

**Romano v New Vanderbilt Rehabilitation & Care Ctr.,
Inc.**

2022 NY Slip Op 34570(U)

October 3, 2022

Supreme Court, Richmond County

Docket Number: Index No. 150881/2018

Judge: Judith N. McMahon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

-----X
**ANTHONY ROMANO, JR., as Executor of the
Estate of ANTHONY ROMANO, Deceased,**

Plaintiff,

-against -

**NEW VANDERBILT REHABILITATION AND
CARE CENTER, INC., JOEL BLUSH, M.D., and
VICTORY INTERNAL MEDICINE, P.C.,**

Defendants.
-----X

IAS Part 6

Present:

HON. JUDITH N. MCMAHON

DECISION AND ORDER

Index No. 150881/2018

**Motion Seq. Nos: 002, 003,
004**

The motion for summary judgment by defendant Victory Internal Medicine, P.C., (Mot. Seq. No. 003) is granted without opposition, and the complaint is severed and dismissed. The motions for summary judgment brought pursuant to CPLR §3212 by defendants Joel Blush, M.D. (Mot. Seq. No. 002) and New Vanderbilt Rehabilitation and Care Center (hereinafter “NVRC”; Mot. Seq. No. 004) are denied.

This matter arises out of alleged medical malpractice rendered to plaintiff’s decedent, 77-year-old Anthony Romano, between January 8, 2015 and October 12, 2015, the date on which Mr. Romano underwent a below the knee amputation of his left leg. Plaintiff’s seven-count complaint (see NYSCEF Doc. No. 1) sets forth causes of action against defendants for, *inter alia*, medical malpractice, vicarious liability, and the failure to provide decedent with informed consent¹.

¹ Defendant NVRC is the rehabilitation facility where decedent lived from 2008 until 2019; defendant Joel Blush, M.D. was decedent’s internist from approximately 2006 until 2019, and defendant Victory Internal Medicine, P.C. is alleged to have been Dr. Bush’s employer between January 8, 2015 and October 12, 2015.

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It is undisputed that decedent became a resident of NVRC in 2008, and that his medical history at the time of admission noted coronary artery disease, status post coronary artery bypass graft, congestive heart failure, status post internal defibrillator placement, hypertension, diabetes, and peripheral vascular disease. Decedent previously had the toes amputated from his right foot as a complication of diabetes, suffered from diabetic neuropathy, and was taking multiple medications.

Mr. Romano died in a nursing home in Pennsylvania on January 26, 2020 (*see* NYSCEF Doc. No. 161), having left NVRC at some point in 2019.

BACKGROUND OF RELEVANT FACTS

On December 30, 2014, decedent was transferred to Staten Island University Hospital for an infection of his left foot. He underwent debridement of a diabetic ulcer on the left ankle that performed on January 3, 2015, by non-party podiatrist, Dr. Lafferty. Mr. Romano was placed on antibiotics and was ultimately discharged back to NVRC on January 13, 2015.

Dr. Bush's records reflect bedside visits with plaintiff at NVRC on January 15, 2015, January 20, 2015, February 9, 2015, March 11, 2015² and March 18, 2015. During his March 26, 2015 visit, Dr. Blush discussed an upcoming skin graft of decedent's left foot ulcer.

On April 22, 2015, decedent underwent a skin graft to the lower left leg from a donor site on the left thigh, which was performed by non-party plastic surgeon, Dr. Culliford. By this time, Mr. Romano had an open wound on the left leg and left foot, and was status post amputation of his left large toe. He returned to NVRC on April 28, 2015, and saw Dr. Blush again on April 29, 2015, May 17, 2015 (at this visit defendant noted blistering along the linear line of the graft donor

² On March 16, 2015, Dr. Lafferty cleaned the left ankle wound, which had progressed in size from being covered with a 4 by 4 bandage, to measuring 16 inches long by 8 inches wide by one half inch deep.

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site), June 18, 2015, July 22, 2015, August 23, 2015, September 10, 2015, September 18, 2015, and September 27, 2015. Nursing notes dated August 23, 2014, August 24, 2015, and August 31, 2015 state that the wound was emitting a foul odor. He is prescribed intravenous Vancomycin in October of 2015.

Mr. Romano was seen by an infectious disease specialist on September 30, 2015 and on October 7, 2015, at which time it was noted that overall drainage had improved, but there was still necrosis between the second and third toes.

On October 12, 2015, decedent himself called 911 and was taken to Staten Island University Hospital where he was diagnosed with necrotizing fasciitis to the distal third of his tibia, and the second and third MTP joints were positive for septic arthritis and subjacent osteomyelitis. Gangrene was noted on decedent's left toes 2 and 3, to the level of the distal tibia fibula (*see* NYSCEF Doc. No. 160, SIUH records, p. 993). He was becoming septic.

Mr. Romano underwent a below the knee amputation of the left lower extremity on October 12, 2015, and on October 20, 2015 he had a second surgical procedure to close and revise the amputation. Decedent was transferred back to NVRC on October 24, 2015.

BILLS OF PARTICULARS

In his Verified Bills of Particulars (*see* NYSCEF Doc. No. 99) decedent alleges that Dr. Blush failed to properly treat and control [decedent's] diabetes and blood sugar; failed to diagnose and treat infections, including necrotizing fasciitis; failed to diagnose and treat sepsis, wet gangrene and gas gangrene; failed to perform wound care and debridement; failed to order appropriate examinations; failed to advise [decedent] of the risks of the procedures; failed to properly and timely perform tests and procedures, and failed to recognize the signs, symptoms and manifestations of [decedent's] condition (*id.*, para. 2).

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As a result of Dr. Blush's malpractice, decedent purportedly suffered, *inter alia*, an amputation of the left big toe, below the knee amputation of the left lower extremity, wet and gas gangrene, sepsis, necrotizing fasciitis of the left leg, renal insufficiency, infected wounds, necrotic left foot injury, inflammation, cellulitis, osteomyelitis, infected left foot ulcers, left foot pain and purulent drainage, septic arthritis, fragmentation and dorsal dislocation at the 2nd and 3rd phalanges and MTP joints, plantar soft tissue ulcer, an inability to walk, the need for future surgeries, aggravation of preexisting conditions and his diabetes, pain, suffering, and depression (*see* NYSCEF Doc. No. 99, para. 1).

Decedent's claims against NVRC (*see* NYSCEF Doc. No. 143) are essentially the same as those listed against Dr. Blush.

DR. BLUSH's and NVRC's MOTIONS FOR SUMMARY JUDGMENT (002, 004)

Dr. Blush moves for summary judgment on the grounds that the appropriate standard of medical care was in all respects met in this case, and that his treatment of decedent was not a proximate cause of the injuries claimed. In support Dr. Blush submits, *inter alia*, the affirmation of his expert, Brent W. Spears, M.D., who is board certified in family medicine and hospice and palliative medicine (*see* NYSCEF Doc. No. 96).

Dr. Spears is unequivocal in his opinion that, among other things, Dr. Blush (1) appropriately appreciated decedent's signs and symptoms and properly managed his diabetes and glucose levels; (2) appropriately identified monitored and treated decedent's infections and foot wounds; (3) apprised decedent of his medical status and the risks, benefits and alternatives of treatment; (4) appropriately referred decedent for all appropriate testing including fingerstick glucose monitoring, routine and venous doppler laboratory studies, and referrals to specialists

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including podiatry, wound care and plastic surgery, and (5) properly deferred treatment to the appropriate medical specialties for further treatment of his patient's infections.

The expert concludes that decedent's co-morbidities contributed to his eventual need for amputation, and that any alleged departures on the part of Dr. Blush were not a proximate cause of decedent's injuries or the worsening of his condition.

NVRC moves for summary judgment dismissing plaintiff's complaint relying, *inter alia*, upon the expert affirmations of Edwin W. Wolf, D.P.M. (*see* NYSCEF Doc. No. 137) and vascular surgeon, Larry A. Scher, M.D., (*see* NYSCEF Doc. No. 138), who point to medical records as dispositive of the issue that decedent was carefully monitored and treated for all medical conditions while a resident of NVRC, and that his uncontrolled diabetes and infections resulted from his co-morbidities and refusal to comply with doctors' instructions.

In opposition to the motions³ plaintiff submits, *inter alia*, the May 11, 2022 affirmation of Ronald Schwartz, M.D. (*see* NYSCEF Doc. No. 165), an expert in internal and geriatric medicine. In Dr. Schwartz' opinion, defendants departed from the acceptable standard of care in (1) not tightly controlling, medicating and monitoring decedent's chronically elevated blood glucose level; (2) not administering nutritional supplements and vitamins to promote healing; (3) not immediately providing decedent with intravenous antibiotics at the first indication of infection (*i.e.*, Dr. Schwartz notes that "[d]espite a purulent, odorous discharge beginning in late August of 2015, no intravenous antibiotics were started until October of 2015" [*id.*, para. 78]), and (4) not transferring decedent to a more capable facility or hospital as the wound grew from 3 by 1.5 inches to the size of 16 by 8 inches. Dr. Schwartz further opines that the negligence and malpractice set forth above was a proximate cause of decedent's (1) chronically elevated blood glucose levels; (2)

³ Dr. Schwartz's affirmation is submitted in opposition to the summary judgment motions of Dr. Blush (Mot. Seq. No. 002) and NVRC (Mot. Seq. No. 004) (*see* NYSCEF Doc. No. 165, para. 8).

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progressively worsening left leg wound which spread, uncontrolled, from January 2105 until October 2015; (3) chronic skin breakdown; (4) infection, gangrene, necrosis, and sepsis at the graft wound site, and (5) the amputation and revision of that amputation of the left lower extremity.

VICTORY INTERNAL MEDICINE, P.C.'S MOTION FOR SUMMARY JUDGMENT (003)

For its part, Victory Internal Medicine, P.C. moves for summary judgment on the grounds that it did not employ Dr. Blush to treat residents of NVRC, and that any medical treatment rendered to Mr. Romano was not provided by Dr. Blush on behalf of Victory Internal Medicine, P.C. In support, Victory submits the affidavit of its Chief Operating Officer, David Wortman (*see* NYSCEF Doc. No. 120), who provides the dates of Dr. Blush's employment with Victory, and explains, *inter alia*, that Victory had no relationship whatsoever with NVRC and received no compensation for Dr. Blush's treatment of patients at NVRC.

Inasmuch as neither plaintiff nor co-defendant NVRC oppose Victory's motion, summary judgment is awarded to defendant Victory Internal Medicine, P.C. dismissing the plaintiff's complaint.

DISCUSSION

It has long been acknowledged that summary judgment deprives the litigant of his day in court and is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (*Andrew v. Pomeroy*, 35 NY2d 361, 364 [1974]). To obtain summary judgment, the movant must establish his position "sufficiently to warrant the court as a matter of law in directing judgment" in its favor (*Friends of Animals, Inc., v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979], *quoting* CPLR 3212 [b]). The proponent of a summary judgment motion must initially make a *prima facie* showing of entitlement to judgment as a matter of law,

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by tendering sufficient evidence to eliminate any genuine material issues of fact from the case (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a showing mandates denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If a *prima facie* showing is made, the burden shifts to the party opposing the motion for summary judgment to come forward with evidentiary proof in admissible form to establish the existence of material issues of fact which require a trial (*see Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]).

“Medical malpractice actions require proof that the defendant physician deviated or departed from the accepted community standards of practice, and that such deviation...was a proximate cause of the plaintiff’s injuries” (*Dixon v. Chang*, 163 AD3d 525, 526 [2d Dept. 2018] quoting *Bongiovanni v. Cavagnuolo*, 138 AD3d 12, 15 [2d Dept. 2016]). Thus, in moving for summary judgment dismissing a complaint alleging medical malpractice, a defendant “must establish, *prima facie*, either that there was no departure or that any departure was not a proximate cause of the plaintiff’s injuries” (*Matthis v. Hall*, 173 AD3d 1162, 1163 [2d Dept. 2019] [*internal quotations marks omitted*]). “If such a showing has been made, a plaintiff must submit evidentiary facts or materials to rebut the defendant’s *prima facie* showing, so as to demonstrate the existence of a triable issue of fact” (*Noble v. Kingsbrook Jewish Med. Ctr.*, 168 AD3d 1077, 1079 [2d Dept. 2019] quoting *Deutsch v. Chaglassian*, 71 AD3d 718, 719 [2d Dept. 2010]; *see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 325).

“Although conflicting expert opinions may raise credibility issues which can only be resolved by a jury, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact” (*Wagner v. Parker*, 172 AD3d 954, 955 [citation omitted]). “In order not to be considered speculative or conclusory, expert opinions in opposition

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should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record" (*Tsitrin v. New York Community Hosp.*, 154 AD3d 994, 996 [2d Dept. 2017] [*internal quotation marks omitted*]). "An expert opinion that is contradicted by the record cannot defeat summary judgment" (*Wagner v. Parker*, 172 AD3d at 955; *see also Lowe v. Japal*, 170 AD3d 701, 702 [2d Dept. 2019]).

Here, the defendants have all demonstrated *prima facie* entitlement to judgment as a matter of law. Dr. Blush and NVRC, through the submission of their experts' affirmations, have established that they did not depart from accepted medical practice and that, in any event, any alleged departure was not a proximate cause of the decedent's injuries (*see Matthis v. Hall*, 173 AD3d 1162, 1164).

Plaintiff has met his burden in rebutting defendants' *prima facie* showing, however, by submitting the affirmation of his expert, Dr. Schwartz, who specifically addressed the assertions made by the defendants' medical experts. Relevant here is Dr. Schwartz' unwavering opinion that (1) commencement of intravenous antibiotics in October 2015 was *untimely* under the circumstances, was a departure from the standard of care, and was a proximate cause of decedent's sepsis, amputation and his prolonged pain and suffering, and that (2) both Dr. Blush and NVRC were negligent in failing, among other allegations, to initiate the antibiotic therapy at the time that the NVRC nurses noted the foul odor coming from decedent's wound, in July of 2015.

Accordingly, it is

ORDERED that the motion for summary judgment pursuant to CPLR §3212 by defendant Victory Internal Medicine, P.C. is granted; and it is further

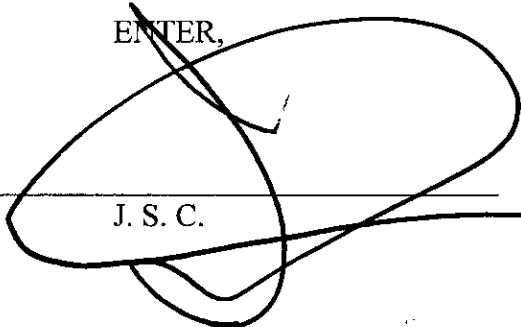
ORDERED that the Clerk of the Court enter judgment severing and dismissing plaintiff's complaint as against Victory Internal Medicine, P.C.; and it is further

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ORDERED that the motions for summary judgment pursuant to CPLR §3212 by defendants Joel Blush, M.D. and New Vanderbilt Rehabilitation and Care Center, Inc., are denied; and it is further

ORDERED that the parties appear for a virtual pre-trial conference via Microsoft Teams on **November 29, 2022 at 12:00 p.m.**

Dated: 10/3/22

ENTER,

J. S. C.

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