

**Cox v Brooklyn Gardens Nursing & Rehabilitation
Ctr.**

2021 NY Slip Op 30972(U)

March 29, 2021

Supreme Court, Kings County

Docket Number: 500319/17

Judge: Genine D. Edwards

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of March 2021.

P R E S E N T:

HON. GENINE D. EDWARDS,

Justice.

-----X
VICKI COX, as Administrator of the Estate of
ANN WATKINS, Deceased,

Plaintiff,

- against -

BROOKLYN GARDENS NURSING
& REHABILITATION CENTER,
PROVIDENCE CARE, INC.,
BROOKLYN GARDENS LLC,
ALPINE HOME HEALTH CARE, LLC,
ALPINE HOME HEALTH CARE BROOKLYN,
LALLYMAY ROSE-BURRELL, R.N.,
STACY ANN WATSON, R.N.,
YEHOSHUA GREENSPAN, R.N.,
ROYAL CARE CERTIFIED HOME HEALTH CARE, LLC,
and ULTIMATE CARE, INC.,

Defendants.

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DECISION AND ORDER

Index No. 500319/17

Mot. Seq. No. 4-6

The following e-filed papers read herein:

NYSCEF No.:

Notice of Motion, Affirmation (Affidavit),
Memorandum of Law and Exhibits Annexed _____
Affirmations (Affidavits) in Opposition and
Exhibits Annexed _____
Reply Affirmations _____

149-184; 186-208; 209-233
242-244; 245-247; 248-278;
280-310; 312-342
347; 348; 355

In this action to recover damages for medical malpractice and wrongful death, defendant Ultimate Care, Inc. (Ultimate); defendant Royal Care Inc., incorrectly sued herein as Royal Care Certified Home Health Care, LLC (Royal); and defendants Alpine Home Health Care, LLC, Lallymay Rose-Burrell, R.N., Yehoshua Greenspan, R.N., and Stacy Ann Watson, R.N. (collectively, the Alpine defendants); move, in each instance, for summary judgment, pursuant to CPLR 3212, dismissing the amended complaint and all cross-claims as against them (Seq. No. 4, 5, and 6, respectively). Plaintiff Vicki Cox, as the administratrix of the estate of Ann Watkins, deceased (plaintiff), opposes Royal's

and the Alpine defendants' respective motions, but does not oppose Ultimate's motion.¹

The Alpine defendants partially oppose the dismissal of its cross-claims as against Royal and Ultimate.

Background

On Oct. 14, 2014,² Ann Watkins (the patient) was discharged home from a rehabilitation facility owned and operated by non-moving defendants Brooklyn Gardens Nursing & Rehabilitation Center, Providence Care, Inc., and Brooklyn Gardens (sued herein as Brooklyn Gardens, LLC) (collectively, Brooklyn Gardens). The patient remained at Brooklyn Gardens for approximately three weeks beginning Sept. 24th following a fall at her home on Sept. 17th resulting in the fracture of her left humerus. Upon discharge from Brooklyn Gardens on Oct. 14th, the patient was suffering from three nosocomial pressure ulcers – one on her sacrum, another on her left buttock, and the other on her right buttock.³ At 92 years of age, the patient was not a large woman – approximately 5'4" tall weighing approximately 119 pounds.⁴ She was not diabetic.

At the conclusion of the patient's rehabilitation treatment at Brooklyn Gardens, Alpine on its own (and through its contractors, Royal and Ultimate) took over the

¹ See Affirmation in Opposition to Defendants' Motions for Summary Judgment, dated June 25, 2020 (NYSCEF #248), at 2, n 1 ("The plaintiff has chosen not to oppose the summary judgment motion made by defendant, Ultimate Care, Inc.") (emphasis omitted).

² All year references are to 2014, unless otherwise indicated.

³ On Sept. 22nd, days before the patient commenced her treatment at Brooklyn Gardens, her skin was in good condition. See Woodhull Records, Part 1 (NYSCEF #222), page 76 of 161 ("Skin intact head to toe, warm and dry to touch, color normal, tu[r]gor elastic, no rashes or lesions, mucus membranes moist and intact. Skin warm to touch, skin turgor elastic, normal skin color."). At that time, her "Braden score" (an accepted predictor of a patient's risk of developing pressure ulcers) was 16 (or low risk). See Woodhull Records, Part 1, page 77 of 161. The Braden score, which ranges from 6 to 23, rates in six categories a patient's predisposition to developing pressure ulcers: (1) sensory perception, (2) skin moisture, (3) activity, (4) mobility, (5) nutrition, and (6) friction and shear. The higher the Braden score, the lower the risk of developing pressure ulcers; conversely, the lower the Braden score, the higher the risk of developing pressure ulcers. Patients with a total score of 16 or below are considered at risk of developing pressure ulcers. The score of 15 or 16 is considered a low risk; 13 or 14, a moderate risk; and 12 or below, a high risk.

⁴ See Woodhull Records, Part 2, page 153 of 161; page 2 of 13.

patient's care – now to be provided at her home – for a period of approximately eight weeks from Oct. 14th through Dec. 8th. During those eight weeks (or a portion thereof, depending on the provider), the patient received three types of services. The first type of services was the wound-care and other skilled nursing provided by Alpine Home Health Care, LLC (Alpine) and its employees who visited the patient at home during that eight-week period; namely: (1) field nurse Lallymay Rose-Burrell, R.N. (Nurse Rose-Burrell), who dressed only two of the patient's three preexisting pressure ulcers on her one and only visit to the patient on Oct. 15th;⁵ (2) skilled nurse Yehoshua Greenspan, R.N. (Nurse Greenspan), who visited the patient on Oct. 20th, 22nd, and 27th but performed no wound care on any of those dates;⁶ and (3) skilled nurse Stacy Ann Watson, R.N. (Nurse Watson), who provided at-home wound care approximately three times per week between Oct. 29th and Dec. 8th, but missed the presence of the majority (and failed to appreciate the severity) of the patient's pressure ulcers as documented by Woodhull on and after Dec. 9th. The second type of service was physical therapy provided by Royal from Oct. 21st through Nov. 14th for the patient's left arm and shoulder. The third and final

⁵ Compare Nurse Rose-Burrell EBT tr at page 115, lines 19-22 (“Q. So what is the third wound? A. I think that was probably an error. She [the patient] only had two wounds that I dressed.”) with Nurse Rose-Burrell EBT tr at page 154, lines 15-18 (“Q. So, does that mean there were three wound sites? A. Left, and right buttock, sacrum, yes.”).

⁶ See Nurse Greenspan EBT tr at page 141, lines 20-22 (testifying, as to his Oct. 20th visit, that “[t]he [patient's] family did the wound care. So I didn't get a chance to look at the wounds.”); at page 145, lines 5-8 (“Q. Does the Revisit form indicate that you assessed the wounds – any of the three [wounds] – on October the 20th? A. It's not shown that I did.”) (emphasis added); at page 163, lines 15-24 (“Q. Do you make any notation regarding the three wounds on the [Revisit] note of 10/22 . . . ? A. No.”) (emphasis added); at page 167, lines 9-20 (testifying that on Oct. 22nd he saw the patient with only one wound which was located on her buttocks); at page 168, lines 16-18 (“I saw the wound [on Oct. 22nd], then I wrote that the family is doing wound care.”); at page 170, lines 8-15 (“Q. You did not perform the wound-care treatment on October 22nd or on October 20th. And the last skilled-nursing visit before your October 20th visit was October 15th [that is, the initial visit by Nurse Rose-Burrell], correct? . . . A. That's what the charts say.”) (emphasis added); at page 178, line 22 to page 179, line 4 (“Q. Does this clinical note [for Nurse Greenspan's Oct. 27th visit to the patient] indicate that you looked at any wound during this visit? A. It doesn't to me. Q. Does this clinical note indicate that you performed any treatment to the wounds during this [Oct. 27th] visit. A. Not that I see.”).

type of service was home health care provided by Ultimate from Oct. 20th through Nov. 3rd.

Throughout the patient's care by the Alpine defendants and Alpine's contractors, she remained at high risk of developing additional pressure ulcers, as well as at high risk of worsening the condition of her three preexisting pressure ulcers that she acquired during her rehabilitation at Brooklyn Gardens. The contributing factors were: (1) the patient's comorbidities (dementia of Alzheimer's origin, hypertension, anemia, chronic kidney disease, dyslipidemia, and osteoporosis); (2) her incontinence of bowel and bladder (moisture); (3) her inability to walk even with the aid of a walker (she was wheelchair bound); (4) her inability to turn in bed without assistance (limited mobility); (5) the necessity of full assistance with transfers from bed to wheelchair and vice versa; and (6) the medical requirement that she wear a soft cast and sling on her left shoulder to allow her left humeral fracture to heal. During the at-home treatment provided by the Alpine defendants and Alpine's contractors, the patient was dependent on others for all activities of daily living. At no time during that period was the patient's bed equipped with a pressure-relieving mattress; nor was her wheelchair equipped with a pressure-relieving cushion.⁷

On Dec. 9th, the Alpine defendants' at-home care of the patient came to a sudden halt when her caregiver – one Doris Norville (Ms. Norville) who resided in the same house as the patient – had her rushed to the emergency room of nonparty Woodhull Medical and Mental Health Center (Woodhull). There, the patient was diagnosed with

⁷ Nurse Watson's recollection (at page 125, lines 2-3 of her deposition testimony) that the patient "was on the air mattress" is unsupported by the Alpine record. In any event, Nurse Watson was unable to recall whether the "air mattress" was "an alternating air-pressure mattress" (at page 125, lines 5-11), which is "usually electrically operated and involuntarily move[s] a patient as areas inflate and deflate." *Rosenblatt v. Center for Nursing & Rehabilitation, Inc.*, 70 Misc. 3d 1220(A), 2021 NY Slip Op. 50166(U) (Sup Ct, Kings County 2021).

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multiple pressure ulcers and deep tissue injuries that were worse in terms of their condition and higher in number than her three preexisting pressure ulcers.⁸

More importantly, the patient, upon admission to Woodhull, was suffering from sepsis, septic shock, severe malnutrition and dehydration (she weighed only 102 pounds, 12 ounces, with an estimated weight loss of 15 pounds since her discharge from Brooklyn Gardens),⁹ hypernatremia (elevated sodium), acute hypotension, acute kidney injury, and contracted limbs. She was intubated because of a hypoxemic respiratory failure. She was managed in the ICU for acute respiratory failure secondary to septic shock that eventually was resolved in the ICU. She was being fed, hydrated, and medicated through an orogastric tube. Thereafter, she was transferred for further management to the PCU (a progressive care unit), multiple attempts to wean her from the ventilator failed. On Dec. 23rd, she underwent a “terminal extubation,” with supplemental oxygen supplied by an aerosol mask due to poor prognosis in the setting of the multiple organ dysfunction and the dry gangrene of the right distal foot.¹⁰ On Dec. 29th, the patient was

⁸ A total of *five* pressure ulcers were *initially* described on the patient’s admission to Woodhull on Dec. 9th, as follows: (1)-(3) a necrotic pressure ulcer on *each* of her sacrum, left heel, and right heel; and (4)-(5) a partial thickness/skin loss pressure ulcer on *each* of her right shin and left inner knee. See Woodhull Records, Part 2, pages 63-64 of 1130. Four of the five pressure ulcers (*i.e.*, those on the patient’s left and right heels, her right shin, and left inner knee) developed during the Alpine defendants’ care of the patient, whereas the fifth pressure ulcer (the one on her sacrum) initially acquired at Brooklyn Gardens, but its condition worsened to the necrotic state during the Alpine defendants’ care of the patient. Shortly after the patient’s admission, a full count of the patient’s pressure ulcers, a total of *thirteen* as counted by Dr. Starer, were documented by the Woodhull staff. See Woodhull Records, Part 2, pages 104, 107-110, 124, and 137 of 1130; Dr. Starer’s Affirmation, ¶¶ 65-66. Corresponding to the spread of pressure ulcers throughout the patient’s body, her Braden score on admission to Woodhull was between 7 and 10 (high risk, in both instances), as compared to her Braden score of 16 (low risk) on Sept. 22nd. Compare Woodhull Records, Part 2, pages 15, 59, 63, 106, 160, and 187 of 1130 (Dec. 9th) with Woodhull Records, Part 1, page 77 of 161 (Sept. 22nd).

⁹ See Woodhull Records, Part 2, pages 65 and 115 of 1130.

¹⁰ See Woodhull Records, Part 5 (NYSCEF #226), pages 954, 956-957, 986, 991, 996-997 of 1130.

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transferred for palliative care to nonparty Buena Vida Nursing Home, where on Jan. 24, 2015 she passed away from “natural causes,” according to her death certificate.¹¹

On Jan. 6, 2017, plaintiff, as the administratrix of the patient’s estate, commenced this action against, among others, Ultimate, Royal, and the Alpine defendants (collectively, the moving defendants).¹² The moving defendants joined issue, asserting, in some instances, cross-claims for contribution and common-law indemnification against one another.¹³ After discovery was completed and a note of issue was filed, the instant motions followed.

Ultimate’s Motion

As noted, plaintiff does not oppose dismissal of her claims as against Ultimate. Nor does Royal oppose dismissal of its cross-claims against Ultimate.¹⁴ Further, the Alpine defendants’ cross-claims against Ultimate are without merit because it is undisputed that Ultimate’s home health aides were not authorized to provide wound care.¹⁵ Moreover, the extent of personal care services provided by Ultimate to the

¹¹. Quoting paragraph 6 of the patient’s Certificate of Death, dated Jan. 27, 2015 (NYSCEF #233).

¹². Plaintiff is the patient’s granddaughter and the sole beneficiary of her estate. *See* Plaintiff’s EBT tr at page 104, line 14 to page 105, line 5 (NYSCEF #158).

¹³. The remaining defendant, Brooklyn Gardens, asserted no cross-claims against codefendants (NYSCEF #65).

¹⁴. Royal’s opening and reply affirmations are silent regarding the validity of its cross-claims against Ultimate (NYSCEF #187 and #347).

¹⁵. *See* Affirmation of Ultimate’s Expert, Jeffrey Levine, M.D. (Dr. Levine), dated Feb. 28, 2020 (NYSCEF #184), ¶ 13 (“The State of New York Department of Health identifies the scope of Home Health Aide tasks. Importantly, it is non-permissible for a home health aide to perform dressing changes on an unstable skin surface, such as pressure ulcers. Home health aides are not allowed to perform wound care on wounds such as those exhibited by the patient.”).

patient (*i.e.*, the number of weeks and the hours per week) was established by Alpine.¹⁶ Accordingly, dismissal of plaintiff's claims and codefendants' cross-claims against Ultimate is warranted.

Royal's Motion

As stated, Royal provided, through nonparty Lynny Anthony Bargas, P.T. (PT Bargas), physical therapy (PT) to the patient for her left shoulder and arm for a total of seven at-home visits from Oct. 21st through Nov. 14th. At the inception of PT, the patient wore a soft cast (or brace) on her left upper arm and had her left arm in a sling, to immobilize and permit her fractured humerus to heal. Before the conclusion of PT, the brace became loose and, by Nov. 3rd, was discarded by the patient's caregiver, Ms. Norville. On Nov. 5th, PT Bargas noted that the patient had a one-inch, stage II left shoulder wound in the area where the patient wore her shoulder brace.¹⁷ Further, on his prior visit to the patient on Oct. 29th, PT Bargas observed her sacral ulcer.

Broadly speaking, plaintiff's claims against Royal fall into two categories of alleged departures from accepted standards of care in the field of physical therapy.¹⁸ The *first* category of alleged departures arose from PT Bargas performing passive range-of-motion exercises on the patient's unprotected left arm (that is, after Ms. Norville discarded the shoulder brace), and, separately, from his subjecting the patient to a series of bed-sitting tolerance exercises that put pressure on her sacrum and worsened the state of her sacral ulcer. The *second* category of alleged departures arose from PT Bargas's failure to recommend to Alpine and the patient's physicians at Woodhull's clinic that she

¹⁶. See Evelyn Henriquez (Ultimate's case coordinator) EBT tr at page 73, lines 2-11 (NYSCEF #163).

¹⁷. As PT Bargas explained, a stage II ulcer "means [that] the skin is broken . . . [,] but it is not deep enough that it would show tendons and bones." PT Bargas EBT tr at page 38, lines 10-16.

¹⁸. See Supplemental Verified Bill of Particulars as to Royal, dated May 2, 2019 (NYSCEF #169), ¶¶ 5-8.

needed – in addition to a replacement shoulder brace – a pressure-relieving mattress and a wheelchair cushion to prevent further development of pressure ulcers.

The supporting affidavit of Royal’s expert, Robyn Kelly, M.S.P.T. (MSPT Kelly),¹⁹ is narrowly tailored to the departure element of plaintiff’s medical malpractice claim as against it.²⁰

As to the departure element, MSPT Kelly’s opinion is limited. Specifically, MSPT Kelly opines that: (1) “[PT] Bargas made proper and timely physical therapy *evaluations*”; and (2) “[PT] Bargas also made the appropriate *notifications* to Alpine of [the patient’s] skin breakdown in [his] notes.”²¹ MSPT Kelly’s opinion fails to address either of plaintiff’s aforementioned allegations; namely, that: (1) PT Bargas improperly *performed* PT on the patient (as opposed to how well, in MSPT Kelly’s opinion, he evaluated the patient); and (2) PT Bargas should have recommended pressure-relieving equipment for the patient. As to PT Bargas’s undisputed failure to recommend the pressure-relieving equipment, MSPT Kelly’s silence in that regard is at odds with her opinion that “[t]he standard of care is that the physical therapist is [to] notify or inform caregivers *how best to avoid skin pressure issues . . .*,” which information presumably includes the use of appropriate pressure-relieving equipment.²² Accordingly, Royal failed to make a prima facie showing of entitlement to summary judgment. In any event, plaintiff’s expert, Perry Starer, M.D.’s (Dr. Starer) detailed affirmation in opposition

¹⁹ M.S.P.T. is an abbreviation for a Master of Science in Physical Therapy.

²⁰ See MSPT Kelly’s Expert Affidavit, dated Mar. 2, 2020 (NYSCEF #188), ¶ 30 (concluding, “to a reasonable degree of physical therapy certainty, that therapist Bargas and Royal acted in accordance [with] standard[s] of practice for a physical therapist”). MSPT Kelly’s affidavit is silent as to the causation element.

²¹ See MSPT Kelly’s Expert Affidavit, ¶ 11 (emphasis added).

²² See MSPT Kelly’s Expert Affidavit, ¶ 21 (emphasis added). *Id.*, ¶ 24 (“[t]he therapist has responsibilities . . . to educate caregivers on methods to ameliorate [skin] breakdown . . .”).

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raised triable issues of fact as to whether Royal departed from accepted standards of care in the field of physical therapy with respect to both categories of the aforementioned allegations.²³

Contrary to Royal's contention, its alleged compliance with its contract with *Alpine* (and with the corresponding limitations contained therein) cannot insulate it from liability to *the patient*. Royal's (and, consequently, PT Bargas's) duty to the patient extended beyond its specific contract with *Alpine* to encompass a general duty, applicable to PT Bargas and to all other physical therapists licensed under Education Law article 136, to comply with good and accepted physical therapy practices. *See Shank v. Mehling*, 84 A.D.3d 776, 922 N.Y.S.2d 495 (2d Dept., 2011).

Alpine Defendants' Motion

As stated, the *Alpine* defendants provided wound care and other skilled-nursing services to the patient from Oct. 14th through Dec. 8th. Plaintiff alleges in her bill of particulars that *Alpine* and its visiting nurses deviated from accepted standards of nursing care by failing to treat the patient's three preexisting pressure ulcers and by allowing to develop (and failing to treat when developed) the additional pressure ulcers, as summarized in the margin.²⁴

²³. To the extent that Royal and the *Alpine* defendants rely on the opinion of Ultimate's expert, Dr. Levine (in ¶ 12 of his affirmation), that the patient was suffering from "skin failure, also known as terminal ulceration," to establish lack of proximate cause, Dr. Levine's opinion is squarely contradicted by plaintiff's expert, as set forth in ¶ 9 of Dr. Starer's affirmation. *See generally Mehtvin v. Ravi*, 180 A.D.3d 661, 118 N.Y.S.3d 646 (2d Dept., 2020) ("That the experts disagreed presented a credibility battle between the parties' experts, and issues of credibility are properly left to a jury for its resolution.") (internal quotation marks and citations omitted); *see also Pichardo v. St. Barnabas Nursing Home*, 134 A.D.3d 421, 21 N.Y.S.3d 42 (1st Dept., 2015) ("While decedent's co-morbidities played an obvious role in her decline, it cannot be said that formation and worsening of skin ulcers was unavoidable as a matter of law.").

²⁴. The alleged failures and deficiencies include the patient repositioning in bed and wheelchair, body positioning (lack of wedges), heel protection (lack of elevation of heels), pressure relief (absence of mattress and wheelchair cushion), wound cleaning/dressing, and nutrition. *See* Second Supplemental Verified Bill of Particulars as to the *Alpine* defendants, dated Dec. 31, 2019 (NYSCEF #170), ¶ 5.

The Alpine defendants, in support of their motion, submit the expert affidavit of Alpine's Chief Nursing Officer, Jeanine Frument, R.P.N. (Nurse Frument), which exclusively addresses the departure element of plaintiff's medical malpractice claim as against them.²⁵

The Alpine defendants, in their motion, failed to establish, *prima facie*, that they did not depart from good and accepted standards of medical care. Instead, their expert, Nurse Frument, merely recounted the care rendered and opined in a conclusory fashion that such care did not represent a departure from good and accepted medical practice. *See Barlev v. Bethpage Physical Therapy Assoc., P.C.*, 122 A.D.3d 784, 995 N.Y.S.2d 514 (2d Dept., 2014). In any event, the opposing affirmation of plaintiff's expert, Dr. Starer, raised triable issues of fact as to whether *each* of the Alpine defendants departed from accepted standards of nursing care *insofar as such departures are alleged in plaintiff's bills of particulars*.²⁶ In this regard, the Court agrees with the Alpine defendants that plaintiff's contention (in ¶ 7 of Dr. Starer's affirmation) regarding the alleged impropriety of their reliance on their back-up agreement with Ms. Norville was not pleaded in her bill of particulars and thus represents a new theory of liability that this

²⁵. *See* Affidavit of Jeanine Frument, R.P.N., dated Mar. 2, 2020 (NYSCEF #212), ¶ 7 (“In my review of the Bill of Particulars and medical records, I concluded that there was no departure in the care provided to [the patient] by Alpine and its nurses”); ¶ 23 (“[I]t is my opinion within a reasonable degree of medical certainty that the nursing care rendered by [the Alpine defendants] met the standard of care at all times during [the patient’s at-home care].”). Contrary to the Alpine defendants’ contention (in ¶¶ 4 and 7 of their reply affirmation [NYSCEF #355]), Nurse Frument did not opine as to the causation element. Rather, Nurse Frument suggested (in ¶ 7 of her affidavit) that the patient’s comorbidities, including anemia, “contributed to an abnormal volume of oxygen to her body because she has less red blood cells which deliver oxygen to the body,” thereby making it more difficult for her skin to heal. Assuming, without deciding, that Nurse Frument’s suggestion constitutes an opinion (*cf. Rosario v. Our Lady of Consolation Nursing & Rehabilitation Care Ctr.*, 186 A.D.3d 1426, 128 N.Y.S.3d 906 [2d Dept., 2020]), it is squarely contradicted by the opinion of plaintiff’s expert. *See* Dr. Starer’s Affirmation, ¶ 10.

²⁶. *See* Dr. Starer’s Affirmation, ¶ 30 (Nurse Rose-Burrell); ¶¶ 31, 33, and 35 (Nurse Greenspan); ¶¶ 38-40; ¶¶ 43-44, 46-48, and 50-57 (Nurse Watson).

Court may not consider.²⁷ *See Campos v. Beth Israel Med. Ctr.*, 80 A.D.3d 642, 915 N.Y.S.2d 132 (2d Dept., 2011); *see also Iodice v. Giordano*, 170 A.D.3d 971, 96 N.Y.S.3d 360 (2d Dept., 2019).

The Alpine defendants' contention that its nurses followed the physician-prescribed wound-care orders for the patient is belied by the record. As Nurse Rose-Burrell conceded during her deposition, she only treated two of the patient's three preexisting pressure ulcers at her initial visit, whereas she was required by the physician orders to treat all the patient's pressure ulcers.²⁸ Further, as Nurse Greenspan admitted in his pretrial testimony, he did not fully examine the patient at any of his three visits, notwithstanding the physician orders.²⁹

In addition, as Nurse Watson testified at her deposition, she was required to notify the patient's physician when the patient's wounds worsened or when the patient developed new wounds.³⁰ Viewing the record in the light most favorable to plaintiff as a nonmoving party, a reasonable view of the evidence indicates that Nurse Watson missed the majority (if not, most) of the patient's pressure ulcers and failed to appreciate their severity when she last attended to the patient at home on Dec. 8th, which was only one day before the patient's Dec. 9th emergency hospitalization at Woodhull's ICU with

²⁷ A back-up agreement with the patient's caregiver (here, Ms. Norville) was necessary because, as Nurse Watson testified (at page 162, lines 6-7 of her pretrial deposition), "[t]he wound care is expected to be done on the days that the nurse is not [visiting the patient]."

²⁸ *Compare* Nurse Rose-Burrell's previously quoted testimony to that of Nurse Watson at the latter's EBT tr at page 131, lines 8-12 ("Q. . . . [W]hether she [the patient] had one ulcer or more than one ulcer, you would have been responsible . . . for treating every ulcer? A. Yes.").

²⁹ *Compare* Nurse Greenspan's previously quoted testimony to that of Nurse Watson at her EBT tr at page 132, line 10 to page 133, line 13 (testifying that, as a wound nurse, she was required to "physically turn the patient," examine the patient's skin, perform a "[h]ead-to-toe assessment . . . [at] every visit," undress the patient, "remove the bandage, discard it, clean the wound, . . . and apply the dressing.").

³⁰ *See* Nurse Watson's EBT tr at page 114, lines 2-24; at page 116, line 23 to page 117, line 2.

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sepsis arising from multiple necrotic pressure ulcers. This Court considered the Alpine defendants' remaining contentions and found them unavailing. Accordingly, denial of the Alpine defendants' motion is warranted.

Conclusion

Based upon the foregoing and after oral argument, it is

ORDERED that Ultimate's motion in Seq. No. 4 is *granted*, and the amended complaint and all cross-claims as against it are dismissed without costs and disbursements; and it is further

ORDERED that Royal's motion in Seq. No. 5 is *denied*; and it is further

ORDERED that the Alpine defendants' motion in Seq. No. 6 is *denied*; and it is further

ORDERED that the action is severed and continued against the remaining defendants, and the caption is amended to read in its entirety as follows:

-----X
VICKI COX, as Administrator of the Estate of
ANN WATKINS, Deceased,
Plaintiff,

- against -

Index No. 500319/17

BROOKLYN GARDENS NURSING
& REHABILITATION CENTER,
PROVIDENCE CARE, INC.,
BROOKLYN GARDENS LLC,
ALPINE HOME HEALTH CARE, LLC,
ALPINE HOME HEALTH CARE BROOKLYN,
LALLYMAY ROSE-BURRELL, R.N.,
STACY ANN WATSON, R.N.,
YEHOSHUA GREENSPAN, R.N., and
ROYAL CARE CERTIFIED HOME HEALTH CARE, LLC,

Defendants.

-----X

and it is further

ORDERED that plaintiff's counsel is directed to electronically serve a copy of this Decision and Order with notice of entry on the other parties' respective counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the Decision and Order of the Court.

E N T E R,

Genine D. Edwards

Hon. Genine D. Edwards
J. S. C.