Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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M/htr

_____AD3d_____ Argued - January 8, 2024

ANGELA G. IANNACCI, J.P.
LINDA CHRISTOPHER
LARA J. GENOVESI
BARRY E. WARHIT, JJ.

2021-05382 DECISION & ORDER

Russell Snow, etc., respondent, v Gotham Staffing, LLC, etc., et al., appellants.

(Index No. 525776/18)

Martin Clearwater & Bell LLP, New York, NY (Barbara D. Goldberg and Jeffrey A. Shor of counsel), for appellants.

Burns & Harris, New York, NY (Mariel Crippen and Judith Stempler of counsel), for respondent.

In an action, inter alia, to recover damages for medical malpractice, the defendants appeal from an order of the Supreme Court, Kings County (Bernard J. Graham, J.), dated April 22, 2021. The order, insofar as appealed from, denied the defendants' cross-motion to compel the plaintiff to serve a certificate of merit and notice of medical malpractice and to transfer the action from the general negligence part to the medical malpractice part.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, the defendants' cross-motion to compel the plaintiff to serve a certificate of merit and notice of medical malpractice and to transfer the action from the general negligence part to the medical malpractice part is granted, and so much of an order of the same court dated September 23, 2021, as, in effect, upon reargument, adhered to the determination in the order dated April 22, 2021, denying the cross-motion is vacated.

On January 7, 2016, Sheena Davis was a patient at Interfaith Medical Center (hereinafter Interfaith) and was brought for a procedure to Interfaith's catheter lab, where she was attended by Patricia Greene, a nurse employed by Interfaith, and the defendant Adeladia Sarmiento-Villaroman, a nurse employed by the defendant Gotham Staffing, LLC. While in the lab with only

Sarmiento-Villaroman, Davis, who was legally blind, fell from an examination table when Sarmiento-Villaroman stepped away from the table to discard used gauze in a nearby trash can. Davis was injured from the fall.

In 2016, Davis commenced an action, inter alia, alleging medical malpractice and lack of informed consent against Interfaith and Greene (hereinafter the 2016 action). Davis filed a certificate of merit in that action pursuant to CPLR 3012-a. In 2018, Davis commenced this action against the defendants. In the bills of particulars, Davis alleged, among other things, that the defendants were negligent in the "care [and] treatment" of her and departed from "the good and accepted standards of hospital, staffing, nursing and medical care" by failing to "order, direct, [and] recommend . . . that [she] receive urgently required fall prevention, protection, restraint and constant observation and/or supervision in view of her legal blindness, medical and physical ailments and impairments, [and] administration of narcotic medications." Davis alleged in the bills of particulars that she had been improperly "document[ed]" as a "low risk for falling" when she was actually at high risk for falling in light of her physical condition and administered medications. Davis died during the pendency of this action and was substituted by the plaintiff, as the administrator of Davis's estate.

In response to Davis's motion to consolidate the 2016 action with this action, the defendants cross-moved to compel the plaintiff to serve a certificate of merit, as required by CPLR 3012-a for all medical malpractice actions, and notice of medical malpractice and to transfer this action from the general negligence part to the medical malpractice part. The plaintiff opposed the motion, arguing that this action sounded in negligence rather than medical malpractice. In an order dated April 22, 2021, the Supreme Court, inter alia, denied the defendants' cross-motion. The defendants appeal.

"In distinguishing whether conduct should be deemed medical malpractice or ordinary negligence, the critical factor is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached" (*Rabinovich v Maimonides Med. Ctr.*, 179 AD3d 88, 92-93). "[A] claim sounds in medical malpractice when the challenged conduct 'constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed [health care provider]'" (*Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 788, quoting *Bleiler v Bodnar*, 65 NY2d 65, 72). "By contrast, when 'the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the hospital's failure in fulfilling a different duty,' the claim sounds in negligence" (*Weiner v Lenox Hill Hosp.*, 88 NY2d at 788, quoting *Bleiler v Bodnar*, 65 NY2d at 73).

Allegations that a health care provider improperly assessed a patient's risk of falling and need for supervision or restraint, in light of his or her medical condition, "implicate questions of medical competence or judgment linked to . . . treatment" (*Weiner v Lenox Hill Hosp.*, 88 NY2d at 788) and, therefore, sound in medical malpractice (*see Scott v Uljanov*, 74 NY2d 673, 674-675; *Losak v St. James Rehabilitation & Healthcare Ctr.*, 199 AD3d 671; *Santana v St. Vincent Catholic Med. Ctr. of N.Y.*, 65 AD3d 1119, 1119-1120; *Caso v St. Francis Hosp.*, 34 AD3d 714, 715). Here, the essence of the allegations was that the defendants were negligent in their assessment of "the level of supervision, nursing care, and security required for [Davis]," in light of her physical condition and the administration of narcotic medications (*Santana v St. Vincent Catholic Med. Ctr. of N.Y.*, 65

AD3d at 1120). Such allegations sound in medical malpractice as opposed to ordinary negligence (*see Scott v Uljanov*, 74 NY2d at 675; *Losak v St. James Rehabilitation & Healthcare Ctr.*, 199 AD3d at 671; *Santana v St. Vincent Catholic Med. Ctr. of N.Y.*, 65 AD3d at 1120; *Caso v St. Francis Hosp.*, 34 AD3d at 715).

Accordingly, the Supreme Court erred in denying the defendants' cross-motion to compel the plaintiff to serve a certificate of merit and notice of medical malpractice and to transfer the action from the general negligence part to the medical malpractice part.

We do not consider the defendants' argument that the complaint should be dismissed as time-barred, as that relief was requested for the first time in their reply papers (*see MTGLQ Invs., L.P. v Makhnevich*, 201 AD3d 931, 932; *US Bank N.A. v Oliver*, 180 AD3d 843, 844).

IANNACCI, J.P., CHRISTOPHER, GENOVESI and WARHIT, JJ., concur.

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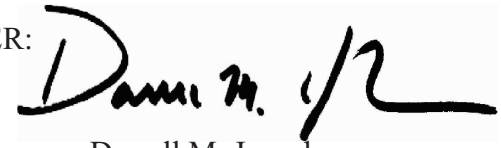

Darrell M. Joseph
Clerk of the Court