SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

----------X

JENNIE SALLEMI,

Plaintiff(s),

- against-

CLOVE LAKES HEALTH CARE AND REHABILITATION,

Defendant(s).

----------X

DCM PART 5
Present:

HON. JUDITH N. MCMAHON

DECISION AND ORDER

Index No. 103143/2008
Motion No. 001, 002, 003

The following papers numbered 1 to 8 were used on this motion on this 26th day of October, 2010:

[001] Notice of Motion [Plaintiff] (Affirmations in Support)	**1**
[002] Notice of Motion [Defendant] (Affirmation in Support)	**2**
[003] Notice of Motion [Plaintiff] (Affirmation in Support)	**3**
Affirmation in Opposition [Plaintiff]	**4**
Affirmation in Opposition and Reply Affirmation (Defendant)	**5**
Affirmation in Opposition (Defendant)	**6**
Reply Affirmation (Plaintiff)	**7**
Reply Affirmation (Plaintiff)	**8**

On or about February 19, 2008, the plaintiff Jennie Sallemi was injured when she fell while being transferred from her wheelchair to the toilet at defendant, Clove Lakes Health Care and Rehabilitation facility [hereinafter known as "Clove Lakes"]. The plaintiff alleges that defendant, *inter alia*, failed in performing a required two-person transfer and in accurately developing a transfer plan for the plaintiff.

It is undisputed that the plaintiff was transferred to defendant Clove Lakes for short term rehabilitation after having surgery on her left leg. Prior to the accident, the plaintiff requested assistance to use the bathroom and defendant Clove Lake employees, Eleanor Nesbeth and Susan Charles, both Certified Nursing Assistants, assisted the plaintiff into a wheelchair and positioned her in front of the toilet. The plaintiff thereafter contends that the nurses failed to properly perform a required two-person transfer by letting go of the plaintiff,

which caused the fall and subsequent injuries. Defendant's contend that the transfer was performed properly and plaintiff caused the accident by letting go of the safety bar.

This action was commenced on or about July 16, 2008. Issue has been joined. Presently, the plaintiff is separately moving to strike defendant's answer and for summary judgment on liability. Defendant is cross-moving for summary judgment in its favor.

Initially the Court notes that plaintiff's motion to strike [001] is hereby denied. There was no evidence that the conduct on part of the defendants was willful or contumacious and as such this Court will instruct the examination before trial of defendant Nursing Supervisor to be held within THIRTY (30) days of the date this Decision and Order. Failure to adhere to this Court's date restrictions may result in sanctions and/or preclusion for the offending party.

In addition, the Court notes it will consider both expert reports in the parties respective summary judgment motions. Plaintiff's contention that defendant's expert should not be considered because it is untimely, is unfounded. CPLR § 3101 (d)(1)(i)

> **does not require a party to respond to a demand for expert witness information at any specific time nor does it mandate that party be precluded from proffering expert testimony merely because of noncompliance with the statue unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party (Rowan v. Cross County Ski & Skate Inc., 42 AD3d 563, 564 [2d Dept., 2007]).**

Here, where there has been no showing or evidence presented of willfulness or prejudice by or against either side, the Court will consider both reports.

With respect to the motions for summary judgment (002 & 003), it is well settled that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of triable issues of fact (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Herrin v Airborne Freight Corp., 301 AD2d 500, 500-501 [2d Dept 2003]). The party moving for summary judgment bears the initial burden of establishing its right to judgment as a matter of law (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]), and in this regard " the evidence is to be viewed in a light most favorable to the party opposing the motion, giving [it] the benefit of every favorable inference" (Cortale v Educational Testing Serv., 251 AD2d 528, 531 [2d Dept 1998]). Nevertheless, upon a prima facie showing by the moving party, it is incumbent upon the party opposing the motion to produce "evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

Here, the plaintiff, Jennie Sallemi, and defendant, Clove Lakes, both presented evidence sufficient to establish their own respective entitlement to summary judgment (Alvarez v. Prospect Hosp., 68 NY2d 320, 325 [1986]). However, as a result, there are numerous questions of fact which preclude this Court from granting summary judgment in either party's favor (id.). The defendant presented the expert affirmation of nurse Barbra Darlington who opined that the transfer performed by the defendant Clove Lake's employees did not deviate from accepted nursing practice (Alvarez v. Prospect Hosp., 68 NY2d 322, 325 [1986]). Further, Nurse Darlington opined that plaintiff caused her fall by releasing her hold of the safety bar. The plaintiff presented the expert report of nurse Caryn Leifer who opined, in complete opposition, that defendants failed to develop and execute a proper transfer protocol; train

their staff regarding the proper way to transfer the plaintiff and further, that the defendant's employees deviated from accepted nursing practice and procedure in the method they used to transfer the plaintiff. As a result, the parties have offered conflicting expert opinions, thereby raising a credibility issue requiring a jury's resolution (Dandrea v. Hertz, 23 AD3d 332 [2d Dept 2005]; Shields v. Baktidy, 11AD3d 671 [2d Dept 2004]; Barbuto v. Winthrop University Hosp., 305 AD3d 623 [2d Dept. 2003]). Further, where there are issues with respect to the plaintiff's comparative negligence, summary judgment is inappropriate (Harinrain v. Walker, 73 AD3d 701, 701 [2d Dept., 2010]).

Accordingly, it is

ORDERED that plaintiff Jennie Sallemi's motion to strike defendant's answer [001] is hereby denied, and it is further

ORDERED that defendant Clove Lakes Health Care and Rehabilitation is to produce the nursing supervisor, as designated by plaintiff, within 30 days of the date of this Decision and Order, and it is further

ORDERED that the failure of any party to comply with this Courts date restriction for defendant nursing supervisor's deposition will result in possible sanctions and/or preclusion for the offending party, and it is further

ORDERED that the defendant Clove Lakes Health Care and Rehabilitation's motion for summary judgment [002] is hereby denied, and it is further

ORDERED that the plaintiff Jennie Sallemi's motion for summary judgment [003] is hereby denied, and it is further

ORDERED that any and all further requests for relief are hereby denied, and it is further

ORDERED that this case is to proceed immediately to trial.

THIS IS THE DECISION AND ORDER OF THE COURT

E N T E R,

Dated: December 2, 2010

Hon. Judith N. McMahon
Justice of the Supreme Court