Postrygacz v Home Attendant Vendor Agency, Inc.
2020 NY Slip Op 31194(U)
May 5, 2020
Supreme Court, Kings County
Docket Number: 506123/2017
Judge: Bernard J. Graham
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

SONIA POSTRYGACZ, as Administratrix of the Estate of FEIGA MAGARAM, and SONIA POSTRYGACZ, indiv., Index No.: 506123/2017

Plaintiff,

DECISION/ORDER

-against-

HOME ATTENDANT VENDOR AGENCY, INC. a/k/a HAVA and ELDERPLAN, INC. d/b/a ELDERPLAN HOMEFIRST, Hon. Bernard J. Graham Supreme Court Justice

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: award summary judgment to the defendants, pursuant to CPLR § 3212

Papers	**Numbered**
Notice of Motion and Affidavits Annexed.....	1-2
Order to Show cause and Affidavits Annexed.....	
Answering Affidavits & cross-motion.....	3-4
Replying Affidavits.....	5, 6
Exhibits.....	
Other: ..... (memo).....	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendant, Elderplan, Inc. d/b/a Elderplan Home First ("Elderplan") has moved, pursuant to CPLR§ 3212, for an Order awarding summary judgment and a dismissal of plaintiff's complaint, upon the grounds that there are no issues of fact which would warrant a trial in this matter.

The plaintiff, Sonia Postrygacz ("Ms. Postrygacz"), the Administrator of the Estate of Feiga Magaram, has opposed Elderplan's motion for summary judgment upon the grounds that there are material issues of fact with regard to the causes of action that have been pled by plaintiff, as against the defendants, for medical malpractice and negligence in the care and treatment that was rendered to the decedent Feiga Magaram. Co-defendant, Home Attendant Vendor Agency Inc., ("HAVA") has also opposed Elderplan's motion and cross-moved to

compel defendant Elderplan to produce a witness for an Examination Before Trial having alleged that the testimony that may be elicited at the deposition is crucial to their defense of this matter.

Background:

This is an action sounding in negligence and medical malpractice arising out of home health care that was rendered to plaintiff's decedent Feiga Magaram ("decedent") by the defendants. The plaintiff alleges that the defendants failed to prevent the development and the subsequent deterioration of the decedent's various pressure ulcers while she was under their care.

An action was commenced on or about March 28, 2017, by the filing of a summons and complaint on behalf of the plaintiffs. Issue was joined on behalf of defendant Elderplan by service of a verified answer, on or about May 19, 2017, and by the service of a verified answer on behalf of defendant, HAVA, on or about May 30, 2017.

At the time that defendants served their answer, discovery demands, which included a demand for a verified Bill of Particulars, were made of the plaintiff. In response, the plaintiff served a Bill of Particulars, on or about July 26, 2017.

A deposition was conducted of Ms. Postrygacz, the administrator of the Estate of the decedent, on March 20 and on March 22, 2019. Thereafter, counsel for Elderplan, by letter dated March 27, 2019, requested that the plaintiff designate a witness they sought to depose on behalf of Elderplan. In a response dated April 1, 2019, the plaintiff stated that prior to designating an institutional witness, Elderplan must respond to plaintiff's Demand for Employment Status of Nursing Staff, dated July 26, 2017. There were allegedly no further exchanges between the parties with respect to conducting this deposition and the EBT did not take place.

A Note of Issue and Certificate of Readiness was filed on behalf of the plaintiff on or about October 16, 2018.

Facts:

It is alleged that in August 2012 and continuing until June 2013, the decedent's medical care was managed by her primary care physician, Dr. Charles Brum, who conducted home visits and subsequently ordered that plaintiff apply for personal care services.

On or about May 2, 2013, the decedent, an 89-year-old female, enrolled in the Elderplan Home First Managed long-term care plan. Elderplan operates as a Medicaid Managed Long Term Program ("MLTCP") pursuant to the New York State Public Health § 4403-f. Elderplan's role was to arrange for home and community based covered services, to coordinate any unidentified non-covered services which were not covered under the MLTCP benefit plan and to identify the member's need for such assistance by conducting in home assessments which are performed by a certified registered nurse.

The Elderplan Nursing staff completed five assessments of the decedent to determine her eligibility and covered services.[1] The first assessment was documented and performed in accordance with the standard New York State Department of Health Managed Long-Term Care. The results of the first assessment found the decedent to be alert and oriented, but forgetful at times, she ambulated with a wheelchair, her skin was intact, and was bladder incontinent but bowel continent. The four assessments which followed were performed in accordance with the New York State Uniform Assessment guidelines.

The decedent's plan of care was initially certified for the period of June 1, 2013 until December 14, 2013. The plan of care authorized a personal care worker to be assigned to the decedent seven days a week and twenty-four hours per day. The care that was to be provided included bathing/shampoo, grooming (inclusive of skin care), incontinent care (liners, diapers and commode, urinal and bedpan), dressing, assisting with ambulation, meal preparation and medication reminders. Dr. Brum allegedly approved of this care plan and during that initial six-month period he made five home visits to the decedent. At one home visit (June 24, 2013), the decedent had a complaint of chest pains and there was a request for a house call by a home care physician.

The next certification period was from December 2013 through May 2014. Again, a worker was to be assigned to the decedent every day and twenty-four hours each day. The plan of care for this period was similar to what was prescribed in the prior period. The assessment report was that the decedent's skin was intact, her skin turgor was good, and she did not have any pressure ulcers. The patient required only limited assistance with bed mobility (moving to and

[1] The assessments were conducted on May 2, 2013, December 19, 2013, June 6, 2014, August 12, 2014 and December 17, 2014.

from the lying position, turning side to side, positioning of the body while in bed), and at that point in time the personal care worker was not required to turn and position the decedent. During this six-month period, Dr. Brum made two house call visits. At a house visit on January 26, 2014, Dr. Brum noted that the decedent needed a home care physician to monitor her condition pertaining to issues of imbalance, dementia, osteoarthritis and the difficulty she encountered when leaving the home which had become burdensome and required the use of an assistive device. In addition, Dr. Brum monitored the decedent's complaints of chest pains, as well as her use of Coumadin and non-insulin dependent diabetes.

The plan of care for the ensuing period (June 1, 2014 to November 30, 2014) was again similar to the two prior periods in that an aide would again be assigned for seven days and twenty-four hours per day, with the aide providing the same personal care. On July 16, 2014, the decedent was admitted to Mount Sinai Hospital after having fallen from the bed and onto her face. The decedent was later discharged from the hospital with a diagnosis of a pulmonary collapse and pneumonia, as well as a finding that her functional status had deteriorated dramatically. Dr. Brum made three house calls during this period and his notes in a progress report dated July 15, 2014 (the day prior to the decedent falling from her bed), stated that the decedent required better monitoring from home attendants.

The records of Elderplan dated August 8, 2014, indicate that the case manager for Elderplan, Lyudmilla Samoylova, had received a request from HAVA to implement a split shift attendant schedule[2] for the decedent since her functional status had deteriorated. This finding was based upon the fact that the decedent's decision making was severely impaired, she was forgetful and confused most of the time, unable to call for assistance in case of an emergency and she should never be left alone. It was further noted that she required total dependence on others for bathing, personal hygiene, dressing, toilet use, and she had total incontinence. There was also a finding that since the decedent was very heavy and could not turn herself, she needed nightly assistance. As a result of decedent's declining health, the responsibilities of the care worker were upgraded to include turning and positioning Ms. Magaram.

[2] A split shift home attendant typically involves two different home attendants, each on a 12 hour shift, who trade off shifts to go home to sleep while the working attendant is able to stay awake during the entire split shift to attend to the patient, including providing frequent turning and repositioning if needed.

On August 8, 2004, Ms. Postrygacz made a similar request to Elderplan that her mother, the decedent, receive a split shift attendant due to the worsening of her physical condition.

The medical records of October 10, 2014 noted that the decedent had a pressure ulcer to her left heel that measured 1.2 (x) 1.0 c.m.

The plan of care for the period of December 1, 2014 to May 31, 2015 was similar to the previous three periods in terms of providing round the clock nursing care, as well as the type of care being administered. Dr. Brum made two house calls to the decedent on February 6, 2015 and March 4, 2015.

On December 2, 2014, the decedent was noted to have pressure ulcers on her right heel, right hip and sacrum. Turning and positioning was still required every two hours and the decedent's heels had to be kept off the bed to prevent further skin breakdown.

The December 17, 2014 assessment by Elderplan for care for the period of December 1, 2014 through May 30, 2015, noted that decedent's condition had deteriorated. Her overall ability to participate in activities of daily living was found to have declined. The decedent was noted to be bed bound and unable to transfer or ambulate and required turning and repositioning, and despite a request for a split shift of two twelve-hour shifts, it was neither recommended nor ordered by Elderplan.

On December 23, 2014, the Elderplan records noted that a request was once again made on the decedent's behalf for two twelve-hour shifts. Nonetheless, when the decedent was discharged from Beth Israel Hospital on December 31, 2014 after another hospital stay, she was still provided with the same personal care worker services.

The January 8 and January 28, 2015 records of the decedent indicated that she had pressure ulcers to both her right heel and buttocks.

The February 28, 2015 notes of Nurse Awopetu of HAVA indicated that the decedent had pressure ulcers on her sacral area, the right side of her neck, both legs above the ankles and redness on her left hip area. On March 4, 2015, Nurse Awopetu reported that the decedent was in need of the split shift due to having to turn and reposition the patient every two hours. On March 5, 2015, the records of Elderplan again noted that Nurse Awopetu had called and stated that the decedent would benefit from split shift personal care workers. The notes indicated that

the decedent had multiple pressure ulcers which included a stage IV pressure ulcer to the sacrum and unstageable pressure ulcers to the left hip and right heel; the sacral pressure ulcer was recently debrided and the decedent while alert and oriented was confused. On March 7, 2015, the decedent was admitted to Coney Island Hospital due to acute respiratory failure which resulted in both urosepsis and a sacral pressure ulcer. When the decedent was discharged on March 17, 2015, she returned to her home with her care still consisting of one twenty-four hour per day nurse shift.

On March 18, 2015, the decedent was noted to have a stage IV sacral pressure ulcer, right heel pressure ulcer and a left hip pressure ulcer. Her health was noted to be fragile; she was at risk of developing additional pressure ulcers; she was bed bound and required frequent repositioning with maximum assistance in moving; she was unable to turn and position herself and was totally incontinent. There were additional requests for implementing a split shift on March 19 and March 24, 2015.

On March 30, 2015, the decedent was transported to Coney Island Hospital after she was found unresponsive at home. The records indicated that her pressure ulcers were found to be infected. The decedent died at the hospital on April 2, 2015.

The role of HAVA during the period that the decedent was enrolled in the Elderplan Home First Managed long-term care plan was that they were the agency allegedly responsible for providing the decedent with home health aides and supervising her personal care.

Discussion:

On a motion for summary judgment seeking a dismissal of a medical malpractice cause of action, a defendant must make a prima facie showing either that there was no departure from good and accepted medical practice, or, if there was a departure, that the departure was not the proximate cause of plaintiff's alleged injuries (Williams v. Bayley Seton Hosp., 112 AD3d 917, 918, 977 NYS2d 395 [2nd Dept. 2013]; Giacinto v. Shapiro, 151 AD3d 1029,1030, 59 NYS3d 42 [2nd Dept. 2017]; Brinkley v. Nassau Health Care Corp., 120 AD3d 1287, 993 NYS2d 73 [2nd Dept. 2014]). Thus, on a motion for summary judgment, the defendant has the initial burden of establishing the absence of any departure from good and accepted practice or that the plaintiff

was not injured by any departure (see Terranova v. Finklea, 45 AD3d 572, 845 NYS2d 389 [2nd Dept. 2007]). "In order to sustain this burden, the defendant is only required to address and rebut the specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars" (Bhim v. Dourmashkin, 123 AD3d 862, 864, 999 NYS2d 471 [2nd Dept. 2014]).

Once the defendant has made such a showing, the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut the prima facie showing made by the defendant, so as to demonstrate the existence of a triable issue of fact (see Fritz v. Burman, 107 AD3d 936, 94, 968 NYS2d 167 [2nd Dept. 2013]; Brinkley v. Nassau Health Care Corp., 120 AD3d at 1287). The plaintiff must "lay bare her proof and produce evidence, in admissible form, sufficient to raise a triable issue of fact as to the essential elements of a medical malpractice claim, to wit, (1) a deviation or departure from accepted medical practice, [and/or] (2) evidence that such departure was a proximate cause of injury" (Sheridan v. Bieniewicz, 7 AD3d 508, 5089 [2nd Dept. 2004]; Gargiulo v. Geiss, 40 AD3d 811, 911-812 [2nd Dept. 2007]). In order to prevail on a claim for medical malpractice, "expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause" (Nicholas v. Stammer, 49 AD3d 832, 833 [2008]).

In addressing the issue of proximate cause, the Court notes that "in a medical malpractice action, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant" (Johnson v. Jamaica Hosp. Med. Ctr., 21 AD3d 881, 883 [2nd Dept. 2005], quoting Holton v. Sprain Brook Manor Nursing Home, 253 AD2d 852 [2nd Dept. 1998]). "A plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased the injury" (Semel v. Guzman, 84 AD3d 1054, 1055-1056 [2nd Dept. 2011], quoting Goldberg v. Horowitz, 73 AD3d 691, 694 [2nd Dept. 2010], quoting Alicea v. Liguori, 54 AD3d 784, 786 [2nd Dept. 2008]).

Here, this Court is presented with the issue as to whether the defendants deviated or departed from good and accepted medical practice in the care and treatment rendered to the decedent, with respect to their management and handling of the decedent, and if so, whether that departure from good and accepted medical practice was the proximate cause of the injuries/damages that the decedent allegedly sustained and her subsequent death.

Defendant Elderplan, Inc. dba Elderplan Home First

In support of the motion for summary judgment by defendant Elderplan and a dismissal of plaintiffs' cause of action as against said defendant, counsel offers the affidavit of Medeya Machavariani, RN, the assistant vice-president of Coordinated Care at Elderplan who oversees the case management functions for Eldercare's Medicare and Medicaid lines of business.

Elderplan maintains that plaintiff's cause of action based upon claims of negligence, medical malpractice and wrongful death should be dismissed as a matter of law because the relationship that Elderplan had with the decedent is governed by contract (the terms of the medical plan) and they performed their duties in accordance with the contract. Elderplan asserts that the decedent had voluntarily enrolled in the medical plan by executing an enrollment agreement and was thereafter provided with a handbook which detailed the enrollee's rights and responsibilities under the plan. Elderplan alleges that they did not undertake any tort duty to the decedent.

Elderplan maintains that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of the contract" (Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 NY2d 382 [1987]).

Elderplan asserts that they developed a care plan for decedent, and in doing so recommended that the decedent be provided with a home health aide to assist with her daily living activities. However, as an Article 44 managed care organization and an MLTCP, Elderplan was not required nor was it licensed to provide any direct patient care services to its members. They were also not required to provide direct supervision of the covered services as

well as any identified non-covered services (services that that are not covered under the MLTCP benefit plan) that are provided by licensed healthcare and home care providers.

Elderplan alleges that their nursing staff were carrying out their duties pursuant to the terms of the contractual agreement, and while they provided organizational and administrative services, they did not provide medical or nursing care and treatment between June 1, 2013 and April 1, 2015.

In addition, Title 18 §505.14 of the New York Compilation of Codes, Rules and Regulations (NYCRR) provides that personal care services must be ordered by an attending physician. It is alleged that the nursing staff performed their duties under the supervision of plaintiff's personal physician and the fact that Dr. Brum countersigned the decedent's plan of care is further evidence he was supervising the personal care services. In fact, during the twenty-two-month period (June 1, 2013 to April 1, 2015) the decedent was enrolled in the plan, Dr. Brum made fifteen visits to the decedent's home to monitor her health situation. The last nursing assessment which was completed on December 17, 2014 provides that the personal care services were ordered by Dr. Brum. They contend that the argument by plaintiff's counsel that the Elderplan nurses may not have been acting under the direction of Dr. Brum is speculative and not supported by the evidence.

The defendant maintains that nurses and other medical professionals are shielded from liability when they are acting under the direction and supervision of an attending physician (see Filippone v. St. Vincent's Hospital & Medical Center of New York, 253 AD2d 616 [1st Dept. 1998]).

Defendant Elderplan further asserts that the statute of limitations for the alleged negligence of the Elderplan nurses and their negligent nursing care is two and one-half years (see CPLR § 214-a). Since the summons and complaint were electronically filed on March 28, 2017, defendant asserts that any allegation of negligence which accrued prior to September 28, 2014 is time barred and those claims should not be considered by the Court.

Elderplan, in moving for summary judgment and a dismissal of the plaintiff's cause of action, maintain that they have met their burden of establishing both the absence of any departure

and that any alleged departure was not the proximate cause of the decedent's alleged injuries and subsequent death since they fully performed their duties.

This Court finds upon review of the defendant's submissions that Elderplan has met their prima facie burden of establishing that they did not depart from good and accepted medical practice and that the decedent's injuries and subsequent death was not the result of any alleged departure, and the burden shifted to the plaintiff and the co-defendant HAVA to establish the existence of a triable issue of fact.

Co-defendant (Hava's) opposition to Elderplan's Motion to dismiss & in support of its Cross-Motion:

In opposing Elderplan's motion for summary judgment, HAVA maintains that the failure of Elderplan to designate an institutional witness on their behalf to submit to an Examination before Trial should result in a denial of Elderplan's motion, as that testimony is crucial to their defense of this matter.

Additionally, HAVA maintains that based upon the Member Handbook and the facts of this case that contrary to Elderplan's defense, Elderplan did provide direct medical care which was demonstrated by supplying a wound care nurse who treated the decedent on a regular basis and supervised the care provided by others. HAVA contends that Elderplan makes its own independent decisions based upon medical necessity in connection with designating a specific plan of care for each patient. Elderplan did not adhere to the assessment of HAVA's nurse dated August 12, 2014 for a split shift nor to the subsequent requests of HAVA that there was a need to turn and reposition the decedent at night due to her declining health. HAVA maintained that the sleep-in-home attendant that Elderplan was providing is not generally available while sleeping to turn a patient hourly or every other hour and that individual was unable to reposition the decedent throughout the night. It was Elderplan and not HAVA who decided not to employ a split shift for its nurses at the decedent's residence.

HAVA asserts that Elderplan's motion should be denied and their cross-motion to compel the deposition of a witness from Eldercare should be granted.

Plaintiff's opposition to defendants' motion to dismiss:

In opposing the motion for summary judgment by defendant, Elderplan, in which the plaintiff claims there are triable issues of fact, the plaintiff offers the opinion of a medical expert, a physician who is Board certified in Internal Medicine and Geriatric Medicine, as well as the deposition testimony of the plaintiff, Sonia Postrygacz. The expert concluded that the care, treatment, services and coordination rendered by Elderplan to plaintiff's decedent from on or about May 2, 2013 through April 2, 2015, was not in accord with good and accepted medical practice and was the proximate cause of decedent's injuries, including pressure ulcers on her sacrum, right buttocks, left and right heel, left hip, lower and upper back and right shin, as well as sepsis infections, dehydration, malnutrition, debridement, emotional trauma, pain and suffering, and her subsequent death.

Plaintiff's expert opined that Elderplan did provide direct medical and/or nursing care and supervision to the decedent as they visited the decedent, assessed and reassessed her medical condition, made specific determinations and arrangements related to her care and treatment, including the denial of care and treatment services and coordinated her care, treatment and services.

The expert further opined that contrary to defendant's contention, Elderplan's relationship with the decedent was not limited to contractual coverage. This was clearly demonstrated when Elderplan denied the request for split coverage. In so doing, Elderplan didn't make a simple yes or no decision whether the decedent's changing medical condition was covered by the contract, but rather made decisions for decedent's medical, nursing care and treatment based upon its medical and nursing assessments of the decedent's condition. When Elderplan issued a denial of the request for a split shift in a letter dated August 20, 2014, based upon its assessment dated August 12, 2014 by its care management team which performed a case review, there was a recognition that the decedent needed assistance in all aspects of daily living. Elderplan determined that it could be met by adjusting her medications to facilitate her sleeping patterns, ordering a hospital bed to facilitate sleep and that her night time needs were limited to toileting which can be scheduled and safely met with the current personal care worker schedule.

The expert opined that Elderplan improperly denied numerous requests for a split shift schedule, which was necessary for the proper care and treatment of the decedent based upon her medical condition, in contravention of 18 NYCRR § 505.14(a)(2)[3]. The expert stated that the decedent's medical condition, which included but was not limited to the need for consistent and frequent turning and repositioning throughout both the day and the nighttime hours, maximal assistance for toilet transfer, total dependence on others, and the inability to be left alone, necessitated dependence with such frequency that split shift personal care services were required. The expert further stated that Elderplan was on notice of the decedent's medical conditions and fully aware of what was needed and necessary for her proper care and treatment, including split shift services to promote proactive and preventative care to avoid the development and/or deterioration of pressure ulcers. These pressure ulcers included a stage IV sacral pressure ulcer and stage III pressure ulcers to her right hip and both heels. The expert opined that by not providing such care, Elderplan deviated from good and accepted practice and the deviation proximately caused the development and/or subsequent deterioration of the decedent's pressure ulcers.

The expert stated that it was a deviation from accepted medical practice by not turning and repositioning the decedent every two hours, especially during the night time hours. Frequent turning and positioning in individuals such as the decedent who are susceptible of developing pressure ulcers is critical to preventing the development and deterioration of pressure ulcers as it distributes pressure to different parts of the body. Additionally, if the two hour turning schedule was found to be ineffective, it was incumbent upon Elderplan to redevise a plan to re-position the decedent more often than every two hours.

The expert opined that the contention by Elderplan that its assessments were performed under the direction and supervision of a physician is without merit. Rather, it was Elderplan who initiated the assessments and evaluations of the decedent; sent its employees to assess and

[3] The section pertaining to split shift personal care services states that "continuous personal care services means the provision of uninterrupted care, by more than one personal care aide, for more than 16 hours in a calendar day for a patient who, because of the patients' medical condition, needs assistance during such calendar day with toileting, walking, transferring, turning and positioning, or feeding and needs assistance with such frequency that a live-in 24 hour personal aide would be unlikely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep."

evaluate the decedent; created and signed off on a plan of care related to the condition of the decedent; made specific determinations and arrangements related to her care, treatment and services, including the denial of care, treatment and services. It was further alleged that they also ignored the suggestions and direction of the medical professionals that were treating the decedent. The expert opined that it was incumbent upon Elderplan who was in the best position to properly care for the decedent, since it conducted each of the assessments of the decedent and developed a plan of care, to provide the physician who had involvement in approving her services, with a complete picture of the specific nuances of her care and treatment. This is clearly demonstrated in Elderplan's notes of the discussion with Dr. Brum who was contacted by Elderplan on August 21, 2014, (one day after Elderplan denied split shift scheduling) regarding changing the decedent's medications and to provide a hospital bed.

This Court finds that the plaintiff has raised triable issues of fact with the submission of an expert opinion who offered a detailed opinion as to the treatment rendered to the decedent which conflicted with defendant's opinion, sufficient to warrant denial of summary judgment and a dismissal of the causes of action pertaining to claims of malpractice as to the defendants (see Conteras v. Adeyemi, 102 AD3d 720, 721, 958 NYS2d 430 [2nd Dept. 2013]); Shahid v. NYC Health & Hosps. Corp., 47 AD3d 798, 850 NYS2d 521 [2nd Dept. 2008]).

In reaching this determination, this Court considered that the plaintiff, in her complaint, has alleged a claim of medical malpractice against defendant Elderplan, as well as a claim of vicarious liability for the HAVA home attendants' medical malpractice.

This Court reviewed the HomeFirst Member Handbook (annexed to defendant Elderplan's Motion for Summary Judgment as Exhibit C), the Elderplan Enrollee Agreement (annexed to defendant Elderplan's Motion for Summary Judgment as Exhibit B), and the argument of Eldercare that their plan of care is approved by decedent's physician, and that, as an Article 44 managed care organization and an MLTCP, they were not required nor were they licensed to provide any direct patient care services to its members. This Court further considered Elderplan's contention that while they provided organizational and administrative services, they did not provide medical or nursing care and treatment during the entire period. In opposition thereto, this Court considered the detailed argument of plaintiff and their expert that Elderplan

did reassess and make specific determinations related to the decedent's care and treatment, including the rejection of repeated requests for split shift coverage at a time when the decedent's condition had worsened and her pressure sores had reached untreatable levels. Accordingly, this Court finds there is a question of fact as to whether Elderplan may be held liable for medical malpractice, as opposed to breach of contract.[4]

Under New York law, the elements of a breach of contract cause of action are "the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach" (Canzona v. Atanasio, 118 A.D.3d 837, 838–39, 989 N.Y.S.2d 44, 47 [2nd Dept. 2014]; (Also see Dee v. Rakower, 112 A.D.3d 204, 208–209, 976 N.Y.S.2d 470 [2nd Dept. 2013]; Elisa Dreier Reporting Corp. v. Global NAPs Networks, Inc., 84 A.D.3d 122, 127, 921 N.Y.S.2d 329 [2nd Dept. 2011]; JP Morgan Chase v. J.H. Elec. of N.Y., Inc., 69 A.D.3d 802, 803, 893 N.Y.S.2d 237 [2nd Dept. 2010]). "Generally, a party alleging a breach of contract must 'demonstrate the existence of a ... contract reflecting the terms and conditions of their ... purported agreement' " (*see* Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 181–182, 919 N.Y.S.2d 465 [2011], quoting American–European Art Assoc. v. Trend Galleries, 227 A.D.2d 170, 171, 641 N.Y.S.2d 835 [1st Dept. 1996]). Moreover, "the plaintiff's allegations must identify the provisions of the contract that were breached" (*see* Barker v. Time Warner Cable, Inc., 83 A.D.3d 750, 751, 923 N.Y.S.2d 118 [2nd Dept. 2011]; Atkinson v. Mobil Oil Corp. 205 AD2d 719, 614 NYS2d 36 [2nd Dept. 1994]). Here, plaintiff's decedent, Ms. Magaram, signed the Elderplan Enrollee Agreement on May 3, 2013, which reflects the terms and conditions of her enrollment in Elderplan. Plaintiff's decedent participated in the Elderplan HomeFirst plan and paid for the services provided through Medicare and Medicaid. The Enrollee Agreement references the Member Handbook as reflecting the terms and conditions of the contract.[5] In further determining this issue, the Court could not consider in the absence of an EBT from an Elderplan representative, the specific reason for Elderplan's decision to reject split shift services, whether a medical doctor was consulted in connection with that decision and what information

[4] Plaintiff has not alleged a breach of contract claim against either Elderplan or HAVA.
[5] "I agree to participate in the HomeFirst plan according to the terms and conditions described in the Member Handbook." (See Exhibit "B' of defendant Elderplan's Motion to Dismiss).

was provided to that medical professional. As it is unclear, due to the lack of deposition testimony from an Elderplan representative, whether the decision to deny the split shift was a medical decision regarding the decedent's treatment or a business decision potentially regarding insurance coverage, this Court must deny Elderplan's motion for summary judgment.

As for plaintiff's claim that Elderplan is liable for any alleged malpractice on behalf of the HAVA home attendants, this Court recognizes that there is a question of fact as to whether the HAVA home attendants, or the other medical practitioners such as the wound care nurse sent to the decedent's home, are employees of Elderplan or independent contractors.

"Under the doctrine of respondeat superior, a hospital may be vicariously liable for the medical malpractice of physicians who act in an employment or agency capacity." Deltoro v Arya, 44 AD3d 896 [2d Dept. 2007]; Mendez v White, 40 AD3d 1057 [2d Dept. 2007]; Boone v North Shore Univ. Hosp., 12 AD3d 338, 339 [2d Dept. 2004].

"The general rule is that an employer who hires an independent contractor is not liable for the independent contractor's negligent acts." Rosenberg v Equitable Life Assur. Socy. Of United States, 79 NY2d 663, 668 [1992]; McDonald v. Shell Oil Co., 20 NY2d 779, 782 [1967]). For reasons of public policy, however, there are certain exceptions where an employer may be liable for the negligence of an independent contractor. For example, the exception for inherently dangerous work applies to situations where the employer "has assigned work to an independent contractor which the employer knows or has reason to know involves special dangers inherent in the work or dangers which should have been anticipated by the employer." Robinson v Jewish Hosp. and Medical Center of Brooklyn, 275 AD2d 362, 712 NYS2d 585 [2d Dept. 2000] (holding the dangerous work exception did not apply to an anesthesiologist determined by the jury to be an independent contractor), *citing* Rosenberg v Equitable Life Assur. Socy. of United States, 79 NY2d at 668, *see also* Chainani v Board of Educ. of the City of N.Y., 87 NY2d 370, 381-382. However, it has been held that public policy is not served by applying the inherently dangerous work exception to the practice of accepted medical procedures, as an employer should not be required to anticipate that a medical professional hired as an independent contractor will exercise his or her professional judgment in a manner that is dangerous or contraindicated. *See* Rosenberg v Equitable Life Assur. Socy. of United States, 79 NY2d at 672.

Although Elderplan did not submit proof that HAVA home attendants are independent contractors, the Member Handbook states that "all covered services are provided by or contracted through HomeFirst." (Defendant Elderplan's Motion for Summary Judgment, annexed as Exhibit C, p. 16). Therefore a question of fact exists as to whether the HAVA home attendant services were "provided by" Elderplan, thereby making them Elderplan employees, or "contracted through" Elderplan, thereby making them independent contractors.

In addressing the cross-motion of the defendant HAVA to compel co-defendant Elderplan to produce a witness on its behalf, the motion is granted to the extent that the name of said witness shall be produced within twenty (20) days after entry of this Decision/Order and the deposition shall be conducted thirty (30) days thereafter.

Conclusion:

The motion by the defendant, Elderplan Inc. d/b/a Elderplan Home First for summary judgment and a dismissal of plaintiff's complaint, pursuant to CPLR§ 3212, is denied. The cross-motion of the defendant HAVA to compel co-defendant Elderplan to produce an institutional witness on its behalf is granted to the extent that the name of said witness shall be produced within twenty (20) days after this Decision/order is entered and the deposition shall be conducted thirty (30) days thereafter.

This shall constitute the decision and order of this Court.

Dated: May 5, 2020
Brooklyn, New York

ENTER

Hon. Bernard J. Graham, Justice
Supreme Court, Kings