Buchanan v Flushing Manor Nursing Home Inc.
2014 NY Slip Op 30401(U)
February 19, 2014
Supreme Court, Queens County
Docket Number: 33723/09
Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Allan B. Weiss Justice IA Part 2

DOROTHY BUCHANAN, by her attorney-in-fact CYNTHIA LESLIE,

Plaintiff,

-against-

FLUSHING MANOR NURSING HOME INC., FLUSHING MANOR HOME, INC. d/b/a FLUSHING MANOR NURSING HOME & REHABILITATION, FMNH, LLC FMNH, LLC d/b/a FLUSHING MANOR NURSING HOME & REHABILITATION,

Defendants,

Index No: 33723/09

Motion Date: 9/20/13

Motion Seq. No.: 11

The following papers numbered 1 to 23 read on this motion by Flushing Manor Nursing Home, Inc. Flushing Manor Home, Inc., d/b/a Flushing Manor Nursing Home & Rehabilitation, FMNH, LLC, FMNH, LLC d/b/a Flushing Manor Nursing Home and FMNH, LLA d/b/a Flushing Manor Nursing and Rehabilitation (herein collectively referred to as "Flushing Manor"), to dismiss the complaint pursuant to CPLR 3212, and for summary judgment in its favor on the counterclaim contained in the answer to plaintiff's amended complaint seeking payment in the amount of $21,771.48, for unpaid fees accrued by plaintiff; and cross motion by plaintiff to strike the answer of Flushing Manor for failure to comply with plaintiff's discovery demands; or alternatively, to preclude defendant from testifying or introducing evidence at trial regarding wheelchairs or chair alarms; or alternatively, to compel defendants to produce the information requested in the Notice to Produce.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1 - 4
Notice of Cross Motion - Affidavits - Exhibits	5 - 8
Answering Affidavits - Exhibits	9 - 17
Reply Affidavits	18 -23

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action sounding in medical malpractice. Plaintiff claims violations of, inter alia, the Public Health Law arising from alleged nursing home negligence. Plaintiff seeks damages for personal injuries sustained when she fell while a resident in defendants' nursing home facility. Flushing Manor moves for summary judgment in its favor on the ground that it did not depart from accepted medical practice in its care of plaintiff. Plaintiff opposes the motion and cross moves to strike defendants' answer for failure to comply with discovery demands. Flushing Manor opposes the cross motion.

Facts

Prior to admission at Flushing Manor, plaintiff had been living independently at Flushing House, an assisted living senior home. Plaintiff was hospitalized at the New York Hospital of Queens following an unwitnessed fall. The admitting diagnosis was syncope and left hip pain. The records from the New York Hospital of Queens (NYHQ), documented a past history of a fracture of the left hip and an x-ray taken at NYHQ was significant for no acute fracture or dislocation and there was no evidence of hardware failure.

On January 18, 2008, plaintiff was admitted to Flushing Manor for short term rehabilitation, with the intention of returning to the community. Upon admission, plaintiff was assessed as a high risk for falls. A comprehensive care plan was created for plaintiff and implemented on admission, documenting fall and safety precautions, including call bell within easy reach, locked bed and wheelchair during transfer and bed in low position. When plaintiff was in bed, the half side rails were to be kept upright and there was frequent visual monitoring when plaintiff was in bed. In addition, plaintiff was provided with "comfortable and well fitted footwear". Plaintiff was to be seen by physical therapy and occupational therapy for assessment and plan.

Plaintiff was incontinent of bowel and bladder and the comprehensive care plan documented incontinent care was instituted, including toileting every 2 to 4 hours, as needed with one person assisting. Plaintiff was alert and responsive to all stimuli but she was noted to be confused and forgetful. Nonetheless she was able to verbalize her needs.

On January 21, 2008, the comprehensive care plan was updated when it was noted that plaintiff was uncooperative and that she had an unsteady gait with ambulation. A bed and chair alarm was given to plaintiff. Also, Dr. Oltean increased plaintiff's dosage of Seroquel to 50 mg bid, and Haldol was prescribed to agitation every 12 hours as needed. Physical therapy recommended that plaintiff ambulate with a wide based quad cane with one person to assist. On January 23, 2008, plaintiff was transferred from room 610B to 612 , a private room across from the nurses' station, which permitted the staff to frequently visualize the plaintiff.

On January 24th and January 30, 2008, the records documented that plaintiff had attempted to get out of the wheelchair. On both occasions, emotional support was given and plaintiff was compliant. On February 3, 2008, at approximately 3:30 a.m., plaintiff was in bed, but did not want to go to sleep. She was then placed in a wheelchair with a chair alarm and placed in front of the nurses' station. Nurse Bersamin was on duty at the time. Bersamin testified that the other CNA, who was assigned to the floor was attending to another patient. At approximately 4:00 a.m., the record indicates that plaintiff was dozing on and off but refused to return to bed. Bersamin testified that she heard the chair alarm sound twice before 4:45 a.m, when plaintiff shifted her weight in the chair. On both occasions, Bersamin repositioned plaintiff and turned the chair alarm off. At approximately 4:45 a.m., Bersamin heard the chair alarm sound. She then observed plaintiff stand up, at which point, Bersamin testified, she then rushed to plaintiff as plaintiff began to fall. Bersamin testified that she was able to catch plaintiff's head and shoulder in order to avoid contact with the floor. Nevertheless, plaintiff fell on her right side. Plaintiff was transferred to Flushing Hospital where was diagnosed with a fracture of the right hip.

Plaintiff commenced the instant action alleging medical malpractice.

Motion for summary judgment

"The essential elements of medical malpractice are (1) a 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 [2003]; *see Hayden v Gordon*, 91 AD3d 819, 820 [2012]; *Guzzi v Gewirtz*, 82 AD3d 838 [2011]). On a motion for summary judgment, a defendant "must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Stukas v Streiter*, 83 AD3d 18, 24 [2011]; *see Gillespie v New York Hosp. Queens*, 96 AD3d 901, 902

[2012]; *Healy v Damus*, 88 AD3d 848, 849 [2011]; *Heller v Weinberg*, 77 AD3d 622, 622-623 [2010]). Once a defendant has made such a showing, the burden shifts to the plaintiff to "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), but only as to those elements on which the defendant met the prima facie burden (*see Stukas v Streiter*, 83 AD3d at 23-24; *Gillespie v New York Hosp. Queens*, 96 AD3d at 902; *Garrett v University Assoc. in Obstetrics & Gynecology, P.C.*, 95 AD3d 823, 825 [2012]).

Here, Flushing Manor met its prima facie burden of establishing entitlement to judgment as a matter of law dismissing the cause of action to recover damages for medical malpractice by submitting a detailed expert affidavit from Dr. Barbara C. Tommasulo that was based on the medical records (*see e.g. Barrett v Hudson Val. Cardiovascular Assoc., P.C.*, 91 AD3d 691, 692 [2012]), and which demonstrated that plaintiff's care was performed in accordance with good and accepted standards of medical practice (*see Olgun v Cipolla*, 82 AD3d 1186, 1187 [2011]; *Smith-Johnson v Gabbur*, 65 AD3d 1122, 1124 [2009]; *Dandrea v Hertz*, 23 AD3d 332 [2005]). Dr. Tommasulo opined, inter alia, that plaintiff was not a candidate for restraints, including a seatbelt as alleged in the bill of particulars; that restraints, including a seat belt would not have prevented plaintiff's fall and that plaintiff was strong enough to stand and, as such, a restraint would have caused the wheelchair to topple over and pose a risk of serious injury to plaintiff.

In opposition, however, the expert affidavit submitted by the plaintiff to the motion was also detailed and based on the medical records, and was sufficient to raise a triable issue of fact as to whether Flushing Manor deviated from accepted medical practice (*see generally Alvarez v Prospect Hosp.*, 68 NY2d at 324). Barbara McFadden, a licensed registered nurse, avers, inter alia, that according to the records reviewed, there was only one registered nurse and two CNAs that were assigned to care for approximately 20 patients on the shift where plaintiff was injured; at the time of plaintiff's fall, one of the two CNAs was on lunch, which left only one CNA and one Registered Nurse caring for approximately 20 patients. McFadden avers that the staff which was assigned to plaintiff at the time of her fall was inadequate and a deviation from standard nursing home practice, especially since plaintiff was identified as a "high fall risk". McFadden avers that plaintiff required a person sitting or standing next to her who was able to interact with her on a one-on-one basis; and that it is standard nursing home practice and procedure for a "high fall risk" patient to be placed in close reach of a nursing staff, as opposed to close view of said nursing staff as was the case here. Finally, McFadden avers, inter alia, that the use of a bed and chair alarm alone is insufficient to prevent falls.

As "[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Feinberg v Feit*, 23 AD3d 517, 519

[2005]; *see Magel v John T. Mather Mem. Hosp.*, 95 AD3d 1081, 1083 [2012]; *Hayden v Gordon*, 91 AD3d at 821; *Bengston v Wang*, 41 AD3d 625, 626 [2007]), the motion by Flushing Manor for summary judgment in its favor dismissing the complaint is denied.

The branch of the motion which is for summary judgment on its counterclaim seeking payment of $21,771.48, representing charges accrued by plaintiff while a patient at Flushing Manor, is also denied. (*see e.g. Chisholm–Ryder Co. v Sommer & Sommer,* 70 AD2d 429, 431, [1979]). Flushing Manor failed to establish, prima facie, its counterclaim for an account stated since the submitted statement of Flushing Manor's account administrator does not demonstrate that Flushing Manor mailed Cynthia Leslie, plaintiff's attorney, a statement of the account and that Cynthia Leslie retained such a statement for an unreasonable period of time without objecting thereto (*see Citibank (South Dakota) N.A. v. Cutler,* 112 AD3d 573 [2013]; *Jim-Mar Corp. v Aquatic Constr.*, 195 AD2d 868, 869 [1993]; *see generally Citibank [S.D.] v Jones*, 272 AD2d 815 [2000]).

Cross Motion

The cross motion by plaintiff to strike the answer of Flushing Manor for failure to comply with plaintiff's discovery demands, is denied as moot as the record indicates that the information sought by plaintiff has since been turned over, albeit late (on August 29, 2013).

Conclusion

The branch of the motion which is for summary judgment dismissing the complaint, is denied. The branch of the motion by Flushing Manor which is for summary judgment on its counterclaim seeking payment of $21,771.48, is denied.

The cross motion by plaintiff to strike the answer of Flushing Manor is denied, as moot.

Dated: February 19, 2014

J.S.C.