

Grignoli v Wyckoff Heights Med. Ctr.

2021 NY Slip Op 31082(U)

April 5, 2021

Supreme Court, Kings County

Docket Number: 11199/2014

Judge: Genine D. Edwards

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At Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 5th day of April 2021.

PRESENT:

Hon. Genine D. Edwards
Justice, Supreme Court

-----X
LILLIAN GRIGNOLI as Administrator of Estate of
GONDALFA ABBATIELLO,

Plaintiff,

Index. No. 11199/2014

-against-

DECISION/ORDER

WYCKOFF HEIGHTS MEDICAL CENTER, DRY
HARBOR, DRY HARBOR NURSING and DRY
HARBOR HRF INC.,

Defendants.

-----X
WYCKOFF HEIGHTS MEDICAL CENTER,

Third-Party Plaintiff,

-against-

CHARLES HINZ, D.O. and DEEPAK SETIA, M.D.,

Third-Party Defendants.
-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

| <u>Papers</u> | <u>Numbered</u> |
|--|-----------------|
| Notice of Motion and Affirmation in Support..... | 1-2 |
| Affirmations in Opposition..... | 3-4 |
| Affirmations in Reply..... | 5-6 |

In this medical malpractice action, defendants Dry Harbor Nursing Home and Dry Harbor HRF, Inc., (collectively “Dry Harbor defendants”) move, in motion sequence #8,

for an order: (1) pursuant to CPLR 3212, granting summary judgment as to the Dry Harbor defendants, and dismissing plaintiff's complaint in its entirety as against them, with prejudice, on the grounds that no triable issues of fact exist and that the Dry Harbor defendants are entitled to judgment as a matter of law; and (2) permitting the Dry Harbor defendants to enter judgment with the clerk of the court against the plaintiff and directing the clerk of the court to sever the Dry Harbor defendants from the caption. Third-party defendants Charles Hinz, D.O. ("Dr. Hinz"), and Deepak Setia, M.D. ("Dr. Setia"), move, in motion sequence #9, for an order, pursuant to CPLR 3212, granting summary judgment in their favor, dismissing the defendant/third-party plaintiff's complaint with prejudice. Plaintiff opposes motion sequence #8. Defendant Wyckoff Heights Medical Center ("Wyckoff") opposes both motions.

Plaintiff commenced this action by filing a summons and verified complaint on August 1, 2014. Wyckoff and the Dry Harbor defendants joined issue by interposing their answers on September 9, 2014. Wyckoff initiated the third-party action against Drs. Hinz and Setia on August 18, 2015. Drs. Hinz and Setia joined issue by filing their answers on October 14, 2015.

When moving for summary judgment in a medical malpractice action, the movant must establish, prima facie, "either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries" *Cox v. Herzog*, 139 N.Y.S.3d 881, 2021 N.Y. Slip Op. 01389 (2d Dept. 2021); see *Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011). In order to sustain its burden in seeking summary judgment, the movant must refute the allegations of negligence contained in the pleadings, including the

complaint and the bill of particulars. *See Stiso v. Berlin*, 176 A.D.3d 888, 110 N.Y.S.3d 139 (2d Dept. 2019); *Pullman v. Silverman*, 28 N.Y.3d 1060, 43 N.Y.S.3d 793 (2016).

In support of their motion, the Dry Harbor defendants submit, *inter alia*, the expert affirmation of Barbara Tommasulo, M.D. (“Dr. Tommasulo”), a physician board certified in internal and geriatric medicine. The affirmation failed to discuss important facts in the record. Specifically, Dr. Tommasulo opined, without addressing the evidence to the contrary, that the Dry Harbor defendants provided adequate and appropriate care to maintain the decedent’s nutrition and hydration throughout her stay at Dry Harbor. Consequently, Dr. Tommasulo’s affirmation failed to eliminate all triable issues of fact as to whether the failure to maintain the decedent’s nutrition and hydration led to her injuries. *See Macias v. Ferzli*, 131 A.D.3d 673, 15 N.Y.S.3d 466 (2d Dept. 2015); *Faicco v. Golub*, 91 A.D.3d 817, 938 N.Y.S.2d 105 (2d Dept. 2012). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” *Stukas*, 3 A.D.3d 18; *see Valerio v. Liberty Behavioral Management Corp.*, 188 A.D.3d 948, 135 N.Y.S.3d 127 (2d Dept. 2020).

In support of their motion, Drs. Hinz and Setia submit the expert affirmation of Michael Hundert, M.D. (“Dr. Hundert”), a physician board certified in internal medicine. Dr. Hundert opined that both Drs. Hinz and Setia met the standard of care required of an attending physician. Nonetheless, the affirmation is insufficient to shoulder their burden since Dr. Hundert failed to define the standard of care he claimed was not violated. *See Mehtvin v. Ravi*, 180 A.D.3d 661, 118 N.Y.S.3d 646 (2d Dept. 2020); *Bongiovanni v. Cavagnuolo*, 138 A.D.3d 12, 24 N.Y.S.3d 689 (2d Dept. 2016). “Failure to make such

prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” *Stukas*, 3 A.D.3d 18; *see Valerio*, 188 A.D.3d 948.

Accordingly, both motions are denied.

This constitutes the Decision of this Court.

ENTER,

Genine D. Edwards

Hon. Genine D. Edwards, J.S.C