

Mars v City of New York
2013 NY Slip Op 30350(U)
January 4, 2013
Sup Ct, Queens County
Docket Number: 32885/09
Judge: Kevin Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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Erskine Mars, Jr. An adult incapable of managing his own affairs, by his Guardian Ad Litem, Andre K. Mars,
Plaintiff,
- against -

Index
Number: 32885/09

Motion
Date: 12/19/12

The City of New York and Assisted Care, Inc.,

Motion
Cal. Number: 94

Defendants.

Motion Seq. No.: 3

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The following papers numbered 1 to 15 read on this motion by defendant, Assisted Care, Inc., for summary judgment; and "cross-motion" by defendant, The City of New York, for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Affidavit-Exhibits.....	1-5
Notice of "Cross-Motion"-Affirmation-Exhibit.....	6-9
Affirmation in Opposition to City.....	10-11
Reply (Assisted).....	12-13
Reply (City).....	14-15

As a preliminary matter, the City's notice of "cross-motion" is deemed a notice of motion, since plaintiff is not a moving party (see CPLR 2215).

Upon the foregoing papers it is ordered that the motions are decided as follows:

Motion by Assisted Care for summary judgment dismissing the complaint and all cross-claims against it is granted. Motion by the City for leave to serve a late motion for summary judgment and, upon the granting of same, for summary judgment dismissing Assisted Care's cross-claims against the City is moot.

The essential facts of this case are not in dispute. Plaintiff was 77 years old on the date of the accident and suffering from Alzheimer's disease and prostate cancer. His son, Andre Mars, applied on his behalf for home care services in late 2006 or early

2007 with the City's Human Resources Administration, Medical Insurance and Community Services Administration Home Care Services Program ("CASA"). He had requested that his father be provided home care attendants to care for him 12 hours throughout the day and 12 hours throughout the night. The Program Director of Assisted Care, John Sullivan, explained in his affidavit in support of the motion that such an arrangement is known as 12-hour split shift care. Pursuant to the Notice of Decision of Initial Authorization of Home Care Services issued on April 2, 2007, plaintiff was not approved for 12-hour split-shift care but was instead approved by CASA for a home attendant/personal care worker for 24 hours per day sleep-in service 7 days per week. The notice of decision also noted, "You may require some assistance during the night." With 24-hour sleep-in care, the home attendant provides 12 hours of care during a 24-hour period, being paid for 12 hours of care plus a small night stipend for sleeping in the client's home. The hours of care usually start when the client normally wakes in the morning. Therefore, although the home attendant lives in the client's home on a 24-hour per day basis, he or she only provides care to the client for 12 hours a day and sleeps at night. The home care attendant is not required, and is not authorized by the City, to be awake and attentive to monitor and assist the client 24 hours per day. However, the attendant would be required to get up at night to assist the client if awakened by the client and specifically asked for assistance, such as in going to the bathroom. Sullivan also explained that Assisted Care does not, and is not required to install bed alarms or monitors in the patient's home.

Plaintiff was provided with two attendants who divided the 24-hour weekly shifts. One attendant slept in plaintiff's home for 4 days in a row and the other slept in the home for 3 days in a row.

Andre Mars testified in his deposition that plaintiff normally went to bed at 8:00 - 10:00 p.m. and slept until the morning. Andre Mars testified that when he would leave the house for work at 6:30-6:45 a.m., plaintiff was still usually sleeping.

The home was a two-story residence. The first floor had two bedrooms, a bathroom, kitchen, hallway and living room. In the hallway opposite the bathroom was a door to the basement. Plaintiff slept in one of the bedrooms and the attendant slept in the other bedroom. Andre Mars and his wife slept in the living room and plaintiff's daughter and another relative slept in the basement.

On September 22, 2008, either at approximately 1:30 a.m., according to Andre Mars, or sometime after 3:00 a.m., according to the attendant, plaintiff opened the door leading to the basement and fell down the stairs. The attendant, Emmanuel Golo, testified in his deposition that he was lying in bed at the time and heard the sound of a "boom". He got up, went to plaintiff's room which

he found to be empty, and then noticed the basement door open. When he went down to the basement he discovered that plaintiff had fallen down the stairs. Both Golo and Andre Mars testified that plaintiff had gotten up twice before during that night. The first time he was found by the front door, and the second time he was found in the kitchen. Golo and Andre Mars testified that they were awakened by the sound either of a bell placed by the family on the doorknob of the front door to alert them to any attempt by plaintiff to open the front door and exit the house, on the first occasion, or by either the sound of slippers feet shuffling or a cane tapping on the floor the second time. On both occasions, Golo led plaintiff back to his room and put him to bed. On the third occasion, both Golo and Andre Mars were alerted by the sound of plaintiff falling down the basement stairs.

Andre Mars testified that his father was prone to wandering and that he would wander to the front door. Mars also testified that, as far as he knows, plaintiff never tried to open the basement door at night prior to the date of the accident.

Assisted Care has thus established its prima facie entitlement to summary judgment as a matter of law by submitting un rebutted evidence that its attendant was not required, or authorized, to maintain a vigil throughout the night to monitor plaintiff and prevent him from wandering to the basement stairs and, therefore, did not breach a duty of care owed to plaintiff (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]). Plaintiff has failed to raise any triable issue of fact in opposition.

Plaintiff has failed to demonstrate that Golo or Assisted Care acted in any way negligently in the services provided to plaintiff. The attendant was entitled to sleep at night and was not required to stay awake to monitor plaintiff throughout the night. Even though Golo was awaked twice in the night prior to plaintiff's fall to find plaintiff wandering to the front door and the kitchen and led him back to bed, his knowledge that plaintiff was prone to wandering at night did not impose upon him the added duty to thenceforth remain awake at night to watch plaintiff. Indeed, Andre Mars acknowledged that notwithstanding his request to the City to provide 12-hour split-shift care for his father, the care that was approved was the 24-hour live-in care in which the attendant would only provide care during the day and that he was entitled to sleep at night, the only exception being that he would get up at some point in the night to change plaintiff's incontinence pad.

Plaintiff's counsel's argument that Gojo, by his previous course of conduct in waking up to the sound of plaintiff wandering and leading him back to bed, assumed the duty to "respond promptly

whenever plaintiff Ersike Mars got up from bed during the night hours and began to wander through the house" is without merit.

"An assumed duty...may arise once a person undertakes a certain course of conduct upon which another relies...[T]he question is whether defendant's conduct placed plaintiff in a more vulnerable position than plaintiff would have been in had defendant done nothing" (Malpeli v Yenna, 81 AD 3d 607, 608-609 [2nd Dept 2011][internal quotations and citations omitted]). Here, Golo's two prior acts of leading plaintiff back to bed upon being awakened to the noise of his wandering did not place plaintiff in a more vulnerable position than he would have been had Golo not so acted. In other words, Golo's actions created no justifiable detrimental reliance on the part of plaintiff or his family so as to support a cause of action in negligence based upon the breach of an assumed duty of care (see id.).

Counsel's additional speculative argument that Golo might have been more alert and heard plaintiff walking about before his tumble down the stairs had he not worked five consecutive 24-hour shifts but had been relieved by other attendants on some days fails to raise an issue of fact. In any event, as heretofore noted, Golo had no duty to be alert and awake at all during the middle of the night.

Contrary to plaintiff's allegation in his bill of particulars that Assisted Care failed to provide plaintiff with competent and skilled employees, the evidence on this record is that Golo was certified by New York State to provide personal care services and was in good standing at all times in question, and the record on this motion does not raise any issue of fact as to any incompetence on the part of Golo. Equally without merit is the allegation in the bill of particulars that Assisted Care was negligent in failing to place monitors or alarms in plaintiff's bed or room to alert the attendant when plaintiff was out of his bed. As heretofore mentioned, the un rebutted evidence presented on this record is that Assisted Care had no duty to provide such devices. Indeed, plaintiff does not oppose the dismissal of these causes of action.

Therefore, Assisted Care is entitled to dismissal of the complaint against it. Moreover, Assisted Care is entitled to dismissal of the City's cross-claims against it for contribution and contractual indemnification. Since Assisted Care was not negligent, as a matter of law, the City's cross-claim for contribution must also fail. As to that branch of the cross-claim for contractual indemnification, plaintiff's claim against the City is premised upon its alleged negligence in failing to approve 12-hour split-shift care for plaintiff even though it was apprised by

plaintiff's family that plaintiff wandered at night and needed care at night. It is undisputed that the contract between the City and Assisted Care did not provide that Assisted Care was obligated to indemnify the City for the City's own negligence.

Accordingly, the motion is granted and the complaint and cross-claim are dismissed against Assisted Care.

Since the complaint and the City's cross-claim are dismissed against Assisted Care, the City's motion for leave to serve a late motion for summary judgment and, upon the granting of same, for summary judgment dismissing Assisted Care's cross-claims against the City for contribution and indemnification is moot.

Dated: January 4, 2013

KEVIN J. KERRIGAN, J.S.C.