

Sprei v Home Health Care Servs. of N.Y., Inc.

2021 NY Slip Op 31192(U)

April 7, 2021

Supreme Court, Kings County

Docket Number: 519022/2016

Judge: Lara J. Genovesi

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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 7th day of April 2021.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

-----X
ABRAHAM SPREI, as Administrator of the Estate of
ESTHER SPREI, deceased,

Index No.: 519022/2016

Plaintiff,

DECISION & ORDER

-against-

HOME HEALTH CARE SERVICES OF NEW YORK,
INC., a/k/a HOME HEALTH SERVICES OF NEW
YORK d/b/a HCS HOME CARE SERVICES,

Defendant.
-----X

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>NYSCEF Doc. No.:</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	<u>54, 55</u>
Opposing Affidavits (Affirmations) _____	<u>78</u>
Reply Affidavits (Affirmations) _____	<u>89</u>

Introduction

Defendant, Home Health Care Services of New York Inc., a/k/a Home Health Services of New York d/b/a HCS Home Care Services, moves, by notice of motion,

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sequence number three, pursuant to CPLR § 3212, for summary judgment. Plaintiff, Abraham Sprei, as administrator of the estate of Esther Sprei, opposes this motion.

Background

Esther Sprei (the decedent) sustained personal injuries on April 1, 2014, when she fell in her bathroom at 1455 49 Street, Brooklyn, New York. It is undisputed that the decedent fell while in the care of her home care nurse, Barno Kabulova, who is employed by defendant Home Care Services (HCS).

Plaintiff Abraham Sprei testified at an examination before trial (EBT) on December 4, 2018. He is the son of the decedent. The decedent lived in her apartment with an aide (*see* NYSCEF Doc. # 61, Abraham Sprei EBT at 7). The decedent needed a home health aide because she “fell down a few times” (*id.* at 18). The first time the decedent needed medical attention after a fall was “about seven or eight years ago” when she fell in her dinette and broke her hip (*see id.* at 20, 21). From the time the decedent broke her hip until the time she passed away she had a home health aide (*see id.* at 27). The aide was with the decedent seven days a week, and plaintiff does not recall if an aide was with her 24 hours per day (*see id.* at 28). When Kabulova was hired as the decedent’s home health aide, plaintiff told her that “she has a tendency to fall and we have a toilet right next to her bed so she wouldn’t have to go to the middle of the night to use the bathroom” (*id.* at 30). On April 1, 2014, Kabulova called plaintiff and told him that the decedent “fell down in the bathroom and she can’t pick her up” (*id.* at 32). Kabulova helped Mrs. Sprei go to the bathroom (*see id.* at 76, 77). When plaintiff arrived at the apartment, he found the decedent lying on the floor in the bathroom (*see id.* at 33).

When plaintiff asked Kabulova why the decedent went to the bathroom instead of using the commode next to the bed, she said that “she wanted to go to the bathroom” (*id.* at 34). Kabulova continued to work as the decedent’s home health aide after the fall (*see id.* 54-56). Plaintiff later affirmed that he had “given instructions to the aide, Barno Kabulova, that at night she should never be taken to the bathroom but that she should always use the commode that was provided near her bed” (*see* NYSCEF Doc. # 82, Abraham Sprei Aff., ¶ 5).

Plaintiff’s wife, Judy Sprei, testified at an EBT as a nonparty witness on October 8, 2020. A home health aide was needed because “she [the decedent] had numerous falls, and she couldn’t be on her own” (*see* NYSCEF Doc. # 84, Judy Sprei EBT at 14). The decedent was “falling down constantly” (*see id.* at 15). The aides would “help her around the house. They would help her go out. She was still mobile. They would help her cook, clean, wash her down” (*see id.* at 16). Mrs. Sprei recalls the decedent having an aide from HCS since 2011 when the decedent fell and broke her hip, and Mrs. Sprei coordinated more frequent supervision from the home health aides (*see id.* at 17-20). From the time the decedent broke her hip until the date of her accident in her bathroom, Mrs. Sprei recalls speaking with the coordinator at HCS, and “kept her apprised that she kept falling” (*see id.* at 27, 28). She spoke with the nurse about preventions and precautions to be taken regarding her constant falls, including the “commode near her bed” (*see id.* at 29). When the nurses visited the decedent’s home, they would give the aides instructions on what the care is for the patient (*see id.* at 49, 50). Mrs. Sprei “told the aides that they have to use the commode,” as well as the nurses who instruct the aides

(*see id.* at 30, 31, 50). No medical provider, nurse, or doctor advised that the decedent was required to use a commode all the time (*see id.* at 31). Mrs. Sprei never spoke with HCS employees regarding the commode (*see id.*). Mrs. Sprei learned of the fall from the aide and that the decedent wanted to go to the bathroom rather than use the commode in the (*see id.* at 33, 34, 49). She was advised by the aide that decedent fell while “she was on the toilet and she was getting up” (*id.* at 34). The decedent never told Mrs. Sprei how she fell (*see id.* at 42).

Non-party witness Barno Kabulova, the decedent’s home health aide, testified at an EBT on October 17, 2019 with a Russian interpreter. Kabulova testified that she was assigned to the decedent by HCS (*see* NYSCEF Doc. # 63, Kabulova EBT at 10). Kabulova recalls being given specific instructions regarding helping the decedent move and noted that “she would walk slow with a walker. When she was walking with a walker I always behind her. When she would go to the bathroom, I was always behind her to prevent her from falling and help her with whatever needed to be done” (*id.* at 14). Kabulova is trained in fall prevention and was trained to always be behind the decedent to hold her back and help prevent her from falling (*see id.* at 19, 20). Nobody told Kabulova about the decedent’s history of falling in her home, and she did not ask the coordinators at HCS (*see id.* at 14-16). Kabulova considered the decedent a “high” risk for falls (*see id.* at 21).

Whenever Kabulova took the decedent outside of the house, she used a wheelchair because the decedent “wasn’t able to stand that long using the walker” (*see id.* at 19). Kabulova testified that there was a commode next to the decedent’s bed, and that she was

“using the commode only at nighttime,” and “during the day she would use the restroom” (*see id.* at 21, 22). The decision of whether to use the restroom or the commode was “her own,” and Kabulova would have done or agreed to whatever the decedent asked (*see id.* at 22). Kabulova would tell the decedent whether she should use the commode, but “she made conclusions on her own” (*id.* at 47). When Kabulova would tell the decedent to not do something, “she wouldn’t obey” because she was “a tough lady” (*id.* at 39). The decedent “doesn’t use the restroom at nighttime,” and “definitely she had a commode next to her” while she is in bed (*id.* at 24, 31; *see also id.* at 36). Kabulova testified that nobody ever told her that the decedent should use the commode and not go to the bathroom (*see id.* at 23, 24). Kabulova recalls the decedent getting up from the kitchen and wanting to go to the bathroom (*see id.* at 30, 31). The accident report issued by HCS says that the time of the incident was at 9:45 p.m., but Kabulova believes that the incident must have been earlier because the decedent is usually in bed by that time and not in the kitchen (*see id.*). Kabulova testified that she never saw the accident report before (*see id.* at 58).

When the decedent went to the bathroom, she walked with the assistance of her walker (*see id.* at 32, 33). Kabulova “wasn’t inside the bathroom because she always wanted privacy” because the decedent “was always saying close it and wait me behind the door” (*id.* at 33; *see also id.* at 53, 54). Kabulova walked the decedent to the bathroom, walked behind her to make sure she didn’t fall, assisted her into getting on to the toilet, and then shut the door to wait outside the bathroom (*see id.* at 52). When the

decedent is finished going to the bathroom, “she would say open the door” and Kabulova would help her walk (*id.* at 54).

According to HCS training, Kabulova was not allowed to be in the bathroom without the decedent’s permission (*see id.* at 50). Kabulova was standing outside of the bathroom door and she heard a noise (*id.* at 34). She opened the door immediately and went inside of the bathroom and saw the decedent sitting on the floor next to the bathtub and was told to call the decedent’s son (*see id.* at 35). Kabulova did not break the decedent’s fall and was not in the bathroom at the time she fell (*see id.* at 43). Kabulova “couldn’t do anything because we were not allowed to touch them” (*id.* 35, 36).

Kabulova allowed the decedent to make the decision to use the restroom on her own because “she was a normal human being” (*id.* at 37). Kabulova testified that everyone at HCS, including the coordinator, knew that the decedent would do dangerous things in her home, and continued to allow it because “she was a woman. She was at her home . . . She was free” (*id.* at 40). According to her training, Kabulova could not force the decedent to do anything against her will (*see id.* at 49, 50). The coordinator knew that Kabulova allowed her to use the bathroom alone, and the coordinator told her to “be cautious” (*id.* at 40). Kabulova believes it was “definitely not” cautious to allow the decedent to use the bathroom alone with the door closed (*id.*). After the accident, Kabulova reported the details to her HCS coordinator, Elvira (*see id.* at 57, 58).

Devon Manne, a registered nurse who worked for HCS¹ from 2013 until about July of 2017, testified at an EBT on September 15, 2020 (*see* NYSCEF Doc. # 85, Manne EBT at 7, 8). Manne performed chart review until September of 2014 when she became the Director of patient Services (*see id.* at 8, 9). Every patient has their own chart (*see id.* at 9). Manne was not responsible for going through the charts and would only go through charts to “get a feel whether a nurse needed education and was doing things improperly and if there were discrepancies found in the chart” (*id.* at 10, 11). The review was a method of doing a quality control of how the nurses were performing when making periodic visits to the patients’ homes (*see id.* at 11, 13).

Manne does not recall seeing the decedent’s chart or nurses’ records (*see id.* at 9, 13). Manne does not know if there is a requirement for nurses to be aware of a patient’s fall risk, but “nurses would indicate if they felt that patients were a fall risk” and would “put that on the plan of care for the aide if they felt that it was a problem” (*id.* at 14, 15). Manne testified that “there are various tools in nursing that assesses a fall risk” and “would indicate that the aide should take certain precautions with them” (*id.* at 15). If a patient ever falls, “the aide was supposed to leave the patient on the floor and call 911 or Hatzalah” (*id.* at 43, 44). The HCS policy and procedure manual also lists out specific duties and responsibilities that an aide might be required to do, including “assisting a

¹ Defendant Sarah Goldman also testified at an EBT on December 11, 2019. Goldman is the Director of Clinical Services for defendant HCS (*see* NYSCEF Doc. # 69 at 9). Goldman first began working for HCS on September 11, 2017 (*see id.*). Goldman is responsible for “oversee[ing] patient care, education for caregivers, medicals and hiring process for the caregivers, respond[ing] to incidents that occur in the home” (*id.* at 10). Goldman has no knowledge of the decedent’s fall (*see id.* at 12).

patient on and off a bedpan, commode, or a toilet” (*id.* at 20, 21; *see also id.* at 25, 26).

These responsibilities are “within the scope of practice of what an aide is allowed to be doing for a patient, but it doesn’t mean that the aide will do all of those things everyday” (*id.* at 21). What is within the scope of practice for the aide is determined by the nurse and the doctor, not the patient’s family (*see id.* at 33). If the patient’s family wanted something specific to be included in the aide’s duties and responsibilities, “it would be preferable for the children to speak with the nurse and have the nurse put that in the plan of care so that now the aide is obligated” (*id.* at 35). Whenever a new patient is taken on by HCS they are screened by the intake department to determine the patient’s specific needs, and Manne does not know what the procedure is like, or whether any department reviewed the patient’s medical history or assessed their fall risk (*see id.* at 28-30). Whenever an aide is assigned, they are given specific instructions regarding fall protection techniques (*see id.* at 30). If an aide was to require the patient to use a walking device, the determination was made by a doctor or nurse (*see id.* at 31, 32). An aide would be required to help an elderly patient on and off a commode “if they were directed from the nurse or the doctor,” and not the patient’s family (*see id.* at 34, 35).

A nurse’s independent evaluation also determines whether there are specific requirements regarding assistance with using a toilet (*see id.* at 46). “Patients who could not stand would need to use a bedpan but there are patients who can walk a limited amount of feet and who need assistance with walking . . . [who] could be assisted by the aide” (*id.* at 48, 49). “Even with the patient’s wishes to use the normal toilet or the family’s wishes to use a normal toilet a nurse would have to assess that this was safe for

the patient to do so with assistance” (*id.* at 49). Until the nurse puts the use of a commode or a regular toilet in the instructions for the aide, the aide is not responsible for requiring that the patient use a commode, even if it is next to the patient’s bed (*see id.* at 50, 51). Manne has no knowledge of whether this was required for the decedent (*see id.* at 39). Defendant’s September 2019 Discovery Response annexed as Exhibit G to its motion includes an “Aide Plan of Care,” which instructs the aide to assist with the decedent’s elimination through toilet and commode (*see* NYSCEF Doc. # 62, Defendant’s Sept. 2019 Discovery Response, Aide Plan of Care).

The decedent had a health care proxy dated March 31, 2004, which appointed her son, plaintiff Abraham Sprei, as her “health care agent to make any and all health care decisions for me, except to the extent that I state otherwise. This proxy shall take effect only when and if I become unable to make my own health care decisions” (NYSCEF Doc. # 81, Health Care Proxy). The proxy also lists Mrs. Sprei as the decedent’s alternate agent (*see id.*). In opposition, plaintiff also annexed a “Home Health Care Services Accident/Incident Report,” dated April 3, 2014 (*see* NYSCEF Doc. # 79, Accident Report). The accident report states that “aide reported that she was assisting the member walk out of the bathroom. The member right leg became weak and the member started to fall down on her side. The aide broke the member’s fall and sat the member on the floor. Aide called Hatzalah and the member’s family. Member was taken to the Hospital for Joint Diseases but was not admitted. Information was communicated to On-call RN Yang and Elderserve” (*see id.*). The portion of the accident report that states “Report completed by:” and “Administration signature/title:” is blank (*see id.*).

Defendant provided an expert affidavit from Ruth E. Langlais, MS, RN, who is the “Director of Clinical Services in an Auburn, Massachusetts franchise of Accessible Home Health Care, a provider of home health care services in 17 states and three international locations” (*see* NYSCEF Doc. # 56, Langlais Aff., ¶ 1. Langlais concludes “within a reasonable degree of nursing certainty that the care and treatment rendered by Kabulova within the period of the alleged negligence was within the standard of care and that the plaintiff’s allegations that she departed from the standard of care are without merit” (*see* NYSCEF Doc. # 56, Langlais Aff., ¶ 8). Specifically, Langlais stated that defendant conformed with the appropriate standard of care by allowing the decedent to go to the bathroom alone because

“good and accepted standards of nursing and home health aide practice dictates that a home health aide may not override a patient’s freedom of choice and force the patient to act according to the home health aide’s directives *except* for when (1) the patient is mentally incompetent, incapacitated, or otherwise mentally unfit; (2) the patient is an imminent danger to others; or (3) the patient is engaging in an activity which to a near certainty would bring imminent harm to herself”

(*Id.* at ¶ 10). Langlais stated further that there are no indications in any of the pleadings, deposition testimonies, or the decedent’s records that the decedent would fall into any of the three exceptions warranting a Kabulova to override her freedom of choice to use the bathroom unassisted with the door closed (*see id.* at ¶ 11, 12).

Plaintiff provided an expert affidavit from Diane Weber, BSN, RN CWOCN, LNC-CSp, who is an “experienced wound, ostomy and continence nurse (CWOCN) with acute care, outpatient and nursing home experience” (*see* NYSCEF Doc. # 86, Weber

CV). Weber concluded that because the decedent had a history of falling, was under fall precautions, and functional limitations in mobility, Kabulova deviated from the good and acceptable nursing and home health aide standard of care by allowing the decedent to be alone in the bathroom (*see* NYSCEF Doc. # 83, Weber Aff, ¶ 6). Weber states that the decedent was in “near certain and imminent danger of falling and injuring herself by being left alone” in the bathroom (*id.*). If the decedent insisted on going to the bathroom alone, Kabulova should have explained to her the dangers of going to the bathroom, offer her the use of the commode, notify her supervisor, and never should have allowed her to be in the bathroom alone (*see id.* at ¶ 10, 11). Weber also reviewed the HCS Home Care Policy and Procedure for Home Health Aide/Personal Care Aide Manual, which outlines the care of the decedent, including “assisting patient on and off bedpan, commode and toilet” (*id.* at ¶ 22). It is Weber’s “professional opinion within a reasonable degree of Nursing and Home Health Aide certainty, after careful review of the home care records of HCS for Ms. Sprei and reviewing the deposition testimony that all of the aforesaid actions and/or inactions which were deviations from the Home Health Aide standard of care were the proximate cause of Esther Sprei’s fall and injury while at home under the care of the defendant HCS’s aide” (*see id.* at ¶ 26).

This action was commenced with the filing of a summons and complaint on August 25, 2016 (*see* NYSCEF Doc. # 1). Issue was joined on November 29, 2016 (*see* NYSCEF Doc. # 2). The note of issue was filed on November 19, 2018.

Discussion

Summary Judgment

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh*, 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra*; *see also Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]). “A defendant seeking summary judgment in a medical malpractice action must make a prima facie showing either that he or she did not depart from the accepted standard of care or that any departure was not a proximate cause of the plaintiff’s injuries” (*Larcy v. Kamler*, 185 A.D.3d 564, 127 N.Y.S.3d 122 [2 Dept., 2020]).

Plaintiff and defendant each submitted an “expert affirmation who opined with a reasonable degree of medical certainty” whether the defendant deviated from its appropriate standard of care (*Cummings v. Brooklyn Hosp. Center*, 147 A.D.3d 902, 48 N.Y.S.3d 420 [2 Dept., 2017]). Summary judgment is not appropriate “where the parties adduce conflicting medical expert opinions because “[s]uch conflicting expert opinions will raise credibility issues which can only be resolved by a jury” (*Cummings v. Brooklyn Hosp. Center*, 147 A.D.3d 902, *supra*, quoting *DiGeronimo v. Fuchs*, 101 A.D.3d 933, 957 N.Y.S.2d 167 [2 Dept., 2012]).

Defendant met its prima facie showing of entitlement to judgment as a matter of law. In support of its motion, defendant’s expert affidavit provides that “within a reasonable degree of nursing certainty that the care and treatment rendered by Kabulova within the period of the alleged negligence was within the standard of care and that the plaintiff’s allegations that she departed from the standard of care are without merit “(see NYSCEF Doc. # 56, Langlais Aff., ¶ 8). Langlais stated that a home health aide cannot override a patient’s freedom of choice to use the bathroom alone unless “(1) the patient is mentally incompetent, incapacitated, or otherwise mentally unfit; (2) the patient is an imminent danger to others; or (3) the patient is engaging in an activity which to a near certainty would bring imminent harm to herself” (*Id.* at ¶ 10). Langlais concluded that Kabulova satisfied this duty of care by allowing the decedent to go to the restroom alone because there is no indication that the decedent fell into any of the three exceptions warranting an override of the decedent’s freedom of choice. Kabulova testified that the decedent wanted to go to the bathroom on her own with the door closed, and Langlais’

affidavit demonstrates that defendant's actions did not deviate from the accepted standard of care and was thus not the proximate cause of plaintiff's injuries (*see Feinberg v. Feit*, 23 A.D.3d 517, 806 N.Y.S.2d 661 [2 Dept., 2005]).

However, in opposition, plaintiff raised triable questions of fact. Plaintiff's expert, Diane A. Weber, opined that because the decedent had a history of falling, was under fall precautions, had functional limitations in mobility, and was in "imminent danger" being left alone, Kabulova deviated from the good and acceptable Nursing and Home Health Aide standard of care by allowing the decedent to be alone in the bathroom. Weber stated that Kabulova never should have allowed her to be in the bathroom alone. Weber concluded that because Kabulova deviated from the Home Health Aide standard of care, allowing the decedent to use the restroom alone instead of the commode was the proximate cause of the decedent's injuries" (*see id.* at ¶ 26).

There are "triable issues of fact as to whether the defendant breached its duty of care to the plaintiff's decedent by leaving [her] unattended while [she] went to the bathroom" (*Esposito v. Personal Touch Home Care, Inc.*, 288 A.D.2d 337, *supra*; *see also Auer v. Affiliated Home care of Putnam, Inc.*, 63 A.D.3d 972, 883 N.Y.S.2d 71 [2 Dept., 2009]). Considering the conflicting expert opinions provided by plaintiff and defendant, questions of fact as to the credibility of the experts' affidavits exist.

Furthermore, there is a question of fact as to the happening of the incident. Plaintiff provided a copy of an HCS Home Care Accident/Incident Report which purports to tell a conflicting version of events wherein the Aide was assisting the plaintiff out of the restroom, and when the plaintiff fell, the aide broke the member's fall and sat the

member on the floor. This report is not authenticated.² The “Report completed by:”, “Date” and “Administration signature/title:” sections of the report are all blank. Further, Kabulova testified to having no knowledge of this report and that the information contained therein is incorrect.

“Records made in the regular course of business are hearsay when offered for the truth of their contents...to establish a foundation for the admission of a business record, the proponent of the record must satisfy the requirements identified in the statute. First, the proponent must establish “that the record be made in the regular course of business—essentially, that it reflect a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business”. Second, the proponent must also demonstrate “that it be the regular course of such business to make the record ... essentially, that the record be made pursuant to established procedures for the routine, habitual, systematic making of such a record” Third, the proponent must establish “that the record be made at or about the time of the event being recorded—essentially, that recollection be fairly accurate and the habit or routine of making the entries assured” ;

In addition to these statutory requirements, the Court of Appeals has held that “[u]nless some other hearsay exception is available, admission may only be granted where it is demonstrated that the informant has personal knowledge of the act, event or condition and he [or she] is under a business duty to report it to the entrant”

(Bank of New York Mellon v. Gordon, 171 A.D.3d 197, 97 N.Y.S.3d 286 [2 Dept., 2019] [internal citations omitted]).

² The parties were given an opportunity to provided supplemental briefs on whether an unauthenticated businesses record may be used in opposition to a motion for summary judgment.

Here, although plaintiff relies on the unauthenticated report, it is not the only evidence (see *Weinstein v. Nicolasi*, 117 A.D.3d 1036, 986 N.Y.S.2d 527 [2 Dept., 2014] [“[w]hile hearsay statements may be used to oppose a summary judgment motion, such evidence is insufficient to warrant a denial of the motion where it is the only evidence submitted in opposition” (*Rivera v. GT Acquisition 1 Corp.*, 72 A.D.3d 525, 526, 899 N.Y.S.2d 46); see *Taylor v. One Bryant Park, LLC*, 94 A.D.3d 415, 941 N.Y.S.2d 142 [1 Dept., 2012]; see generally *Yassin v. Blackman*, 188 A.D.3d 62, 131 N.Y.S.3d 53 [2 Dept., 2020]). The accident report, which states that Kabulova broke the decedent’s fall, is inconsistent with Kabulova’s testimony that she did not break the decedent’s fall. Therefore, there is a question of fact exists as to whether Kabulova broke the decedent’s fall and whether a failure to break the decedent’s fall while she was alone in the bathroom is a deviation from the standard of care (see *D’Elia v. Menorah Home and Hosp. for Aged and Infirm*, 51 A.D.3d 848, 859 N.Y.S.2d 224 [2 Dept., 2008]).


Plaintiff further relies on the decedent’s Health Care Proxy to argue that the defendant should have followed the plaintiff’s wishes and required that the decedent use a commode to go to the bathroom. However, the proxy specifically states that “health care agent to make any and all health care decisions for me, except to the extent that I state otherwise. This proxy shall take effect only when and if I become unable to make my own health care decisions.” The aide testified that the decedent stated she did not want to use the commode and there is no indication that the decedent was unable to make her own health care decisions.

Conclusion

Defendant's motion for summary judgment, motion sequence three, is denied.

This constitutes the decision and order of this Court.

ENTER:



 Hon. Lara J. Genovesi
 J.S.C.

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