

**Perillo v Kings Harbor Multicare Ctr.**

2019 NY Slip Op 34305(U)

June 27, 2019

Supreme Court, Westchester County

Docket Number: Index No. 51018/18

Judge: Gerald E. Loehr

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
BENJAMIN PERILLO as ADMINISTRATOR of the  
Estate of EVA PERILLO and BENJAMIN PERILLO,  
Individually,

Plaintiffs,

**DECISION AND ORDER**  
Index No.: 51018/18

-against-

KINGS HARBOR MULTICARE CENTER and KINGS  
HARBOR HEALTH SERVICES, LLC,

Defendants.

-----X  
KINGS HARBOR MULTICARE CENTER and KINGS  
HARBOR HEALTH SERVICES, LLC,

Third-Party Plaintiffs,

-against-

ADVANCED MEDICAL STAFFING and NICKIESHA  
GOULD,

Third-Party Defendants.

-----X  
LOEHR, J.

The following papers numbered 1 to 8 were read on the motion of Advanced Medical Staffing and Nickiesha Gould for summary judgment dismissing the Third Party Complaint and the Cross-Motion of Defendants Kings Harbor Multicare Center and Kings Harbor Health

Services, LLC (collectively, "Kings Harbor") for summary judgment dismissing the Complaint and all counterclaims.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits	1
Memorandum of Law in Opposition	2
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Notice of Cross-Motion - Affirmation	5
Reply Affirmation	6
Affirmation in Opposition - Exhibits	2
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Notice of Cross-Motion (#3) - Affirmation - Exhibits	4
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Upon the foregoing papers, it appears that on November 11, 2014 Eva Perillo (the "Decedent"), then 76-years old, was admitted to Montefiore Hospital for treatment, including surgery, for various problems. Post operatively, she was discharged from Montefiore and was transferred to Kings Harbor for rehabilitation. Advanced Medical Staffing provided nurse staffing at Kings Harbor. Under the care plan formulated for the Decedent at Kings Harbor, she was to have two CNA's to assist her, inter alia, in transferring from her wheelchair onto and then off the toilet. On December 27, 2014, CNAs Bryan and Gould assisted the Decedent onto the toilet. When she was finished, CNAs Bryan and Gould returned to assist her off the toilet. As they were doing so, the Decedent became "wobbly." The CNAs then attempted to place the Decedent back onto the toilet but were unable to because the "commode extender" had shifted. According to Advanced Medical, the CNAs then gently lowered the Decedent to the floor. According to the Plaintiff, they dropped her.

The Decedent having passed away on August 4, 2016, apparently for reasons unrelated to this action, the Plaintiff commenced his action on April 2, 2015, asserting causes of action for

negligence. Kings Harbor answered and impleaded Advanced Medical for common law indemnification and contribution and contractual indemnification. Advanced Medical now timely moves to dismiss the Third Party Complaint. Kings Harbor then “cross-moved” to dismiss the Complaint and Advanced Medical’s counterclaim. The cross-motion, however, is not timely, having been made more than 45 days after the filing of the Note of Issue and must be denied on that basis.

Advance Medical has established their prima facie entitlement to summary judgment upon evidence that the CNA’s properly assisted the Decedent, that any problem with the commode was the responsibility of Kings Harbor, and that, in any event, the Decedent was not dropped onto the floor. In opposition, Plaintiff has submitted evidence that the Decedent was dropped onto the floor after the CNA’s did not properly support her (*see Fortinas v Westchester Medical Center*, 300 AD2d 437, 439 [2d Dept 2002]). Accordingly, the motion of advanced Medical is denied. The cross-motion of Kings Harbor, aside from being untimely, sought to dismiss the Complaint on the basis that if Advanced Medical had not been negligent, as their liability was derivative of advanced Medical, they could not be negligent. As there is a question of fact as to advanced Medical’s negligence, the motion would fail even if it had been timely.

The parties shall appear in the Settlement Conference Part on August 13, 2019 at 9:15am. This constitutes the decision and order of this Court.

Dated: White Plains, New York  
June 27, 2019



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HON. GERALD E. LOEHR  
J.S.C.

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