

Cruz v Premier Home Health Care Servs., Inc.
2019 NY Slip Op 33298(U)
November 6, 2019
Supreme Court, New York County
Docket Number: 151132/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: HON. KATHRYN E. FREED

PART

IAS MOTION 2EFM

Justice

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INDEX NO.

151132/2017

ROLANDO CRUZ,

MOTION SEQ. NO.

001

Plaintiff,

- v -

PREMIER HOME HEALTH CARE SERVICES, INC., and
MARIA ORTIZ,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for

DISCOVERY

In this personal injury action, defendants Premier Home Health Care Services, Inc. ("Premier") and Maria Ortiz ("Ortiz") move, pursuant to CPLR 3012-a and 3406 (a), to compel plaintiff Rolando Cruz ("Cruz"), as legal guardian of Juana Collado ("Collado"), an incapacitated individual, to serve a certificate of merit and notice of medical malpractice and transfer this action, pursuant to 22 NYCRR 202.3, from the general negligence part to the medical malpractice part (Doc. 24). Plaintiff opposes the motion and cross-moves for an order, pursuant to CPLR 3025 (b) and (c), granting leave, *nunc pro tunc*, to amend the summons and complaint to reflect the substitution of Collado's new legal guardian (Doc. 33). After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, the motions are decided as follow.

FACTUAL AND PROCEDURAL BACKGROUND:

In February 2017, plaintiff commenced this action by filing a summons and complaint as against defendants for injuries Collado allegedly sustained at her residence in September 2015 while receiving home-health services from Ortiz, a home-health attendant and employee of Premier (Doc. 1). Specifically, the complaint alleges that Collado was caused to fall at the premises (Doc. 1 at 4).

In the instant motion to compel, defendants argue that the claims set forth in the summons and complaint and the bill of particulars sound in medical malpractice and should be transferred to the medical malpractice part (Doc. 25). Specifically, they contend that the complaint alleged, *inter alia*, that Premier held itself out to the general public as being qualified, capable and competent in providing home-health care and home-health aide services through clinicians, nurses, nursing assistants and home attendants; that they had a duty to care, treat and supervise plaintiff; and that plaintiff's injuries were caused entirely by the negligence of Premier in hiring, training, supervising and managing its clinicians, nurses, nursing assistants, home care attendants and other personnel (Doc. 25). Moreover, defendants take issue with the bill of particulars, in which plaintiff alleges that they failed to follow the applicable operating practices and procedures and adhere to and execute their own orders regarding safety precautions while providing treatment, nursing services, and supervision to plaintiff (Doc. 25).

In opposition to defendants' motion, plaintiff argues, *inter alia*, that this action sounds in negligence and not medical malpractice because the alleged incident occurred at Collado's home and Ortiz was not providing her with any medical or nursing treatment at the time of her injuries (Doc. 34). Thus, urges plaintiff, an exercise of specialized medical judgment was not required (Doc. 34). Moreover, plaintiff claims that the incident report and the emergency record of

Jamaica Hospital Medical Center both support a finding that this action is a simple negligence case (Doc. 34).

In support of the cross-motion, plaintiff submits an order from this Court reflecting that Norman P. Bock of the Law Offices of Norman P. Bock, Esq. ("Bock") was appointed as legal guardian for Collado on April 17, 2019 (Doc. 37).

LEGAL CONCLUSION:

An action to recover for personal injuries against a medical facility "may be based either on negligence principles or on the more particularized medical malpractice standard. Simple negligence principles are applicable to those cases where the alleged negligent act may be readily determined by the trier of fact based on common knowledge. However, where the directions given or treatment received by the patient is in issue, consideration of the professional skill and judgment of the practitioner or facility is required and the theory of medical malpractice applies" (*Friedmann v New York Hosp.-Cornell Med. Ctr.*, 65 AD3d 850, 850-851 [1st Dept 2009] [internal quotation marks and citations omitted]; see *Reardon v Presbyterian Hosp. in City of N.Y.*, 292 AD2d 235, 236 [1st Dept 2002]; *Coursen v New York Hosp.-Cornell Med. Ctr.*, 114 AD2d 254, 256 [1st Dept 1986]).

Here, defendants' motion to compel is denied because this action concerns ordinary negligence, and the medical malpractice standard is thus inapplicable. An incident report prepared by Premier on the date of the incident reflects that Ortiz left Collado unattended in the bedroom and that she was injured during that time (Doc. 40). A hospital record from the same date indicates that Collado fell while she was on her way to the bedroom (Doc. 41). Insofar as "the gravamen of the action concerns the alleged failure to exercise ordinary and reasonable care

to insure that no unnecessary harm befell the patient,” this Court finds that it may be readily assessed on the basis of common knowledge (*Papa v Brunswick Gen. Hosp.*, 132 AD2d 601, 603 [2d Dept 1987]; see *Friedmann v New York Hosp.-Cornell Med. Ctr.*, 65 AD3d at 850-851; *Reardon v Presbyterian Hosp. in City of N.Y.*, 292 AD2d at 236-237; compare *Stanley v Lebetkin*, 123 AD2d 854, 854-855 [2d Dept 1986]).

Plaintiff’s cross-motion for leave to amend the caption and complaint to name Norman P. Bock of the Law Offices of Norman P. Bock, Esq as the legal guardian of Juana Collado is granted. In April 2019, this Court (Rosado, J.) removed Cruz as Collado’s guardian and appointed Bock as his successor (Doc. 37). Defendants do not oppose the cross-motion, and, in any event, this Court finds that the substitution will not prejudice or surprise defendants (see CPLR 3025 [b], [c]; *Bank of America, N.A. v DeNardo*, 151 AD3d 1008, 1010 [2d Dept 2017]; *Leibowitz v Mt. Sinai Hosp.*, 296 AD2d 340, 342 [1st Dept 2002]).

The remaining arguments are either without merit or need not be addressed based on the findings above.

In accordance with the foregoing, it is hereby:

ORDERED that defendants’ motion, pursuant to CPLR 3012-a and 3406 (a), to compel plaintiff to serve a certificate of merit and notice of medical malpractice and to transfer this action to the medical malpractice part is denied; and it is further

ORDERED that the plaintiff's motion for leave to amend the caption and complaint to name Norman P. Bock of the Law Offices of Norman P. Bock, Esq as the legal guardian of Juana Collado is granted; and it is further

ORDERED that the amended complaint, in the form annexed to the motion papers (Doc. 42), shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED that the action shall bear the following caption:

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NORMAN P. BOCK OF THE LAW OFFICES OF
NORMAN P. BOCK, ESQ, as legal guardian of
JUANA COLLADO, Incapacitated,

Plaintiff,

Index No.: 151132/17

-v-

*PREMIER HOME HEALTH CARE SERVICES,
INC. and MARIA ORTIZ (Employee of Premier
Home Health),*

Defendants.

-----X

And it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141 B) and the Clerk of the General Clerk's

Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the amended caption; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh]); and it is further

ORDERED that the parties are required to appear for a previously scheduled compliance conference on January 7, 2020 at 80 Centre Street, New York, New York, Room 280 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

11/6/2019

DATE

CHECK ONE:

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CASE DISPOSED

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GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

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GRANTED IN PART

☐

OTHER

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SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE



KATHRYN E. FREED, J.S.C.