Muhammad v Visiting Nurse Serv. of N.Y.
2019 NY Slip Op 32136(U)
July 7, 2019
Supreme Court, Kings County
Docket Number: 508903/2015
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PRESENT: HON. PAUL WOOTEN *Justice* **PART** 97

KHADIJAN MUHAMMAD, individually and as Administrator of the Estate of FRANCINE A. LOWERY,

Plaintiff,

- against -

VISITING NURSE SERVICE OF NEW YORK a/k/a VNSNY CHOICE, CARE AT HOME-DIOCESE OF BROOKLYN, INC. and "JANE DOE," - Said name being fictitious and unknown

Defendants.

INDEX NO. 508903/2015

SEQ. NOs. 3, 4

The following papers were read on these motions for summary judgment by defendants:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1, 2, 3, 4
Answering Affidavits — Exhibits (Memo)	5, 6
Replying Affidavits (Reply Memo)	7, 8

Motions sequence numbers 3 and 4 are consolidated for disposition.

This is a wrongful death and negligent hiring and retention action commenced by plaintiff, Khadijan Muhammad, individually and as Administrator of the Estate of her deceased mother, Francine A. Lowery (the decedent) via filing of the Summons and Verified Complaint on July 20, 2015 against defendants Visiting Nurse Service of New York a/k/a VNSNY CHOICE (hereinafter, VNSNY) and Care At Home–Diocese of Brooklyn, Inc. (CAH).

Before the Court is a motion by VNSNY for an Order, pursuant to CPLR 3212, seeking summary judgment due to plaintiff's failure to prove a *prima facie* case on the issue of liability

against VNSNY and dismissal of all cross-claims against VNSNY (motion sequence number 3). In its motion, VNSNY argues that it is not liable to plaintiff for any alleged negligence of CAH because CAH was an independent contractor of VNSNY and VNSNY was not negligent in monitoring or supervising CAH or its employees. Plaintiff is in opposition to VNSNY's motion and VNSNY submits a reply.

Also before the Court is a motion by CAH for an Order, pursuant to CPLR 3212, seeking summary judgment dismissing plaintiff's Complaint as asserted against CAH (motion sequence number 4). In its motion, CAH argues that plaintiff is unable to establish CAH's liability for the decedent's injuries to her face and death based on the time of her death. In addition, CAH avers that plaintiff cannot recover for the decedent's injuries to her face because there is no evidence that the decedent was conscious before the time of her death. Plaintiff is in opposition to CAH's motion and CAH submits a reply.

BACKGROUND

VNSNY is a home health agency, licensed under New York Public Health Law article 36. The decedent had enrolled with VNSNY through a Select Health plan, which is a managed care Medicaid plan. For patients enrolled in Select Health, VNSNY provides nurse case management services, which are based on review of an enrollee's clinical information and records but it is Select Health who determines the level of home care aide service for an enrollee, including the number of service hours per day.

CAH is a home care services agency, licensed under New York Public Health Law article 36, which provides home care aide services based on referrals, including from VNSNY. The aides employed by CAH report only to CAH.

In 2012, VNSNY and CAH entered into an agreement, pursuant to which CAH was retained to provide home health care aides to patients referred to CAH by VNSNY. According

to the terms of the agreement, VNSNY was responsible solely for the development or revision of the patient's plans of care and assessment of the level of home health services for patients. However, CAH, not VNSNY, was responsible for assigning individual aides to the patients. VNSNY also issued a written protocol, titled "Patient Not Answering Door or Phone," which describes certain activities and procedures for the aide and CAH to follow in these instances. With regard to patients not answering the phone or door for their home care aides, CAH was not required to call 911, or perform welfare checks or safety checks, unless a patient was bedbound, had no family, or CAH became aware of any safety issues with the patient.

The decedent lived alone in her one-bedroom apartment and was recovering from an open-heart surgery, which she had in April of 2013. She also suffered from a number of medical conditions but was not bedbound or homebound. In 2013, CAH assigned a new home care aide to the decedent to perform cleaning and housekeeping work, as well as to accompany her to medical appointments. The aide was scheduled to work at the decedent's home on Mondays through Fridays, from 9:00 a.m. to 1:00 p.m. Importantly, the decedent was responsible for letting the aide into her apartment so she used to leave the front door unlocked for the aide. The aide did not have the key to the apartment.

On January 6, 2014, the home health aide arrived at the decedent's apartment at 9:00 a.m., but was unable to enter because the door was locked and the decedent was not answering the door. The aide called CAH to report this incident and followed the instructions of her supervisor who, in turn, followed the VNSNY's protocol for patients not answering the door for the aide, and approximately one hour and a half later, the aide's supervisor sent the aide home. At 12:06 p.m., plaintiff came to her mother's apartment and she found the decedent with her head on a hot radiator pipe located next to her bed, but she had already passed away. Her face was severely burned as a result. Plaintiff also found the decedent's cell phone in the

kitchen ringing. Plaintiff testified that when she found the decedent, she looked like she was trying to get to her home phone, which was on the window ledge next to her bed–about three inches from the radiator.

The decedent was pronounced dead at 12:34 p.m. Her autopsy report stated that she passed away due to hypertensive and atherosclerotic disease[1] between 8 a.m. and shortly before 12:06 p.m., but that it was impossible to determine the specific time of her death. According to the report, the burns took more than a few minutes to develop; however, it was impossible to determine how long or whether they took place during the dying process or after death.

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Alvarez*, 68 NY2d at 324; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Qlisanr, LLC v Hollis Park Manor Nursing Home, Inc.*, 51 AD3d 651, 652 [2d Dept 2008]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2d Dept 1974]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material

[1] Plaintiff states in the Bill of Particulars that the decedent had a heart attack.

issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921 [2d Dept 2005]; *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY 2d 223, 231 [1978]; CPLR 3212[b]).

DISCUSSION

"Where a defendant is responsible for caring for an individual, the defendant's abandonment of that individual can result in liability" (*Esposito v Personal Touch Home Care*, 288 AD2d 337, 338 [2d Dept 2001]). For example, in *Esposito*, the home health care aide was caring for the plaintiff's decedent who suffered from multiple sclerosis and needed to use a walker and a wheelchair (*see id.*). He fell in front of the bathroom entrance and became injured because he went to the bathroom unattended (*see id.*). The *Esposito* Court found triable issues of fact as to whether the home health care agency breached the duty of care to the decedent as a result of leaving him unattended while in the aide's care (*see id.*).

In *Vilarin v Onobanjo*, the decedent was bedridden and was receiving in-home nursing care (*see Vilarin v Onobanjo*, 276 AD2d 479, 480 [2d Dept 2000]). The nurse caring for the decedent left her shift one hour early during which time a fire broke out in the patient's

apartment (*see id.).* Plaintiff argued that had the nurse did not leave the disabled patient early, the fire would have not occurred or would have been detected (*see id.*). The *Vilarin* Court found that there was an issue of fact as to whether the alleged abandonment of the decedent by the nurse was a proximate cause of his death (*see id.*).

Similarly, in *Willis v City of New York*, the plaintiff, who had multiple sclerosis, was injured when a fire broke out during the working hours of her home care aide (*see Willis v City of New York*, 266 AD2d 207, 207-08 [2d Dept 1999]). The plaintiff argued that her injuries from the fire could have been prevented if the aide did not abandon her by leaving early, which might have been without permission (*see id.*). As in *Vilarin,* the *Willis* Court found an issue of fact as to whether the aide's alleged abandonment of the plaintiff was a proximate cause of her injuries (*see id. at 208*). Moreover, the Court found that there were issues of fact as to whether plaintiff's injuries from the fire were foreseeable and whether the defendant home care agency owed a duty to rescue the plaintiff from the fire (*see id.*).

In *Auer v Affiliated Home Care of Putnam, Inc.*, the Court also found triable issues of fact as to whether leaving the decedent patient unattended while eating constituted a breach of duty of care (*see Auer v Affiliated Home Care of Putnam, Inc.*, 63 AD3d 972, 972 [2d Dept 2009]. There, the decedent had multiple sclerosis and choked on a hot dog while his two home health care aides were in another room and left him eating unattended (*see id.* at 972). While one of the aides tried to perform the Heimlich maneuver or resuscitate him, the patient later died in hospital (*see id.*).

In *Easton v Comprehensible Care of America, Inc.*, the jury found that the negligence of the defendant home health care agency, through its home aide, was the proximate cause of plaintiff's daughter's severe burn injuries (*see Easton v Comprehensible Care of America, Inc.*, 233 AD2d 875 [4th Dept 1996]). The accident occurred when the aide left the paralyzed and

severely disabled patient alone for a few minutes with an absorbent pad around her neck (*see id.* at 875). She then reached to grab a cigarette and a lighter to smoke the cigarette and the pad caught fire (*see id.*). The plaintiff argued that the defendant was negligent because the aide allowed her daughter to smoke while she was unattended knowing that she was not only paralyzed but also suffered from tremors, seizures, and impaired vision (*see id.*). However, plaintiff's daughter was allowed to smoke unattended when she was cared for by her family, which evidence was excluded from the trial (*see id.*). Nevertheless, the Appellate Division, Fourth Department reasoned that this evidence was not relevant to the issue of whether the aide was negligent in allowing plaintiff's daughter to smoke alone while in the aide's care (*see id.*).

In contrast, in *Garcia v All Metro Health Care*, the decedent had brain injury but was not bedridden nor was he homebound (*see Garcia v All Metro Health Care*, 108 AD3d 742, 742-43 [2d Dept 2013]). On the day of his accident, the decedent left his home at 2 p.m. to go to an appointment with a urologist at his hospital and was seen by the doctor at 3:12 p.m. (*see Garcia*, 108 AD3d 742, Defendants-Respondents Brief, 2012 WL 12941503). Instead of going to the hospital to meet the decedent there, his home care aide arrived at his apartment for her shift at approximately 2:00 p.m. and clocked in through the phone at his home at 2:11 p.m. (*see Garcia*, 108 AD3d at 743). She was able to enter the apartment because he had left the key under the door mat for her (*see id.).* At 3:45 p.m., the decedent was hit by a car when crossing the street and he died about one hour later (*see id.*). The *Garcia* Court held that the defendants did not breach a duty of care to the decedent and that any alleged negligence on their part was not a proximate cause of the decedent's death because the alleged negligence merely provided an opportunity for the car accident (*see id.*). The Court also noted that the home aide service plan did not prescribe that the decedent could not go to doctors' appointments without the aide

as he was capable of traveling alone and he had previously went to doctors' appointments during the time when the aide was not scheduled to care for him (*see id.*).

Here, plaintiff argues, *inter alia*, that had the home care aide been able to gain entry into the decedent's locked apartment in the morning on the day of her passing, the decedent "may not have died." Although the plaintiffs in *Esposito, Vilarin*, *Willis*, *Auer*, and *Easton* advanced similar causation arguments, those cases are distinguishable in material respects. First, the alleged abandonment or leaving the patients unattended in *Esposito, Vilarin*, *Willis*, *Auer*, and *Easton* took place during the scheduled work hours of the nurses or home care aides and during the time when the patients were in their care.

In the case at bar, neither party can show that the decedent suffered the burn injuries and passed away during the aide's scheduled shift hours and while in the care of the aide. Specifically, the decedent's autopsy report stated that the precise time of her injuries and death could not be established but that she died between 8:00 a.m. and 12:06 p.m. and the aide was not scheduled to begin her shift until 9 a.m. While the decedent last spoke with her daughter at 7:45 a.m. or 8 a.m., the decedent was not answering the door, nor her home and mobile phone, since approximately 9:00 a.m. Thus, the decedent might have passed away after 8:00 a.m. and before 9:00 a.m., at which time any finding of dereliction of duty on the part of the aide or CAH in their failure to gain entry into the decedent's apartment and preventing her death would not be relevant. On the other hand, one may speculate that it is also just as likely that the decedent passed away during the time the aide and CAH tried to gain entry into her apartment, or even after the aide was sent home. Moreover, the record is devoid of any evidence that the aide or CAH could have prevented the decedent's death given the cause of her death. Consequently, the facts of the instant matter support more than one theory of when the decedent might have passed away relative to the aide's arrival at her apartment and at least one of them establishes

that CAH cannot be held liable for the decedent's injuries and death even if the aide's or CAH's negligence is assumed. This existence of evenly balanced probabilities of contrary inferences as to causation that may entail liability if CAH's negligence can be established means that plaintiff still would be unable to prevail as she cannot sustain her burden of proof by preponderance of evidence other than by engaging in speculation (*see Morales v Kiamesha Concord*, 43 AD2d 944, 945 [2d Dept 1974]; *see also generally Bernstein v City of New York*, 69 NY2d 1020, 1021 [1987] [Where the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was the result of one cause as the other, plaintiff cannot have a recovery, since he has failed to prove that the negligence of the defendant caused the injury" [internal citations omitted]]; *MacKendrick v Newport News Shipbuilding & Dry Dock Co.*, 40 AD2d 798, 799 [1st Dept 1972] ["Where the balance of probabilities between causes which entail liability and others which do not is so equal that an inference of fact which entails liability is the result of mere speculation, a plaintiff may not prevail"], citing *Johnson v Tschiember*, 7 AD2d 1029, 1029 [2d Dept 1959]). In addition, the showing that plaintiff's claim that the alleged negligence of the aide or CAH caused the decedent's injuries and death is based on speculation is sufficient for CAH to meet its *prima facie* burden on a motion for summary judgment dismissing plaintiff's Complaint (*see e.g. Acunia v New York City Dept. of Educ.*, 68 AD3d 631, 632 [1st Dept 2009]).

Second, unlike the patients in *Esposito, Vilarin*, *Willis*, *Auer*, and *Easton*, the decedent here was not bedridden or homebound, nor was she so disabled as to require similar level of attentiveness and care as the patients in those cases. Importantly, despite her open-heart surgery and high blood pressure, the decedent did not have a history of a prior heart attack, stroke, fainting, blacking out, falling, or not answering the door for the aide. She was able to

walk around her house with and without a walker and even leave her apartment alone with a walker. Moreover, plaintiff's mother was allowed to live alone and the home health aide's duties were limited to performing housekeeping work and accompanying her to medical appointments.

Third, similar to *Garcia*, the decedent was not prohibited from going to appointments without the aide (*see Garcia*, 108 AD3d at 742-43). Plaintiff testified that the decedent would go to her dialysis sessions alone, three times a week, and each session took at least three hours. She typically would leave her apartment at 12:00 p.m. and return home, sometimes alone, by 3:00 p.m. or 6:00 p.m. Plaintiff also testified that her mother went to her other medical appointments with the aide when they were scheduled mid-morning, and thus, during the aide's shift.

Fourth, the Court finds that no negligence on the part of the aide caused the front door of the decedent's apartment to become locked, because unlike in *Garcia* where the decedent left the key to his apartment under the door mat, here, the aide did not have the key to the apartment and the decedent was responsible for letting the aide into her home (*cf. Garcia*, 108 AD3d 742, Defendants-Respondents Brief, 2012 WL 12941503). Additionally, the decedent's granddaughter testified that when she left the apartment approximately at 8 a.m. on the day of the decedent's passing, she turned the knob on the door from outside and the door was not locked. As a result, the Court finds that the locked door to the apartment coupled with the aide's and CAH's allegedly negligent, failed attempts to reach the decedent or gain entry to the apartment merely provided an opportunity for the decedent's heart condition to cause her most unfortunate injuries and death (*see generally Garcia*, 108 AD3d at 742-43).

Therefore, the Court finds that CAH's motion for summary judgment dismissing plaintiff's Complaint as asserted against it must be granted. In light of the foregoing, the Court

need not address VNSNY's motion for summary judgment on the issue of liability, and the herein matter is dismissed as a result.

CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion of Visiting Nurse Service of New York a/k/a VNSNY CHOICE for summary judgment on the issue of liability is denied as moot (motion sequence number 3); and it is further,

ORDERED that the motion of Care At Home–Diocese of Brooklyn, Inc. for summary judgment dismissing the Complaint is granted (motion sequence number 4); and it is further

ORDERED that counsel for Care At Home–Diocese of Brooklyn, Inc. is directed to serve a copy of this Order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 7/7/19

PAUL WOOTEN J.S.C.

KINGS COUNTY CLERK
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