

**Siegel v Engel Burman Senior Hous. at E. Meadow,  
LLC**

2011 NY Slip Op 33756(U)

September 29, 2011

Sup Ct, Nassau County

Docket Number: 6709/09

Judge: Antonio I. Brandveen

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN  
J. S. C.

ANDREW SIEGEL, As Executor Under Will of  
CAROL E. SIEGEL, Deceased,

TRIAL / IAS PART 30  
NASSAU COUNTY

Plaintiff,

Index No. 6709/09

- against -

Motion Sequence No. 005, 007

ENGEL BURMAN SENIOR HOUSING AT  
EAST MEADOW, LLC d/b/a THE BRISTAL AT  
EAST MEADOW, ULTIMATE CARE NEW  
YORK, LLC, XYZ CORP., ESTHER  
GIOBADDIA, ERIC SCHOENFELD, MD,  
MARTINE E. KESSLER, MD, THE PLASTIC  
SURGERY GROUP, PC and SOUTH NASSAU  
COMMUNITIES HOSPITAL HOME CARE  
SERVICES,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1, 2</u>
Answering Affidavits .....	<u>3</u>
Replying Affidavits .....	<u>4, 5</u>
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The defendants Engel Burman Senior Housing at East Meadow, LLC d/b/a The  
Bristol at East Meadow, Ultimate Care New York, LLC, XYZ Corp. and Esther  
Giobaddia move for judgment dismissing with prejudice the verified complaint and all  
cross claims. These defendants claim there are no triable issues of fact. The defense

contends the plaintiff fails to establish these defendants acts negligently in the care of the decedent. The defense asserts the plaintiff's allegations regarding statutory violations must be dismissed since there is no evidence the alleged violations caused the decedent's injury and death. The defense avers the wrongful death cause of action must be dismissed because the predicate claims against these defendants are not viable. The defense maintains the plaintiff's allegations in the verified bill of particulars regarding negligent training must be stricken since there is no claim in the verified complaint for negligent hiring nor training.

The plaintiff cross moves for summary judgment on liability, as well as oppose the defense motion. The plaintiff contends the defense motion must be denied because these defendants fail to satisfy their prima facie burden because the record demonstrates Giobaddia failed to exercise reasonable care in handling an oxygen tank which dropped on the decedent's foot. The plaintiff asserts the defendants violated statutes and regulations pertaining to the care of the decedent as a registered resident of an adult living facility when the oxygen tank was mishandled.

This Court carefully reviewed and considered all of the papers submitted with respect to both motions. "Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (*Ugarriza v. Schmieder*, 46 N.Y.2d 471, 474). Under CPLR 3212(b), a

motion for summary judgment “shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). The court’s role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff’d* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co.*,

*supra*). This Court determines none of the parties have established a prima facie showing regarding negligence and proximate cause to warrant the court as a matter of law in directing judgment in their favor. There are material issues of fact which require resolution by a trier of fact.

Accordingly, both motions are denied.

So ordered.

Dated: **September 29, 2011**

ENTER:



J. S.C.

NON FINAL DISPOSITION

**ENTERED**

OCT 04 2011

NASSAU COUNTY  
COUNTY CLERK'S OFFICE