

Panton v New York Presbyt. Hosp.

2023 NY Slip Op 31539(U)

May 5, 2023

Supreme Court, New York County

Docket Number: Index No. 805409/2020

Judge: Judith N. McMahon

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

PRESENT: HON. JUDITH N. MCMAHON PART 30M

Justice

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LISA PANTON	INDEX NO. <u>805409/2020</u>
Plaintiff,	MOTION DATE <u>03/10/2023</u>
- v -	MOTION SEQ. NO. <u>001</u>

NEW YORK PRESBYTERIAN HOSPITAL,
Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion for summary judgment of the defendant The New York and Presbyterian Hospital s/h/a “New York Presbyterian Hospital” (hereinafter “NYPH”) pursuant to CPLR §3212 is denied.

This matter arises out of alleged medical malpractice rendered to plaintiff’s decedent, seventy-five-year-old year-old Mary Gant, during her admission to NYPH from October 13, 2018, through November 13, 2018. Decedent suffered a displaced femur fracture on October 20, 2018, when she fell while attempting to get out of bed to use the bathroom at approximately 9:30 a.m. that morning. On behalf of her mother’s estate, plaintiff alleges that NYPH was negligent in, *inter alia*, failing to properly assess decedent for fall risk factors and failing to properly amend decedent’s care plan to include a pressure sensitive bed alarm¹ and one-on-one

¹ It is undisputed that the pressure sensitive bed alarm was “on” during the night of October 19, 2018, into the early morning hours of October 20, 2018, but was not in the “on” position at the time of decedent’s 9:30 a.m. fall. Defendant’s nursing expert, Nurse Sara Newman, attests that “current standards of patient safety for daytime” do not require that the alarm be on during daytime hours (*see* NYSCEF Doc. No. 39, para. 30). The record does not reflect who turned the alarm off, or what time it was turned off.

supervision following a stroke she suffered on October 14, 2018². There were no witnesses to decedent's fall.

On October 26, 2018, decedent underwent successful surgery (*i.e.*, open reduction and internal fixation) to repair her right hip. She was discharged from NYPH on November 13, 2018 and passed away on March 15, 2019.

Plaintiff previously executed a Stipulation withdrawing the wrongful death cause of action, as well as all claims for gross negligence and recklessness under the Public Health Law, specifically 10 NYCRR §407.8 and §415.3 (*see* NYSCEF Doc. No. 28).

In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact (*see Klein v. City of New York*, 89 NY2d 833 [1996]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). “Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Ostrov v. Rozbruch*, 91 AD3d 147 [1st Dept. 2012]).

In support of the motion, defendant submits the expert affirmations of a registered nurse, Sara E. Newman (*see* NYSCEF Doc. No. 39) and a geriatric orthopedist, Sanjit Kenda, M.D. (*see* NYSCEF Doc. No. 40). Nurse Newman opines to a “reasonable degree of certainty” that (1) decedent's risk of falling was appropriately assessed on a daily basis by NYPH staff, and that proper fall precautions were implemented, reviewed, and maintained; (2) fall prevention measures were reviewed daily with Ms. Gant and her family, including the importance of calling

² An MRI of the brain revealed a small acute infarct in the subcortical of the white matter of the right parietal lobe (*see* NYSCEF Doc. No. 50, p. 3738).

for assistance verbally or with the call bell; (3) Ms. Gant was alert and oriented when she was assessed on the morning of her fall, and acknowledged instructions to press the call bell if she needed assistance, and (4) NYPH acted quickly and appropriately in responding to the fall.

Dr. Konda sets forth that NYPH's collective treatment of decedent was appropriate, surgical repair of the hip was successful, and decedent's right hip fracture and other claimed injuries were a direct result of her "unexpected and impulsive decision to get out of bed on her own in defiance of repeated instructions that she request assistance from the staff to do so and despite her daily acknowledgment of her shared responsibility in fall prevention" (*id.*, para 31).

"The affirmation of defendants' expert was sufficient to meet defendants' *prima facie* burden of establishing the absence of a departure from good and accepted medical practice, or that any such departure was not a proximate cause of plaintiff's alleged injuries" (*Einach v. Lenox Hill Hosp.*, 160 AD3d 443 [1st Dept. 2018]). "An expert's opinion must be based on facts in the record or personally known to the witness, and in the absence of such record support, an expert's opinion is without probative force" (*Pascocello v. Jibone*, 161 AD3d 516 at 516 [1st Dept. 2018]; [*internal citations omitted*]).

"Where a defendant makes a *prima facie* case of entitlement to summary judgment dismissing a medical malpractice action by submitting the affirmation from a medical expert establishing that the treatment provided to the injured plaintiff comported with good and accepted practice, the burden shifts to the plaintiff to present evidence in admissible form that demonstrates the existence of a triable issue of fact" (*Bartolacci-Meir v. Sassoon*, 149 AD3d 567 at 570 [1st Dept. 2017]; *see also DeCintio v. Lawrence Hosp.*, 25 AD3d 320 [1st Dept. 2006]; *Ducasse v. New York City Health & Hosps. Corp.*, 148 AD3d 434 [1st Dept. 2017]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

In opposition to the motion, plaintiff submits the affirmation of Ira Mehlman, M.D., a physician board certified in Emergency Medicine and Internal Medicine (*see* NYSCEF Doc. No. 56), who opines to a reasonable degree of medical certainty that NYPH departed from the standard of care when it (1) failed to appreciate decedent's lack of safety awareness and cognitive decline as noted in her hospital chart between October 17th and October 20, 2018 (*id.*, para. 10); (2) failed to provide constant one-on-one supervision and/or bring decedent to the nurse's station for constant supervision; (3) failed to update the fall plan from October 18, 2018 through October 20, 2018 despite noting decedent's cognitive deficits in the days prior to her fall (*i.e.*, NYPH chart reflected "forgets limitations" and "cognitively impaired"); (4) continued to rely on decedent to ring her call bell when she needed assistance, and (5) failed to implement the use of a pressure sensitive bed alarm³ before October 20, 2018, which "would have provided the staff the opportunity to intervene" (*id.*, para 16).

The foregoing expert affirmation raises clear questions of fact sufficient to defeat summary judgment. "The medical experts' conflicting opinions...raise issues of fact that must be resolved at trial" (*Hendricks v. Transcare New York, Inc.*, 158 AD3d 477, 478 [1st Dept. 2018]). As such, the motion for summary judgment by defendant NYPH to dismiss plaintiff's complaint is denied.

The Court notes, however, that all other claims made by plaintiff other than those delineated above (*i.e.*, alleged failure to respond to the call bell, failure to provide Ms. Gant with a safe environment free of barriers, failure to timely respond to, investigate, and document Ms. Gant's fall, negligent hiring and credentialing, ordinary negligence, negligence *per se*, lack of

³ Aside from Nurse Newman's one sentence as to the "current standards of patient safety for daytime," this Court has no evidence disputing Dr. Mehlman's statement that failure to implement the use of a pressure sensitive bed alarm under the circumstances at bar was a departure from the standard of care.

informed consent, violation of multiple provisions of Part 505 of Title 10 of the NYCRR) are severed and dismissed.

Accordingly, it is

ORDERED that the motion for summary judgment by the defendant The New York and Presbyterian Hospital to dismiss plaintiff's complaint pursuant to CPLR 3212 is denied; and it is further

ORDERED that any and all additional requests for relief are hereby denied; and it is further

ORDERED that the parties shall appear for a virtual pre-trial conference via Microsoft Teams on **June 15, 2023 at 10:15 a.m.**

5/5/2023
DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

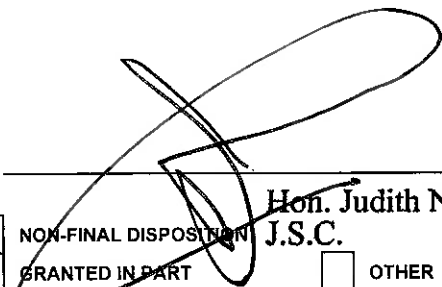
CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE



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