

Curry v Martin

2019 NY Slip Op 33842(U)

November 22, 2019

Supreme Court, Bronx County

Docket Number: 31668/2018E

Judge: Howard H. Sherman

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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 04

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Thornton Curry, as Attorney in Fact for HANNAH
CURRY

Decision and Order

Index No. 31668/2018E

Plaintiff

-against-

Lola Lee Martin, and
Mrs G's Services LLC.,

Howard H. Sherman
JSC

Defendants

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The following papers numbered 1-3 read on this motion for an order compelling plaintiff to serve a Certificate of Medical Malpractice , et alia.

Notice of Motion - Affirmation and Exhibits A-F
Affirmation in Opposition
Affirmation in Reply

PAPERS NUMBERED

1
2
3

Plaintiff's motion is denied for the reasons set forth below.

In this action , Thornton Curry , as attorney in fact for his mother, Hannah Curry, seeks damages for personal injuries suffered by Mrs. Curry as a result of a wound alleged to have been created on June 10, 2017 when the individual defendant home - care attendant despite explicit instructions not to do any foot care, cut Mrs. Curry's toenails. It is alleged that she used a rusty, contaminated scissor with which to do so, and as a result , the wound became infected, gangrenous, and eventually necrotic. On July 18, 2017, Mrs. Curry was required to undergo an above-the-knee amputation .

Plaintiff asserts causes of action in negligence , negligent hiring and retention , and res ipsa loquitur as against the caretaker, and the licensed home care service agency by which she was employed.

As pertinent here, the amended complaint asserts that on April 4, 2017, the agency was assigned by Elderplan/Homefirst through Medicare/Medicaid to provide nursing care to Mrs. Curry , and “[I] violation of 10 NYCRR § 763.6(b) ¹, a Plan of Care (“POC”) was not formulated , as required, within ten (10) days .” [Paragraph 14] It is also alleged that defendants were negligent in failing “to timely and properly assess her needs in the creation of a POC..”, and “to properly care for [her] and provide

¹TITLE 10. DEPARTMENT OF HEALTH
CHAPTER V. MEDICAL FACILITIES
SUBCHAPTER C. STATE HOSPITAL CODE
ARTICLE 7. CERTIFIED HOME HEALTH AGENCIES AND LICENSED HOME CARE SERVICES AGENCIES

PART 763. CERTIFIED HOME HEALTH AGENCIES, LONG TERM HOME HEALTH CARE PROGRAMS AND AIDS HOME CARE PROGRAMS MINIMUM STANDARDS

763.6 Patient assessment and plan of care.

(a) A comprehensive interdisciplinary patient assessment shall be completed, involving, as appropriate, a representative of each service needed, the patient, the patient's family or legally designated representative and patient's authorized practitioner. Such assessment shall address, at a minimum, the medical, social, mental health and environmental needs of the patient.

(b) A plan of care shall be developed within 10 days of admission to the agency and approved by the patient based on the comprehensive interdisciplinary patient assessment. The plan shall designate a professional person employed by the agency to be responsible for coordinating care which includes but is not limited to:

(1) coordination of all services provided directly or by contract to the patient by the agency, informal supports and other community resources to carry out the agency's plan of care;

(2) cooperation with other health, social and community organizations providing or coordinating care;

(3) consultation with the patient's authorized practitioner, the local social services representative and discharge planner, if applicable. If an authorized practitioner has referred a patient under a plan of care that cannot be completed until after an evaluation visit, the authorized practitioner shall be consulted to approve additions or modifications to the original plan; and

(4) responsibility for maintaining current clinical records, conducting case reviews and completing required patient-specific records and reports, as appropriate.

appropriate nursing services " [¶ 24], and in breaching their duty to care for [her] in a safe and appropriate manner, in compliance with all statutes, rules , and regulations attendant to home health care in the State of New York." [¶¶ 28-29].

The verified bill of particulars allege that among other things, defendants were negligent in " ignoring and violating their own POC once belatedly created." [¶ 7]

Motion

Defendant Mrs. G's Services LLC moves for an order pursuant to :1) CPLR § 3012-a compelling plaintiff to serve a Certificate of Merit; 2) CPLR § 3406 compelling plaintiff to file a Notice of Medical Malpractice , and 3) CPLR §§ 3101, 3041, 3042, and 3126, dismissing the complaint for willful failure to comply with defendant's demand for a Supplemental Bill of Particulars, or, in the alternative, compelling plaintiff to serve a Supplemental Bill of Particulars. The third branch of the motion has been withdrawn [Affirmation in Reply ¶ 3].

Plaintiff opposes the motion contending that neither defendant provided medical services to Mrs. Curry, and as a consequence, cannot be liable for medical malpractice. Nor , it is argued, do the pleadings allege that either defendant violated an accepted standard of medical care , or that they were charged with the exercise of specialized medical knowledge in rendering care to the principal.

In reply, defendant argues that to the extent that plaintiff alleges that defendants required skills not ordinarily possessed by lay persons (see Amended Verified Complaint ¶ 24), the complaint sounds in medical malpractice, as confirmed by the inclusion in the complaint of the interdisciplinary patient assessment (10 NYCRR 763.6(a)) from which it is alleged defendants deviated in providing nursing care, and as a consequence, expert testimony will be required to determine this issue at trial.

Discussion and Conclusions

There is no rigid analytical line separating the ordinary negligence and medical malpractice (Scott v. Uljanov, 74 N.Y.2d 673, 675, 543 N.Y.S.2d 369, 541 N.E.2d 398 (1989)). The critical question to be determined “is the nature of the duty to the plaintiff which the defendant is alleged to have breached (see, Bleiler v Bodnar, 65 NY2d 65; Stanley v Lebetkin, 123 AD2d 854).” Halas v. Parkway Hosp., 158 A.D.2d 516, 517, 551 N.Y.S.2d 279 (2d Dept. 1990), and whether the acts or omissions complained of may be readily determined by the trier of fact based on common knowledge, or whether consideration of the professional skill and judgment of a practitioner or facility is required (see, Friedmann v. New York Hosp.–Cornell Med. Ctr., 65 A.D.3d 850, 884 N.Y.S.2d 733 (1st Dept. 2009); Reardon v. Presbyterian Hosp. in City of N.Y., 292 A.D.2d 235, 739 N.Y.S.2d 65 (1st Dept. 2002)).

The court finds that despite the invocation of certain regulatory provisions, the gravamen of plaintiff's complaint is not the lack of or adherence to any interdisciplinary plan, nor the breach of a professional standard of care, but rather, the failure of a home health attendant to exercise reasonable care in providing living assistance services to Mrs. Curry, by engaging in an expressly prohibited grooming activity with a rusty, and contaminated implement. Liability, if any, can be assessed by a jury based on the basis common knowledge" (see, Reardon, supra at 236), needing no reference to a consideration of professional skills or judgment. The circumstances here are analogous to those claims arising from improper supervision of the non-ambulatory (see, Rodriguez v. Home Health Mgt. Servs. Inc., 2018 N.Y. Misc LEXIS 3311 [Sup.Ct. N.Y. Cty. 2018])

Accordingly, it is

ORDERED that the motion be and hereby is denied.

This shall constitute the decision and order of this court.

Dated: November 22, 2019



Howard H. Sherman