Munno v Clove Lakes Health Care & Rehabilitation Ctr., Inc.
2021 NY Slip Op 33015(U)
December 21, 2021
Supreme Court, Richmond County
Docket Number: Index No. 151237/2018
Judge: Judith N. McMahon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

X

NANCY MUNNO

Plaintiff(s),

- against-

CLOVE LAKES HEALTH CARE AND REHABILITATION CENTER, INC.

Defendant(s).

X

Present:
HON. JUDITH N. McMAHON

DECISION AND ORDER

Index No. 151237/2018
Motion No. 001, 002

Defendant Clove Lakes Health Care and Rehabilitation Center, Inc. ("Clove Lakes") moves this Court for an Order pursuant to CPLR §3212 dismissing Plaintiff Nancy Munno's Complaint in its entirety. Plaintiff Nancy Munno ("Plaintiff") moves this Court for an Order granting her summary judgment on the issue of liability as against Clove Lakes on her cause of action for negligence. The Court hereby denies Clove Lakes' motion for summary judgment dismissal except as to Plaintiff's causes of action for medical malpractice, negligent hiring and supervision and gross negligence. The Court also denies Plaintiff's motion in its entirety.

FACTS

Plaintiff commenced this Action as against Clove Lakes by filing a Summons and Complaint on May 17, 2018. Plaintiff seeks to recover damages for injuries she suffered while she was a patient at Clove Lakes after she fell out of a wheelchair, which she claims was defective. Plaintiff has a history of left hip injuries, which began in 1998 when she had her first total left hip replacement at the age of forty-five. Since such time, Plaintiff's left hip became

dislocated several times and she was required to undergo surgery for repairs. In 2016, Plaintiff underwent surgery at Staten Island University Hospital ("SIUH") to have a spacer placed, where her left hip replacement was removed due to an infection to the replacement prosthesis, and she stayed in Eger Nursing Home for approximately one month. In October 2016, Plaintiff underwent surgery to have the spacer removed and replaced due to infection at SIUH and was admitted to Clove Lakes until January 2017. In March 2017, Plaintiff had the second spacer removed and replaced with a permanent hip replacement at SIUH. According to Plaintiff, she only used a walker to ambulate from April to August 2017 when she resided at home with her husband. Plaintiff went to the SIUH emergency room in August 2017 after she was unable to stand and was experiencing extreme pain. The staff at SIUH told Plaintiff that the hip replacement migrated to the left after the screw which holds the cup portion of the hip replacement was fractured. Plaintiff testified that during her surgery at SIUH to correct the left hip replacement, her left femur was fractured.

On September 11, 2017, Plaintiff was admitted to Clove Lakes and she was assessed as alert and oriented to place, person, time and situation. According to Clove Lakes' records, Plaintiff was noted as needing one-person care with extensive assistance for bed mobility, toileting, hygiene and bathing. It was also noted that Plaintiff needed a wheelchair for locomotion and that she was a high fall risk. According to Plaintiff's At Risk Care Plan that was implemented on September 11, 2017, Plaintiff was a high risk for falls due to her medications and unsteady gait/impaired mobility. The At Risk Care Plan included several interventions, including encouraging Plaintiff to request assistance when needed, having a call bell within easy reach, using assistive devices and keeping her bed in the lowest position with side rails raised.

Plaintiff began physical therapy on September 12, 2017 in order to improve her gait so that she would use a rolling walker with supervision instead of using a wheelchair. Plaintiff testified that she told Clove Lakes staff during her first week at the facility that she felt like she was going to slide out of her wheelchair and the chair was slightly leaning forward. Specifically, Plaintiff testified that she told physical therapist Bensen Larose about her wheelchair. According to the Plaintiff, she complained about the wheelchair twice per day in physical therapy. During physical therapy, Plaintiff was provided a "reacher", which she used at home, to pick things up off the floor. On September 16, 2017, Plaintiff was found on the ground in her room after she slid down and off her wheelchair while using the reacher to close the drapes on her window. Plaintiff stated that she did not press the call bell for assistance prior to closing the drapes. According to Plaintiff's testimony, she fell to the side of the wheelchair and the wheelchair subsequently fell on her. Plaintiff was diagnosed with a displaced left femur fracture and underwent surgery at SIUH on September 28, 2017. After her surgery, Plaintiff was readmitted to Clove Lakes and remained there until her discharge on January 17, 2018 without further incident.

DISCUSSION

Defendant Clove Lakes moves this Court for an Order granting it summary judgment and dismissing Plaintiff's causes of action as against it for medical malpractice, negligence, negligent hiring and supervision and gross negligence. The Court notes that Plaintiff has voluntarily withdrawn her claim for lack of informed consent. Pursuant to CPLR §3212(b), a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in

directing Judgment in favor of any party." CPLR §3212(b). A party seeking summary judgment must show that there are not material issues of fact that are in dispute and that it is entitled to judgment as a matter of law. *See Paulin v Needham*, 28 AD3d 531, 531 [2d Dept 2006]. "Once a defendant makes a prima facie showing, the burden shifts to the plaintiff to raise a triable issue of fact." *Nill v Schneider*, 173 AD3d 753, 755 [2d Dept 2019], *lv to appeal denied*, 35 NY3d 901 [2020].

Plaintiff's Cause of Action for Medical Malpractice

"A defendant seeking summary judgment in a medical malpractice action must make a prima facie showing either that he or she did not depart from the accepted standard of care or that any departure was not a proximate cause of the plaintiff's injuries." *Aliosha v Ostad*, 153 AD3d 591, 592 [2d Dept 2017]. *See Gillespie v New York Hosp. Queens*, 96 AD3d 901, 902 [2d Dept 2012]. "In response, it is the plaintiff's burden to raise a triable issue of fact regarding the element or elements on which the defendant has made its prima facie showing" and the plaintiff "must submit evidentiary facts or materials to rebut the defendant's prima facie showing beyond mere general and conclusory allegations of medical malpractice." *Aliosha v Ostad*, 153 AD3d 591, 592 [2d Dept 2017] (internal citations omitted). *See Korszun v Winthrop Univ. Hosp.*, 172 AD3d 1343, 1345 [2d Dept 2019]. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions since such conflicting expert opinions will raise credibility issues which can only be resolved by a jury." *Lowe v Japal*, 170 AD3d 701, 702 [2d Dept 2019] (internal citations omitted). "However, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact." *Id.* The Court of Appeals has held that "general

allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion." *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 325 [1986].

In support of its motion for summary judgment dismissal of the medical malpractice claim, Clove Lakes has submitted the affidavit of Lawrence N. Diamond, M.D. ("Dr. Diamond"). According to Dr. Diamond, Plaintiff did not have any cognitive defects that required an elevated level of care and Clove Lakes properly implemented an At Risk Care Plan based on the Fall Risk Assessment that was conducted on the Plaintiff. Dr. Diamond notes that each of the assessments conducted by Clove Lakes properly considered Plaintiff's physical and mental capacities while attempting to make sure she maintained her independence. Dr. Diamond opines that the Activities of Daily Living Care Plan was appropriate given Plaintiff's post-surgical physical capacity and cognitive capacity. Dr. Diamond also sufficiently explains how the record lacks any evidence that Plaintiff required close supervision during her admission or while she was in her wheelchair in her bedroom. Dr. Diamond asserts that "Plaintiff, as a cognitively aware resident, was aware that she should have used the call bell to request assistance, but did not use the call bell at the time of the incident."

According to Dr. Diamond, "Clove Lakes did not deviate from the good and accepted standards of medical and nursing care during Plaintiff's admission, nor were they the proximate cause of Plaintiff's injuries due to this unavoidable and unpredictable incident. Dr. Diamond also notes that the record is devoid of evidence that Plaintiff complained about the wheelchair or that Clove Lakes engaged in reckless conduct that would result in gross negligence. Based upon

Dr. Diamond's affidavit, the Court finds that Clove Lakes has demonstrated prima facie entitlement to summary judgment by showing that it did not depart from good and accepted medical practice. The Court further finds that Clove Lakes has sufficiently demonstrated that any alleged departures were not a proximate cause of the Plaintiff's injuries. The burden now shifts to Plaintiff to overcome Clove Lakes' prima facie showing.

The Appellate Division, Second Department has held that a plaintiff must submit an expert medical opinion in opposition to a defendant's summary judgment that is supported by a medical expert opinion, as "a medical diagnosis is outside the experience and knowledge of an ordinary lay person." *Sun v City of New York*, 99 AD3d 673, 676 [2d Dept 2012]. *See also Wray-Davis v New York Methodist Hosp.*, 186 AD3d 537, 538 [2d Dept 2020]; *McGuigan v Centereach Mgt. Group, Inc.*, 94 AD3d 955, 956-57 [2d Dept 2012]. Here, Plaintiff has "failed to submit any affidavit from a medical expert to support the malpractice claim and to refute" Clove Lake's submissions. *Thomas v. Richie*, 8 AD3d 363, 364 [2d Dept 2004]. "The plaintiff thus failed to meet her burden of coming forward with appropriate evidentiary material establishing the existence of a triable issue of fact. *Id.* *See also Wind v. Cacho*, 111 AD2d 808, 808-09 [2d Dept 1985]. Since Plaintiff has failed to sufficiently rebut Clove Lakes' prima facie showing, the Court grants Clove Lakes' motion for summary judgment dismissal of Plaintiff's medical malpractice cause of action.

Plaintiff's Cause of Action for Negligence

The Court now turns to Plaintiff's cause of action for negligence, for which both Clove Lakes and Plaintiff move for summary judgment. Clove Lakes argues that as evidenced by the affidavit of Dr. Diamond, the staff at Clove Lakes properly assessed the Plaintiff and

implemented the appropriate Care Plan. According to Clove Lakes, Plaintiff's claim that she made complaints about the wheelchair is devoid of merit and is unsupported by the record. Clove Lakes maintains that the only evidence Plaintiff submitted is her own self-serving testimony, as there is nothing in the Incident Report or the progress notes that shows Plaintiff made a complaint to the staff about her wheelchair. Clove Lakes notes that Benjamin Larose testified that while he did not recall if Plaintiff made a complaint about the wheelchair, he would have written a work order for plant operations to inspect it if she did make such a complaint. Eleanor Nesbeth, the CNA who was assigned to Plaintiff, also testified that she did not hear Plaintiff complain but would have reported the complaint to maintenance if a resident did make such a complaint.

In opposition to Clove Lakes' Motion, Plaintiff argues that she is entitled to summary judgment on her negligence claim and that Clove Lakes failed to institute an appropriate and updated care plan that provided for a wheelchair with front anti-tipping devices or pillows or a dycem (which is a non-slip cushion) to prevent her from falling out of the chair. Plaintiff points to her testimony, in which she states that she consistently complained to Clove Lakes staff about the wheelchair, and argues that Clove Lakes violated its duty of care by providing her equipment that was defective. According to Plaintiff, the three witnesses who appeared on behalf of Clove Lakes were unable to recall if she complained about the wheelchair and did not offer evidence that the wheelchair was inspected prior to the time she used it.

As the Appellate Division, Second Department has held, "summary judgment should not be granted 'where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Lacagnino v Gonzalez*, 306 AD2d 250 [2d Dept 2003] (internal citations

omitted). "On a motion for summary judgment, the court's function is to determine whether material factual issues exist, not to resolve such issues." *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910 [2d Dept 2007]. *See Martinez v 281 Broadway Holdings, LLC*, 183 AD3d 716, 719 [2d Dept 2020]). Furthermore, "a motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910 [2d Dept 2007] (internal citations omitted). "Summary judgment is a drastic remedy and should not be granted when there is any doubt as to the existence of a triable issue of fact." *Trio Asbestos Removal Corp. v. Gabriel & Sciacca Certified Pub. Accountants, LLP*, 164 AD3d 864, 865 [2d Dept 2018]. The Appellate Division, Second Department has also held that "on a motion for summary judgment, however, self-serving statements of an interested party which refer to matters exclusively within that party's knowledge create an issue of credibility which should not be decided by the court but should be left for the trier of facts." *Sacher by Sacher v. Long Is. Jewish-Hillside Med. Ctr., Inc.*, 142 AD2d 567, 567 [2d Dept 1988] (citations omitted).

Here, the Court finds that neither Clove Lakes or Plaintiff have made the requisite showing of prima facie entitlement to summary judgment on Plaintiff's negligence claim. At her deposition, Plaintiff testified that she complained to the staff at Clove Lakes repeatedly about the wheelchair. However, the witnesses who appeared on behalf of Clove Lakes stated that they did not recall Plaintiff complaining about the wheelchair and would have made a written work order had she done so. Based upon this conflicting testimony, the Court find that there are issues of credibility and issues of fact that cannot and should not be resolved on a motion for summary judgment. While Plaintiff largely relies upon her testimony in support of her motion, the Court

finds that her statements during her deposition create an issue of credibility to be decided by the trier of fact, particularly whether Plaintiff felt as if she was sliding out of the wheelchair prior to her fall. *See Sacher by Sacher v. Long Is. Jewish-Hillside Med. Ctr., Inc.*, 142 AD2d 567, 567 [2d Dept 1988]. Based upon the outstanding issues of fact, the Court finds that Clove Lakes has failed to eliminate all material issues of fact and meet its prima facie burden for summary judgment dismissal of Plaintiff's negligence cause of action. The Court further finds that Plaintiff has similarly failed to meet her prima facie burden and eliminate all material issues of fact as to this cause of action. Therefore, the Court denies the motions of Clove Lakes and Plaintiff for summary judgment on the negligence cause of action.

Plaintiff's Cause of Action for Negligent Hiring and Supervision

Turning to the remainder of Clove Lakes' motion, the Court finds that Clove Lakes has met its prima facie burden with respect to that branch of the motion for dismissal of the cause of action for negligent hiring and supervision. "To establish a cause of action based on negligent hiring and supervision, it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury." *Hoffman v Verizon Wireless, Inc.*, 125 AD3d 806, 807 [2d Dept 2015] (internal citations omitted). "The employer's negligence lies in having "placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring and retention of the employee." *Johansmeyer v New York City Dept. of Educ.*, 165 AD3d 634, 635-36 [2d Dept 2018] (internal citations omitted).

Here, Clove Lakes has shown that the record is devoid of any evidence showing that it knew about any complaints made by Plaintiff regarding her wheelchair. The record does not contain any work orders for Plaintiff's wheelchair or any other documents demonstrating that Plaintiff complained about her wheelchair. Clove Lakes has further demonstrated its prima facie entitlement to summary judgment dismissal of this cause of action based upon the affidavit of Dr. Diamond, who states that there is no evidence indicating that the Clove Lakes staff was incompetent or improperly trained. Dr. Diamond further explains that "there is no evidence of anyone on staff having had a history or providing incompetent care or that they were unfit or inexperienced prior to treating the decedent." As the burden shifts to Plaintiff to overcome Clove Lakes' prima facie showing, the Court finds that Plaintiff has failed to show that Clove Lakes knew or should have known of the employee's propensity for the conduct that caused her alleged injuries. Since Plaintiff has failed to demonstrate that an issue of fact exists with respect to this cause of action, the Court grants Clove Lakes' motion to dismiss Plaintiff's cause of action for negligent hiring, retention and supervision.

Plaintiff's Cause of Action for Gross Negligence

With respect to Clove Lakes' motion to dismiss Plaintiff's cause of action for gross negligence, the Court finds that Clove Lakes has established its prima facie entitlement to judgment as a matter of law based upon the affidavit of Dr. Diamond and the records from the facility, "which showed 'the absence of any conduct that could be viewed as so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others." *Gold v. Park Ave. Extended Care Ctr. Corp.*, 90 AD3d 833, 834 [2d Dept 2011] (internal citations omitted). In opposition, Plaintiff has failed to submit any expert affidavit that demonstrates an

issue of fact exists as to this cause of action. *See generally id.* Plaintiff has further failed to submit any evidence that shows a material issue of fact exists as to whether Clove Lakes committed gross negligence. Therefore, the Court grants the branch of Clove Lakes' motion which seeks to dismiss Plaintiff's cause of action for gross negligence.

Accordingly, it is hereby

ORDERED that Clove Lakes' motion for summary judgment dismissal of Plaintiff's cause of action for medical malpractice is granted; it is further

ORDERED that Plaintiff's cause of action for medical malpractice is hereby dismissed; it is further

ORDERED that Clove Lakes' motion for summary judgment dismissal of Plaintiff's cause of action for gross negligence is granted; it is further

ORDERED that Plaintiff's cause of action for gross negligence is dismissed; it is further

ORDERED that Clove Lakes' motion for summary judgment dismissal of Plaintiff's cause of action for negligent hiring and supervision is granted; it is further

ORDERED that Plaintiff's cause of action for negligent hiring and supervision is hereby dismissed; it is further

ORDERED that Clove Lakes' motion to dismiss Plaintiff's cause of action for negligence is hereby denied; it is further

ORDERED that the remainder of Clove Lakes' motion is hereby denied in its entirety; it is further

ORDERED that Plaintiff's motion for summary judgment is hereby denied in its entirety; it is further

ORDERED that Plaintiff's cause of action for lack of informed consent is hereby marked withdrawn; it is further

ORDERED that any and all other requests for relief are denied; and it is

ORDERED that counsel must appear for a Microsoft Teams Conference on February 15, 2022 at 10:30 A.M.

This is the Decision and Order of the Court.

E N T E R,

Dated: 12/21/ **2021**

Hon. Judith N. McMahon
Justice of the Supreme Court

Hon. Judith N. McMahon
J.S.C.