Ellison v Rochester Gen. Health Sys.
2017 NY Slip Op 33086(U)
December 19, 2017
Supreme Court, Monroe County
Docket Number: 2014-4740
Judge: William K. Taylor
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

NAOMI J. ELLISON, AS ADMINISTRATOR OF THE ESTATE OF RICHARD ELLISON

Plaintiff,

vs.

DECISION & ORDER
Index #2014-4740

ROCHESTER GENERAL HEALTH SYSTEM, (AKA) ROCHESTER GENERAL HOSPITAL, THENDRIX H. ESTRELLA, MD, DOUGLAS BOPP, ALAN LANGTON, BRIAN SHONITSKY, PATRICK GLENDE, and NICHOLAS TORRES,[1]

Defendants.

Special Term December 14, 2017

Appearances:
Francis M. Ciardi, Esq., for Plaintiff
Emily D. Crowley, Esq. for Defendants

Taylor, J.,

Plaintiff commenced this negligence and medical malpractice action seeking damages for the death of her brother, Richard Ellison. The medical malpractice claim is against Defendant Dr. Thendrix H. Estrella ("Dr. Estrella"), and the negligence claims are against Defendant Rochester General Hospital ("RGH") and Defendants Douglas Bopp, Alan Langton, Brian Shonitsky, Patrick

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[1] Pursuant to an Order of Supreme Court (Stander, J.) dated March 23, 2015, Defendants Brad Knight, Anthony Sinclair, and Salvatore Mitrano were dismissed from the litigation. On March 31, 2017 the parties stipulated to the caption being amended to accurately reflect the remaining defendants.

Glende, and Nicholas Torres (collectively, the "Security Officers"), who were employed by RGH as Safety and Security Officers and called upon to subdue an agitated Mr. Ellison following his arrival at the Emergency Department. Defendants now move for summary judgment pursuant to CPLR 3212. For the reasons that follow, Defendants' motion is granted in its entirety.

Plaintiff's complaint alleges two causes of action that this Court can discern - medical malpractice and negligence. At oral argument Plaintiff narrowed the alleged negligence morass to the following claims: (1) failure to train as against RGH; (2) failure to render care in a timely fashion to Mr. Ellison as against the Security Officers; and (3) negligently placing Mr. Ellison in a prone position during his restraint as against the Security Officers. Plaintiff conceded to dismissal of the medical malpractice claim against Dr. Estrella and, in any event, he met his initial burden and Plaintiff failed to offer any evidence in response. Thus, Defendants' motion for summary judgment as to the medical malpractice claim against Dr. Estrella is hereby GRANTED.

As to Plaintiff's failure to train claim, her complaint as amplified by the bill of particulars appears to argue that RGH is vicariously responsible for the alleged negligence of its security officers in handling patients presenting to the hospital

with mental illness because RGH did not properly train its employees. See Attorney Affidavit of Christopher A. DiPasquale, Esq. at Ex. A ¶30; Ex. C ¶¶8, 13. Plaintiff's claim concerning Defendants' failure to render care and/or preventing Mr. Ellison from receiving medical care appears to allege that the Security Officers failed to care for him and/or prevented EMTs from accessing him to provide care after he was restrained. See Attorney Affidavit of Christopher A. DiPasquale, Esq. at Ex. C ¶13. Plaintiff's final claim is that Mr. Ellison died as a result of the manner in which he was positioned by the Security Officers during his restraint. See Attorney Affidavit of Christopher A. DiPasquale, Esq. at Ex. A ¶28; Ex. C ¶13.

Applying the well-settled standards for summary judgment[2], Defendant RGH plainly met its initial burden. Defendants have submitted ample evidence demonstrating that the Security Officers were trained and licensed extensively by RGH. All Security Officers are specifically trained to deal with emotionally disturbed individuals as well as the appropriate continuum of

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[2] It is well-settled that "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" necessitating a trial. Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); CPLR 3212(b). Proof offered by the moving party must be in admissible form. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Dix v Pines Hotel, Inc., 188 AD2d 1007 (4th Dept 1992). And once a prima facie showing has been made, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez, 68 NY2d at 324; see also, Mortillaro v Rochester Gen. Hosp., 94 AD3d 1497, 1499 (4th Dept 2012).

force and proper use of restraints. See Attorney Affidavit of Christopher A. DiPasquale, Esq. at ¶¶41-42.

With the burden shifted Plaintiff has not offered any proof whatsoever to address her failure to train theory of negligence. Indeed, to the contrary, Plaintiff made numerous references to the comprehensive RGH protocols and manuals as well as by stating that RGH had "established policy and procedures..." See Attorney Affirmation of Frank M. Ciardi, Esq. at ¶38. Thus, Defendants' motion for summary judgment as to the failure to train claim against RGH is hereby GRANTED.

Defendant Security Officers have likewise met their initial burden as to the negligence claims against them. To be liable under common-law negligence, it must be shown defendants owed a duty to plaintiff, that a breach of that duty occurred, and that the breach was a proximate cause of the claimed injury. See generally, Roberson v Wyckoff Heights Medical Ctr., 123 AD3d 791, 791 (2d Dept 2014). Even if negligence and injury exist, "the negligent party may be held liable only where the alleged negligence is found to be a proximate cause of the injury." Canonico v Beechmont Bus Serv., Inc., 15 AD3d 327, 328 (2d Dept 2005).

Applying those standards here, the Security Officers are entitled to judgment as a matter of law. These officers were trained by RGH in appropriately responding to aggressive and

combative individuals - as the record plainly shows Mr. Ellison was. The record demonstrates the officers used necessary and reasonable force in securing Mr. Ellison and the deposition testimony, the autopsy, and the expert affidavit provided by Dr. LaPoint show that Mr. Ellison was not subjected to any excessive pressures that could result in asphyxia. And the record further reflects that upon being subdued the Security Officers assisted or permitted EMTs to check on Mr. Ellison's pulse and did not in any way prevent him from being cared for during the less than ten minutes from his arrival on scene, restraint, and ultimate cardiac arrest. Put simply, the Security Officers have established their entitlement to judgment as a matter of law under all theories of negligence advanced by Plaintiff.

With the burden shifted, Plaintiff relies upon the expert affidavit of Dr. Michael M. Baden. Dr. Baden challenges Dr. LaPoint's reliance on excited delirium syndrome and also opines that Mr. Ellison's placement in a prone position was the proximate cause of his death as a result of positional asphyxia. See Affidavit of Michael M. Baden MD at ¶19. Dr. Baden's affidavit opines that Mr. Ellison was pushed to the ground during a struggle and that, while he was in the prone position, compression on Mr. Ellison's back by the Security Officers coupled with his morbid obesity resulted in positional asphyxia rather than complications from excited delirium. See Affidavit

of Michael M. Baden MD at ¶¶14, 19. Such conflicting opinions and the resultant credibility battle of experts would not normally be suitable to be resolved by way of summary judgment. See e.g., Cook v Peterson, 137 AD3d 1594, 1597 (4th Dept 2016). Where, however, an expert's opinions are based on assumptions not supported by the record, such opinions will be considered speculative and thus insufficient to raise a triable issue of fact. See e.g., Cannarozzo v County of Livingston, 13 AD3d 1180 (4th Dept 2004).

Such is the case here. As Defendants correctly observe, there is nothing in the record to suggest the Security Officers exerted downward compression on Mr. Ellison's back in such a manner that would have caused asphyxia. Nor could Plaintiff at oral argument point the Court to anything in the record supporting such an opinion. While Plaintiff articulated that various individuals were involved in restraining Mr. Ellison's limbs as he thrashed about, nothing could be articulated that would support Dr. Baden's opinion concerning back compression. The suggestion at oral argument that "something must have caused Mr. Ellison's death" is not sufficient to raise a triable issue of fact. This Court must have fealty to the proof submitted, and Plaintiff has simply failed to meet her burden.

Even assuming *arguendo* that Defendants' negligence had been established, the proximate cause of Mr. Ellison's death was

complications from excited delirium syndrome and not the actions (or inactions) of the Security Officers. As noted above, Mr. Ellison's cause of death is described as a "[c]omplication of excited delirium." See Attorney Affidavit of Christopher A. DiPasquale, Esq. at Exhibit Y. Dr. Scott LaPoint, who conducted an autopsy on Mr. Ellison, described excited delirium syndrome as a "well-described phenomenon with a characteristic pattern of behavior and timing of death usually associated with a specific history of drug abuse, particularly cocaine." See Affidavit of Dr. Scott F. LaPoint, MD at ¶21. The behaviors associated with the syndrome manifest as "severe agitation, paranoia, excitability, increased physical strength and decreased response to pain...often requir[ing] several people to restrain [the] individual. See Affidavit of Dr. Scott F. LaPoint, MD at ¶22. Death may occur either during the heightened state of excited delirium or when the body backs down from the overload of excitatory hormones resulting in a cardiac arrhythmia. See Affidavit of Dr. Scott F. LaPoint, MD at ¶¶ 23 and 24.

Here, Mr. Ellison met all the factors as one to suffer from excited delirium syndrome: he weighed over 300 pounds, had an abnormally enlarged heart, tested positive for recent cocaine use, was schizophrenic, upon arrival at the hospital became belligerent and threatened to kill people, and required numerous security officers to subdue him - injuring at least one officer

during the melee. In Dr. LaPoint's expert medical opinion, Mr. Ellison died from complications of Excited Delirium Syndrome with no evidence whatsoever pointing to his cause of death resulting from positional asphyxia. See Affidavit of Dr. Scott F. LaPoint, MD at ¶25-53. As Dr. Baden's expert opinion is not based on evidence in the record, that proof fails to establish causation even if one were to assume negligence on the part of the Security Officers.

Accordingly, Defendants' motion for summary judgment is hereby GRANTED in its entirety and the complaint is DISMISSED.

This constitutes the decision and order of this Court.

Honorable William K. Taylor
Supreme Court Justice
December 19, 2017