SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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RAMONA RODRIGUEZ,

Plaintiff, INDEX NO. 805374/17

-against-

HOME HEALTH MANAGEMENT SERVICES INC.
and MERCEDES POLANCO,

Defendants.

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JOAN A. MADDEN, J.:

Plaintiff moves for an order pursuant to CPLR 3212 granting partial summary judgment on liability against defendants.[1] Plaintiff also seeks an immediate trial on damages and a trial preference due to plaintiff's age and poor health. Defendants oppose the motion.

The following facts are not disputed. Plaintiff suffers from dementia, and at the time of the accident she was 94 years old, frail and living at home with 24-hour home care. On July 25, 2017, her caretaker, defendant Mercedes Polanco, an employee of defendant Home Health Management Services Inc. ("Home Health"), left plaintiff alone sitting in a chair in the living room while she took a shower. When Ms. Polanco finished showering, she found plaintiff sitting on the floor, awake, alert and complaining of pain in her knee. Plaintiff was taken by ambulance to Mt. Sinai St. Luke's Hospital, where she was found to have a partially displaced right hip fracture. On August 8, 2017, plaintiff had hip replacement surgery.

Plaintiff commenced the instant action on October 11, 2017. The complaint asserts claims for negligence consisting of a first cause of action for "pain and suffering," alleging that

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[1]The branch of the motion for the appointment of plaintiff's daughter Dorotea Rodriguez as her guardian ad item, was granted in the absence of opposition, by order dated June 20, 2018.

plaintiff was caused to suffer "serious and permanent injuries . . . by the carelessness, negligence, recklessness and unskillfulness of the defendants"; a second cause of action against defendant Home Health for negligent hiring and supervision of Ms. Polanco, who was "careless unskillful and negligent, and who did not possess the requisite knowledge and skill of home-attendants or nurses in the community"; and a third cause of action alleging Ms. Polanco was negligent in her "duty to supervise and to attend the plaintiff while under her care," by leaving plaintiff "unsupervised and unattended, allowing plaintiff to become injured."

Defendant served and filed an answer on November 17, 2017. On December 17, 2018, plaintiff served and filed a Bill of Particulars, which indicates that plaintiff may be asserting claims for medical malpractice as well as negligence.[2] On April 5, 2018, a preliminary conference was held and the Court issued a preliminary conference order directing plaintiff to

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[2]The Bill of Particulars states in pertinent part that defendants

> were negligent, careless, reckless and did commit *malpractice* in improperly and inadequately supervising and/or rendering home-care treatment to the Plaintiff herein. Defendants were negligent of their duty to supervise and aid the Plaintiff, who was entrusted to their care . . . was a disabled ninety-four year old known by defendants to be incapable of safe unsupervised ambulation and other common and vital activities without assistance. . . Failure to comply with the plan of care prescribed by plaintiff's heath care providers, defendants were negligent and deviated from good and customary nursing practices . . . in carelessly leaving her unattended, unsupervised and helpless for a significant period of time . . . Defendants were specifically negligent, reckless and deviated from accepted nursing and/or home attendant practices by leaving Plaintiff alone in her living room, unattended while Mercedes Polanco, the employee and agent of Home Health Management Services, Inc., went off to take a shower while she was on duty and supposed to be supervising the plaintiff; this negligence and/or abandonment of the plaintiff allowed and facilitated and proximately caused her to fall and fracture her hip and suffer other serious and permanent injuries requiring surgery [emphasis added].

"particularize allegations re deviating for 'good and accepted nursing and/or home attendant practices,' within 30 days including relevant regulations." On June 12, 2018, plaintiff filed a Supplemental Bill of Particulars stating, in its entirety, that defendants "deviated from good and accepted nursing and home attendant practices by leaving a patient in their chair unattended for an estimate of 45 minutes knowing she was at risk to fall and as set out in the investigative report of the New York State Department of Health hereto as Exhibit "E."

Meanwhile, in December 2017, plaintiff's counsel filed a complaint with the New York State Department of Health ("DOH"), alleging that Ms. Polanco, the aide employed by Home Health, was "negligent in not ensuring that the patient was left in a safe manner, while the aide took a shower." On February 2, 2018, DOH advised plaintiff's counsel by letter that after conducting an "onsite investigation" of the complaint, in which "agency staff were interviewed," and "clinical records and relevant policy and procedures" were reviewed. "[y]our allegation(s) is sustained" and DOH "has taken appropriate corrective action." DOH issued a report ("DOH report") finding the allegations "substantiated" and that "[o]n 07/25/17, the patient sustained a hip fracture while under the care of the aide. The incident occurred while the aide was showering. The aide was negligent in not ensuring the patient was left in a safe manner, while the aide took a shower." The DOH findings also include the following quote from defendant Home Health's own "Incident/Complaint Report" dated July 25, 2017: "HHA (Home Health Aide) used poor judgment leaving patient sitting in the living room instead of putting the patient on the bed with side rails up. HHA is very remorsable [sic] about what happened. HHA followed agency procedure by calling 911 then the agency. HHA places [sic] on 15 days probation

effective 07/28/17 and reoriented to rules and regulations of the agency regarding safety of the patient." [3]

Plaintiff is now moving for partial summary judgment on the issue of liability with respect to the claims of negligence against defendants Home Health and Polanco. As the proponent of a motion for summary judgment, plaintiff must make a prima facie showing of entitlement to judgment and dismissal as a matter of law, by submitting evidentiary proof in admissible form sufficient to establish the absence of any material issues of fact. See CPLR 3212(b); Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Once plaintiff's showing is satisfied, the burden of proof shifts to defendants to produce evidentiary proof in admissible form sufficient to demonstrate material issues of fact requiring a trial. See Winegrad v. New York University Medical Center, supra.

In support of the motion, plaintiff contends that the admissible evidence establishes that there is no defense to this action as defendant Polanco was negligent in the care of the plaintiff causing her to sustain serious injuries. Plaintiff relies on the facts set forth in Home Health's Incident Report dated July 26, 2017, the certified copy of the DOH report, and plaintiff's certified medical records from Mt. Sinai St. Luke's Hospital. Plaintiff also submits the pleadings, the bills of particulars, an affirmation from plaintiff's treating physician, Dr. Alejandro

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[3]The accident report from which this quote was taken, is not included with the documents annexed to the motion. The only accident report submitted is a one-page form entitled "Home Attendant Program Client Incident Report," signed by a "Case Coordinator" and dated July 26, 2017. That report merely states that the incident occurred on July 25, 2017 in the "living room" while the "attendant was . . . taking a shower," the bodily injury was a "(R) broken hip," the client was "unable to make a statement," the client/daughter's attitude was "negative," and "911 was notified; EMS responded; patient was rushed to the hospital & admitted."

Prigollini and an affidavit from plaintiff's daughter Dorotea Rodriguez.

Plaintiff's daughter states that in July 2017 her mother was in such "frail health" so as to require full time assistance of a full time home health aide; her mother had "memory lapses," difficulty following instructions; and could not navigate on her own. She states that defendant Home Health provided an aide and on July 27, 2017, defendant Mercedes Polanco was assigned. She states that her mother had "limited mobility" before the accident, but now she is "largely confined to a wheel chair" and is "in pain from the effects to the accident." She states that after the accident, she spoke to Ms. Polanco, "who expressed remorse at having left my mother unattended which facilitated the accident." She provides photographs of the living room and bedroom where the side rail equipped bed is located. She states that her mother 'was at risk of falling and Mercedes acknowledged to me she knew this before the accident and should have placed her in her bed before leaving to shower."

Dr. Prigollini states that he is familiar with Mrs. Rodriguez's history and physical and mental condition as her treating physician and from the hospital records of her emergency admission on July 27, 2017, and the records of the New York State DOH. He avers that prior to the accident, Mrs. Rodriguez was 94 years old, in frail heath and at risk of falling; had been diagnosed as suffering from "dementia with behavioral disturbances"; and required the full time assistance of a home health aide for "all activities of daily living, including protection from falling." Dr. Prigollini opines that the hip fracture she sustained as result of the accident has "permanently substantially compromised her mobility, limited travel only for health care needs, resulted in ongoing pain and aggravates her underlying frail health," and presents a risk for further complications to her health, which "could be life threatening." He further opines that

according to the DOH records, "it was while her Aide left her to shower, leaving her seated on a living room chair with no fall protection that . . . she fell sustaining an injury," and "[i]n my opinion, the Aide's action was not consistent with standards of good Home Health Aide practice, with which I am familiar, providing the foreseeable opportunity for the fall to occur."

Based on the foregoing, plaintiff has made a prima facie showing of entitlement to judgment as a matter of law on her claims for negligence. The facts in the DOH report as to how the accident occurred are admissible evidence under Public Health Law §10(2). See Colao v. St. Vincent's Medical Center, 65 AD3d 660 (2nd Dept 2009); Cramer v. Benedictine Hospital, 301 AD2d 924 (3rd Dept 2003). Those facts are consistent with defendant Home Health's July 26, 2017 Incident Report. Thus, based on the documentary proof, plaintiff has established that Ms. Polanco left plaintiff alone sitting in a chair without any fall precautions, so she could take a shower, and while she was gone, plaintiff fell and suffered a broken hip. Moreover, the affidavits of plaintiff's treating doctor and daughter, establish that at the time of the accident, plaintiff was 94 years old, suffering from dementia, in frail health, at risk of falling, and in need of and living with 24 hour home care. On this record, the court finds that plaintiff has established a prima facie failure to exercise ordinary and reasonable care, as plaintiff was clearly at risk of falling, and leaving a 94-year frail woman with dementia, sitting alone in a chair without fall precautions while the aide took a shower, falls "far below any permissible standard of care." Andre v. Pomery, 35 NY2 361, 365 (1974); Ugarriza v. Schmieder, 46 NY2d 471, 474 (1979).

The burden shifts to defendants to raise a material issue of fact as to their negligence. To support their opposition, defendants submit an attorney's affirmation; the April 5, 2018

preliminary conference order; a letter dated May 9, 2018 from their attorney to plaintiff's attorney requesting, *inter alia*, a supplemental bill of particulars "particulariz[ing] allegations regarding deviating from good and accepted nursing and hor home attendant practices including relevant regulations"; plaintiff's supplemental bill of particulars dated July 12, 2018; and an expert affidavit of Dr. Bruce Silver, M.D., a board certified geriatrician.

Defendants argue that summary judgment is premature, as no depositions have been taken and plaintiff has failed to comply with court-ordered discovery. Defendants, however, admit that there are no witnesses to the accident, since plaintiff is mentally incompetent, and that Ms. Polanco acknowledges she left plaintiff alone to take a shower, and the location of the accident is uncontested. Rather, defendants argue that plaintiff's case "turns on her counsel's claim that by tending to her personal needs, Polanco violated some professional standard for home heath aides and therefore was negligent as a matter of law," and despite court orders directing plaintiff to identify such standard, plaintiff has failed to do so. Defendants also argue that no such industry standard exists and point to the affidavit of their expert Dr. Silver, who opines that the accepted standard of care for home health aides allows a single aide to be with a patient, but the aide is not required to keep "eyes on the patient every minute" and is permitted to "take breaks to attend to his or her personal needs." Dr. Silver further opines that the use of bed rails is dangerous and does not necessarily prevent a patient from falling out of bed, and cites industry standards and studies.

Defendants' arguments are insufficient to deny summary judgment. Contrary to defendants' argument, plaintiff's case does not "turn on" the professional standard of care for home health aides. The issue of whether a defendant departed or deviated from an accepted

standard of care is material to a claim for medical malpractice. Where as here, plaintiff's claims sound in negligence, the salient issue is whether defendants breached their duty to exercise reasonable care under the circumstances. See Segall v. Heyer, 161 AD2d 471 (1st Dept 1990). Dr. Silver's opinion that an aide is permitted to leave a patient alone to take care of her own "personal needs," is immaterial to plaintiff's motion for summary judgment on liability. The issue is not whether Ms. Polanco could have or should have left Ms. Polanco alone so she could take a shower, but whether Ms. Polanco breached her duty of reasonable care by leaving plaintiff alone without any protections against falling. Dr. Silver's opinion as to the risks and dangers of bed rails is likewise immaterial. The issue here is not the type and manner of fall precautions that should or should not have been used, since is it undisputed that Ms. Polanco provided absolutely no precautions at all to protect plaintiff from falling. Notably, neither defendant Home Health nor defendant Ms. Polanco submits an affidavit in opposition to plaintiff's motion, even though they are in the best position to raise a material issue of fact as to the reasonableness of Ms. Polanco's actions.

Thus, given defendants' failure to identify proof in plaintiff's exclusive knowledge or control which they need to oppose the motion, nor any person they need to depose, summary judgment is not rendered premature by the lack of discovery. See CPLR 3212(f); Sapp v. S.J.C. 308 Lenox Ave Family LP, 150 AD3d 525 (1st Dept 2017); Voluto Ventures, LLC v. Jenkens & Gilchrist Parker Chapin LLP, 44 AD3d 557 (1st Dept 2007); Jean v. Zong Hai Xu, 288 AD2d 62 (1st Dept 2001).

Moreover, given defendants' failure to raise a material issue of fact as to negligence, they have failed to controvert the facts underlying plaintiffs' prima facie showing of negligence. As

the Court of Appeals holds in Andre v. Pomeroy, although summary judgment is rarely granted in negligence cases where "there is often a question as to whether the defendant or plaintiff acted reasonably under the circumstances . . . . this does not mean that the court is obliged on policy grounds, to ferret out speculative issues 'to get the case to the jury,' where the trial may disclose something the pretrial proceedings have not. It simply means, as one learned treatise observed, that when the suit is founded on a claim of negligence, the plaintiff will generally be entitled to summary judgment 'only on cases in which there is no conflict at all in the evidence, the defendant's conduct fell far below any permissible standard of due care, and the plaintiff's conduct . . . was not really involved." Andre v. Pomeroy, supra at 364-365 (quoting 4 Weinstein-Korn-Miller, NY Civ Prac, ¶3212.03).

Applying this standard to the case at bar, the Court concludes that it is "ripe for summary judgment," as defendants' negligence was "conclusively established" by the uncontested facts that plaintiff, a 94 year old woman, who was frail, suffering from dementia, at risk of falling and in need of 24 hour home care, was left alone sitting in a chair without any fall precautions while her aide took a shower. Id at 365. "This could not be considered reasonable conduct under any standard and it does not take a trial to resolve that point." Id at 365; see Colonial Sand & Stone Co, Inc v. Tracy Towing Line, Inc, 16 AD2d 645 (1st Dept 1962) (Where the captain of defendants' tugboat left the pilot house in charge of his deckhand and returned too late to prevent the tugboat and tow from passing too near the west shore and colliding with the Milestone Light, the Appellate Division First Department held that the opposing affidavit failed to controvert the facts establishing negligence, and that the "prima facie proof is so convincing that the inference of negligence arising therefrom in the absence of other evidence is inescapable."). Plaintiff is

therefore, entitled to partial summary judgment on liability and a trial on damages.

Finally, in view of plaintiff's advanced age and frail health, the branch of plaintiff's motion for a trial preference pursuant to CPLR 3403(a)(4) is granted.

Accordingly, it is

ORDERED that the branch of plaintiff's motion for partial summary judgment on liability is granted and a trial is directed on the issue of damages; and it is further

ORDERED that plaintiff shall file note of issue on or before August 30, 2018; and it is further

ORDERED that plaintiff is entitled to a trial preference, and upon filing note of issue, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 158), which administers the Trial Calendar, and said Clerk shall mark the Court records to reflect plaintiff's trial preference; and it is further

ORDERED that the parties are directed to appear for a settlement and pre-trial conference in Part 11, Room 351, at 60 Centre Street, on September 6, 2018 at 11:00 a.m.

DATED: July 31, 2018

ENTER:

J.S.C.

HON. JOAN A. MADDEN
J.S.C.