SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY** IAS PART 16
Justice

CLAIRE HESS and LOUIS SLOANE,

Plaintiff,

- against -

WOODCREST REHABILITATION AND RESIDENTIAL HEALTH CARE CENTER, LLC,

Defendants.

INDEX NO. 21812/2005

MOTION DATE October 30, 2007

MOTION CAL. NO. 12

MOTION SEQ. #3

The following papers numbered 1 to 10 read on this motion by the defendants for summary judgment dismissing the plaintiffs' complaint.

	PAPERS NUMBERED
Notice of Motion/Affid(s)-Exhibits.....	1 - 4
Affid(s) in Opp.-Exhibits.....	5 - 6
Replying Affidavits-Exhibits.....	7

Upon the foregoing papers the motion is determined as follows:

This action concerns an accident that occurred on March 22, 2005 when the plaintiff Claire Hess was a patient at the defendant's facility. The plaintiff was admitted to the defendant's facility on March 13, 2005 for rehabilitation following a hospitalization related to vertebral fractures sustained due to osteoporosis.

On the day of the accident, at approximately 2:45 a.m., the plaintiff was in the bathroom connected to her room at the facility. The plaintiff had ambulated to and used the bathroom without assistance. After finishing, the plaintiff rang for assistance and Muriel Douglas, a certified nursing assistant who was employed by the defendant at the time, responded. Ms. Douglas testified that on the day of the incident she was five feet four inches tall and weighed approximately 158 pounds. Upon admission to the defendant's facility, the plaintiff was five feet seven inches tall and weighed approximately 300 pounds. As the plaintiff attempted to stand up from the toilet, she testified at her deposition that her legs gave out, that Ms. Douglas was unable to support her and she fell and became wedged between the toilet bowl and the wall of the bathroom in front of the bowl.

The plaintiff testified that Ms. Douglas was unable to extract her from the bathroom and that she was uprooted only after two of the defendant's male personnel pulled her out by her arms. The plaintiff averred that while she was being pulled through the bathroom door by the defendant's personnel she heard a crack in what she thought was her right leg. The plaintiff also stated that she felt pain in her right hip and exclaimed aloud that her leg was broken. After her removal from the bathroom, the plaintiff was returned to her bed via a Hoyer lift and the plaintiff asserts that she was not lowered into the bed, but dropped from six to eight inches above the bed.

The branch of the defendant's motion to dismiss the plaintiffs' common-law negligence claims is denied. In the supplemental bill of particulars the plaintiffs claim that Claire Hess was injured due to the conduct of the defendant's employees. At her deposition taken on September 18, 2006, Claire Hess expressly testified that the defendant's personnel broke her leg while removing her from the bathroom. The defendant failed to establish, prima facie, entitlement to judgment as a matter of law on this claim. The affidavit from the defendant's nursing expert, Marie Mitchell, R.N., was completely conclusory on this point and consists solely of the statement that "[t]here is no evidence that the plaintiff's claimed injury occurred as a consequence to Woodcrest Rehabilitation's post-fall response and assessment". This opinion ignores the plaintiff's testimony concerning pain in the area immediately after the conduct and does not address the uncontradicted proof that the medical records generated by the defendant contain no reference to right hip and/or leg pain in the plaintiff until after the fall.

The assertion by the defendant's expert that a registered nurse specifically evaluated the plaintiff for a fracture or dislocation immediately following the accident and expressly ruled those injuries out is unsupported by the record. The entry in the nursing notes for March 22, 2005 at 2:45 a.m. only states a generalized opinion that "[n]o injuries noted at that time". Moreover, nowhere in the deposition testimony of Ms. Douglas or Millicent Small, the director of nursing for the defendant, is an actual post-accident injury assessment recounted. The first express notation of a possible hip fracture in the medical records is in the nursing note from March 22, 2005 at 11:00 a.m. which states that "[r]esident is complaining of severe pain in the right hip and femur areas . . . transfer resident to NYH of Queens for further evaluation to R/O fracture".

Even if the defendant established entitlement to judgment as a matter of law on this claim, the plaintiff raised an issue of fact with the affirmation of their medical expert, Mark McMahon, M.D., an orthopedist, who opined that the plaintiff's hip fracture did not exist prior to her accident and was caused by the actions of defendant's personnel.

An issue of fact also exists, raised with the submission of the

affidavit of the plaintiff's nursing expert, Patricia Eckardt, R.N., concerning whether it was appropriate to have Ms. Douglas, who weighed nearly one-half that of the plaintiff, attempt to help Claire Hess off the toilet unassisted.

The branch of the defendants motion to dismiss the plaintiffs' cause of action for negligent hiring is granted without opposition. As the defendant has admitted its employees were acting within the scope of their employment at the time of the accident, a claim for negligent hiring can not survive (See e.g., Ashley v City of New York, 7 AD3d 742).

The plaintiff's claims based upon the doctrine of res ipsa loquitur also must be dismissed. "Submission of a case on the theory of res ipsa loquitur is warranted only when the plaintiff can establish three elements: '(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff'" (Ebanks v New York City Transit Authority, 70 NY2d 621, 623, citing Prosser, Torts § 39, at 218 [3d ed]). Here, the theory fails of two accounts. First, the event, the plaintiff's fall in a rehabilitation center, is an occurrence that can occur without negligence. The defendants established with the affidavit of their nursing expert that falls like the plaintiff's are common. This opinion is supported by the fall prevention assessments and protocols that are required to be made upon a patient's admission to a facility like the one at issue. Second, the plaintiff can not establish that the accident did not involve any "voluntary action or contribution" on her part.

The defendant's assertion that the existence of a potentially viable negligence cause of action precludes a cause of action for a violation of the Public Health Law §2801-d based upon the same conduct has not been ruled upon by the Court of Appeals or the Appellate Division, Second Department. However, the language of the statute itself indicates a contrary conclusion as it provides that "damages recoverable pursuant to this section" are "in addition to and cumulative with any other remedies available to a patient" (Public Health Law §2801-d[4]). The Appellate Division, First Department has ruled that such concurrent claims can stand (See, Zeides v Hebrew Home for the Aged at Riverdale, Inc., 300 AD2d 178, 180) and the Appellate Division, Fourth Department expressly overruled a case, Goldberg v Plaza Nursing Home Co., 222 AD2d 1082, which held that seemingly duplicative claims based upon negligence and Public Health Law §2801-d can not stand (See, Doe v Westfall Health Care Ctr., Inc., 303 AD2d 102).

Nevertheless, the plaintiffs' cause of action based upon Public Health Law §2801-d fails as they failed to identify in the complaint or in either bill of particulars they served any state or federal "statute, code, rule or regulation" with which the defendant failed to comply

(See, PHL §2801-d[1]). Both the original and supplemental bills of particulars served by the plaintiffs only state that the plaintiffs will ask the court to take "judicial notice" of the applicable statutes and ordinances violated by the defendant. Indeed, in a stipulation incorporated by reference in an order of the court dated January 30, 2007, the plaintiffs agreed to supplement their bill of particulars with respect to "statutory violations", but failed establish that they complied with this stipulation and the plaintiffs have not moved for leave to amend their pleading.

Accordingly, the plaintiffs' cause of action based upon Public Health Law §2801-d is dismissed.

Dated: January 30, 2008

Peter J. Kelly, J.S.C.