Matter of Pellot v Lutheran Med. Ctr.
2019 NY Slip Op 30292(U)
February 1, 2019
Supreme Court, Kings County
Docket Number: 510246/15
Judge: Bernard J. Graham
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At an IAS Term, Part 36 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1st day of February, 2019.

PRESENT:

HON. BERNARD J. GRAHAM, J.S.C.,
Justice.

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MICHAEL PELLOT, as Administrator of the Estate of MIGUEL E. PELLOT, Deceased,

Plaintiff,

- against -

Index No. 510246/15

LUTHERAN MEDICAL CENTER, THE PALM GARDENS CENTER FOR NURSING AND REHABILITATION, LLC, PALM GARDENS CARE CENTER LLC, AND THE NEW YORK COMMUNITY HOSPITAL OF BROOKLYN, INC.,

Defendants.

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The following papers numbered 1 to 12 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4-6
Opposing Affidavits (Affirmations)	7-8, 9-10
Reply Affidavits (Affirmations)	11, 12
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant Palm Gardens Center for Nursing and Rehabilitation s/h/a The Palm Gardens Center for Nursing and Rehabilitation, LLC, Palm Gardens Care Center, LLC, (Palm Gardens) moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint as against it. Defendant New York Community Hospital of Brooklyn, Inc, (Community Hospital), likewise moves for an order,

pursuant to CPLR 3212, granting it summary judgment dismissing the complaint as against it.

Palm Gardens' motion is granted only to the extent that plaintiff's fifth cause of action for wrongful death is dismissed and the request for punitive damages as part of the third cause of action premised on Public Health Law § 2801-d is dismissed. Community Hospital's motion is granted only to the extent that the fifth cause of action for wrongful is dismissed as against it. The motions are otherwise denied.

Plaintiff Michael Pellot alleges that failures with respect to defendants' care and treatment of Miguel Pellot during Miguel Pellot's admissions at their facilities led to the development of pressure ulcers and/or prevented the healing of pressure ulcers and that such failures led to pain and suffering and were a factor in causing his death on September 2, 2013. Miguel Pellot,[1] who had a history of alcohol abuse and smoking, arrived at the emergency room at defendant Lutheran Medical Center (Lutheran) on May 8, 2013 and was thereafter admitted to treat multiple problems, including bilateral pneumonia, emphysemia, ventilator dependent respiratory failure, septic shock, cirrhosis, congestive heart failure, a brain bleed, and acute renal failure. Treatment at Lutheran included intubating Pellot and placing him on a ventilator, administering antibiotics/drugs to address his septic shock and other conditions, dialysis for the renal failure, and the placement of a percutaneous endoscopic gastrostomy (PEG) tube for feeding. During his stay at Lutheran, Pellot also developed and was treated for various pressure ulcers. While some of Pellot's conditions stabilized while he was at Lutheran, at the time of his discharge from Lutheran to Palm Gardens on July 22, 2013, Pellot still suffered from his diagnosed conditions, including

[1] All subsequent references to Pellot without a first name relate to the decedent, Miguel Pellot, rather than plaintiff, Michael Pellot.

septic shock, his prognosis was "very grim," he remained dependent on a ventilator to breath, he was still fed through the PEG tube, he was still receiving multiple drugs to address his various conditions, and he had several Stage II and Stage III pressure ulcers.[2]

After Pellot was admitted to Palm Gardens on July 22, 2013, Palm Gardens' staff performed various assessments, including one involving an examination relating to Pellot's skin in which his various skin conditions were documented. Based on this assessment, a skin care plan was created by Palm Gardens that required application of a hyrdrogel, protective dressings, the provision of an air mattress, elevation of Pellot's feet, the use of a Haier (or Hoyer) lift to transfer him, and turning and positioning him every two hours. Palm Gardens' assessments also included a bowel and bladder assessment and a hydration assessment. On July 24, 2013, Pellot exhibited labored breathing, low blood pressure, increased heart rate, and his urine was amber colored. In order to address these issues, Palm Gardens transferred Pellot to Community Hospital that day.

At Community Hospital, Pellot was diagnosed with, among other diagnoses, sepsis, severe malnutrition, exacerbation of his chronic obstructive pulmonary disease (COPD), and uncontrolled diabetes. Community Hospital treated these conditions as well as others that had been diagnosed at Lutheran. In a skin assessment performed following Pellot's admission to Community Hospital, a Community Hospital wound specialist staff noted the presence of various Stage IV, Stage III, and Stage II pressure ulcers. The skin care plan at Community Hospital included topical treatments and the turning and positioning of Pellot.

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[2] At her deposition, Svetlana Polyakova, RN, a critical care nurse at Lutheran and who was certified in wound ostomy, testified regarding how pressure ulcers are staged, and, as is relevant to the ulcers found on Pellot, the staging ranges from Stage I, which is less serious, to Stage IV, which is the most serious (Two other staging classifications discussed by Nurse Polyakova, do not appear to be relevant to Pellot's treatment). Staging is similarly described in the affirmation of Vincent Marchello, M.D., submitted in support of Palm Garden's motion.

Community Hospital discharged Pellot back to Palm Gardens on August 29, 2013. While some of Pellot's conditions resolved or stabilized during his admission at Community Hospital, at the time of his discharge, Pellot remained on a respirator and feeding was performed through the PEG tube.

Upon his readmission to Palm Gardens, Palm Gardens' staff noted Pellot had several Stage IV pressure ulcers and two Stage III pressure ulcers. Palm Gardens' treatment plan for Pellot's skin issues included topical treatments on the ulcers, covering them with dry dressings, the use of an air mattress, the use of a pillow to elevate his heels, and turning and positioning. At 11:15 p.m. on August 29, 2013, a nurse noted that Pellot's abdomen was round and distended. On August 30, 2013, Pellot's abdomen remained distended and feces was observed at the site of the PEG tube, and Pellot was thereafter transferred back to Community Hospital for evaluation and treatment.

Following his readmission to Community Hospital on August 30, 2013, Community Hospital's wound care nurse noted Pellot had many Stage II, Stage III and Stage IV pressure ulcers. Based on his skin condition, Community Hospital placed Pellot on a skin breakdown prevention protocol similar to the skin care plan that had been instituted at Palm Gardens. Although Community Hospital provided treatment for Pellot's other medical conditions, his condition did not improve, and he died on September 2, 2013. The report of the autopsy performed by the Office of the Medical Examiner of the City of New York states that the cause of death was "MULTIPLE SEPTIC COMPLICATIONS OF PULMONARY EMPHYSEMA AND CHRONIC ALCOHOLISM WITH HEPATIC CIRRHOSIS OF UNKNOWN ETIOLOGY" and that the contributing cause of death was "DIABETES MELLITUS, HYPERTENSIVE AND ATHEROSCLEROTIC CARDIOVASCULAR DISEASE."

Plaintiff commenced this action in August 2015, and, in the verified complaint, alleges causes of action for negligence, medical malpractice, and wrongful death against all defendants, and causes of action based on negligence per se and Public Health Law § 2801-d against Palm Gardens only. Plaintiff also seeks punitive damages from Palm Gardens under the Public Health Law § 2801-d cause of action. Issue has been joined, a note of issue filed, and Palm Gardens and Community Hospital's motions are now before the court.

"In order to establish the liability of a professional health care provider for medical malpractice, a plaintiff must prove that the provider 'departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries'" (*Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 1088 [2d Dept 2014], quoting *DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2d Dept 2012] [internal quotation marks omitted]). A defendant moving for summary judgment dismissing a medical malpractice action must make a prima facie showing that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the patient's injuries (*see Williams v Bayley Seton Hosp.*, 112 AD3d 917, 918 [2d Dept 2013]; *Makinen v Torelli*, 106 AD3d 782, 783-784 [2d Dept 2013]). "Once the health care provider has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden" (*Schmitt*, 121 AD3d at 1088; *see Stukas v Streiter*, 83 AD3d 18, 30 [2d Dept 2011]).

Public Health Law § 2801-d confers a private statutory right of action for the benefit of nursing home residents based on the violation of specified rights. The basis for liability under the Public Health Law § 2801-d, "is neither deviation from accepted standards of medical practice nor breach of a duty of care. Rather, it contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule"

(*Zeides v Hebrew Home for Aged at Riverdale*, 300 AD2d 178, 179 [1st Dept 2002], *appeal withdrawn* 1 NY3d 623 [2004]; *see Henry v Sunrise Manor Ctr. for Nursing & Rehab.*, 147 AD3d 739, 741 [2d Dept 2017]; *Moore v St. James Health Care Ctr., LLC*, 141 AD3d 701, 703 [2d Dept 2016]). Under section 2801-d, a patient may obtain compensatory damages upon a finding that he or she has been injured as the result of a deprivation of a specified right unless there is a finding that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient (Public Health Law § 2801-d [2]). Punitive damages may be assessed "where the deprivation of any such right or benefit is found to have been willful or in reckless disregard of the lawful rights of the patient" (Public Health Law § 2801-d [2]; *Butler v Shore Front Jewish Geriatric Ctr., Inc.*, 33 Misc 3d 686, 695-698 [Sup Ct, Kings County 2011]).

With respect to punitive damages, some trial level courts have suggested that section 2801-d (2) provides for recovery of punitive damages under a standard that is less stringent than applicable to such damages in the context of a malpractice claim (*see Peters v Nesconset Ctr. for Nursing & Rehabilitation*, 47 Misc 3d 1211 [A], 2015 NY Slip Op 50555, *3 [U] [Sup Ct, Queens County 2015]; *Osborne v Rivington House-Nicholas A. Rango Health Care Facility*, 19 Misc 3d 1132 [A], 2008 NY Slip Op 50975, *6 [Sup Ct, New York County 2008]). Nevertheless, the language of section 2801-d (2) still sets a high bar for the recovery of punitive damages (*see Butler*, 33 Misc 3d at 695-698; *see also Holder v Menorah Home & Hosp. for the Aged & Infirm*, 36 Misc 3d 1210 [A], 2011 NY Slip Op 52515, *8 [U] [Sup Ct, Kings Count, 2011]). This view is reinforced by the Court of Appeals' discussion of punitive damages in its recent decision in *Chauca v Abraham* (30 NY3d 325 [2017]), in which it adopted a standard for the recovery of punitive damages under the New York City Human Rights Law (Administrative Code of City of NY §§ 8-107 [1] [a], 8-502) that is

similar to the statutory language contained in section 2801-d (2) (*see Chauca*, 30 NY3d at 334). The Court of Appeals made clear in *Chauca* that a mere statutory violation would not suffice given that punitive damages are generally intended to address "'gross misbehavior'" (*Chauca*, 30 NY3d at 331, quoting *Thoreson v Penthouse Intl.*, 80 NY2d 490, 497 [1992]), and "'may only be awarded for exceptional misconduct which transgresses mere negligence'" (*Chauca*, 30 NY3d at 331, quoting *Sharapata v Town of Islip*, 56 NY2d 332, 335 [1982]).

Turning first to the motion by Palm Gardens, it has demonstrated its prima facie entitlement to dismissal of the complaint through the affirmation of Vincent Marchello, M.D., who is board certified in internal medicine and sub-certified in geriatric medicine. Dr. Marchello asserts that Palm Gardens properly assessed and rendered care for Pellot's skin and other conditions during Pellot's admissions to Palm Gardens from July 22 to July 24, 2013 and August 29, 2013 to August 30, 2013, and that the care rendered complied with the state and federal regulations relating to nursing home care that plaintiff alleges were violated. To the extent that the absence of nursing initials in Palm Gardens records relating to the turning and positioning of Pellot from 9:00 a.m. to 3:00 p.m. on July 23, 2013 would allow an inference that Pellot was not turned or positioned during that time period, Dr. Marchello asserts that a failure to turn or position Pellot during that brief period would not have affected Pellot's skin conditions. Dr. Marchello further notes that Pellot arrived at Palm Gardens with pressure ulcers, that Community Hospital's records show that there was no change in Pellot's pressure ulcers and skin conditions after Pellot was transferred there after each of his brief admissions. Given Pellot's co-morbidities, including diabetes, pneumonia and chronic alcoholism, the fact that the ulcers did not change while at Palm Gardens shows, according to Dr. Marchello, that Pellot received appropriate wound care while he was at Palm Gardens. Finally, given the findings of the autopsy report, Dr. Marchello asserts that multiple organ

failure, not the pressure ulcers, was the cause of Pellot's death. Through this affirmation, as well as the appended medical records and deposition testimony, Palm Gardens' has demonstrated, prima facie, its entitlement to summary judgment dismissing the complaint by showing that its care complied with accepted standards of medical practice, did not violate any rules or regulations governing nursing home care, was not willful or reckless, and was not a proximate cause of Pellot's injuries or death (*see Senatore v Epstein*, 128 AD3d 794, 796 [2d Dept 2015]; *Khosrova v Westerman*, 109 AD3d 965, 966 [2d Dept 2013]; *Mitchell v Lograno*, 108 AD3d 689, 692-693 [2d Dept 2013]; *see also Novick v South Nassau Communities Hosp.*, 136 AD3d 999, 1002 [2d Dept 2016]; *Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]).

In opposition, plaintiff has submitted an affirmation from Perry Starer, M.D., who is board certified in internal medicine with a sub-specialty in geriatric medicine. One of Dr. Starer's primary assertions is that, contrary to Dr. Marchello's opinion, the failure of the nurse to initial the turning and positioning records for plaintiff from 9:00 a.m. to 3:00 p.m. on July 23, 2013, allows an inference that no such turning and positioning occurred. Dr. Starer further asserts that, contrary to Dr. Marchello's averments, the failure to turn and position Pellot for that amount of time was sufficient to cause skin degradation and that such degradation occurred in view of records at Community Hospital showing that one of the ulcers Palm Gardens had identified as a Stage II ulcer was a Stage IV ulcer upon admission to Community Hospital and that Palm Gardens admission assessment does not mention four Stage II ulcers that are noted in Community Hospital's records.

Based on Dr. Starer's contentions, plaintiff has demonstrated factual issues with respect to whether Palm Gardens departed from accepted medical practice in its care of Pellot, and whether its departures were a factor in the development or degradation of Pellot's

pressure ulcers (*Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 903-904 [2d Dept 2017]). Similarly, these assertions also demonstrate factual issues with respect to Palm Gardens' compliance with state and federal regulations governing nursing home record keeping, assessments and skin care (*see* 10 NYCRR 415.12[c]; 42 CFR §§ 483.20 [g], 483.25[b] and 483.70 [i] [1]; *Pichardo v St. Barnabas Nursing Home, Inc.*, 134 AD3d 421, 425 [1st Dept 2015]). As such, these factual issues require denial of Palm Gardens' motion with respect to plaintiff's negligence, negligence per se, medical malpractice and Public Health Law § 2801-d causes of action.[3]

While Dr. Starer's affirmation demonstrates the existence of factual issues with respect to Palm Gardens' negligence/malpractice and its violations of nursing home regulations, nothing in Dr. Starer's affirmation or the other evidence in the record suggests that Palm Gardens' alleged violation of these regulations was "willful or in reckless disregard of the lawful rights of the patient" (Public Health Law § 2801-d [2]; *Holder*, 2011 NY Slip Op 52515, *8; *Butler*, 33 Misc 3d at 695-698; *see also Vissichelli v Glen-Haven Residential Health Care Facility, Inc.*, 136 AD3d 1021, 1023 [2d Dept 2016]). In the absence of evidence demonstrating a factual issue with respect to willful or reckless conduct, plaintiff has failed to demonstrate the existence of a factual issue warranting denial of the portion of Palm Gardens' motion seeking dismissal of the complaint to the extent that plaintiff seeks punitive damages with respect to the Public Health Law § 2801-d cause of action.

With respect to the wrongful death cause of action, Dr. Starer's affirmation provides little to connect Palm Gardens' alleged failures with respect to wound care to Pellot's death. In the "Discussion and Opinion" section of his affirmation, Dr. Starer simply states that Palm

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[3] The court notes that Palm Gardens has not argued that it is entitled to dismissal of the negligence or negligence per se causes of action on any ground other than its care complied with accepted standards of medical practice and was not a cause of Pellot's injury or death.

Gardens' "failures contributed to the worsening of Mr. Pellot's condition, development of sepsis and septic complications that resulted in Mr. Pellot's untimely demise at the age of 65" (Dr. Starer Affirmation, at ¶ 23).[4] While Dr. Starer also correctly notes in the medical summary section of his affirmation that the autopsy report identifies the presence of multiple pressure ulcers with recurrent episodes of sepsis as part of the final diagnosis (Dr. Starer Affirmation at ¶ 10), this reference to the pressure ulcers is part of a listing of 10 conditions noted under a primary diagnosis of pulmonary emphysema and secondary diagnosis of "PROLONGED HOSPITAL ADMISSIONS (MAY 2013-AUGUST 2013) AT MULTIPLE HOSPITALS FOR PNEUMONIA AND CLINICAL SEPSIS (SEE ALSO DIAGNOSES II). However, the cause of death notation and contributing cause of death notation contained in the autopsy report make no specific reference to pressure ulcers, and Dr. Starer has failed to explain, in other than conclusory terms, how the listing of the pressure ulcers in the diagnosis section of the autopsy report renders them a cause of Pellot's death. This failure is particularly glaring in view of the treatment records from Lutheran and Community Hospital that show that Pellot was diagnosed with multiple conditions, including pneumonia, septic shock, cirrhosis and multi-organ failure, while at Lutheran in May 2013, and that these conditions existed before he developed the pressure ulcers, which remained resistant to treatment through his admissions at the facilities of each of the defendants until the time of his death at Community Hospital in early September 2013. As such, Dr. Starer's affirmation fails to demonstrate the existence of factual issues with respect whether Palm Gardens' alleged failures were a proximate cause of Pellot's death (*see Vissichelli*, 136 AD3d at 1023-

[4] Dr. Starer makes similar conclusory statements in paragraphs 24 and 28.

1024; *Bacani v Rosenberg*, 74 AD3d 500, 502-503 [1st Dept 2010], *lv denied* 15 NY3d 708 [2010]; *Collymore v Montefiore Med. Ctr.*, 39 AD3d 237, 237-238 [1st Dept 2007]).[5]

While Community Hospital likewise has demonstrated its prima facie entitlement to dismissal of the wrongful death cause of action through its reliance on the aforesaid autopsy report, it has otherwise failed to demonstrate its initial summary judgment burden with respect to plaintiff's remaining causes of action.[6] In moving, Community Hospital primarily relies on an affidavit from Mary R. Brennan, R.N., who is board-certified in ostomy and wound care. Although Nurse Brennan provides a lengthy summary of Pellot's condition and the care provided to Pellot at Lutheran, Palm Gardens and Community Hospital, she states her ultimate opinions in a conclusory fashion and her affirmation thus fails to demonstrate Community Hospital's prima facie entitlement to summary judgment (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Macias v Ferzli*, 131 AD3d 673, 676 [2d Dept 2015]; *Lormel v Macura*, 113 AD3d 734, 735-736 [2d Dept 2014]; *Callahan v Guneratne*, 78 AD3d 753, 754 [2d Dept 2010]). Accordingly, except for the portion of the motion addressed to the wrongful death cause of action, Community Hospital's motion must

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[5] In any event, if the reference to the pressure ulcers in the diagnoses section of the autopsy report is enough to suggest that they caused or contributed to Pellot's death, and if Dr. Starer's assertion that failures at Palm Gardens' contributed to the development of new pressure ulcers or the worsening of existing ulcers is accepted, Dr. Starer has failed to address the fact that Lutheran's records show that the sepsis and necrotic condition of the ulcers started at Lutheran and thus predated Pellot's admission to Palm Gardens and failed to suggest how Pellot's limited time at Palm Gardens, even if a factor in worsening the pressure ulcers, could have had any real impact on the sepsis that caused his death.

[6] Although plaintiff contends that Community Hospital has not submitted any admissible evidence in support of its motion, the court rejects this contention as Community Hospital has properly incorporated by reference the pleadings and exhibits, which include the autopsy report, that are attached to Palm Gardens' motion that is already properly before the court (*see Daramboukas v Samlidis*, 84 AD3d 719, 721 [2d Dept 2011]; *Carlson v Town of Mina*, 31 AD3d 1176, 1177 [4th Dept 2006]; *see also Carey v Five Bros., Inc.*, 106 AD3d 938, 940 [2d Dept 2013]).

be denied regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad*, 64 NY2d at 853).

Moreover, Dr. Starer, in his affirmation addressed to the care rendered to plaintiff at Community Hospital, has, in any event, identified gaps in Community Hospital's records relating to its turning and positioning of Pellot and identified a failure to document certain ulcers and the degradation of ulcers as shown by comparison of Community Hospital's records with those of Palm Gardens upon his readmission to Palm Gardens. Based on Dr. Starer's contentions, plaintiff has demonstrated factual issues with respect to whether Community Hospital departed from accepted medical practice in its care of Pellot, and whether its departures were a factor in the development or degradation of Pellot's pressure ulcers (*Cummings*, 147 AD3d at 903-904; *Pichardo*, 134 AD3d at 424-425).

As discussed above with respect to Palm Gardens' motion, Dr. Starer's affirmation fails to demonstrate a factual issue as to whether any of the alleged departures with respect to the pressure ulcers were a proximate cause of Pellot's death. Community Hosptial is thus likewise entitled to dismissal of plaintiff's wrongful death cause of action.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.
HON. BERNARD J. GRAHAM

KINGS COUNTY CLERK
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