SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

VIRGINIA MILOS as Administrator for the Estate of LENUTA MILOS, and VIRGINIA MILOS, individually

Plaintiffs,

-against-

FAIRVIEW NURSING CARE CENTER, INC., ZVI BATASH, M.D., DINAH KLEIN, ARI KATZ, THE KLEIN FAMILY FOUNDATION

Defendants

Index No.: 501749/2014

DECISION/ORDER

Hon. Judge Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: award summary judgment to the defendant, Zvi Batash, pursuant to CPLR sec. 3212.

Papers	**Numbered**
Notice of Motion and Affidavits Annexed.....	1-2
Order to Show cause and Affidavits Annexed.....	
Answering Affidavits.....	3
Replying Affidavits.....	4
Exhibits.....	
Other:.....(memo).....	5

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Decision:

In this motion for summary judgment, the defendant, Zvi Batash, M.D. ("Dr. Batash"), by his attorney(s), has moved to dismiss plaintiff's complaint pursuant to CPLR §3212. The motion and supporting papers were filed on or about January 24, 2018.

Plaintiff, Virginia Milos, opposes this motion and argues that summary judgment is not appropriate in this matter. Opposition to this motion was submitted on or about March 21, 2018. The instant motion was argued before the undersigned in Part 36 of this Court on June 21, 2018.

Background:

Lenuta Milos ("Mrs. Milos") was admitted to North Shore University Hospital-Manhasset ("NSUH-Manhasset") on April 3, 2012. Prior to being admitted, Mrs. Milos resided at home and had a history of dementia, prior stroke, and dysphagia (difficulty swallowing) (see NSUH Medical Records, Ex. "J"). At NSUH-Manhasset, Mrs. Milos was treated for generalized weakness, dehydration, and UTI (see NSUH Med. Records, Ex. "J"). Dr. Batash was the attending physician assigned to treat Mrs. Milos at NSUH-Manhasset and among the treatments he provided, he ordered nutritional and swallowing evaluations to develop an appropriate dysphagia diet, and continued Mrs. Milos' prescriptions of Aricept and Seroquel (see Exhibit "G" at 48).

On April 10, 2012, Mrs. Milos was discharged to Fairview Nursing Care Center ("Fairview") for rehabilitation (see NSUH Med. Records, Exhibit "J"), where Dr. Batash was an attending physician. Dr. Batash claims Mrs. Milos' daughter Virginia specifically requested that Mrs. Milos be transferred to Fairview so Dr. Batash could continue treating her because she was happy with his care (see Batash Dep., (Ex. "G") at 24).

On April 11, 2012, Dr. Batash gave Mrs. Milos an initial evaluation at Fairview, as required for all new residents (see Batash Dep., (Ex. "G") at 26, Milos Med. Chart, Ex. "K"). Mrs. Milos' chief complaints were weakness and dementia, and she was presently taking Colace, Aricept, multivitamins, Seroquel, Senna, and a Z-Bec vitamin. Dr. Batash performed a full physical exam, continued Mrs. Milos' prescriptions, and adjusted the administration of Seroquel from 9:00 AM to 9:00 PM due to his observation that she appeared more somnolent than usual. According to Dr. Batash, Seroquel is a long-term chronic psychiatric medication that patients are usually on for a lifetime (see Batash Dep., (Ex. "G") at 64). He also ordered a psychiatric evaluation for the Seroquel prescription and a nutritional evaluation to address Mrs. Milos'

dysphagia diet (see Batash Dep. (Ex. "G") at 63, Milos Med. Chart, Ex. "K"). Based on these evaluations, Dr. Batash approved the recommendations that Mrs. Milos was to be given pureed food and nectar thick liquids, have close supervision of her oral intake, be fed only when she was alert, have reduced distractions while feeding, eat slowly with small sips of food, and remain in an upright position for at least thirty minutes after meals (see Batash Dep. (Ex. "G") at 68-69, Milos Med. Chart, Ex. "K").

On April 14, 2012 a Fairview nurse noted that Mrs. Milos was experiencing bouts of productive cough and contacted Dr. Batash, who ordered 10cc of Robitussin to be administered three times a day for seven days (see Batash Dep. (Ex. "G") at 81, Milos Med. Chart, Ex. "K"). At approximately 5:15pm, RN Ophelia Uriarte observed a CNA assist Mrs. Milos in the Fairview dining room with the consumption of her pureed meal. After looking away for a moment, the CNA discovered Mrs. Milos facedown and unresponsive, with her face cyanotic (see Uriarte Dep. (Ex. "H") at 22, Milos Med. Chart, Exhibit "K"). The record indicates that Mrs. Milos was returned to her room, CPR was administered, and 911 was called. The EMS report indicates, among other things, that Mrs. Milos was brought by ambulance after becoming unresponsive due to choking while eating, and she was difficult to intubate because there was food in her oral pharynx (see Batash Dep. (Ex. "G") at 93, NSUH Med. Records, Ex. "L"). Dr. Batash was notified by phone of Mrs. Milos' condition and gave the order to have her transferred to NSUH-Forest Hills (see Uriarte Dep. (Ex. "H") at 177-178). There is no evidence or testimony as to whether Dr. Batash was present at Fairview when the incident occurred.

Dr. Batash performed a physical examination of Mrs. Milos upon her arrival at NSUH-Forest Hills on April 14, 2012 and noted that her lab results were unremarkable. A chest x-ray showed right side emphysema, and an EKG showed sinus tachycardia at 128 beats per minute (see Batash Dep. Ex. "G" at 90-91, NSUH Med. Records, Ex. "L"). Mrs. Milos was then sent to

the ICU and was diagnosed with left-sided pneumothorax (collapsed lung) due to aspiration of food into her airway and right sided subcutaneous emphysema (chest trauma). Mrs. Milos remained unconscious and in critical condition until she died approximately 14 hours later.

Issues Presented:

Dr. Batash (Defendant) argues that he did not depart from good and accepted standards of medical practice as an attending physician in his treatment of Mrs. Milos. This claim is based on the expert opinion expressed in the affirmation of Howard D. Kolodny, M.D. ("Dr. Kolodny") that all of Dr. Batash's actions were within community standards of care given Mrs. Milos' medical history. In addition, Dr. Batash asserts that he was not a proximate or competent producing cause of Mrs. Milos' injuries because the diet and feeding plan created by Dr. Batash was intended to be carried out by the RNs and CNAs at Fairview. As Dr. Batash has never been an employee of Fairview, he claims he has no vicarious liability for any failure of the RNs or CNAs to carry out the diet and feeding plan.

Opposing the motion, Virginia Milos (Plaintiff) argues that Dr. Batash departed from good and accepted standards of medical care by continuing Lenuta Milos' prescription of Seroquel, which was not approved for the treatment of dementia, and can cause substantial risk of choking and aspirational pneumonia, which was the actual cause of Lenuta Milos' death.

Virginia Milos also contends that Dr. Batash deviated from good and accepted standards of medical care by prescribing Robitussin without instructions to the RNs and/or CNAs as to how it should be administered.

Defendant's Contentions:

In support of his motion, Dr. Batash provides the expert opinion of Dr. Kolodny that, within a reasonable degree of medical certainty, Dr. Batash did not deviate or depart from accepted standards of medical practice in the care and treatment of Mrs. Milos. Dr. Kolodny states that community standards require a physician caring for a nursing home patient to see the patient within twenty-four hours of admission to the nursing home, and once monthly thereafter unless an acute problem develops, but not if the acute problem is so severe as to require immediate transfer to the hospital (see Kolodny Aff., par. 13 (Ex. "A")). The record reflects that Dr. Batash did see Mrs. Milos within twenty-four hours of being admitted to Fairview, and thus acted within the community standards of care.

Dr. Kolodny's expert opinion also supports Dr. Batash's claim that the continued prescription of Seroquel and the prescription of Robitussin was within the standard of care. It is Dr. Kolodny's opinion that the discontinuation of Seroquel would have been detrimental to Mrs. Milos because Seroquel is a long-term chronic antipsychotic medication and should be discontinued or adjusted by a psychiatric physician with specialized experience with the medication (see Kolodny Aff., par. 14). Although Dr. Batash did adjust the timing of the medication so that it would be administered at 9:00 PM instead of 9:00 AM, he claims he did not feel comfortable changing the dosage without psychiatric involvement (see Batash Dep., p. 64). In addition, Dr. Batash states that the 10cc of Robitussin is the lowest dose typically given, he has never known Robitussin to cause sleepiness, and its administration had no impact on Mrs. Milos' feeding (see Batash Dep., p. 84-85).

Furthermore, Dr. Batash contends that his conduct was not the proximate cause of the choking injury that ultimately led to Mrs. Milos' death. This contention is supported by Dr. Kolodny's statement that care plans for dysphagia patients are typically designed by attending

physicians, such as Dr. Batash, and implemented by the RNs and CRNs. Dr. Kolodny agrees with Dr. Batash's claim that he had no vicarious responsibility for the conduct of the RNs and CRNs at Fairview, because he was not an employee of Fairview and was not responsible for supervising the RNs and CNAs. Because standards of care of an attending physician did not require Dr. Batash to be present at Fairview during Mrs. Milos's choking incident, his absence cannot be said to be a departure from the standard of care, or a proximate cause of Mrs. Milos' injury because it was not his duty to provide lifesaving measures to Mrs. Milos.

Plaintiff's Contentions:

Virginia Milos argues that several material issues of fact exist regarding Dr. Batash's departure from good and excepted standards of medical care. First, Virginia Milos asserts there is a question as to whether Dr. Batash deviated from good and accepted standards of medical care by continuing to prescribe Seroquel to Mrs. Milos. Not only is Seroquel "not approved to treat dementia-related psychosis," but it also can cause a substantial risk of choking and aspirational pneumonia (see Product Insert for Seroquel, p. 1(Plaintiff's Ex. "B")). The record states that the cause of Mrs. Milos' death was choking. Dr. Perry Starer's ("Dr. Starer") expert testimony supports the claim that Seroquel is an improper treatment for Mrs. Milos' dementia, and that the throat inflammation caused by Seroquel added to her difficulty swallowing and increased her risk of choking (see Starer Aff., para. 4-5 (Plaintiff's Ex. "I")).

The second issue of fact Virginia Milos states is whether Dr. Batash deviated from good and accepted standards of medical care by prescribing Robitussin to Mrs. Milos without any instructions for its administration. Dr. Starer claims that Robitussin can cause drowsiness, which could affect Mrs. Milos' ability to swallow food (See Starer Aff., para. 8). Dr. Starer further asserts that, because Dr. Batash did not instruct the RNs and CRNs that the Robitussin should not

be administered close to Mrs. Milos' mealtime and did not evaluate Mrs. Milos' reaction to the Robitussin before allowing her to be fed a meal, Dr. Batash departed from good and accepted medical standards of care (see Starer Aff., para. 9).

It is these two contended departures from good and accepted medical standards of care that Virginia Milos claims were the proximate cause of Mrs. Milos' injury and ultimate death. Furthermore, it is Dr. Starer's expert opinion that not only did Dr. Batash deviate from good and accepted medical standards of care, but those deviations also directly contributed to Mrs. Milos' death.

Discussion:

On a motion for summary judgment seeking a dismissal of a medical malpractice cause of action, a defendant must make a prima facie showing either that there was no departure from good and accepted medical practice, or, if there was a departure, that the departure was not the proximate cause of plaintiff's alleged injuries (Williams v. Bayley Seton Hosp., 112 AD3d 917, 918 [2nd Dept. 2013]; Giacinto v. Shapiro, 151 AD3d 1029, 1030 [2017]; Brinkley v. Nassau Health Care Corp., 120 AD3d 1287 [2nd Dept. 2014]). Thus, on a motion for summary judgment, the defendant has the initial burden of establishing the absence of any departure from good and accepted practice or that the plaintiff was not injured by any departure (see Terranova v. Finklea, 45 AD3d 572 [2nd Dept. 2007]). "In order to sustain this burden, the defendant is only required to address and rebut the specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars" (Bhim v. Dourmashkin, 123 AD3d 862, 864 [2014]).

Once the defendant has made such a showing, the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut the prima facie showing made by the defendant, so as to demonstrate the existence of a triable issue of fact (see Fritz v. Burman, 107 AD3d 936, 940 [2nd

Dept. 2013]; Brinkley v. Nassau Health Care Corp., 120 AD3d at 1287). In order to prevail on a claim for medical malpractice, "expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause" (Nicholas v. Stammer, 49 AD3d 832, 833 [2008]).

Here, this Court is presented with a material question of fact of whether Dr. Zvi Batash deviated or departed from accepted medical practice while caring for the decedent, Lenuta Milos, and if so, whether Dr. Batash's departure from accepted medical practice was the proximate cause of the injuries that occurred.

Defendant, Dr. Batash, in setting forth his prima facie argument for summary judgment, has offered the expert opinion of Dr. Howard D. Kolodny, an endocrinology physician, who is Board Certified in Internal Medicine. Dr. Kolodny maintained that, based upon his review of the medical records from North Shore University Hospital Manhasset, the Fairview Nursing Care Center and North Shore University Hospital-Forest Hills, that to a reasonable degree of medical certainty, the care and treatment rendered to the decedent, Lenuta Milos, was at all times in accordance with good and accepted medical practice. Dr. Kolodny opined that nothing that Dr. Batash did or failed to do was the competent producing cause of any of decedent's injuries that were alleged in this action.

Dr. Batash, as decedent's attending physician at North Shore University Hospital, did order a GI evaluation, urology and oncology evaluations for a bladder mass found on a CT scan, and nutritional and swallowing evaluations to determine an appropriate dysphagia diet. As to the care rendered at Fairview Nursing Care Center, Dr. Kolodny maintains that Dr. Batash has met the community standards with respect to a doctor caring for a nursing home patient by seeing the patient within the initial twenty-four hour period of her admission to the nursing care facility and once monthly thereafter.

Dr. Kolodny opined that Dr. Batash by prescribing Robitussin (10cc-3 times daily, which was characterized as a minimal dosage), after being informed of Mrs. Milos' cough, was appropriate, given the symptoms prescribed by the RN as to the decedent's physical condition. Dr. Kolodny further maintained that the Robitussin prescribed did not contain a narcotic, and thus, it would not cause drowsiness, nor would it have had an impact on the decedent's feedings. As to the determination by Dr. Batash that the decedent should continue to take Seroquel, that too was appropriate since it was initially prescribed by the primary care physician and the standard of care was for the patient to continue the medication. Dr. Batash properly determined that since Seroquel is a long term chronic antipsychotic medication, it was proper to defer to the opinion of an expert in psychotic medication before discontinuing or adjusting the dosage. Dr. Kolodny further opined that the determination by Dr. Batash to change the timing of administering Seroquel would not have negatively impacted the ability of Lenuta Milos to swallow. Further, at Fairview Nursing Care Center, Dr. Batash ordered a psychiatric evaluation of Lenuta Milos, and Dr. Kolodny asserts that a plan of care for the dysphagia and an appropriate diet was implemented, but its implementation was not the responsibility of Dr. Batash, but rather was that of the staff at Fairview.

This Court finds that the defendant set forth his prima facie burden of establishing that Dr. Batash had neither departed from good and accepted medical practice or that the plaintiff had not been injured as a result of any alleged departure, and the burden shifted to the plaintiff to establish the existence of a triable issue of fact.

In opposing the motion for summary judgment by the defendant, Dr. Batash, the plaintiff offers the expert medical opinion of Dr. Perry Starer. Dr. Starer is a board-certified geriatrician and has a private practice in both Internal Medicine and Geriatrics. Dr. Starer, in offering his opinion, reviewed the medical records of the decedent from North Shore Hospital, the Fairview

Nursing Care Center, EMS, as well as the deposition transcripts of both Dr. Batash and Virginia Milos.

Dr. Starer opined that Dr. Batash deviated from the standard of care by his determination that the decedent continue to take Seroquel. Dr. Starer maintains that it was inappropriate for the patient to take Seroquel since it is an anti-psychotic drug that is used for treating schizophrenia and bipolar disorder and Ms. Milos was not suffering from either schizophrenia or a bipolar disorder. Seroquel is known to cause pharyngitis (inflammation to the back of the throat) which can lead to difficulty swallowing. Since Mrs. Milos was already suffering from dysphasia, she was considered a risk for choking and taking Seroquel put her at an increased risk for choking. Dr. Starer further opined that the determination by Dr. Batash to change the time of the day for Mrs. Milos to take Seroquel would not have helped the patient as the time was not relevant since Seroquel has a twenty-four hour affect upon the body.

Dr. Starer further opined that the failure of Dr. Batash to provide instructions to the nursing staff of Fairview Nursing Care Center regarding administering Robitussin was a departure from good and accepted medical practice. Dr. Batash should have instructed the nurses not to administer Robitussin close to the patient's meal time since drowsiness is a commonly known side effect of Robitussin, and since she had dysphagia, the patient should have been fed only when she was alert.

This Court finds that in opposition to defendant's motion, plaintiff raised an issue of fact with the submission of an expert opinion which offers detailed opinions as to the treatment rendered which conflicts with defendants' expert opinions, thereby precluding summary judgment. The plaintiff has raised two issues of fact regarding Dr. Batash's deviation from good and accepted standards of medical care. The first is the decision by Dr. Batash to continue to prescribe Seroquel to Mrs. Milos. The plaintiff asserts that Dr. Batash was aware that Seroquel

was a psychiatric medication and needed evaluation by a psychiatric expert. Yet while Dr. Batash was able to arrange for a nutritional and speech therapy evaluation, a psychiatric evaluation was not conducted in the crucial period between April 11 and April 14, and Ms. Milos continued to take the medication. The second issue pertains to the decision by Dr. Batash to prescribe Robitussin to Mrs. Milos without providing instructions to either the RNs or the CRNs who had the responsibility of administering the medication.

It is well settled that where parties to a medical malpractice action offer conflicting expert opinions on the issue of malpractice and causation, summary judgment ought to be denied (Feinberg v. Feit, 23 AD3d 517, 519 [2nd Dept. 2005]; Shields v. Baktidy, 11 AD3d 671, 672 [2nd Dept. 2014]). With regard to proximate cause, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not the injury was caused by the defendant (see Johnson v. Jamaica Hosp. Med. Ctr, 21 AD3d 881, 883[2005]).

Conclusion:

The motion by defendant, Zvi Batash, M.D. for an order granting summary judgment, and a dismissal of this action is denied.

This shall constitute the decision and order of this Court.

Dated: October 2, 2018
Brooklyn, New York

ENTER:

Hon. Bernard J. Graham, Justice
Supreme Court, Kings County

KINGS COUNTY CLERK
FILED
2018 OCT -5 PM 3:39

HON. BERNARD J. GRAHAM

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