

<b>Meltzer v Pine Grove Manor, II LLC</b>
2016 NY Slip Op 30188(U)
February 2, 2016
Supreme Court, Queens County
Docket Number: 3362/2009
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2  
Justice

TERRY L. MELTZER, as Administratrix of the  
Estate of GUSSIE GRUBER, deceased,

Index  
Number 3362/ 2009

Plaintiff,

Motion  
Dates September 22, 2015  
November 24, 2015

-against-

PINE GROVE MANOR, II LLC, Individually  
and d/b/a GRACE PLAZA NURSING AND  
REHABILITATION CENTER, GRACE PLAZA  
NURSING AND REHABILITATION CENTER,  
THE HEBREW HOME FOR THE AGED AT  
RIVERDALE, NURSING HOME OF THE HEBREW  
HOME FOR THE AGED AT RIVERDALE a/k/a  
PALISADE NURSING HOME, PALISADE NURSING  
HOME CO., Individually, FLUSHING MANOR  
GERIATRIC CENTER, INC., Individually,  
FLUSHING MANOR GERIATRIC CENTER d/b/a  
DR. WILLIAM O. BENENSON REHAB PAVILION,  
Individually and NORTH SHORE  
UNIVERSITY HOSPITAL,

Motion Seq. Nos. 6 & 7

Defendants.

x  
Motions Seq. #6 and #7 are combined for disposition.

The following papers numbered 1 to 19 read on this motion Seq.#6 by defendant North Shore University Hospital (North Shore) for partial summary judgment dismissing plaintiff's claims of negligence and medical malpractice against it based on hospital admissions from September 19, 2006 through October 10, 2007 as time-barred; and on this motion Seq.#7 by defendants Pine Grove Manor, II, LLC, individually and d/b/a Grace Plaza Nursing and Rehabilitation Center (Pine Grove Manor), and Grace Plaza Nursing and Rehabilitation Center (Grace Plaza) for summary judgment dismissing the complaint and plaintiff's claims for punitive damages against them.

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Upon the foregoing papers it is ordered that the motions are determined as follows:

This is an action to recover damages for medical malpractice, negligence, gross negligence, wrongful death, and violations of Public Health Law §§ 2801-d and 2803-c and Emergency Medical Treatment and Active Labor Act (42 USC § 1395dd) arising from the alleged negligence of defendants in the care and treatment of Gussie Gruber, resulting in her death on July 19, 2008. Plaintiff Terry L. Meltzer, as administratrix of the estate of Gussie Gruber, claims, among other things, that defendants failed to provide proper decubitus ulcer prevention and treatment.

North Shore's motion for partial summary judgment dismissing plaintiff's claims of negligence and medical malpractice against it based on hospital admissions from September 19, 2006 through October 10, 2007 on the ground that they are time-barred is denied. The complaint alleges several causes of action against North Shore, including, among other things, negligence and medical malpractice and wrongful death based on the same acts of alleged negligence and medical malpractice of North Shore. With respect to the medical malpractice and negligence causes of action, North Shore established, prima facie, that more than two years and six months had elapsed between the time the action was properly commenced on April 30, 2010 and Gussie Gruber's hospital admissions at North Shore from September 19, 2006 through October 10, 2007. Pursuant to CPLR 214-a, an action for medical malpractice must be commenced within "two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure . . . ." Here, at the time of Gussie Gruber's death on July 19, 2008, the statute of limitations for any medical malpractice claims against North Shore based on her hospital admissions from September 19, 2006 through October 10, 2007 had not expired and, pursuant to CPLR 210(a), the statute of limitations was extended until one year after the date of Gussie Gruber's death, that is, July 19, 2009. Nevertheless, plaintiff did not properly commence the action until April 30, 2010.

In opposition, however, plaintiff raised a triable issue of fact by demonstrating that the statute of limitations was tolled by the continuous treatment doctrine. Pursuant to CPLR 214-a, the statute of limitations is tolled until the end of the course of treatment when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same illness, injury, or condition which gave rise to the act, omission, or failure complained of (*see Nykorchuck v Henriques*, 78 NY2d 255 [1991]). Based on a careful review of the evidence in the record, on each admission to North Shore from September 2006 through April 2008, Gussie Gruber received ongoing and continuous treatment for multiple decubitus ulcers. North Shore was responsible for Gussie Gruber's care and treatment of pressure sores at all times during her admissions. In view of the foregoing, plaintiff established that there was a course of treatment with respect to the condition (i.e. bed sores) giving rise to this lawsuit (*see e.g. Torres v Terence Cardinal Cooke Health Care Ctr.*, 72 AD3d 588 [2010]).

Furthermore, this court finds that the wrongful death cause of action against North Shore is timely. Pursuant to EPTL 5-4.1, a cause of action to recover damages for wrongful death must be commenced within two years after the decedent's death. In this case, the decedent's negligence and medical malpractice causes of action against North Shore had not expired at the time of her death on July 19, 2008 (*see Baron v Brown*, 101 AD3d 915 [2012]; *Scanzano v Horowitz*, 49 AD3d 855 [2008]). In addition, plaintiff asserted the wrongful death cause of action predicated on the same acts of alleged negligence against North Shore within two years after Gussie Gruber's death since the action was properly commenced on April 30, 2010.

The court will now address the branch of the motion by Pine Grove Manor and Grace Plaza for summary judgment dismissing the complaint against them. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage (*see Rebozo v Wilen*, 41 AD3d 457 [2007]; *Thompson v Orner*, 36 AD3d 791, 791-792 [2007]). Therefore, on a motion for summary judgment in a medical malpractice action, a defendant has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Rebozo*, 41 AD3d at 458; *Williams v Sahay*, 12 AD3d 366, 368 [2004]). The affidavit of a defendant physician may be sufficient to establish a prima facie entitlement to summary judgment where the affidavit

is detailed, specific, and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care (*see Suib v Keller*, 6 AD3d 805 [2004]; *Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755 [2001]). In opposition, the plaintiff must submit a physician's affidavit attesting to the defendant's departure from accepted practice and that such departure was a competent producing cause of the injury (*see Anonymous v Wyckoff Hgts. Med. Ctr.*, 73 AD3d 1104 [2010]).

Pine Grove Manor and Grace Plaza made a prima facie showing of entitlement to judgment as a matter of law dismissing the causes of action alleging negligence, medical malpractice, and wrongful death by submitting the expert affidavit of Marirose Kaufman, R.N., a registered nurse. In her affidavit, Nurse Kaufman opined that the care and treatment of Gussie Gruber rendered by Pine Grove Manor and Grace Plaza was in accordance with good and accepted standards of nursing care at all relevant times. Nurse Kaufman stated that, during each of Gussie Gruber's eleven admissions from September 18, 2006 through April 4, 2008, the nursing staff assessed Gussie Gruber's condition, each identified pressure ulcer was evaluated by a physician who ordered topical treatments, and interventions were initiated on each admission for skin care and preventative measures. The comprehensive care plan focused on mobility, elimination of pressure ulcers, respiratory illness, possible lung carcinoma, and she was intubated and then required a tracheotomy. Therefore, it is Nurse Kaufman's opinion that the skin breakdown was unavoidable based on Gussie Gruber's medical condition. Nurse Kaufman explained that Gussie Gruber's respiratory issues, diabetes, anemia, gastrointestinal bleeding, and Alzheimer-type dementia as well as the fact that her head was required to remain elevated during tube feeding, which occurred approximately 18 hours per day, all increased her risk of skin impairments. In addition, Nurse Kaufman stated that Gussie Gruber did not develop any new areas of ulceration during her stay at Pine Grove Manor and Grace Plaza.

The affirmation of Dr. Ronald Roth, a physician specializing in geriatric and long-term care patients, established the existence of triable issues of fact as to whether Pine Grove Manor and Grace Plaza departed from accepted standards of nursing care in their care and treatment of Gussie Gruber. In his affirmation, Dr. Roth opined that Pine Grove Manor and Grace Plaza departed from standards of good and accepted care by failing to provide proper pressure ulcer prevention and treatment, thereby causing the acceleration of the wounds and prevention of healing. Dr. Roth stated that the standard of care, as well as state and federal regulations, require that a pressure ulcer be assessed at least every seven days to evaluate the treatment protocol and determine if the wound is healing. Dr. Roth noted that, between November 2, 2006 and November 28, 2006, the pressure ulcer was evaluated only two times, but it should have been evaluated at least three times. There was also no documentation regarding the upper back pressure ulcer from February 19, 2007 and February 28, 2007, a period of nine days. In these instances, Dr. Roth indicated that the size and severity of the

pressure ulcers increased dramatically. Additionally, Dr. Roth explained that the standard of care and state and federal regulations require that a resident at risk for pressure ulcers be turned and repositioned at least every two hours, or more frequently depending upon the resident's condition. Dr. Roth stated that, based on a review of Gussie Gruber's medical chart, there were many months in which she was turned and repositioned every two to four hours, which is an improper turning and positioning protocol particularly for a resident with existing pressure ulcers, and that there were numerous instances in which no turning and positioning was ever done or documented at all. Furthermore, Dr. Roth stated that a review of the medical records reveals that there were omissions in the treatment provided to Gussie Gruber, thereby causing her sacral wounds to worsen and prevent healing. Specifically, there are missed treatments to the sacral wound on November 6, 2006 and November 20, 2006, which is directly related to the explosion of the length of the wound from 3.5 centimeters to 14 centimeters between November 2, 2006 and November 28, 2006. Similarly, there are missed treatments to the right foot sacral wound on January 23, 2007 and the mid-back, right heel, and right foot sacral wounds on February 13, 2008, all of which prevented the healing of the wounds. Therefore, it is Dr. Roth's opinion that the aforementioned omissions by Pine Grove Manor and Grace Plaza proximately caused the acceleration of Gussie Gruber's existing pressure ulcers and prevented the healing of those wounds.

With respect to the causes of action alleging gross negligence and violations of Public Health Law §§ 2801-d and 2803-c and Emergency Medical Treatment and Active Labor Act (42 USC § 1395dd), Pine Grove Manor and Grace Plaza failed to establish their entitlement to judgment as a matter of law because Nurse Kaufman's affidavit did not address those issues (*see Pichardo v St. Barnabas Nursing Home, Inc.*, \_\_\_ AD3d \_\_\_, 2015 NY Slip Op 08904 [1<sup>st</sup> Dept 2015]; *compare Gold v Park Ave. Extended Care Ctr. Corp.*, 90 AD3d 833 [2011]). Given that Pine Grove Manor and Grace Plaza failed to satisfy their prima facie burden on the aforementioned causes of action, the sufficiency of plaintiff's opposition papers in that regard need not be addressed (*see Winegrad*, 64 NY2d at 853).

In view of the foregoing, the branch of Pine Grove Manor and Grace Plaza's motion seeking summary dismissal of plaintiff's claims for punitive damages under the causes of action for gross negligence and violations of Public Health Law §§ 2801-d and 2803-c is also denied. Punitive damages may be awarded where the defendant's conduct evinces "a high degree of moral culpability or willful or wanton negligence or recklessness" (*see Dmytryszyn v Herschman*, 78 AD3d 1108 [2010]). Similarly, Public Health Law § 2801-d(2) only sets forth a basis for an award of punitive damages where the defendant's actions were "willful or in reckless disregard of the lawful rights of the patient." As previously discussed, Pine Grove Manor and Grace Plaza failed to demonstrate, through Nurse Kaufman's affidavit, that Pine Grove Manor and Grace Plaza did not act willfully or in reckless disregard of Gussie Gruber's rights as a patient for purposes of Public Health Law § 2801-d(2) and that Gussie

Gruber's injuries were not the result of willful or wanton negligence under the common-law standard.

Accordingly, North Shore's motion for partial summary judgment dismissing plaintiff's claims of negligence and medical malpractice based on hospital admissions from September 19, 2006 through October 10, 2007 as time-barred is denied. The motion by Pine Grove Manor and Grace Plaza is denied in its entirety.

Dated: February 2, 2016

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J.S.C.