

Rivera v Brookdale Hosp. Med. Ctr.
2026 NY Slip Op 30285(U)
January 23, 2026
Supreme Court, Kings County
Docket Number: Index No. 500946/2021
Judge: Consuelo Mallafre Melendez
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At an IAS Term, Part 15 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 23rd day of January, 2026

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
AMERICO RIVERA,

Plaintiff,

-against-

THE BROOKDALE HOSPITAL MEDICAL CENTER,

Defendant.
-----X

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

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: 50 – 61, 66 – 67, 69

DECISION & ORDER

Index No. 500946/2021

Mo. Seq. 3

Defendant The Brookdale Hospital Medical Center (“Brookdale Hospital”) moves for an Order, pursuant to CPLR 3212, granting summary judgment in their favor and dismissing Plaintiff’s Complaint, and in the alternative, precluding the corrections to Plaintiff’s examination before trial in Plaintiff’s ERRATA sheet on the basis the proposed corrections are substantive and material in nature (Seq. No. 3). Plaintiff opposes the part of the motion seeking summary judgment.

On the portion of the motion regarding the ERRATA sheet, “a witness may make changes ‘in form or substance’ to his or her deposition testimony as long as such changes are accompanied by ‘a statement of the reasons’ given by the witness for making them” (*Torres v Bd. of Educ. of City of New York*, 137 AD3d 1256, 1257 [2d Dept 2016], quoting CPLR 3116 [a].) “A correction will be rejected where the proffered reason for the change is inadequate. Further, material or critical changes to testimony through the use of an errata sheet is also prohibited (*i.d.* [internal citations and quotation marks omitted]).

Defendant argues that the “corrections” proposed by Plaintiff substantively and materially alter his testimony (*see* Exhibit G, H). For example, in the following question and answer:

“Q: My question is, is there anything that you cannot do now, that you could do prior to the Brookdale admission?”

“A: No. No. No.”

Plaintiff sought to change his response to:

“A: I cannot sit or stand in one position for too long. I cannot bend down to put on my shoes or tie my shoelaces without assistance. I cannot perform footcare on my own. I use a walker when walking longer distances or, otherwise, I use a cane for shorter distances. I have to climb stairs one foot at a time. I experience pain in my lower back. I cannot stand upright, and I have to hold the walls for extra support when showering.”

The reason for the changes offered by Plaintiff on the ERRATA sheet is “Mistake and did not understand question fully.” Defendant notes in their supporting papers that Plaintiff utilized a Spanish language interpreter throughout the examination, and he did not express any issues “regarding his ability to answer the questions or the translation.”

Plaintiff does not oppose the part of the motion involving the ERRATA sheet, nor does Plaintiff offer any further explanation for the proposed changes to his deposition transcript. Moreover, the Court agrees with Defendant’s argument that Plaintiff’s “statement of reasons” explaining the substantive and material changes to his testimony is inadequate. Accordingly, that part of the motion is **granted**, and the proposed changes are stricken and disregarded.

Plaintiff commenced this action on January 13, 2021, asserting claims of medical malpractice¹ against Brookdale Hospital in connection with the treatment and care of a sacral pressure ulcer.

Plaintiff was admitted to Brookdale Hospital from May 21, 2019 through July 24, 2019. He was 63 years old and had been experiencing episodes of vomiting, lower left quadrant pain, and loss of appetite. At the time of his admission, he had a documented stage I sacral pressure ulcer measuring 7 x 6 cm.

Over the course of his admission, Plaintiff was treated for multiple issues including alcohol withdrawal symptoms, sepsis, urinary tract infection, pneumonia, and hemodynamic instability. He was transferred to the ICU on May 22, and he was intubated and placed a mechanical ventilator on May 27. During his admission, the sacral pressure ulcer grew in size and was classified as a stage III/unstageable ulcer. He underwent a surgical debridement on July 2, 2019, and a PEG tube placement on July 14.

On July 24, 2019, he was discharged to Henry J. Carter Nursing Home and remained there until September 26, 2019. According to this testimony, his pressure ulcer has since resolved, and he lives at home.

Plaintiff alleges that Brookdale Hospital departed from the standard of care in treating Plaintiff's pressure ulcer, and their departures led to the worsening and deterioration of the ulcer and the need for prolonged wound care.

In evaluating a summary judgment motion in a medical malpractice action, the Court applies the burden shifting process as summarized by the Second Department: “[A] defendant

¹ Plaintiff's causes of action for violation of Public Health Law § 2801-d and § 2808-a, negligence *per se*, and breach of contract were dismissed pursuant to CPLR 3211 (a) (7) in a decision and order dated February 8, 2023.

must make a prima facie showing either that there was no departure from good and accepted medical practice, or that the plaintiff was not injured by any such departure” (*Rosenzweig v Hadpawat*, 229 AD3d 650, 652 [2d Dept 2024]). “In order to sustain this prima facie burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff’s complaint and bill of particulars” (*Martinez v Orange Regional Med. Ctr.*, 203 AD3d 910, 912 [2d Dept 2022]). “Once a defendant physician has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden. Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” (*Rosenzweig* at 652 [2d Dept 2024] [internal quotation marks and citations omitted].) However, “expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact” (*Barnaman v Bishop Hucles Episcopal Nursing Home*, 213 AD3d 896, 898-899 [2d Dept 2023]).

In support of their motion, Brookdale Hospital submits an expert affirmation from Ernest Chiu, M.D. (“Dr. Chiu”), a licensed physician board certified in plastic surgery. He affirms that he has relevant education and experience in wound care, including the prevention and treatment of pressure ulcers.

Dr. Chiu opines that all treatment and care received by Plaintiff at Brookdale Hospital was within the standard of care. He opines that Plaintiff’s existing stage I sacral pressure ulcer was promptly identified and documented within hours of his admission, and interventions such as silicon foam dressing, skin cleansers, and barrier creams were implemented.

Dr. Chiu further opines that Plaintiff underwent a proper wound prevention protocol including “repositioning, heel pads, skin protective devices, multilayer silicon dressing and an

alternating pressure relief mattress” to prevent the development of additional pressure ulcers. He also notes that antibiotics were administered to prevent infection.

The expert opines that Plaintiff’s wound was assessed and documented throughout his admission in accordance with the standard of care. Although the expert notes that there were some inconsistencies in sizing in the nursing notes, he opines that “these can be attributed to positioning factors and scrivener’s errors.” He states that based on the medical records and nursing notes, “the plaintiff was repositioned every two hours” while he was in the ICU and medical floor, which complied with the standard of care.

On the issue of proximate causation, Dr. Chiu opines in detail that the worsening of Plaintiff’s sacral pressure ulcer was unavoidable due to his prolonged multiorgan failure. He also opines that because his bed needed to be elevated more than 45 degrees while he was on a ventilator, “there was no way to completely avoid putting pressure on the sacral area” which made healing more difficult even in the absence of negligence.

Based on these submissions, the Court finds that the movant has established prima facie entitlement to summary judgment. The movant’s expert set forth detailed opinions as to the standard of care and further opined that no departures from Brookdale Hospital were a proximate cause of Plaintiff’s injuries. The burden therefore shifts to Plaintiff to raise a triable issue of fact.

In opposition, Plaintiff submits an expert affirmation from a licensed physician, [name of expert redacted], board certified in plastic surgery and oral and maxillofacial surgery. The Court was presented with a signed, unredacted copy of the affirmation for *in camera* inspection. Like the movant’s expert, Plaintiff’s expert affirms that along with his work as a reconstructive surgeon, he has relevant education, training, and clinical experience in wound care and treatment, including the standard of care for preventing and treating pressure ulcers.

Plaintiff's expert opines that Brookdale Hospital departed from the standard of care in treating Plaintiff's preexisting pressure ulcer. Firstly, the expert opines that the standard of care required timely surgical debridement of the sacral pressure ulcer once it was assessed as "unstageable." The expert notes that on June 28, a surgical consult was ordered. The sharp debridement was performed on July 2. The expert notes that the ulcer was "at various times 'unstageable' which indicates the wound was covered by necrotic tissue" beginning on June 14. In the expert's opinion, the delay of two weeks before requesting a surgical consult and performing a debridement constituted a departure from the standard of care.

The expert also opines that it was a departure from the standard of care "not to do any further debridement" after July 2, 2019, despite a surgical consult ordered on July 12. He counters the opinion of the movant's expert that the one debridement performed was sufficient, because necrotic tissue remained after that date rendering the wound unstageable.

Additionally, the expert opines that the hospital failed to "timely and accurately document" the size of the pressure ulcer due to the "gaps and inconsistencies in the nurses' charting" from June 14 through July 2, during the time Plaintiff was on a ventilator. Specifically, there were fluctuating assessments in size on certain dates, such as recording the measurement of the pressure ulcer as "1.5 x 5 cm" and "9 x 6 cm" on the same day. The expert opines that these documenting errors constitute a departure from the standard of care, because the care plan cannot be "properly adjusted if the hospital charting is not complete." Further, the below-standard charting regarding the measurement of the patient's ulcer calls into question whether the hospital staff repositioned him every two hours, or whether the notes are merely part of the electronic records template or copied from a previous note.

The expert counters the opinion of the movant's expert that the fact Plaintiff was on a ventilator excuses the lack of "regular ongoing ulcer assessments and repositioning every two hours." The expert opines that the standard of care is to reposition the patient every two hours and assess the ulcer every nursing shift.

The expert also opines that Brookdale Hospital departed from the standard of care by failing to place a PEG tube for nutritional support until July 19, because it was documented in the chart that he was not receiving sufficient caloric intake from a nasogastric tube. The expert acknowledges that there was a note stating the attending physician "attempted [to] discuss" a PEG tube with Plaintiff's wife on July 9 and she was "not ready yet for this conversation." However, the expert opines that this does not excuse the 10-day delay before they ultimately obtained consent and placed the PEG tube. The expert opines that Brookdale Hospital departed from the standard of care by failing to "emphasize to [Plaintiff's spouse] the importance of PEG placement for overall health" and make further attempts to obtain consent.

On the issue of proximate causation, Plaintiff's expert opines that because of the above departures, the pressure ulcer "increased in size by 400%" during his admission, and that it deteriorated from stage I ("intact" skin) to necrotic tissue damage at stage III. Plaintiff's expert counters the movant's expert that the "massive increase in size" and depth of the injury was unavoidable due to his comorbidities. Although the expert acknowledges that his various health issues placed him at higher risk, they opine that his pressure ulcer would not have grown to this degree with appropriate wound assessment, earlier or more frequent debridement, and earlier PEG tube placement.

The Court finds that Plaintiff's expert has sufficiently raised issues of fact to counter the movant's prima facie showing. The expert sets forth specific alleged departures and delays, including the timing of the surgical consults, debridement, and PEG tube placement, which the expert opines proximately caused Plaintiff's worsened injuries. "When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution" (*Stewart v. North Shore University Hospital at Syosset*, 204 AD3d 858, 860 [2d Dept. 2022], citing *Russell v. Garafalo*, 189 A.D.3d 1100, 1102 [2d Dept. 2020]). Accordingly, the part of the motion seeking summary judgment on behalf of Brookdale Hospital must be **denied**.

Lastly, the movant argues in their supporting papers and reply that Plaintiff cannot prove any "legally cognizable damages" based on his testimony that he is no longer receiving any treatment for the pressure ulcer and has no limitation on his activities or movement. They also argue that Plaintiff answered "No" when asked if he received any treatment for the pressure ulcer "after leaving Brookdale." Despite these statements, the Court notes that the medical records partly contradict Plaintiff's testimony, in that he was discharged from Brookdale to a skilled nursing facility, Henry J. Carter, and he had a stage III/unstageable pressure ulcer at the time of that discharge. The movant did not submit any evidence as to the treatment he received at Henry J. Carter, and they do not account for any rehabilitation or wound care at the skilled nursing facility. Thus, they have not shown as a matter of law that Plaintiff suffered no "legally cognizable" injuries as a result of the alleged malpractice. The issue of the extent of Plaintiff's

claimed damages is not properly before the Court on this motion and remains an issue of fact for trial.

Accordingly, it is hereby:

ORDERED that the part of Brookdale Hospital's motion (Seq. No. 3) seeking to strike the "corrections" in Plaintiff's ERRATA sheet dated June 29, 2023 is **granted** without opposition; and it is further

ORDERED that the part of Brookdale Hospital's motion (Seq. No. 3) seeking summary judgment is **denied**.

This constitutes the decision and order of this Court.

ENTER.



Hon. Consuelo Mallafre Melendez
J.S.C.