addressed herein and finds them unavailing. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied.

Now, therefore, it is hereby

ORDERED that Plaintiff's motion is denied; and it is further

ORDERED that Defendants' motion is granted and the complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: January 3, 2025
Poughkeepsie, New York

CHRISTI J. ACKER
JUSTICE OF THE SUPREME COURT

To: Counsel via NYSCEF