SHORT FORM ORDER

INDEX No. 08-39990

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 2-28-13
ADJ. DATE 4-17-13
Mot. Seq. # 003 - MD

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DONALD RIGNEY, as Administrator of the Goods, Chattels, and Credits which were of PATRICIA RIGNEY, deceased,

Plaintiff,

- against -

NORTH SHORE UNIVERSITY HOSPITAL and ST. JOHNLAND NURSING CENTER, INC.,

Defendants.

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Upon the following papers numbered 1 to 42 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (003)1 - 29; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 30-37; ; Replying Affidavits and supporting papers 38-41; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (003) by the defendant, North Shore University Hospital, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against it is denied.

In this medical malpractice action, causes of action alleging negligent departures from the accepted standards of medical care and treatment by the defendants, lack of informed consent, negligence premised upon the doctrine of res ipsa loquitur[1], wrongful death, and violation of New York Public Health Law § 2801-d have been asserted against defendant St. Johnland Nursing Center, Inc.. The plaintiff's decedent, Patricia Rigney, then sixty-nine years of age, was diagnosed with a cerebral aneurysm which was surgically treated at defendant North Shore University Hospital where she remained bedridden as a patient from May 13, 2006 through June 30, 2006. It is alleged that defendant hospital, by its employees, staff, and agents, negligently departed from the accepted standards of care and treatment in failing to prevent and properly treat decubitus ulcers on the decedent's body, allowing the ulcers to progress and become infected, and that they failed to provide her with proper informed consent, all in violation of

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[1]A cause of action based upon the doctrine of res ipsa loquitur, the principal that the thing speaks for itself, does not state a separate theory on which a plaintiff may recover for injury, but merely permits the jury to infer negligence (*see* ***States v Lourdes Hospital***, 100 NY2d 208, 762 NYS2d 1 [2003]; ***Abbott v Page Airways, Inc.*** 23 NY2d 502 297 NYS2d 713 [1969]; ***Clark v Bishop Francis J. Mugavero Center for Geriatric Care, Inc.***, 29 Misc3d 1219(A) [Sup Ct Kings County 2010];

the New York Public Health Law and Education Law. The decedent was a patient at defendant St. Johnland Nursing Center from June 30, 2006 through October 13, 2006, and from October 19, 2006 through October 27, 2006. The ulcers were present upon the decedent's discharge from North Shore University Hospital at the time of transfer to St. Johnland Nursing Center. The decedent developed sepsis and eventually died on July 8, 2008. This action has been settled against defendant St. Johnland Nursing Center. North Shore University Hospital now seeks summary judgment dismissing the complaint as asserted against it.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.,***). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of this motion, North Shore University Hospital (NSUH) has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, its answer and amended answer, and plaintiff's verified bills of particulars; uncertified copy of plaintiff's death certificate; partial copies of plaintiff's decedent's medical records and an uncertified copy of the North Shore University Hospital record which are not in admissible form pursuant to CPLR 3212 and 4518 (*see* ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]); unsigned and uncertified partial copies of the transcripts of the examinations before trial of Audrey Davis dated September 29, 2011 and Irina Mikhaleva dated January 6, 2012, which are not in admissible form and are not considered (*see* ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]); and the affirmation of defendant's expert physician, Ira Leviton, M.D., and the affidavit of Judy L. Dillworth, R.N.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Holton v Sprain Brook Manor Nursing Home***, 253 AD2d 852, 678 NYS2d 503[2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see* ***Derdiarian v Felix Contracting Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Prete v Rafla-Demetrious,*** 221 AD2d 674, 638 NYS2d 700 [2d Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see* ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [1985]; ***Lyons v McCauley,*** 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; ***Bloom v City of New York,*** 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions

were a competent-producing cause of the injuries of the plaintiff (*see* ***Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.***, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.***, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

It is determined that even if defendant NSUH's evidentiary proof were in admissible form, that it has not established prima facie entitlement to summary judgment dismissing the complaint as there are factual issues raised in the moving papers, and the plaintiff has submitted the conflicting affirmation of his expert physician which raises factual issues and precludes summary judgment.

NSUH has submitted the affirmation of its expert physician, Ira Leviton, M.D., who affirms that he is licensed to practice medicine in New York State and is certified in internal medicine and infectious disease. While Dr. Leviton has set forth his current position, he has not set forth his work experience and the basis for his medical expertise. He set forth that he reviewed the "pertinent" records in this case, but does not apprise the court which records he has reviewed and upon which he bases his opinions. Dr. Leviton has set forth his opinions within a reasonable degree of medical certainty and opined that the staff at NSUH acted within accepted standards of medical care in the treatment they rendered to decedent Patricia Rigney, their care did not cause or contribute to her alleged injuries, and that no action, or alleged lack of action on the part of the staff at NSUH, played a role in causing or hastening her demise.

Dr. Leviton stated that the plaintiff's decedent was transferred to NSUH from Southside Hospital on May 13, 2006 with a diagnosis of subarachnoid hemorrhage due to a mid-cerebral artery aneurysm. Upon arrival, she was able to speak and move all of her extremities, but by May 14, 2006, she became somewhat confused and less verbal. On May 15, 2006, plaintiff underwent a selective cerebral angiogram. Thereafter, her mental status and condition continued to deteriorate, and she became more lethargic. On May 16, 2006, a right craniotomy was performed by Dr. David J. Chalif, M.D. On May 24, 2006, plaintiff was unable to be weaned off ventilatory support, so a tracheostomy was performed and a PEG feeding tube inserted. Dr. Leviton opined that the staff at NSUH properly treated the decedent's infections and administered antibiotics when appropriate. He noted the various infections she suffered between May 16, 2006 and May 30, 2006, including staphylococcus aureus bacteria upon bronchial culture; E. coli bacteria upon urine culture; and coagulase negative staphylococci and E. coli upon blood cultures. Flagyl was given as empirical treatment for clostridium difficile. She was transferred to the Respiratory Care Unit on June 1, 2006, and on June 8, 2006 she was off all antibiotics until June 19, 2006 when she developed a fever and was treated for a urinary tract infection. She was off antibiotics for five days when she was transferred to St. Johnland Nursing Center.

Dr. Leviton stated that when the decedent was transferred to the Respiratory Care Unit on June 1, 2006, a topical antifungal medication, Nystatin powder, was to be applied to her groin every six hours. On or about June 25, 2006, prior to her discharge, the decedent developed a Stage II pressure ulcer on her sacrum, despite appropriate nursing care. While Dr. Leviton set forth the decedent's risk factors for developing such ulcers and skin breakdown, he did not set forth the nursing care and treatment utilized for prevention or treatment of the ulcer, and he did not set forth the standard of care and how such standard of care was complied with, other than his conclusory and unsupported opinion. Dr. Leviton stated that although the bill of particulars alleges that the decedent sustained a Stage IV decubitus ulcer and bilateral ankle decubitus ulcers, he found no evidence of the same and stated that "hence, these allegations must be disregarded." However, this court finds that the failure to set forth the standard of care and how it was complied with by the NSUH staff, and whether the decedent sustained a Stage IV decubitus ulcer and bilateral ankle decubitus ulcer are factual issues precluding summary judgment.

Dr. Leviton opined that it was not necessary for NSUH staff to perform debridement or obtain a surgical consultation to address the Stage II ulcer. He did not set forth the appearance and condition of the alleged ulcer or

ulcers, and did not set forth the criteria for staging such ulcers or the decedent's Braden score for risk for pressure injury. He further opined that the conservative care and treatment rendered to the ulcer, which included the routine application of Dermagran ointment to the sacral area was sufficient to treat the ulcer. However, this conservative treatment, which he advocates was sufficient, is inconsistent with his earlier opinion that the plaintiff's decedent had multiple risk factors for the development of such ulcers. Thus, whether conservative treatment in an at-risk patient is appropriate raises factual issue which Dr. Leviton does not address, leaving this court to speculate as to the same. He further opined that NSUH did not transfer the decedent to a facility that was unable to provide for her care, however, this conclusory opinion does not set forth the services and criteria for the care needed for treatment of the ulcers, and whether St. Johnland met that criteria at the time of transfer. He further opined that to attribute the decedent's demise to a single pressure sore is absurd, however, he does not indicate the progression, or lack thereof of the pressure sore, and any sequelae developing therefrom, or the cause of her death. Dr. Leviton offers no opinion with regard to whether informed consent was provided, further precluding summary judgment.

Judy L. Dillworth, R.N. set forth that she is a registered nurse and is the director of nursing for critical care services at NYU Langone Medical Center. Although she has set forth her degrees, she has not set forth her work experience upon which she bases her expert opinions rendered on behalf of the defendant NSUH. She reviewed the "pertinent medical records" but has not identified them. She set forth her opinions within a reasonable degree of medical certainty. It is her opinion that the allegations set forth in the bill of particulars are unfounded and that the nursing staff at NSUH provided care well within acceptable standards of care.

Nurse Dillworth stated that on May 13, 2006, the Braden Scale was utilized to assess the decedent's risk for developing a pressure sore, and that on May 15, 2006, due to a Braden Score of 16, she was placed on skin alert protocol, was placed on a specialized air mattress, and remained on such protocol through the entirety of her stay in ICU through June 1, 2006. She stated that turning and positioning the decedent every two hours and monitoring and moisturizing of the skin, elevating her heels, and the use of the air mattress were implemented when she was transferred to the Respiratory Care Unit. On June 24, 2006, a 3 cm x 4 cm decubitus ulcer, Stage II, was noted, but she stated that it never progressed beyond that size and was not infected at the time of discharge from the hospital. She continued that a Stage II ulcer involved the loss of the outer layer of the skin creating a shallow, open ulcer. Care consists of covering, protecting and cleaning the area twice daily, applying emollients, alleviating pressure, and applying Dermagran ointment. Dillworth did not indicate where, if at all, this documentation can be found in the hospital record. It is her opinion that all of the alleged injuries were an unfortunate consequence of the decedent's bed-ridden state, coupled with multiple risk factors.

In defendants' reply, uncertified pages of the record of St. Johnland have been provided, which should have been provided with the moving papers in admissible form. It is noted, however, that the St. Johnland record refers to the ulcer as a Stage II on June 30, 2006 upon admission, and is described as being about 2 inches by ½ inch, as opposed to the 3 cm x 4 cm ulcer described by Dillworth. The ulcer was noted to be Stage III on July 1, 2006, and by July 5, 2006, the evolving ulcer was described as Stage IV. No testimony has been presented to demonstrate the time interval relative to the factors causing progression of the ulcer. There is no opinion proffered that the ulcer did not progress due to any events or care and treatment at North Shore University Hospital prior to discharge.

Based upon the foregoing, it is determined that defendant NSUH has not demonstrated prima facie entitlement to summary judgment dismissing the complaint. Additionally, plaintiff's expert raises factual issues which preclude the granting of summary judgment dismissing the complaint.

The plaintiff's expert set forth that he is a physician licensed to practice medicine in New York State and is board certified as a medical examiner and in internal medicine. He set forth his education and experience, and the records and materials which he reviewed and upon which he bases his opinions. All opinions are given within

a reasonable degree of medical certainty. It is the plaintiff's expert's opinion that the substandard care provided to the plaintiff's decedent at NSUH was the cause of her decubitus ulceration which eroded into the subcutaneous tissue, making it Stage III, which went negligently untreated prior to her discharge on June 30, 2006. The plaintiff's expert disagrees with defendant's expert that the injuries suffered by the decedent were unavoidable.

The plaintiff's expert stated that patients with certain medical conditions, including obesity, decreased or limited mobility, and diabetes mellitus, are at an increased risk for developing decubitus ulcers. He continued that if a Stage I pressure sore appears, additional precautions must be taken to prevent this condition from worsening. He stated that the record indicted that the staff at NSUH failed to properly observe and record the decedent's condition until it progressed to Stage II ulceration. He stated that while the defendant's experts refer exclusively to check marks/initials placed on the record, and the testimony of hospital nurses, the evidence reveals that the deterioration of the decedent's skin condition contradicts their statement that the care claimed to have been given was in fact provided. Had the patient been repositioned and turned every two hours, had her skin been inspected and properly moisturized, the skin breakdown which occurred while she was at NSUH would not have occurred. Once the ulceration developed and progressed into the dermis at Stage II, they failed to protect the sores from progression into the subcutaneous tissue Stage III. The decedent was transferred to an outside facility several days later, and the ulceration was noted to have already eroded into the subcutaneous tissue, indicating it was not being treated properly.

The plaintiff's expert stated that the decedent's foley catheter was removed on June 21, 2006 and she was incontinent of urine, posing an increased risk of skin breakdown. The cotton padding placed under the patient to prevent the bed from soaking poses an increased risk of skin breakdown due to lying in urine. Throughout her admission at NSUH, the decedent had also had bowel incontinence. Although the June 24, 2006 nursing note indicated that the skin was intact, it is not determinative of whether a pressure ulcer is developing or exists in its early stages. At Stage I, the skin is intact, however, it will appear red and when touched, the skin will blanche or appear ashen, bluish, or purple. The skin must be touched to detect warmth or pain. He continued that while nurse Davies indicated that none of those conditions existed on the earlier part of her shift, her later note indicates that a pressure ulcer protocol/plan of care form documented a Stage II sacral ulcer measuring 3 cm x 4 cm. The plaintiff's expert stated that there was no explanation provided concerning why or how the condition changed so drastically over a few hours from nothing to Stage II. It is the plaintiff's expert's opinion that it is not possible medically for a 3 cm x 4 cm decubitus ulceration to develop from normal or intact skin in just a few hours, and the process would take at least two days. Thus, he concluded, the NSUH staff failed to make proper observation of the sacral/coccygeal region and failed to properly document this condition and initiate an appropriate treatment.

The plaintiff's expert stated that on June 25, 2006, nurse Mikhaleva initially noted that the decedent did not have any skin breakdown, but that was subsequently crossed out and she recorded that the patient was suffering from a Stage I ulcer on her sacrum. The plaintiff's expert opined that it is not medically possible for a 3 cm x 4 cm Stage II decubitus ulcer to go back to a Stage I on one day, again illustrating substandard care due to the discrepancies in assessments and findings. During the night shift on June 26, 2006, the patient care flow sheet contains no entries regarding whether or not any interventions were provided to protect the decedent's skin overnight, contrary to the protocol which requires turning and repositioning every two hours with skin moisturizing provided. Additionally, he stated, none of the records reflect that such protocol or orders were rendered on the day shifts on June 25 and June 28, 2006. It is the plaintiff's expert's opinion that during this time interval, the ulceration was penetrating into the subcutaneous region making it a Stage III ulcer which was revealed shortly after the decedent's transfer to St. Johnland, as evidenced by the physician's order sheet dated June 30, 2006 indicating the decedent had a Stage III decubitus ulcer. Thus, he concludes, the ulcer had already progressed to Stage III prior to transfer from NSUH, and that there was further departure by failing to notify the skin nurse to evaluate the wound as required for Stage III ulcers at NSUH.

The plaintiff's expert opined that NSUH was responsible for putting the decedent in a condition so as to expose her to further progression and deterioration of the ulcer. He continued that the discharge of the plaintiff's decedent from NSUH was negligently premature in that they failed to properly address the deteriorating decubitus ulceration, failed to obtain surgical debridement of the ulceration with application of frequent changes of moist dressings, and increased the risk of creating further deterioration into a Stage IV ulcer after discharge on June 30, 2006. He disagreed with Dr. Leviton, defendant's expert, that the ulcer was unavoidable. Had the staff properly carried out physicians' orders and complied with proper standards of skin care, a pressure ulcer would not have developed or progressed. While expert nurse Dillworth stated that the staff complied with the protocol, the plaintiff's expert added, the record demonstrates otherwise. The plaintiff's expert further opined that these departures from good and accepted practice, singularly or in combination, were a proximate cause and a substantial contributing factor to the decedent sustaining injuries, including developing a Stage III pressure ulcer on her sacrum and increasing the risk of further deterioration into a Stage IV ulcer, infection, and sepsis. He continued that the departures significantly diminished this patient's chance of a better outcome and/or the possibility of a better recovery, and thus deprived her of a more favorable outcome.

Based upon the foregoing, it is determined that plaintiff's expert has raised factual issues which preclude summary judgment from being granted to the moving defendant even if the defendant's evidentiary proof had been submitted in admissible form.

Accordingly, motion (003) by defendant NSUH for summary judgment dismissing the claim as asserted against it is denied.

Dated: May 14, 2013

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION