

Famoso v Arcadia Mgt., Inc.

2019 NY Slip Op 35014(U)

October 22, 2019

Supreme Court, Nassau County

Docket Number: Index No. 605537/17

Judge: Diccia T. Pineda-Kirwan

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - NASSAU COUNTY

Present: Honorable DICCIA T. PINEDA-KIRWAN
Justice

IA PART 30

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CHARLES FAMOSO, as Executor of the Goods,
Chattels and Credits of GRACE FAMOSO, Deceased,

Plaintiff(s),

Index No.: 605537/17
Motion Date: 8/22/19
Motion Cal. #: 5, 6
Seq. No.: 2, 3

-against-

ARCADIA MANAGEMENT, INC. d/b/a THE
ARBORS AT ISLANDIA EAST and d/b/a THE
ARBORS AT ISLANDIA WEST,

Defendant(s).
-----X

The following numbered papers read on this motion by defendant for summary judgment, and cross motion by plaintiff for discovery.

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits.....	EF 32 - 48
Notice of Cross-Motion-Affidavit-Exhibits.....	EF 49 - 58
Replying.....	EF 59 - 62
Stipulation.....	1

After conference, the discovery issues (Seq. 3), have been resolved by stipulation.

Now upon the foregoing cited papers, defendant's motion for summary judgment is decided as follows:

First, movant is advised to establish whether its motion is timely, and if not, to demonstrate good cause for its late filing (*see Brill v City of New York*, 2 NY3d 648 [2004]; *see generally Huerta v Longo*, 63 AD3d 684 [2009]). In this instance, movant failed to include proof that its motion was timely filed pursuant to CPLR 3212, which was ultimately shown by the certification order and note of issue.

Plaintiff commenced this action to recover for injuries his mother, Grace Famoso, now deceased, allegedly sustained as a result of ten falls she suffered while she was a resident at defendant's assisted living residence homes (the Arbors) from June 8, 2013 to July 18, 2015. The Arbors is licensed by the New York State Department of Health and governed by New York's statutes and regulations.

Pursuant to 18 NYCRR § 485.2(a), an adult home is a type of facility licensed to provide “care and services to adults who, though not requiring continual medical or nursing care... are unable or substantially unable to live independently.” A resident cannot be admitted to an adult home without a medical determination that he or she meets the conditions for admission, and an interview between the facility and the resident or resident’s representative (*see* 18 NYCRR § 487.4[e]). This determination is made through a written medical evaluation signed by a physician, physician assistant or nurse practitioner which states, among other things, that the resident is not medically or mentally unsuited for care in the facility, that the resident does not require placement in a hospital or residential health care facility, and that the resident was physically examined within 30 days prior to the date of admission (*see* 18 NYCRR § 487.4[g]). An adult home may not admit someone who requires services beyond those the operator is permitted to provide (*see* 18 NYCRR § 487.4[a]).

Plaintiff asserts causes of action sounding in negligence and breach of contract, for allowing his mother to be admitted at the Arbors, and to continue to live there when the Arbors could no longer meet all of her needs. Defendant now moves for summary judgment on the issue of liability.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form, demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). Only when the movant satisfies its initial burden will the burden shift to the opponent, “to lay bare his or her proof and demonstrate the existence of triable issues of fact” (*Chance v Felder*, 33 AD3d 645, 645-646 [2006]).

In support, defendant submits, among other things, the expert affidavit of Diane J. Yastrub, a Registered Nurse, copies of Ms. Famoso’s evaluations, and the Arbors’ records for Ms. Famoso.

Nurse Yastrub states that on June 7, 2013, the day prior to Ms. Famoso’s admission, one of her physicians, Dr. Wilbert Maniego, determined that she was an appropriate resident for the Arbors. Ms. Famoso was admitted to the Arbors on June 8, 2013, at the age of 89, pursuant to a residency agreement (Agreement) executed by plaintiff. Nurse Yastrub avers that throughout Ms. Famoso’s stay, it was her personal independent

physicians who determined whether she could stay or be re-admitted, pursuant to the applicable statutes and regulations for an adult home, and not the facility itself. She testified that the Arbors could not provide medical diagnosis of or medical care to Ms. Famoso pursuant to the New York Social Service statutes and regulations, but instead all of her medical assessments and needs, including her prescription medications, were provided by her independent physicians. She explained that adult homes, such as the Arbors, are operated on a "social," as opposed to a "medical" model, and that they provide room and board, housekeeping, personal care, supervision, and recreational activities for independent adults who do not require continual medical or nursing care.

Nurse Yastrub explains that in addition to Ms. Famoso's initial assessment, she was required to be re-evaluated periodically, and also after any hospitalization lasting longer than 24 hours. Here, Ms. Famoso received certifications on June 2, 2014, August 26, 2014, October 9, 2014, January 20, 2015, June 5, 2015, and June 30, 2015. She claims that Ms. Famoso was denied re-admission to the Arbors when her residency would have required care beyond the level that the Arbors could safely provide, and points to two occasions, in October of 2014 and December of 2014, when she was denied re-admission.

Addressing some of Ms. Famoso's falls directly, Nurse Yastrub states that after her October 10, 2014 fall, Ms. Famoso was documented as having slurred speech, which is indicative of a stroke, which would not be the fault of the Arbors. She further states that Ms. Famoso appears to suffer from osteoporosis, which could result in a spontaneous/pathological fracture, meaning that the two hip fractures she sustained at the Arbors could have caused her falls, rather than the falls causing the fractures. She adds that while Ms. Famoso was at the Safe Care Neighborhood of the Arbors East, which has a higher level of staffing but does not provide one to one supervision, any resident who requests supervision is assisted, but that Ms. Famoso did not ask for assistance at the time of her falls on July 10, 2015, October 10, 2014, and January 29, 2015.

Nurse Yastrub concluded that Ms. Famoso was a suitable resident for the Arbors at all times she resided there, that the care she received did not deviate from the standard of care for adult homes, that the Arbors complied with the contractual terms of the Agreement, and that Ms. Famoso did not sustain any injury as a result of her treatment at the Arbors. She opined that Ms. Famoso remained self-ambulatory during her entire residency and the fact that a resident may fall over the course of her time at an adult home does not mandate that she be transferred to a nursing home, since falls involving medically-compromised seniors are an inevitable fact of life in senior residential facilities.

In opposition, plaintiff submits, among other things, the affidavit of Rebecca McCarthy, a registered nurse board certified in gerontology. Nurse McCarthy states that when Ms. Famoso was first admitted to the Arbors, her "Pre-Move In Evaluation" noted she had numerous medical ailments that caused her to be confused, forgetful, have difficulty following instructions, and suffer short term memory deficits, impaired judgment, disorientation, combativeness, agitation, paranoia, and be in need of supervision. She asserts that Ms. Famoso's condition put her at a high risk for falls and defendant failed to provide the necessary supervision to ensure her safety.

Nurse McCarthy notes that Ms. Famoso fell on ten occasions during her stay at the Arbors, which indicates that it was not properly suited to care for her. She adds that the Arbors failed to complete an incident report and do an investigation for several falls, including a fall that occurred on July 10, 2015, that resulted in a left hip fracture. She asserts that this was a violation of 18 NYCRR § 487.7(d)(11)(vii) which states: "[t]he operator must prepare an incident report . . . whenever . . . a resident is involved in an accident . . . which results in such resident requiring medical care, medical attention or services." Nurse McCarthy further states that the Arbors failed to properly care for Ms. Famoso's needs, and references "Individualized Service Plans" for Ms. Famoso that were completed on June 12, 2014, February 21, 2015, and June 17, 2015, in which the case manager checked "no" to the question that asked if Ms. Famoso had a history of falls.

She opines that defendant breached paragraph 9 of the Agreement by failing to revise Ms. Famoso's "Individualized Service Plan" despite her many falls and behavioral issues. Aside from falls, Ms. Famoso exhibited aggressive behaviors including: pushing "wellness director against the wall while refusing to take medication," on October 1, 2014, slapping a "med tech in the face" on October 6, 2014, "kicking and trying [sic] bite throwing walker" on February 20, 2015, "very aggressive threw brief at supervisor," on March 8, 2015, and pushing staff "into bathroom wall while trying to toilet her" on May 19, 2015. Additionally, Ms. Famoso was transferred to the hospital on October 5, 2014, for hitting and kicking staff, and several days later, fell within a few hours of her readmission to the Arbors. Nurse McCarthy opines that Ms. Famoso's many re-admissions breached Section X of the Agreement, which states in relevant part that "the operator shall not admit any resident if the Operator is not able to meet the care needs of the Resident." She also opines that Ms. Famoso's re-admissions and retention violated 18 NYCRR §§487.4(c) and 488.4(c), which both provide, in pertinent part that "[a]n operator shall not accept nor retain any person who: (4) causes, or is likely to cause, danger to himself or others; (5) repeatedly behaves in a manner which directly impairs the well-being, care or safety of the resident or other residents."

Addressing specific falls, Nurse McCarthy states that during her falls on January 26, 2015, and January 29, 2015, Ms. Famoso hit her head, which should have been a warning to the Arbors to be proactive with fall prevention or transfer her if they were not able to keep her safe. She disagreed with Nurse Yastrub that the October 10, 2014 fall was the result of a stroke as the CT scan from the same date did not show evidence of a stroke. She additionally disagreed with Nurse Yastrub's opinion that Ms. Famoso probably had osteoporosis as there is no medical documentation stating she suffered from same. Furthermore, she found Nurse Yastrub's statement – that falls involving medically compromised seniors are inevitable at senior residential facilities – to be “absurd.” Nurse McCarthy opined that it was a departure from the standard of care for the Arbors to have ignored Ms. Famoso's decline while she suffered multiple falls, two hip fractures, and head injuries. She further found the availability of aides upon request for assistance to be insufficient due to as Ms. Famoso's compromised cognitive status.

Nurse McCarthy stated that defendant was required to identify progressive changes in Ms. Famoso's behavior or health status pursuant to 18 NYCRR §488.7(b)(1). Although defendant provided “Additional Services” under the Agreement, which included services to assist with ambulation, continence, and escorts to dining, services which Ms. Famoso desperately needed, such services were never offered, added, or suggested as part of her “Individualized Service Plan” or management of her case.

Nurse McCarthy further opines that notes in Ms. Famoso's records indicate that she should have been transferred to another facility. She points to a note by the Arbors on April 25, 2015, that Ms. Famoso was “unable to ambulate, combative, altered mental status, increased confusion, unsteady gait, unable to transfer and, danger to self and others” and yet remained at the Arbors. Additionally, a note in St. Catherine of Sienna Medical Center, during Ms. Famoso's admission from October 11, 2014 to October 14, 2014 states that Ms. Famoso is “not a good candidate for long term AC [assisted care] due to falls.”

Nurse McCarthy concludes that the care rendered to Ms. Famoso violated various standards set forth in New York State statutes and regulations for adult homes, failed to comply with the contractual terms of the Agreement, and failed to follow generally accepted professional standards of practice for adult homes. She opines that these departures resulted in Ms. Famoso's multiple falls.

The elements of a negligence claim are the existence of a duty, a breach thereof, and a resulting injury (*see Martinez v Khaimov*, 74 AD3d 1031 [2010]). The elements of a breach of contract cause of action are “the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of the contract, and resulting damages.” (*JP Morgan Chase v J.H. Elec. of New York, Inc.*, 69 AD3d 802, 803 [2010]). Here, defendant fails to establish its entitlement to judgment as a matter of law as to either cause of action.

Defendant’s reliance on *Hanley v Engel Burman Sr. Housing at Massapequa, LLC*, 2012 WL 985221, 2012 NY Misc LEXIS 1246 (Sup Ct, Nassau County, Mar. 7, 2012), is unavailing as it is distinguishable. For instance, the facility in *Hanley* sought to reduce the risk of falls by specifying that the resident would be escorted to meals, activities, and eventually with going to the bathroom by a staff member. Additionally, it was found that the resident in *Hanley* did not need to be transferred to a nursing home, since she was already receiving Hospice Care, and assistance from private duty aides, which filled in the gaps in her care – an accommodation not present here. Furthermore, some of the resident’s “falls” may not have been falls at all, and several occurred despite the fact that she was receiving one-on-one assistance, assistance that Ms. Famoso did not receive. Lastly, the resident’s daughter was regularly advised of her mother’s state, alternate treatment was discussed numerous times, and she elected not to pursue other care options. Here in contrast, plaintiff states that it was not until April of 2015, after his mother had already fallen six times, that his mother’s case manager began to intimate that Ms. Famoso needed more skilled care, and suggested “safe care” in Arbors East, instead of transferring her to a nursing home.

Lastly, the branch of the motion seeking to time-bar plaintiff’s claims as to injuries sustained as a result of Ms. Famoso’s October 10, 2014 fall, is denied.

Pursuant to CPLR 214-a, the statute of limitations for a medical malpractice cause of action is two years and six months. Defendant contends that as this action was commenced on June 13, 2017, the statute of limitations had expired as to Ms. Famoso’s October 10, 2014 fall.

Medical malpractice is a form of negligence, and “no rigid analytical line separates the two” (*Scott v Uljanov*, 74 NY2d 673, 674 [1989]). Conduct will be deemed malpractice, rather than negligence, when it “constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician” (*Id*

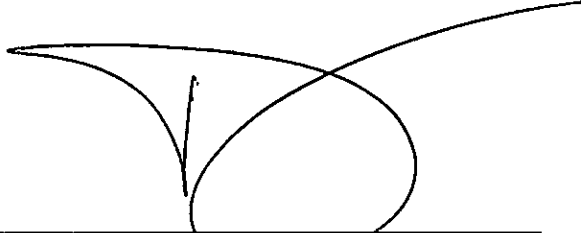
quoting *Bleiler v Bodnar*, 65 NY2d 65, 72 [1985]). While in certain circumstances, a hospital's assessment of a patient's need for supervision constitutes an integral part of the process of rendering medical treatment, and thus sounds in medical malpractice (*see Id; Smev v Sisters of Charity Hosp. of Buffalo*, 210 AD2d 966, 967 [1994]), where "the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the [facility's] failure in fulfilling a different duty", the complaint sounds in negligence (*Bleiler* at 73). The only information regarding the October 10, 2014 fall available in the record is in the "Incident Report" from that date which states "resident was found on floor by care specialist" complaining of right leg pain. At this juncture, based on this record, the Court cannot determine whether the conduct at issue during the October 10, 2014 fall was "an integral part of the process of rendering medical treatment" so that the complaint sounds in malpractice, or whether the facility failed to fulfill a different duty sounding in negligence (*see Edbauer v Harris Hill Nursing Facility*, 245 AD2d 1103, 1104 [1997]).

Accordingly, the motion is denied.

Any request for relief not expressly granted herein is denied.

This constitutes the decision and order of the Court.

Dated: October 22, 2019



DICCIA T. PINEDA-KIRWAN, J.S.C.

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE