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SHORT FORM ORDER

INDEX NO. 14-1339
CAL. NO. 15-00157OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 3-18-15
ADJ. DATE 6-24-15
Mot. Seq. #001 MD

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GEORGE M. COHEN and CHARLENE COHEN, Individually and as Husband and Wife,

Plaintiffs,

- against -

STEVEN C. DESOUSA, P.T., P.C. and EAST NORTHPORT PHYSICAL THERAPY,

Defendants.

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CELLINO & BARNES, P.C.
Attorney for Plaintiffs
600 Old Country Road, Suite 500
Garden City, New York 11530

TROMELLO MCDONNELL & KEHOE
Attorney for Defendants
P.O. Box 9038
Melville, New York 11747

Upon the following papers numbered 1 to 25 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 15 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 16 - 20 ; Replying Affidavits and supporting papers 21 - 15 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for summary judgment in its favor is denied.

In 2011, after falling from a chair, plaintiff George Cohen underwent total right hip replacement surgery at Huntington Hospital. A few days after surgery, he was transferred to the Gurwin Jewish Nursing and Rehabilitation Center to continue his rehabilitation treatment. Approximately two weeks later, plaintiff was discharged from the Gurwin facility. In late September 2011, he began receiving physical therapy treatment for his right hip from defendant Steven C. Desousa, P.T., P.C., d/b/a East Northport Physical Therapy, a professional corporation owned and operated by Steven Desousa, a licensed physical therapist. Plaintiff allegedly received physical therapy treatments two or three times a week at East Northport Physical Therapy, with such treatments including therapeutic exercises and gait training. On December 5, 2011, plaintiff allegedly was injured when he fell on a Biodex rehabilitation treadmill during a physical therapy session.

Subsequently, plaintiff commenced this action against defendant seeking damages for negligence. His wife, Charlene Cohen, brought a derivative claim for loss of services. The complaint alleges, among other things, that defendant was negligent in allowing plaintiff "to be left unsupervised or improperly supervised while rehabilitating a medical condition," in allowing "the use of medical equipment that was not properly maintained," and in failing "to properly ensure the safety of plaintiff."

Defendant now moves for summary judgment dismissing the complaint, arguing it cannot be held liable, as plaintiff's accident was caused by an "unforeseen malfunction of the treadmill." Defendant's submissions in support of the motion include copies of the pleadings, transcripts of the parties' deposition testimony, photographs of the subject Biodex treadmill, and the operation manual for such treadmill. Defendant also submits an affidavit of Brian Becker, a licensed physical therapist. Plaintiffs oppose the motion on the grounds that defendant failed to make a prima facie showing of entitlement to judgment in its favor, and that an issue exists as to whether Steven Desousa followed accepted standards of care for physical therapists. In opposition, plaintiffs submit copies of the parties' deposition testimony and an affidavit of a licensed physical therapist, Robin Evans. In reply, defendant submits an affidavit of Steven Desousa. The Court notes a sur reply submitted by plaintiff without prior approval was not considered in the determination of this motion (*see* CPLR 2214 [c]).

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (see Rotuba Extruders v Ceppos, 46 NY2d 223). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a mater of law by tendering proof in admissible form sufficient to demonstrate the absence of any material issues of fact (Alvarez v Prospect Hosp., 68 NY2d 320, 324; Zuckerman v City of New York, 49 NY2d 557, 562; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065, 1067). The initial burden on a summary judgment motion is a heavy one, as a court must view the evidence in the light most favorable to the nonmoving party, and all inferences must be resolved in favor of the nonmoving party (William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh, 22 NY3d 470, 475; Vega v Restrani Constr. Corp., 18 NY3d 499, 503). If the initial burden is met, the party opposing summary judgment must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Vega v Restrani Constr. Corp., 18 NY3d 499, 503; Alvarez v Prospect Hosp., 68 NY2d 320, 324). However, if the moving party fails to make a prima facie case, summary judgment must be denied, regardless of the sufficiency of the opposing papers (Alvarez v Prospect Hosp., 68 NY2d 320, 324).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (see Pulka v Edelman, 40 NY2d 781; Solan v Great Neck Union Free School Dist., 43 AD3d 1035; Engelhart v County of Orange, 16 AD3d 369). Although proximate cause generally is a matter for the jury, a plaintiff who brings a negligence action must establish prima facie that the defendant's negligence was a substantial cause of the event which produced his or her injury (Derdiarian v Felix Contr. Corp., 51 NY2d 308, 315; see Maheshwari v City of New York, 2 NY3d 288; Garcia v Pepe, 11 AD3d 654). Proximate cause may be inferred from the facts and circumstances surrounding the injury; however, there must be sufficient proof in the record to permit a finding of proximate cause based not upon speculation, but upon the logical inferences to be drawn from the evidence (see Schneider v Kings Hwy.

Hosp. Ctr., 67 NY2d 743; Hartman v Mountain Val. Brew Pub, 301 AD2d 570; Babino v City of New York, 234 AD2d 241).

"An allegation that a party failed in the proper performance of services related primarily to its profession is a claim of professional malpractice" (Travelers Indem. Co. v Zeff Design, 60 AD3d 453, 455). To establish liability for professional malpractice, a plaintiff must prove the defendant deviated or departed from the accepted practices of such profession, and that such deviation or departure was a proximate cause of the plaintiff's injury (Archer v Haeri, 91 AD3d 685, 685; Georgetti v United Hosp. Med. Ctr., 204 AD2d 271, 272; see 43 Park Owners Group, LLC v Commonwealth Land Tit. Ins. Co., 121 AD3d 937; Bruno v Trus Joist a Weyerhaeuser Bus., 87 AD3d 670). On a motion for summary judgment dismissing a professional malpractice action, a defendant has the initial burden of establishing the absence of any departure from good and accepted practice in such profession or that the plaintiff was not injured thereby (see e.g. Archer v Haeri, 91 AD3d 685; Shank v Mehling, 84 AD3d 776; Kung v Zheng, 73 AD3d 862; Shahid v New York City Health & Hosps. Corp., 47 AD3d 800).

A physical therapist accused of malpractice moving for summary judgment must establish as a matter of law that he or she did not deviate from the good and accepted practices of physical therapy, or that any deviation therefrom was not a proximate cause of the plaintiff's injuries (see Barlev v Bethpage Physical Therapy Assoc., P.C., 122 AD3d 784; Archer v Haeri, 91 AD3d 685; Shank v Mehling, 84 AD3d 776; Bickom v Bierwagen, 48 AD3d 1247, 852 NYS2d 542). If the defendant makes such a showing, the burden shifts to the plaintiff to lay bare his or her proof and demonstrate the existence of a triable issue as to whether the defendant deviated from accepted practices and whether such deviation was a proximate cause of the plaintiff's injuries (see Latona v Roberson, 71 AD3d 1498; Bickom v Bierwagen, 48 AD3d 1247; Ives v Allard Chiropractic Off., 274 AD2d 910; see also Holbrook v United Hosp. Med. Ctr., 248 AD2d 358).

Defendant's submissions are insufficient to establish a prima facie case that it did not depart from accepted standards of physical therapy practice in its assessment and treatment of plaintiff or that plaintiff was not injured by any departures from such standards (see Archer v Haeri, 91 AD3d 685; see generally Alvarez v Prospect Hosp., 68 NY2d 320). Plaintiff, who was 80 years old when the subject accident occurred, testified at an examination before trial that prior to suffering the right hip fracture in 2011, he sustained a fracture to his arm in 2009 and a fracture to his pelvis in 2010, both injuries occurring after he slipped and fell on ice. He testified that when he began treatments at East Northport Physical Therapy in September 2011, he used either a cane or a walker when ambulating, and that he was treated by Steven Desousa and other employees at the facility. Plaintiff testified that he began walking on the treadmill approximately three or four weeks before his accident, but that he did not use the treadmill at every physical therapy appointment. He testified that each time he went on the treadmill before the accident, an employee of the physical therapy facility stood within two or three feet of him and started and stopped the machine for him. He further testified that he was instructed to push a red button on a panel at the front of the treadmill to stop the walking belt from moving, and that, prior to his accident, the machine would come to a gradual stop after the button was pressed. Plaintiff testified that on the day of his accident, he decided to stop the machine himself because he was tired and there was no physical therapy employees, only other patients, in the gym area. He testified that after he pushed the red button the machine came to a sudden, "jarring" stop, which caused his body to twist and fall onto

the base of the treadmill.

Steven Desousa testified that, prior to the course of treatment that began in September 2011 following plaintiff's right hip replacement surgery, he had treated plaintiff in 2007 for a fractured arm and in early 2011 for a fractured pelvis. He testified that beginning on September 28, 2011, plaintiff's treatment included walking backwards on a treadmill for five minutes at .5 mph, with a supervision distance of two to three feet, and that such exercise was designed to strengthen the hip muscles and improve stability. He testified that an employee hired to assist and supervise patients as they perform exercises typically would supervise plaintiff while he was on the treadmill. Further, Desousa testified that he modified the therapy program as plaintiff's condition improved and that, beginning on October 19, 2011, plaintiff spent 10 minutes per session on the treadmill walking backwards at .7 mph. He testified that plaintiff continued to exercise on the treadmill for the same amount of time during his treatment sessions in October and November 2011, and that he continued to have the same close supervision when performing such activity. Desousa testified that on November 30, he changed plaintiff's treatment plan to walking both forwards and backwards on the treadmill at 1.2 mph for ten minutes, with the supervision distance increased to three to six feet. He testified that on December 5, plaintiff walked on the treadmill for six minutes before the accident. Contrary to plaintiff's deposition testimony, Desousa testified that he was in the gym area, supervising patients, at the time of the accident. He testified that he saw plaintiff push the red button to stop the treadmill after walking for six minutes and then heard a "belt type" noise coming from the machine. He testified that simultaneous to hearing the noise, he observed plaintiff, who had turned to his right and was holding the handrail, fall down onto the treadmill. When asked how long defendant had owned the treadmill, Desousa testified he was uncertain when it was purchased.

Contrary to the assertion by defendant's counsel, the conclusory affidavit of Brian Becker fails to establish a prima facie case that defendant did not deviate from accepted standards of practice for physical therapy (see Barlev v Bethpage Physical Therapy Assoc., P.C., 122 AD3d 784; see also Tomeo v Beccia, 127 AD3d 1071; Yaegel v Ciuffo, 95 AD3d 1110; Ocasio-Gary v Lawrence Hosp., 69 AD3d 403). Here, Becker does not explain in his affidavit the accepted practices for physical therapists supervising and assisting patients, like plaintiff, who have a history of falls or have recently undergone hip joint replacement; instead, he profers only the vague, conclusory assertion that "the extent and distance of supervision is a matter of judgment by the treating therapist." Moreover, plaintiff's deposition testimony that no employees were present when he decided he wanted to stop exercising on the treadmill, in conflict with Desousa's testimony that he was in the gym area and observed the accident, demonstrates a triable question as to whether Desousa was sufficiently close for safety purposes to assist plaintiff in the event he lost his balance while on the treadmill (see Zapata v Buitriago, 107 AD3d 977; Luthart v Danesh, 201 AD2d 930). Becker, ignoring the conflicting testimony, simply asserts in his affidavit that a distance of three to six feet supervision "was appropriate and in no way a departure from accepted physical therapy practice," and that "the sole cause of the plaintiff's accident was the malfunction of the subject treadmill" (see Reiss v Sayegh, 123 AD3d 787; Faicco v Golub, 91 AD3d 817; see also Muscatello v City of New York, 215 AD2d 463).

Defendant's submissions also are insufficient to establish as a matter of law that defendant properly maintained the treadmill. Relying on Desousa's deposition testimony, Becker opines in his

affidavit that the treadmill was cleaned and lubricated "properly and consistent with the manufacturer's handbook and manual." However, defendant failed to show that Becker is qualified to offer expert opinion regarding the subject treadmill's operation and maintenance (see Leicht v City of N.Y. Dept. of Sanitation, 131 AD3d 515; Hofmann v Toys "R" Us, NY Ltd. Partnership, 272 AD2d 296, 707 NYS2d 641 [2d Dept 2000]; see generally Matott v Ward, 48 NY2d 455). In addition, there is no evidence in the moving papers that any maintenance procedures were followed by defendant to ensure the treadmill belt operated at an even speed and did not abruptly stop moving. In fact, when questioned during his deposition about the maintenance schedule for the treadmill, Desousa testified only that the treadmill is kept clean and that the treadmill belt is lubricated three times a month. "An expert cannot reach a conclusion by reliance on a 'contingent, speculative or merely possible' foundation of material facts" (Kirker v Nicolla, 256 AD2d 865, 867).

Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

Dated: February 3, 2016

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION