

<b>Haigler v Absolute Home Care, Inc.</b>
2020 NY Slip Op 34984(U)
November 30, 2020
Supreme Court, Westchester County
Docket Number: Index No. 50019/2018
Judge: Mary H. Smith
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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

P R E S E N T:

HON. MARY H. SMITH  
JUSTICE OF THE SUPREME COURT

-----  
LORETTA HAIGLER, as an administratrix of the  
Estate of JANET BROWN LOGAN,

Plaintiff(s),

- against -

**DECISION & ORDER**

Index No.: 50019/2018

ABSOLUTE HOME CARE, INC., ABSOLUTE HOME HEALTH CARE, INC., ANY-TIME HOME HEALTH CARE, INC., ANY-TIME HOME CARE, INC., JAYA RADHA (intended to be a nurse employed by ABSOLUTE HOME CARE, INC. and ABSOLUTE HOME HEALTH CARE, INC.) and EMMA GUERRERO (intended to be a nurse's aide employed by ANY-TIME HOME HEALTH CARE, INC. and ANY-TIME CARE, INC.)

Defendant(s).

-----  
Defendants Any-Time Home Care, Inc., Any-Time Home Health Care, Inc. (collectively Any-Time), and Emma Guerrero (Ms. Guerrero) move (Motion #4) for summary judgment.

Defendant Jaya Radha (Nurse Radha) moves (Motion #5) for summary judgment.

The following papers were read:

Notice of Motion (#4), Affirmation, Exhibits (10), and Memo of Law	1-13
Affirmation in Partial Opposition	14
Affirmation in Opposition, Affidavits (2), Exhibits (9), and Memo of Law	15-27
Affirmation in Reply	28
Notice of Motion (#5), Affirmation, and Exhibits (20)	29-50
Affirmation in Opposition, Affidavits (2), Exhibits (7), and Memo of Law	51-61
Affirmation in Reply	62

By way of background, Loretta Haigler (Ms. Haigler) is the eldest daughter and administratrix of the estate of Janet Brown Logan (Mrs. Logan). Ms. Haigler and Mrs. Logan resided in a one floor condominium. Mrs. Logan required 24-hour care due to a prior stroke, which resulted in right side paralysis. Mrs. Logan resided in the living room where she was confined to a bed with a commode approximately 5-6 feet away. On January 16, 2016, Ms. Guerrero was employed by Any-Time as a home health assistant (HHA) and was caring for Mrs. Logan and Nurse Radha was a registered nurse and independent contractor who was also caring for Mrs. Logan. On that date, Nurse Radha and Ms. Guerrero were assisting Mrs. Logan to use the commode and Mrs. Logan ended up on the floor, allegedly suffering an injury to her right leg. This action ensued. Now, Ms. Guerrero, Any-Time, and Nurse Radha move for summary judgment.

On a motion for summary judgment, the Court is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The movant must set forth a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once the movant sets forth a *prima facie* case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]).

In support of the motion, Ms. Guerrero and Any-Time proffer the expert affidavit of Phyllis Quinlan, Ph.D., RN. Dr. Quinlan avers that the standard of care for an HHA is to provide care as directed and instructed by the on-site nurse. Dr. Quinlan asserts that this standard is consistent with the National Council of State Boards of Nursing, National Guidelines for Nursing Delegation. Dr. Quinlan asserts that plaintiff alleges that Ms. Guerrero was negligent in her treatment of Mrs. Logan by failing to properly transfer her. Dr. Quinlan avers that she reviewed, among other things, the deposition transcripts of Ms. Haigler, Ms. Guerrero, and Nurse Radha. Based thereon, Dr. Quinlan opines that Ms. Guerrero was not negligent in her treatment of Mrs. Logan as she was obligated to defer to Nurse Radha regarding the transfer of Mrs. Logan out of the bed, transfer from the floor, and the decision not to call 911.

In opposition, plaintiff sets forth numerous arguments. Initially, plaintiff contends that she should be held to a lesser burden of proof under the Noseworthy Doctrine as this is a wrongful death claim and Mrs. Logan was unable to provide her version of the accident while she was alive as she was non-verbal and virtually unable to communicate at the time. Plaintiff also contends that Dr. Quinlan's affidavit is deficient in several ways. Among other things, plaintiff notes that Dr. Quinlan only addresses Ms. Guerrero's decision to transfer Mrs. Logan out of the bed, the decision to transfer Mrs. Logan from the floor, and the decision not to call 911, but fails to address the allegation that Ms. Guerrero was negligent in the manner that she transferred Mrs. Logan, which caused injury. Plaintiff

also proffers, among other things, the expert affidavit of Sheila Sheehy, RN. Ms. Sheehy notes that Mrs. Logan's plan of care issued by Any-Time provided that a two person assist with a Hoyer lift be used to transfer Mrs. Logan to and from the commode. Ms. Sheehy also disputes Dr. Quinlan's assertion that her standard of care is consistent with the National Council of State Boards of Nursing, National Guidelines for Nursing Delegation. Ms. Sheehy notes that these guidelines provide, among other things, that the HHA shall only perform tasks that she is confident and comfortable performing and that she bears the responsibility for any such tasks undertaken. Ms. Sheehy notes that Ms. Guerrero testified at her deposition that, due to Mrs. Logan's weight, she was not able to properly assist Mrs. Logan on the date of the accident. Further, Ms. Sheehy notes a number of discrepancies as to how the accident occurred, noting, among other things, that Nurse Radha testified that the accident occurred in the transfer to the commode, while Ms. Guerrero testified that Mrs. Logan slid off the commode and elsewhere that the accident occurred as Mrs. Logan was being transferred back to the bed. Plaintiff contends that these discrepancies also make summary judgment inappropriate.

Plaintiff's bill of particulars alleges that Ms. Guerrero was negligent in the manner that she transferred Mrs. Logan. The motion of Ms. Guerrero and Any-Time does not address this allegation, but focuses on the propriety of that decision. In order to make a prima showing, the moving party must address the specific factual claims of negligence raised in the bill of particulars (*see Davydov v Bd. of Managers of Forestal Condominium*, 185 AD3d 548, 550 [2d Dept 2020]; *Humphrey v Gardner*, 81 AD3d 1257, 1258 [4th Dept 2011]). As Dr. Quinlan fails to address all the factual allegations raised in the bill of particulars, Ms. Guerrero and Any-Time have failed to make a *prima facie* showing.

Regardless, in support of their motion, the movants submitted deposition transcripts of Ms. Guerrero and Nurse Radha, in which Ms. Guerrero testified that the accident occurred on the commode or while transferring Mrs. Logan from the commode while Nurse Radha testified that the accident occurred when, after transferring Mrs. Logan from the bed to a wheelchair, the two were attempting to transfer Mrs. Logan from the wheelchair to the commode. In light of these conflicting accounts as to how the subject accident occurred, the evidence submitted by Ms. Guerrero and Any-Time failed to establish, *prima facie*, that they were not negligent in the treatment of Mrs. Logan (*see Richard v Thomas*, 136 AD3d 779, 779-80 [2d Dept 2016]). Next, the Court considers the motion of Nurse Radha.

In support of the motion, Nurse Radha proffers, among other things, the expert affidavit of Deborah Aiello, RN. Ms. Aiello avers that she reviewed, among other things, the deposition transcripts of Ms. Haigler, Ms. Guerrero, and Nurse Radha. Regarding the allegation in the bill of particulars, that Nurse Radha was negligent in allowing Mrs. Logan to fall and dropping her, Ms. Aiello states that there is insufficient evidence in the record to suggest that Mrs. Logan was dropped. Regarding the allegation that Nurse Radha failed to securely transfer Mrs. Logan, used unsafe transfer procedure, and did not utilize the available transfer apparatus, Ms. Aiello states that there is no evidence to support these

claims. Based in part hereon, Ms. Aiello opines that Nurse Radha did not deviate from good and accepted nursing practices.

In opposition, plaintiff proffers, among other things, expert affidavit of Sheila Sheehy, RN. Ms. Sheehy avers that she reviewed, among other things, the deposition transcripts of Ms. Haigler, Ms. Guerrero, and Nurse Radha. Based in part hereon, Ms. Sheehy opines that Nurse did deviate from good and accepted nursing practices.

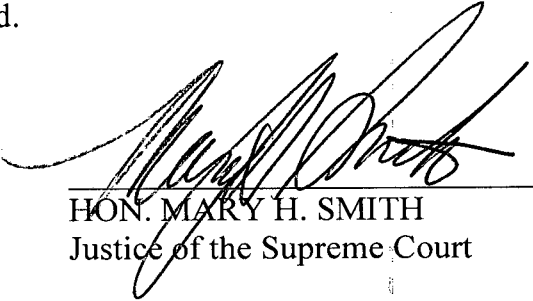
“A defendant cannot satisfy its summary judgment burden merely by pointing to gaps in the plaintiff’s proof” (*M.V.B. Collision, Inc. v Allstate Ins. Co.*, 187 AD3d 881 [2d Dept 2020]). Thus, Ms. Aiello’s belief that plaintiff’s proof is lacking, as set forth in the record so far, is insufficient to make a *prima facie* showing.

Additionally, it is well settled that where conflicting affidavits and other contradictory evidence is submitted, summary judgment is not appropriate (*see Webar, Inc. v Capra*, 212 AD2d 594, 596 [2d Dept 1995]). The reasoning is that it is not within the purview of the Court to resolve issues of credibility on a motion for summary judgment (*see Halkias v Otolaryngology-Facial Plastic Surgery Associates, P.C.*, 282 AD2d 650, 651 [2d Dept 2001] [“Resolution of issues of credibility of both expert and lay witnesses and the accuracy of their testimony are matters within the province of the jury.”]).

Moreover, in support of the motion, Nurse Radha submitted the depositions transcripts of Ms. Guerrero and Nurse Radha whose version of the events surrounding Mrs. Logan’s accident, as noted above, differ in many not insignificant ways. In light of these conflicting accounts as to how the subject accident occurred, the evidence submitted by Ms. Guerrero and Any-Time failed to establish, *prima facie*, that they were not negligent in the treatment of Mrs. Logan (*see Richard v Thomas*, 136 AD3d 779, 779-80 [2d Dept 2016]).

Based on the foregoing, the motions for summary judgment filed by Ms. Guerrero, Any-Time, and Nurse Radha are denied. This matter is referred to the Settlement Conference Part in Courtroom 1600 at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York. The parties will be notified when the date and time of the conference is scheduled.

Dated: November 30, 2020  
White Plains, New York



---

HON. MARY H. SMITH  
Justice of the Supreme Court