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| <b>Schneller v Pine Val. Ctr., LLC</b>   |
| 2018 NY Slip Op 34438(U)   |
| December 28, 2018  |
| Supreme Court, Rockland County   |
| Docket Number: Index No. 031860/2015   |
| Judge: Sherri L. Eisenpress  |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
DIANA SCHNELLER, as Administrator of the Estate of  
STEPHEN SCHNELLER, deceased, and DIANA SCHNELLER  
Individually,

*Plaintiff,*

*-against-*

**DECISION AND ORDER  
ON MOTIONS FOR  
SUMMARY JUDGMENT**

Index No.: 031860/2015

PINE VALLEY CENTER, LLC, MICKEY SHARMA, M.D.,  
DEVENDRA SHARMA, M.D., SHARMA and SHARMA, MDS,  
and HADASSAH ZOBERMAN, S.L.P.,

*Defendants.*

-----X  
*Sherri L. Eisenpress, J.*

The following papers, numbered 1 to 14, were reviewed in connection with (i) the Notice of Motion (#4) filed by defendants Pine Valley Center, LLC ("Pine Valley") and Hadassah Zoberman, S.L.P, ("Zoberman") for an Order, pursuant to Civil Practice Law and Rules § 3212, for summary judgment and dismissal of the action as against said defendants; and (ii) the Notice of Motion (#5) filed by Defendant Mickey Sharma, M.D. and Devendra Sharma, M.D. for an Order, pursuant to Civil Practice Law and Rules § 3212, dismissing the instant medical malpractice action as against said defendants:

| <u>PAPERS</u>  | <u>NUMBERED</u> |
|--|-----------------|
| <b>Motion #4</b>   |                 |
| NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXPERT AFFIDAVIT OF JANE KRUPNICK, LSP/EXPERT AFFIDAVIT OF THEODORE ZELTNER/EXHIBITS "A-O" | 1-4             |
| AFFIRMATION IN OPPOSITION/AFFIDAVIT OF KAREN SHEFFLER/AFFIDAVIT OF ADAM BUDZIKOWSKI, M.D./EXHIBITS "1-11"                          | 5-7             |
| <b>Motion #5</b>   |                 |
| NOTICE OF MOTION/AFFIRMATION IN SUPPORT/AFFIRMATION OF LUIGI CAPOBIANCO, M.D./EXHIBITS "A-O"                                       | 8-10            |

AFFIRMATION IN OPPOSITION/AFFIDAVIT OF KAREN SHEFFLER/AFFIDAVIT OF ADAM BUDZIKOWSKI, M.D./EXHIBITS "1-11" 11-13

AFFIRMATION IN REPLY/EXHIBIT "P" 14

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

### **Factual Background**

This wrongful death/negligence/medical malpractice action was commenced against the various defendants on April 28, 2015, by Diana Schneller, as Administrator of the Estate of her deceased brother, Stephen Schneller ("decedent"). The various defendants answered, the parties engaged in and completed discovery, and Plaintiff filed a Note of Issue through the NYSCEF system on February 23, 2018. This Court granted permission to file summary judgment motions on or before July 30, 2018, and as such, they are timely made.

In September 2008, decedent Stephen Schneller, then 70 years of age, was admitted as a permanent resident to Pine Valley Center for Rehabilitation and Nursing for frequent falls and acute exacerbation of his COPD. His past medical history was significant for schizophrenia, hypertension, hyperlipidemia, hyperthyroidism, GERD, lower extremity edema and psoriasis. Since the time of his admission, he had been on a restricted diet of "mechanical soft food," which is food ground to a diet texture. On or about May 6, 2013, Defendant Zoberman, a Speech Language Pathologist employed by Pine Valley, was informed by the nursing staff that decedent had complained his diet was too mushy. Zoberman advised that she would screen and evaluate decedent to determine if he was a candidate for a diet texture upgrade to a "regular" diet, which is food that is unaltered. Defendant Zoberman made a determination that decedent was a candidate for a regular diet and placed a "telephone order" to Dr. Devendra Sharma requesting a speech therapy evaluation for a dietary referral, skilled speech therapy five times a week for two weeks and trial of upgraded diet textures. Dr. Devendra Sharma ordered the evaluation.

Defendant Zoberman conducted the Speech Language pathology evaluation and concluded that decedent had mild disabilities in the oral phase of swallowing and that he had disabilities regarding bolus manipulation. It is alleged by Plaintiff that Zoberman did not recommend or obtain any instrument evaluation of the swallowing of decedent, which she claims would have revealed the presence of any further disabilities of swallowing in the oropharynx or pharynx. After the evaluation, defendant Zoberman conducted Speech Language Pathology therapy for the oral phase disabilities and discharged decedent on May 14, 2013, to unsupervised meals despite ordering the continuation of aspiration precautions, which it is alleged, she failed to communicate to either defendant Sharma or to the nursing staff of Pine Valley. On May 15, 2013, Dr. Devendra Sharma issued the order upgrading decedent's diet to regular consistency with thin liquids and maintaining aspiration precautions.

On May 28, 2013, decedent choked on his lunch of meatballs. Pine Valley providers responded with a "Code Blue" which involved abdominal thrusts as part of the Heimlich maneuver and CPR. Decedent needed assistance to breath and when the EMT's arrived they intubated him and transported him to the hospital. He passed away the following day at Good Samaritan Hospital. The cause of death listed in the autopsy report is "acute cardiorespiratory failure due to asphyxia due to obstruction of airway by bolus of food (choking)."

#### **The Parties' Contentions**

In support of her summary judgment motion, moving Defendant Zoberman submits the expert affidavit of Jane Krupnick, S.L.P., in which she provides her opinion that Zoberman properly assessed decedent as a candidate for Speech Therapy evaluation; that she properly performed the Dysphagia SLP Evaluation and properly created a plan of care. She further opines that Zoberman's actions were in accordance with reasonable standards of care in the field and that there were no negligent acts or omissions by Zoberman that were the proximate cause of Schneller's death.

With respect to the summary judgment motion by Defendant Pine Valley, the expert affidavit of Theodore Zeltner, M.D., Board Certified in Internal Medicine, is offered in support. Dr. Zeltner opines that the Pine Valley staff provided appropriate supervision and monitoring in the dining room on May 28, 2013. He further opines that the actions of Pine Valley staff in responding to and managing the choking incident were in accordance with good and accepted practices of a skilled nursing facility and that no alleged act or omission on the part of Pine Valley or its staff was a substantial factor in causing the death of Schneller.

Defendants Mickey Sharma, M.D. and Devendra Sharma M.D submit the expert affidavit of Dr. Luigi Capobianco, Board Certified in Family Medicine and Geriatric Medicine, in support of their summary judgment motion. It is Dr. Capobianco's expert opinion that Dr. Mickey Sharma and Dr. Devendra Sharma's care and treatment from May 8, 2009 through May 28, 2013 was appropriate, conformed in all respects with accepted custom and practice and was not the proximate cause of the alleged injuries sustained by decedent. More specifically, Dr. Capobianco opines that the doctors performed a thorough examination of the patient; that Dr. Sharma appropriately relied upon the opinions of the expert in speech pathology; that it is not the standard of care for a medical attending to diagnose or formulate a plan of treatment with respect to a patient's diet upgrade when the patient is being followed by the speech pathologist; that defendants adequately and appropriately responded to the patient's choking emergency including performance of the Heimlich maneuver and chest compressions; that it is not Dr. Mickey Sharma's responsibility or role to train the staff as to respective nursing home policies; and that defendants' conduct during the code and the coordination of medical care within the facility by Dr. Mickey Sharma, as Medical Director, were all within the accepted standards of care and not a proximate cause of decedent's injuries.

Plaintiff opposes the various summary judgment motions. Plaintiff submits the affidavit of Karen Sheffler, MS, CCC-SLP, BCS-S, who offers her expert opinion regarding the departures of the defendants with regard to the diet texture upgrade from a mechanical soft

to a regular diet texture, without any one-one-one supervision at mealtimes, despite having ordered aspiration precautions for decedent. Specifically, Ms. Sheffler opines that Zoberman departed from good and accepted speech language pathology practice by not obtaining an instrument evaluation of the actual swallowing of Mr. Schneller, as well as her failure to account for decedent's past medical history including Schizophrenia and antipsychotic medications. She further opines that defendants departed from good and accepted practice by failing to minimize and/or prevent the increased risk of asphyxiation death from choking on a regular texture diet and in having no order in the records for the nursing staff to monitor decedent during mealtimes.

Plaintiff also submits the expert affidavit of Dr. Adam Budzikowski, Board Certified in Internal Medicine, Internal Medicine-Cardiology and Internal Medicine-Clinic Cardiac Electrophysiology, in opposition to the summary judgment motions. Dr. Budzikowski opines that Pine Valley staff failed to follow the 2010 American Heart Association Protocol for responding to a Foreign Body Airway Obstruction and failing to immediately provide chest compressions and the Code Blue response was delayed and incorrect. He further opines that the medical doctors improperly deferred to non-physician medical provider decisions for treatment of a patient at a high risk for choking and asphyxiation death, all of which were substantial factors and a proximate cause of decedent's choking death. Plaintiff argues that Defendants failed to meet their burden upon summary judgment based upon their experts failure to address the Pine Valley CPR Protocol regarding when the code is called and when 911 is to be called as well as its expert's failure to address the schizophrenia diagnosis and antipsychotic medications and increased risk of choking. Lastly, Plaintiff argues that summary judgment must be denied because there are conflicting expert opinions.

#### **Legal Discussion**

Turning now to Defendants' motions for summary judgment, the proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant

a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

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. Wiands v. Albany Medical Center, 29 A.D.3d 982, 983, 816 N.Y.S.2d 162 (2d Dept. 2006). In a summary judgment motion on a medical malpractice action, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured thereby. Belak-Redl v. Bollinger, 74 A.D.3d 1110, 1111, 903 N.Y.S.2d 508 (2d Dept. 2010). The defendant doctor must establish his or her entitlement to judgment as a matter of law by proffering competent evidence, such as affidavits of medical experts, hospital or medical records, examinations before trial, etc.. Georges v. Swift, 194 A.D.2d 517, 518, 598 N.Y.S.2d 545 (2d Dept. 1993). Once the defendant doctor has made such a prima facie showing, the burden then shifts to the plaintiff patient to lay bare his or her proof and demonstrate the existence of a material triable issue of fact regarding his or her claims against a defendant doctor. Id.

In the instant matter, Defendants Pine Valley, Dr. Mickey Sharma and Dr. Devendra Sharma have met their *prima facie* burden upon summary judgment through evidence in admissible form and in light of their expert affidavits. In opposition thereto, however, Plaintiff has established a triable issue of fact with respect to the medical malpractice claims. Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions, as such credibility issues can only be resolved by a jury. Feinberg v. Feit, 23 A.D.3d 517, 519, 806 N.Y.S.2d 661 (2d Dept. 2005); Roca v. Perel, 51 A.D.3d 757, 859 N.Y.S.2s 203 (2d Dept. 2008); Bengston v. Wang, 41 A.D.3d 625, 839 N.Y.S.2d 159 (2d Dept. 2007); Barbuto v. Winthrop University Hosp., 305 A.D.2d 623, 760 N.Y.S.2d 199 (2d dept. 2003). Likewise, while Defendant Zoberman has established her entitlement to summary judgment in light of her expert affidavit, Plaintiff has established triable issues of fact sufficient to deny summary judgment by virtue of her expert affidavit. Due to the conflicting affidavits in this matter, Defendants' motions for summary judgment with respect to the medical malpractice claims, wrongful death claims and negligence claims must be denied.

Accordingly, it is hereby

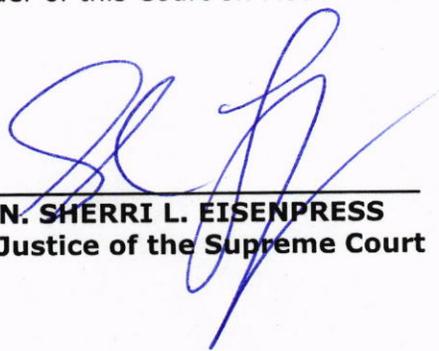
**ORDERED** that the Notice of Motion (#4) filed by Defendants Pine Valley Center and Hadassah Zoberman is DENIED; and it is further

**ORDERED** that the Notice of Motion (#5) filed by Defendants Mickey Sharma, M.D. and Devendra Sharma, M.D. is DENIED; and it is further

**ORDERED** that the parties are to appear in the Trial Assignment Part for a conference on **WEDNESDAY, JANUARY 23, 2019, at 9:30 a.m.**

The foregoing constitutes the Decision and Order of this Court on Motion #'s 4 and 5.

Dated: New City, New York  
December 28, 2018

  
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**HON. SHERRI L. EISENPRESS**  
Acting Justice of the Supreme Court

To: All parties via e-filing