

**Hanley v Engel Burman Senior Hous. at
Massapequa, LLC**

2012 NY Slip Op 30669(U)

March 7, 2012

Supreme Court, Nassau County

Docket Number: 026689/09

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 14

_____ X

RUTH HANLEY, deceased, by and through
the Administratrix, of her Estate, PEGGY
LINQUIST,

Plaintiffs,

-against-

Index No.: 026689/09
Motion Sequence...01
Motion Date...12/22/11
XXX

ENGEL BURMAN SENIOR HOUSING AT
MASSAPEQUA, LLC, EB CARE AT
MASSAPEQUA, LLC, ULTIMATE CARE NEW
YORK, LLC, and THE BRISTAL AT
MASSAPEQUA,

Defendants.

_____ X

Papers Submitted:
Notice of Motion.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Upon the foregoing papers, the motion by the Defendants, Engel Burman Senior Housing at Massapequa, LLC, EB Care at Massapequa, LLC, d/b/a The Bristal at Massapequa and Ultimate Care New York, LLC, (hereafter "Bristal") seeking an order pursuant to CPLR § 3212 granting them summary judgment dismissing the Plaintiff's complaint against them is decided as hereinafter provided.

The Plaintiff in this action, Peggy Linquist, as Administratrix of the Estate of Ruth Hanley, seeks to recover damages for personal injuries as well as the death of her mother, the decedent Ruth Hanley. She alleges that the Defendant, Bristal, the assisted living facility where her mother resided for the last 13 months of her life, acted negligently in, *inter alia*, allowing her mother to be admitted there and for allowing her to continue to live there when it became an unsuitable environment for her and was unable to meet all of her needs. More specifically, the Plaintiff faults the Defendant, Bristal, both for accepting her mother as a resident and not compelling her transfer to a more skilled facility. The Plaintiff also faults the Defendant, Bristal, for the care it provided to her mother. In particular, she alleges that the Defendant, Bristal's negligence resulted in her mother's numerous falls and their ensuing consequences, including Ms. Hanley's premature death. She has advanced causes of action sounding in negligence, wrongful death, gross negligence and breach of contract. The Defendant, Bristal, maintains that the propriety of both Ms. Hanley's original residence there as well as her continuing residence at their facility was always determined by independent doctors, as was required by the applicable regulations. The Defendant, Bristal, additionally maintains that at all times, Ms. Hanley met all of its retention standards even up until the day of her death. It accordingly seeks summary judgment dismissing the complaint.

The facts pertinent to the determination of this motion are as follows:

The Bristal is an Enriched Housing Assisted Living facility governed by the

Social Services Law and Part 48 of the New York State Department of Health Regulations. As an assisted living facility, it supplies room and board, housekeeping and recreational activities for independent adults. *See* Public Health Law § 2 (28). Supportive assistance is provided with dressing, incontinence care and medication management. It does not provide medical or skilled services. Medical services are at all times provided by outside physicians. *See* Public Health Law § 2 (28). Furthermore, it is the residents' attending doctors who assess both their suitability for admission as well as the propriety of their continued residency there.

Ms. Hanley was first placed at the Bristol on or about June 25, 2007 at her family's request. She presented with a variety of long-standing illnesses and medical conditions, including acute anemia, dementia (which became progressively worse during her residence at the Bristol), hypertension, coronary artery disease, hypothyroidism, asthma, atrial fibrillation and adrenal insufficiency for which she had been treated with steroidal medications for over fifty years. Her medical history included surgical repair of an abdominal aortic aneurysm and a pancreatic mass. At the Bristol, Ms. Hanley resided in the Reflections Unit, a secure unit reserved for residents with some level of dementia. Residential Functional Assessments were performed on intake on June 25, 2007, on July 25, 2007 and quarterly on October 18, 2007, January 2, 2008, March 3, 2008 and May 25, 2008, by which date she was receiving Hospice Care.

The admission agreement between Ms. Hanley and the Bristol provided:

“The Operator will not admit nor retain any person requiring continual medical or nursing care. Accordingly, admissions are restricted to individuals:

1. Who, if disabled, have stabilized chronic disabilities;
2. Who are ambulatory as defined by New York State Department of Health Code; and
3. Whose mental condition is such that they are not a danger to themselves or others.”

It also provided:

“B. The grounds upon which involuntary termination may occur are:

1. If the Resident required continual medical or nursing care which the Community (i.e., the Bristol) does not provide;
2. If the Resident’s behavior poses imminent risk of death or imminent risk of serious physical harm to himself/herself or anyone else; or
4. If the Resident repeatedly behaves in a manner that directly impairs the well-being, care or safety of the Resident or any other resident, or which substantially interferes with the orderly operation of the Community . . .”

10 NYCRR 488.4 (“Admission and Retention Standards”) precludes residents requiring more extensive services from continuing to reside at an assisted living facility. 10

NYCRR 488.7(5) provides:

“In the event that a resident becomes ill or displays a progressive deterioration of health or behavior, the operation must:

- (i) protect the resident’s safety and comfort;
- (ii) obtain medical evaluation and services; and
- (iii) if necessary, arrange for the transfer of the resident to an appropriate medical facility.”

Skilled or enhanced assisted living facilities are permitted to admit and retain residents who exceed the admission and retention standards of assisted living provided that it can provide or arrange an adequate safe plan of care in accordance with the resident's individual service plan ("ISP"). 10 NYCRR 1001.7(d).

10 NYCRR 1001.7(e)(2) provides:

"If a resident reaches the point where (s)he is in need of twenty-four hour skilled nursing care . . . then the resident shall be discharged from the residence and the operator shall initiate proceedings for the termination of the residency agreement . . . provided, however, (that) a resident may remain at a residence certified as an enhanced assisted living residence if each of the following conditions are met:

- (i) the resident's physician and home care services agency, if applicable, determine and document that, with the provision of additional nursing, medical and/or hospice care, the resident can be safely cared for in the residence and would not require placement in a hospital, nursing home or other facility licensed under Article 28 of the Public Health Law or Article 19, 31 or 32 of the Mental Hygiene Law;
- (ii) the resident hires appropriate nursing, medical or hospice staff to care for his or her increased needs;
- (iii) the operator agrees to retain the resident and to coordinate the care provided by the enhanced assisted living residence and other provider staff; and
- (iv) the resident is otherwise eligible to reside in the facility.

Again, determinations like these are not made by an assisted living facility like the Bristol but are made by private attending physicians.

Kathleen Schneider, the Reflections Unit Director at the Bristol when Ms.

Hanley resided there, has attested that Ms. Hanley always met the Bristal's retention standards: She was ambulatory with the use of a walker and, in general, functioned with the assistance of one aide. Ms. Schneider further attests that the Bristal does not provide medical services; only private doctors do and it was those doctors who, through periodic Medical Evaluations and Mental Health Evaluations, determined whether Ms. Hanley's changed needs or circumstances required her to be transferred to a skilled nursing facility or mental health facility, or whether she could be retained as a resident of the assisted living facility. Ms. Schneider noted that the facility staff might observe changes in the resident's status and discuss the possible need for additional care with the family and the resident's doctors, but any decision regarding the need to transfer a resident from the Bristal to a skilled nursing facility required a medical determination that such a transfer was necessary.

Ms. Schneider opined that Ms. Hanley met all the criteria for admission. She was ambulatory; able to have her personal needs met in the Reflections Unit; generally functioned with the assistance of one aide; and, she was not a danger to herself or others despite her dementia. Ms. Schneider further opines that Ms. Hanley was always a suitable resident. She points out that during her thirteen month residence, she was evaluated by a physician at least six times at which time they consistently opined that she needed the support and services available in an assisted living facility like the Bristal and that she did not require placement in a skilled nursing or mental health facility. Ms. Schneider also notes that Ms. Hanley was evaluated by a psychiatrist twice, on July 26, 2007 and February 15, 2008, and

both times her continued residence in an assisted living facility was found to be appropriate by them. Ms. Schneider notes that none of Ms. Hanley's attending doctors ever recommended her discharge.

Ms. Schneider further notes that consistent with 10 NYCRR 1001.7, Ms. Hanley was permitted to remain at the Bristol despite her increased needs in view of her family's fervent wish to keep her there and the addition of private duty aides and Hospice Care to ensure her continued well being.

As for Ms. Hanley's falls, Ms. Schneider notes that her record reflected that she was "unsteady" upon admission. Therefore, to reduce the risk of falls, it was specified that she was to use a walker and that she would be escorted to meals and activities by a staff member. Eventually, she also received assistance with going to the bathroom. And, when she was placed on Hospice Care, she had a commode and handrail in her room. Not only did none of her doctors ever recommend a transfer to a more skilled facility, her family hired extra aides and ultimately brought in Hospice to avert her transfer to a more skilled facility. Ms. Schneider opines that the requirements set forth at 10 NYCRR 1001.7 (e) (2) were in fact met making it appropriate for Ms. Hanley to remain at the Bristol.

As for Ms. Hanley's falls and the Bristol's alleged failure to provide adequate support, Ms. Schneider notes that the Bristol met or exceeded the Department of Health's guidelines. She also notes that some of Ms. Hanley's falls occurred when she was being attended to by an aide and the falls were unavoidable. She also notes that the fact that Ms.

Hanley was found sitting on the floor next to her door did not even establish that she fell because dementia patients do that; they just sit themselves down. As for her last "fall" on July 25, 2008, Ms. Schneider notes that Ms. Hanley was sitting on her bed and she leaned over and fell into the headboard when Aide Harris went to get her walker.

Dr. Levine, who is Board Certified in Internal Medicine and Geriatric Medicine, has reviewed Ms. Hanley's pertinent medical records as well as the pertinent records of this case. It is his opinion that the Bristol did not act negligently in its retention and care of Ms. Hanley. Like Ms. Schneider, Dr. Levine notes that facilities like the Bristol rely on doctors to make determinations regarding a resident's admission and stay and none of Ms. Hanley's doctors ever took issue with her continued residence at the Bristol. Dr. Levine notes that a history of medical diagnosis does not preclude acceptance at an assisted living facility: It is the patient's functional status that is determinative. He further notes that residents are permitted to continue to reside in assisted living facilities despite increased needs which would normally dictate against their admission in the first instance if appropriate accommodations can be and are made. He specifically opines that Ms. Hanley's continued residence at the Bristol during the last four months of her life was appropriate as not only was it done with her family's endorsement, private duty aides and Hospice Care filled in the gaps in Ms. Hanley's care.

Like Ms. Schneider, Dr. Levine opined that Ms. Hanley's initial admission was appropriate; she was able to walk independently and despite being a little confused, was able

to cook for herself and dress and wash herself and tend to her own toiletry needs. She was appropriately found to be suitable for admission via a physical and medical evaluation by private doctors and she was evaluated via an Initial Functional Resident Assessment upon admission. Dr. Levine notes that Ms. Hanley was medically re-evaluated numerous times, on October 17, 2007, December 26, 2007, January 27, 2008, February 15 and 19, 2008 and July 29, 2008. He notes that “[a]ware of her history and her multiple comorbidity factors, Mrs. Hanley’s treating and evaluating physicians nonetheless approved her retention at the Bristol, and appropriately so [and that] it was not within the facility’s purview to overrule these medical determinations and compel the family to remove Mrs. Hanley to a nursing home, particularly [when] she was already receiving Hospice Care within the facility.”

He further notes that Ms. Hanley’s mental health was evaluated on July 26, 2007 (diagnosis: dementia with psychosis or psychotic symptoms) and February 15, 2008 (diagnosis: dementia with depression) and her residence at Bristol was approved by the examining psychiatrists. None of the psychiatrists recommended a change in residency. Dr. Levine also notes that Ms. Schneider evaluated Ms. Hanley regularly, too. Dr. Levine notes that regulations mandated that Ms. Hanley’s suitability for continued residence at the Bristol had to be determined by a physician after each hospitalization and her return to the Bristol was consistently approved by her doctors on each and every occasion.

As for Ms. Hanley’s falls, Dr. Levine also notes she was unsteady on admission, and that while there were nine incidents in 13 months, “falls involving medically

compromised seniors are an inevitable fact of life in senior residential facilities," many of which occur without any fault on the part of the facility. He notes that Ms. Hanley's propensity to fall was always noted and addressed by Bristal. He also notes that Ms. Hanley's family was always informed of her falls but wanted her kept at the Bristal anyway, even after considering options. In fact, he notes that in February 2008, Ms. Hanley's family had her moved back to Bristal after a three week stay at Daleview Nursing Home where she recuperated from a five day stay in the hospital. Similarly, her family resisted rehabilitation at a nursing home following other hospitalizations, always seeking her to return to the Bristal. In fact, Ms. Hanley's records at the Bristal consistently reflect that the Plaintiff feared that her mother would be transferred out of the Bristal and that she steadfastly opposed that. In retrospect, she now opines that her mother would have been better off at a nursing home because she was falling too much at the Bristal and at a nursing home, she would have been in bed a lot and would have had a wheelchair. Dr. Levine represents that short of the use of restraints which are not used at an assisted living facility, many of Ms. Hanley's falls could not have been prevented. Several of her falls occurred despite one-to-one assistance being given. Dr. Levine also opined that the Bristal was adequately staffed.

The records indicate that once Hospice began in early March, 2008, all of Ms. Hanley's needs were routinely assessed and monitored. The level of care she required was evaluated time and time again by Hospice nurses and the need for a change was never found. In fact, Ms. Hanley was provided with a wheelchair at one point when she was unsteady on

her feet and only allowed to resume use of her walker when she was able to do so safely. They also indicate not only was the Plaintiff regularly advised of her mother's state, alternate treatment was discussed numerous times and she elected not to pursue other care options.

Dr. Levine notes that despite three incidents of blows to her head on March 30, 2008, May 6, 2008 and July 25, 2008, Ms. Hanley only sustained soft tissue injuries; there was never intra-cranial trauma. In fact, Ms. Hanley was seen at the hospital on each occasion and the doctors all approved her return to the Bristal. And, there were numerous other hospitalizations for medical treatment and on each and every occasion, Ms. Hanley's doctors approved her return to the Bristal.

Finally, Dr. Levine opined that "[t]here is no plausible provable link between any of the various reported incidents and falls and [Ms. Hanley's] death." The Death Certificate lists the cause of death as cardiopulmonary failure "due or as a consequence of" chronic debilitative state "due or as a consequence of" advanced dementia. He notes that Ms. Hanley's death "was due to an acute change in condition manifested by shortness of breath [which] suggests a cardiovascular event such as a myocardial infarction, arrhythmia or pulmonary embolus." In a Bristal Case Note dated 7/30/08, Ms. Hanley's personal physician, Dr. Mauro Gasparini, opined that her death was most likely due to a leak in the previously repaired abdominal aortic aneurysm. Dr. Levine notes that "[n]one of these events could have taken place due to a fall-related injury."

The elements of a negligence claim are the existence of a duty, a breach thereof

and a resulting injury. *Martinez v. Khaimov*, 74 A.D.3d 1031 (2nd Dept. 2010). The Defendant, Bristol, has established that it did not breach a duty to Ms. Hanley and even assuming, arguendo, that it did, any such breach did not cause Ms. Hanley's injury. It is not disputed that it was Ms. Hanley's doctors who not only made the determination regarding her initial suitability to reside at the Bristol but whether it was appropriate for her to remain there, as well. Without their approval, Ms. Hanley could not have been accepted or retained at the Bristol. Similar to a hospital's role *vis-a-vis* a patient's doctor, the Bristol was not required to question Ms. Hanley's doctors' orders unless they were so clearly contraindicated by normal practice that ordinary prudence required that they be questioned. *Bedard v. Klein*, 88 A.D.3d 754, 755 (2nd Dept. 2011), citing *Toth v. Community Hosp. at Glen Cove*, 22 N.Y.2d 255, 265 n.3 (1968); *Georgeti v. United Hosp. Medical Ctr.*, 204 A.D.2d 271 (2nd Dept. 1974); *see also Fiorentino v. Wenger*, 19 N.Y.2d 407, 414 (1967). Not only has the Defendant, Bristol, established that the doctors' determinations were not questionable, it has also established that via its assessments, it confirmed that Ms. Hanley's doctors' determinations were appropriate and not contraindicated.

A claim to recover for gross negligence is to be dismissed when there is "an 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 Center Corp.*, 90 A.D.3d 833 [2nd Dept. 2011], quoting *Averett v. Loretto Adult Community, Inc.*, 32 A.D.3d 1273, 1274 [4th Dept. 2006]) or "activated by evil or

reprehensible motives' ” (*Anzalone v. Long Island Care Center, Inc.*, 26 A.D.3d 449 [2nd Dept. 2006], quoting *Spinosa v. Weinstein*, 168 A.D.2d 32, 43 [2nd Dept. 1991]). The Defendant, Bristol, has demonstrated that there has been no such conduct here.

“[T]o succeed on an action to recover damages for wrongful death, the plaintiff must prove the following elements: (1) the death of a human being born alive; (2) a wrongful act, neglect or default of the defendant by which the decedent’s death was caused, provided the defendant would have been liable to the deceased had death not ensued; (3) the survival of distributees who suffered pecuniary loss by reason of the death of decedent; and, (4) the appointment of a personal representative of the decedent.” *Slobin v. Boasiako*, 19 Misc 3d 1110(A) (Supreme Court Nassau County 2008), quoting *Chong v. New York City Transit Authority*, 83 A.D.2d 546 (2nd Dept. 1981). Again, the Defendant, Bristol, has established both that it did not commit a wrongful act and even if it did, it was not the cause of Ms. Hanley’s death.

The “essential elements of a cause of action to recover damages for breach of contract” are “the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of the contract, and resulting damages.” *JP Morgan Chase v. J.H. Elec. of New York, Inc.*, 69 A.D.3d 802, 803 (2nd Dept. 2010). The Defendant, Bristol, has also established that it did not breach its agreement with Ms. Hanley and in any event, any possible breach by it did not cause Ms. Hanley’s damages.

The Defendant, Bristol, has established its entitlement to summary judgment

dismissing the complaint against it thereby shifting the burden to the Plaintiff to establish the existence of a material issue of fact.

The Plaintiff has not met her burden.

In opposition, the Plaintiff has submitted the affidavit of Alan M. Radin, M.D., who is Board Certified in Internal Medicine with a Special Competence in Geriatrics. Having examined Ms. Hanley's medical records and the records of this case, he opined to a reasonable degree of medical certainty that the Defendants were negligent in admitting and retaining Ms. Hanley despite the fact that her condition required continual medical and nursing care; in failing to involuntarily terminate her residency for behavior that posed an imminent risk of death or imminent risk of serious physical harm to herself by falling; in failing to seek appropriate evaluations and make arrangements to transfer Ms. Hanley to more appropriate facility after she sustained injuries that required continual medical and nursing care; and, in failing to provide adequate supervision and protective devices to prevent falls and injuries.

Dr. Radin opined that since the Bristol conducts a Functional Assessment upon admitting a resident, it retained authority to refuse to accept them. That being said, Dr. Radin opined that in view of her medical history, Ms. Hanley required the services of a skilled nursing facility and should not have been accepted. He also opined that she posed an increased risk of falling with the potential for serious injuries.

Dr. Radin opined that Ms. Hanley fell eight times in a year. From this, he

concluded that the Bristal was not implementing adequate safeguards to prevent her falls. However, on one occasion, she was found simply sitting on the floor with no injuries and on two occasions, she was being assisted by an aide when she fell. He also opined that the fact that she fell when an aide was there is clear evidence of negligence. He goes on to opine that repeated falls have a negative impact on elderly people's quality of life and health because avoidance of activities which pose a fear of falling results in a loss of physical function, decreased postural control and difficulties in activities of daily living. He also opined that "during the period of time that Ms. Hanley resided at The Bristal she had 8 falls and contemporaneously demonstrated an overall decline in the independent ability to engage in activities of daily living. Further, these falls caused periods of immobility, bed rest and hospitalization. Immobility is a known factor in worsening Congestive Heart Failure and Kidney disease, both conditions Ms. Hanley suffered." He further opined that Ms. Hanley's "history of multiple falls proximately caused her to suffer physical injuries, mental anguish and fear, a loss of personal dignity and independence, worsening of her underlying medical conditions and frailty, and an overall decline in her quality of life." He opined that Ms. Hanley's multiple falls combined with her deteriorating medical condition coupled with the Bristal's failure to transfer her to a skilled nursing facility led to her death.

The Plaintiff does not contest the fact that outside doctors approved Ms. Hanley's initial and continued placement at the Bristal. Rather, the Plaintiff, via its expert, faults the Bristal for not overruling those determinations. The Defendants have established

that while that's possible, it is rare and that there were no reasons to do so here since Ms. Hanley's needs could be met at the Bristol.

The regulations on which the Plaintiffs rely (10 NYCRR 415.12; 42 CFR § 483.25) which aim to ensure that residents' abilities in daily living do not diminish unless unavoidable and that residents receive adequate supervision and assistive devices to prevent accidents apply to a skilled nursing facilities, not assisted living facilities. The Bristol was not a nursing home and contrary to the Plaintiff's contention, the fact that additional aides and Hospice Care were brought in to attend to Ms. Hanley did not turn it into one. Hospice Care is customarily provided at not only homes but assisted living facilities as well and has been condoned by the New York State Department of Health. Furthermore, care was consistently taken by the Bristol to try to prevent falls beginning with Ms. Hanley's admission to the Bristol and increased as needed. Hospice Care and social workers aided in that endeavor as well. And, while it is not determinative, the Court must note the Plaintiff's strident efforts to keep her mother at the Bristol and ardent efforts to resist her placement in a nursing home.

Contrary to the Plaintiff's characterization of Ms. Hanley's falls on March 20, 2008 and July 25, 2008, the fact that she fell even when being attended to by an aide does not *prima facie* demonstrate negligence by the Bristol. And, there is absolutely no evidence that these things would have been avoided had Ms. Hanley been in a nursing home.

Furthermore, the Plaintiff has failed to articulate what and how care at a skilled

nursing facility would have differed from the care Ms. Hanley was receiving at the Bristol, especially after March 3, 2008, when Hospice Care began or how her death would have been avoided. And, their allegations that Ms. Hanley suffered “mental anguish and fear, a loss of personal dignity and independence, worsening of underlying medical conditions and frailty, and an overall decline in her quality of life” finds no factual support and accordingly cannot be relied on to establish damages. *See, Delgado v. New York City Hous. Auth.*, 51 A.D.3d 570 (1st Dept. 2008); *Andrews v. New York City Hous. Auth.*, 66 A.D.3d 619 (2nd Dept. 2009).

Most importantly, a causative link between the Bristol’s care of Ms. Hanley and her death has not been established. Even considering not just the July 25, 2008 fall but the cumulative effect of her numerous falls and the fact that “chronic debilitative state” is mentioned as a contributing factor to the ultimate cause of Ms. Hanley’s death on her death certificate (which was actually cardiopulmonary failure) does not suffice to link her falls to her death. The Plaintiff’s expert, Dr. Radin’s conclusion, that “Ruth Hanley’s history of multiple falls with increasing frequency proximately caused her “Chronic Debilitative State” and was a substantial contributing factor to her death on July 25, 2010” is not adequately supported by the record in view of Ms. Hanley’s serious pre-morbid medical conditions and the complete absence of any evidence of injury to her brain.

Accordingly, it is hereby

ORDERED, that the Defendants’ motion for summary judgment, pursuant to

CPLR § 3212, is **GRANTED** and the complaint is dismissed without costs.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
March 7, 2012



Hon. Randy Sue Marber, J.S.C.
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ENTERED
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