

**Kadi v Rosenson**

2021 NY Slip Op 32822(U)

December 21, 2021

Supreme Court, Kings County

Docket Number: Index No. 502801/2015

Judge: Ellen M. Spodek

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At an IAS Term, Part 63 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 21 day of December 2021

P R E S E N T:

HON. ELLEN M. SPODEK, Justice

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JOSEPH KADI AS EXECUTOR OF THE ESTATE OF SAMAH KADI,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 502801/2015

*ms# 7*

LEO ROSENSON, SCHAROME MANOR, SIGNATURE SENIOR LIVING, SCHAROME CARES, INC., BARRY J. BULS, M.D., MAN SHING CHAN, M.D., AND HOMEFIRST, LHCSA, INC.,

Defendants

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Defendant Barry J. Buls, M.D. moves pursuant to CPLR 3212 for summary judgment on the grounds that no material issues of fact exist and dismissing all claims prior to July 8, 2011 on statute of limitations grounds. Plaintiff opposes the motion.

The decedent Samah Kadi became a resident at Scharome Manor on or about October 30, 2006. The Facility was later known as Signature Senior Living and Scharome Cares. At the time, the Mr. Kadi was 86 years old, and suffered from dementia. He required assistance with daily activities, medications and bathing. The decedent remained a resident of the facility from October 30, 2006 through August 10, 2011. Scharome Manor was an adult residential care program that provided 24-hour residential care settings for dependent adults. On or about the time of admission

Dr. Buls became decedent's primary care physician. Dr. Buls had regular periodic contact and interaction with Mr. Kadi throughout the years, approximately every one to two months.

On June 10, 2011, Mr. Kadi was 91 years old and living in an assisted living facility with a primary diagnosis of dementia. He was often confused and required complete assistance with dressing himself bathing and grooming and required supervision and direction when completing activities of daily living. Mr. Kadi was noted to be unable to transfer himself. However, he could bear weight and pivot. He was receiving care 24 hours a day 7 days a week from health care aides, and his skin was intact.

On July 7, 2011 Mr. Kadi was seen by Dr. Chan. Dr. Chan noted that the patient had developed bilateral hip skin rashes. Dr. Chan noted that there was acute distress with no fever. His medications included Nexium, Claritin, Folic acid, Vitamin B12 injections monthly and Ambien. His blood pressure was 130 / 70 and his pulse was 68. Upon examination he was noted to be alert, confused, nonverbal and noncommunicative. His neck was supple, chest was clear, heart revealed S3 and his skin was noted to have erythema and redness in the bilateral hip areas. The assessment was probable stage one decubiti dermatitis and senile dementia. The plan was to turn the patient from side to side and get the patient out of bed daily. Lortisone cream was prescribed to be applied twice daily. On July 7, 2011, Scharome Manor documented Dr. Chan's findings that the patient had wounds on the right and left hip and that wound care and/or nursing care was required.

Home First (the outside nursing care entity) advised that they required a "face to face" exam and documentation by a physician to implement the care plan. On July 8, 2011 this "face to face" exam was done by Dr. Buls and the form was provided to Scharome Manor, and forwarded to Home First LTC agency. As of July 12, 2011 no nurse had been sent to begin Mr. Kadi's

treatment. The administrator placed a call to Home First to inquire as to the status of a nurse. The representative informed the administration that they spoke with the doctor as there was a discrepancy in the "face to face" and the nurse should be coming that day or the next to start the wound care. Mr. Kadi's aide noted that there were two more wounds on his ankle.

On July 14, 2011 Mr. Kadi was seen by Dr. Kimlyn Long. Dr. Long's exam found wounds on both heels and to a lesser extent both hips. She prescribed Adaptic 3 x 5 dressing which was to be applied to the affected area, SANTYL ointment to be applied to both hips twice daily as well as Silvadene to be applied to the open wounds on both feet as well as the right ankle. Dr. Long did not admit Mr. Kadi and sent him back to Scharome Manor. Dr. Long however, continued the management of Mr. Kadi's care.

On July 15, 2011 Mr. Kadi began to receive skilled nursing and wound care as directed by Dr Long. On July 19, 2011 and July 26, 2011, he was examined and treated by Dr Long. On each visit Dr. Long performed a sharp excisional debridement and after each visit Mr. Kadi was returned to Scharome Manor. On August 1, 2011, Dr. Buls prepared a residential evaluation form. He agreed that Mr. Kadi did not need admission to a nursing home, as at the time he was receiving skilled nursing and wound care.

On August 2, 2011 Mr. Kadi returned to Dr. Long for continued treatment and recommendations for the decubitus ulcers including sharp excisional debridement. The doctor requested follow up in one week. On August 9, 2011 Mr. Kadi returned to Dr. Long for continued treatment. Dr. Long once again performed sharp excisional debridement but at that point admission was recommended for surgical debridement. On August 10, 2011 Mr. Kadi was admitted to Staten Island University Hospital.

On August 11, 2011 Mr. Kadi underwent debridement of wounds to his bilateral hips and heels. The patient developed A-fib and peri ventricular tachycardia and underwent cardioversion. He was admitted to the Medical ICU was subsequently found to be septic. He developed respiratory failure and required intubation and mechanical ventilation.

On Aug 26, 2011 Mr. Kadi was transferred to Lenox Hill Hospital due to an evacuation for Hurricane Sandy. At the time he was minimally responsive with multiple stage four decubiti ulcers in the bilateral hips and heels with severe sepsis secondary to the ulcers.

On August 30, 2011 he was transferred back to Staten Island University Hospital where he improved. However, they were unable to extubate the patient. A tracheostomy was performed on September 2nd and a PEG was placed on September 13, 2011.

On September 15, he was transferred to Specialty Hospital at Monmouth where it was noted he had eight decubiti ulcer wounds. He was also noted to have severe peripheral vascular disease. He remained in the New Jersey hospital until October 24, 2011 when he was transferred to the New Vanderbilt Sub Acute Rehab. He was weaned off the ventilator but his trach collar remained in place. Mr. Kadi remained at the New Vanderbilt Rehab and Care Center from October 24, 2011 through December 6, 2011.

Mr. Kadi was transferred to Palm Gardens Nursing Home on December 13, 2011 where he was found to have 14 decubiti ulcers. He remained there until December 31, 2011 when he was transferred to New York Community Hospital. He had multiple admissions and eventually passed away on April 14, 2012.

Defendant Dr. Buls submits the affirmation of Dr. Vincent Garbitelli, a board certified doctor of Internal Medicine licensed to practice in the state of New York. In his opinion, Dr. Garbitelli states that all of the care and treatment provided by Dr. Buls was within the standard of good and acceptable medical practice, and that his treatment was not the proximate cause of the Mr. Kadi's injuries. Dr. Garbitelli states that, "Mr. Kadi was at the end of his life. He had significant atherosclerotic disease; failing liver function; chronic anemia from his bone marrow's poor function; and abnormal red blood cells. These are all age related conditions and were the cause of the ulcers and no precautions or earlier intervention would have altered the outcome" Def., Motion, Exh. B, para 33. Additionally, Dr. Buls was Mr. Kadi's primary care physician and was not affiliated with Scharome Manor. Dr. Garbitelli opines that Dr. Buls's periodic evaluations of Mr. Kadi were consistent with the standard of care and included all indicated tests and treatment including blood work.

Plaintiff submits the affidavit of a board certified doctor in internal medicine and geriatrics licensed to practice in the state of New York. Plaintiff's expert states that Dr. Buls had a responsibility to evaluate Mr. Kadi's risk for developing pressure ulcers. The expert points out that there are several commonly used tests for determining risk of developing ulcers, which Dr. Buls did not perform. Plaintiff's expert states that, "As [Mr. Kadi's] primary care physician, Dr. Buls had the responsibility to evaluate him for the risk of developing pressure ulcers. It was a clear departure from the standard of care by Dr. Buls, as Mr. Kadi's primary care physician, in failing to make a determination that he was at risk of developing pressure ulcers, either by formal assessment or his own assessment." Exp. Aff. Opp. Page 7.

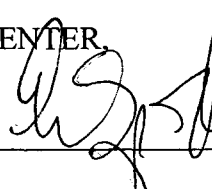
On a motion for summary judgment dismissing a medical malpractice cause of action, a defendant has the prima facie burden of establishing that there was no departure from good and

accepted medical practice, or, if there was a departure, the departure was not the proximate cause of the alleged injuries. *Brinkley v. Nassau Health Care Corp.*, 120 A.D.3d 1287 (2d Dept. 2014); *Stukas v Streiter*, 83 AD3d 18, 24-26 (2d Dept. 2011). 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. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Brinkley v. Nassau Health Care Corp.*, supra; *Fritz v. Burman*, 107 A.D.3d 936, 940 (2d Dept. 2013); *Lingfei Sun v. City of New York*, 99 AD3d 673, 675 (2d Dept. 2012); *Bezerman v. Bailine*, 95 AD3d 1153, 1154 (2d Dept. 2012); *Stukas v. Streiter*, at 24. A plaintiff succeeds in a medical malpractice action by showing that a defendant deviated from accepted standards of medical practice and that this deviation proximately caused plaintiff's injury. *Contreras v Adeyemi*, 102 AD3d 720, 721 (2d Dept. 2013); *Gillespie v New York Hosp. Queens*, 96 A.D.3d 901, 902 (2d Dept. 2012); *Semel v Guzman*, 84 AD3d 1054, 1055-56 (2d Dept. 2011). The plaintiff opposing a defendant physician's motion for summary judgment must only submit evidentiary facts or materials to rebut the defendant's prima facie showing. *Stukas*, at 24.

The Court finds that Dr. Buls has failed to sustain his prima facie burden for summary judgment. After review of the papers it is clear that there are issues of fact regarding the care Mr. Kadi received. Defendant's expert fails to meet his prima facie burden of establishing that there was no departure from good and accepted standards of medical care. Dr. Garbitelli states that Dr. Buls "periodically and appropriately evaluated the patient during his interaction as the patient's primary care physician." Motion, Exh. B, para 26. He does not elaborate on what evaluations Dr. Buls conducted or how they related to Mr. Kadi's risk of developing ulcers. Dr. Garbitelli further states that Dr. Buls, "made the appropriate recommendations when indicated and properly

administered and or recommend testing, including blood work to monitor his patient.” Id. Again, Dr. Garbitelli does not give specifics or establish the appropriateness of Dr. Buls’s recommendations with facts. Regarding the progression and severity of Mr Kadi’s ulcers, Dr. Garbitelli states that “The contention that some intervention would have prevented the decubitus ulcers or curbed their progression is further disproven by the pure fact that they continued to develop and significantly progress while under the care of several different facilities.” Motion, Exh. B, para 35. Such statements are conclusory and therefore insufficient to meet Defendant’s prima facie burden. Therefore, Defendant’s motion must be denied. Given that Defendant did not meet his initial burden it is unnecessary for the court to reach the statute of limitations arguments in this motion.

This constitutes the decision and order of the Court.

ENTER  
  
 JSC  
 2021 DEC 29 11:09:22  
 HON. ELLEN M. SPODEK  
 KINGS COUNTY CLERK