

Rella v Dragan

2021 NY Slip Op 33421(U)

October 4, 2021

Supreme Court, Nassau County

Docket Number: Index No. 612034/2019

Judge: Christopher G. Quinn

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU CIVIL TERM PART 23

Present: HON. CHRISTOPHER G. QUINN
Justice of the Supreme Court

ROSALIE RELLA,

Plaintiff,

INDEX NO: 612034/2019

-against-

MOTION SEQ. No. 1 - MD

JOHN DRAGAN and AGEWELL PHYSICAL
THERAPY & WELLNESS, P.C.,

Defendants.

The following papers were read on this motion:

- 1) Notice of Motion/Affirmation/Exhibits/Attachments
 - 2) Memorandum of Law
 - 3) Affirmation in Opposition/Exhibits/Attachments
 - 4) Reply
- (NYSCEF Nos 16-)

Defendants seek an Order granting them summary judgment pursuant to CPLR § 3212. Plaintiff opposes. Plaintiff brings three causes of action sounding in medical malpractice, lack of informed consent and negligence.

In this action plaintiff seeks damages for injuries allegedly incurred due to alleged medical malpractice. Plaintiff alleges that physical therapist, JOHN DRAGAN, PT, one of the owners of AGEWELL PHYSICAL THERAPY & WELLNESS, P.C., negligently encouraged and permitted ROSALIE RELLA to continue physical therapy despite her expression of exhaustion, which allegedly resulted in a fall and injury to RELLA on September 27, 2017.

In support of their motion, defendants provide an expert affidavit from a Board Certified Physical Therapist, Kevin Weaver. Weaver has a doctorate in physical therapy. He states that he reviewed the Bill of Particulars, the deposition testimony and medical records.

The records he reviewed include records from Rockville Skilled Nursing and Rehabilitation where plaintiff was a resident from September 29, 2015 to January 17, 2016. Those records indicate that the patient had a prior medical history of diabetes mellitus, morbid obesity, spinal stenosis, sciatica, vertigo, atherosclerosis, as well as an open wound in her lower back. The patient required a lift and a two person assist to transfer. She also had a history of chronic left shoulder injury with dislocation following a fall. The records also indicate that the patient had difficulty walking, and the plan was for physical therapy, as well as occupational therapy. (Motion, Exh. K).

The records also include those of defendant AGEWELL PHYSICAL THERAPY & WELLNESS, P.C. (Exhibit I) via their "First Contact" Form on September 11, 2017. Those records reveal, RELLA advised defendants that she could not walk due to pain in her legs and had an inability to move her right leg for the last 2 years. She also advised defendants that she had received physical therapy at home for half of the year, and had been in a rehabilitation facility until January 17, 2017. She was accompanied by an aide, who assisted with all activities of daily living as RELLA was relatively wheelchair bound. She lived with her 84-year-old husband in a private home and advised that she had a fall within the last year. (Motion, Exh. K).

The deposition testimony reviewed included that of the plaintiff who testified that on September 26, 2017, she arrived at AGEWELL PHYSICAL THERAPY & WELLNESS, P.C. via Ambulette, and that her aide Andy was present. She stated that the session was approximately 2 ½ hours long, during which time her aide was left in a waiting room. (Exhibit E). She testified that she practiced getting in and out of bed for approximately 20 minutes, then she moved on to leg exercises for approximately half an hour at which point in time she was taken to the parallel bars. She described the parallel bars as approximately 12 feet long, and she stated that she was approximately mid-way down the parallel bars when she fell. RELLA testified that DRAGAN had placed a one-to-two-inch foam rubber step in front of her wheelchair and then had her use the parallel bars to stand up from the wheelchair and step up on the foam step, and then she would immediately sit back down in her wheelchair (Exhibit E).

RELLA testified that she performed the exercise approximately three times before the accident occurred. She stated that her wheelchair was behind her at all times but was not in a locked position and there was nobody behind the wheelchair to prevent it from going backward

(Exhibit E). Plaintiff testified that after the third step-up, she told DRAGAN that she was "very tired and couldn't go on". He told her to "do it one more time".

Plaintiff testified that she told DRAGAN that her leg and foot were burning, and that there was something wrong, to which statement, DRAGAN gave no response.

She testified that this was the first time during the session that she had any issues from her left leg, which she testified buckled just before she fell. As a result of her fall, her right foot was underneath her in an awkward position. She did admit that DRAGAN was right in front of her but stated that he was not able to catch her in any way (Exhibit E).

The plaintiff testified that after she fell, her right foot was burning and in pain. DRAGAN helped her into her wheelchair, and he contacted her aide. RELLA denies that DRAGAN offered to call an ambulance or that he told her to seek medical attention. She admitted that he put ice on the foot, however, she stated that it did not get any better. Afterwards, she and her aide were taken home via the Ambulette.

RELLA testified that she underwent an x-ray the next day, and that her foot was swollen and red and she could not walk. She states she was given a boot to wear, and a prescription for pain killers. Approximately one month later, she followed with Dr. Madden and he took another x-ray and he advised her that it was not yet healed, but she admitted that the pain was better. One month later she followed up again, and again she was told that it was healing. (Exhibit E).

The plaintiff testified that she had no surgery but went back to physical therapy for three months, which she stopped for reasons including a lack of improvement.

At his deposition the defendant DRAGAN testified that on September 20, 2017, he performed an initial assessment of RELLA which included determinations that she had a high BMI at 5 feet 2 inches tall and 225lbs and had a weak left hip, knee and ankle (Exhibit H). He also noted that RELLA's leg had collapsed two years prior resulting in a hospitalization and diagnosis of left stenosis, and that since that time she utilized a wheelchair although she was able to ambulate short distances with a rolling walker, which required someone to pull her right leg for her. At this time, RELLA also advised that she had nine (9) falls in the last two (2) years (Exhibit H).

He testified that he spoke to the plaintiff to obtain her medical history and his overall assessment of the patient was that she required moderate assistance to rise from wheelchair to stand at walker. RELLA was assessed as wheelchair dependent secondary to severe left hip osteoarthritis/weakness, lumbar degenerative disc disease and stenosis. (Exhibit H).

DRAGAN noted that the physical therapy goal would be the improvement of strength and functional mobility and the patient's ability to ambulate. He testified that on September 26, 2017, he wheeled her over to the parallel bars and positioned her, in the wheelchair between the bars, assuring that her legs were in the appropriate position to stand (Exhibit H). He then assisted her to a standing position with his hands.

The records of Dr. Geraci (Exhibit M) start in March 2018, subsequent to the September 2017 care and treatment at issue. Those records make no mention of the alleged physical therapy incident or the fact that RELLA suffered an injury to her foot. The records reference "numerous medical problems," including spinal stenosis, morbid obesity, insulin dependent diabetes, hypertension, hyperlipidemia and osteoarthritis. On July 12, 2018, Dr. Geraci noted RELLA used a wheelchair but was able to ambulate with a walker for short distances. In August 2018, there is a specific notation that RELLA had limited activity due to spinal stenosis. This was noted again on March 6, 2019.

Based on review of all the above, defendant's expert Kevin Weaver, DPT, opined, with a reasonable degree of physical therapy certainty, that DRAGAN appropriately made contact with the plaintiff so as to facilitate her weight shifting from side to side and initiate a step. He also opined that DRAGAN appropriately maintained a position behind and to the side of the patient. Mr. Weaver opined that DRAGAN has the appropriate experience, education, practical experience, and credentialing to address RELLA's needs, appropriately noted her limitations and functional capabilities/inabilities, and established reasonable goals for RELLA.

Mr. Weaver opined that DRAGAN appropriately managed and monitored RELLA throughout the course of her treatment. Mr. Weaver opined that the expression that a patient is "tired" is a subjective statement and not determinative of whether or not therapy should continue. Mr. Weaver concurred with DRAGAN's deposition testimony that it was his responsibility to encourage the patient while being cognizant of her limitations and history of prior falls. Weaver opined that all safeguards in treatment were appropriately taken and that DRAGAN was

appropriately present, with other personnel, to provide maximum assistance and security to RELLA. (Exhibit A).

It is Weaver's opinion, with a reasonable degree of physical therapy certainty, that JOHN DRAGAN and AGEWELL PHYSICAL THERAPY & WELLNESS, P.C. acted in accordance with good and accepted physical therapy practice in all aspects of the care and treatment rendered to ROSALIE RELLA, did not deviate from accepted physical therapy practice, and that none of the actions of the defendants caused or contributed to ROSALIE RELLA's injuries

In opposing the motion the plaintiff argues that the defendants have failed to make a *prima facie* showing of entitlement to summary judgment. Counsel argues that there is an issue of fact in dispute as to what defendant DRAGAN was doing at the time of plaintiff's fall. Counsel notes the discrepancy in the deposition testimony as the plaintiff testified that DRAGAN never touched her when she was doing the exercises and DRAGAN claims that he was supporting her as she did them.

Counsel for the plaintiff argues that the expert affidavit cannot properly be relied upon to grant summary judgment as he states that DRAGAN did not depart from good and accepted practice because his hands were in contact with RELLA the entire time during the exercise, and that his hands remained upon her the entire time as she was "lowered" to the floor. Further, counsel notes that the expert does not opine the significance of plaintiff informing the defendant that she was tired and wanted to stop, especially in light of the fact she was a wheelchair-bound, 75 year old woman, who weighed 225lbs, and who had fallen nine times within two years.

Counsel argues that this is not conceded and is a disputed material issue of fact.

The Court agrees.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case [see *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986); *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851(1985)]. The movant has the initial burden of proving entitlement to summary judgment. The failure to make a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers [*Winegrad v.*

New York Univ. Med. Ctr., supra]. In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party. There must be no material and triable issue in dispute if there is a doubt, the motion must be Denied [*New York City Asbestos Litig. v. Chevron Corp.*, 33 NY3d 20 (2019)]. It is clear from the deposition testimony and other evidence that the defendants have failed to make a *prima facie* showing of entitlement to judgment as a matter of law.

According to the deposition testimony of the parties, including the defendants, a trier of fact could find that defendant was negligent in failing to physically assist the plaintiff during the exercise or in allowing her to continue after she expressed her fatigue. The defendants' expert does not specifically set forth what applicable standard of care he relies upon to determine whether a patient with a medical condition and history should continue on after such a statement. Plaintiff alleges that the defendants did not take proper precautions during the exercises.

Although counsel claims that the plaintiff needed to present expert evidence to properly oppose the motion, the Court disagrees, as it find that the movants haven't met their burden. Summary judgment is a drastic remedy which should be employed only when there is no doubt regarding the absence of triable issues [*Marine Midland Bank, N.A. v. Bullard Orchards Inc.*, 140 AD2d 870 (3rd Dept 1988)]. Based on the proof and arguments presented the motions of the defendants, are Denied.

It is **SO ORDERED**.


HON. CHRISTOPHER G. QUINN, J.S.C.

Dated: OCT 04 2021

ENTERED

Oct 04 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE