

Gertsyuk v MSR Baku Intl. Inc.
2022 NY Slip Op 30452(U)
February 9, 2022
Supreme Court, Kings County
Docket Number: Index No. 504533/2018
Judge: Debra Silber
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 KINGS : PART 9**

-----X

NADIYA GERTSYUK,

Plaintiff,

-against-

DECISION / ORDER

Index No. 504533/2018

Motion Seq. No. 6

Date Submitted: 1/14/22

**MSR BAKU INTERNATIONAL INC. and
ATLANTIC ADULT DAY CARE,**

Defendants.

-----X

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of defendant Atlantic's motion for summary judgment

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits and Exhibits Annexed.....	<u>125-138</u>
Affirmation in Opposition to Motion and Exhibits Annexed.....	<u>140-155,157-164</u>
Reply Affirmations.....	<u>156, 165</u>

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

Upon the foregoing papers, defendant Atlantic Adult Day Care (hereafter "Atlantic") moves, (Mot. Seq. # 6) pursuant to CPLR 3212, for an order granting it summary judgment dismissing plaintiff's complaint. After virtual oral argument, the motion is denied in part and granted in part, for the reasons which follow.

This action arises from a slip and fall accident on a staircase at 2001 Emmons Avenue, Brooklyn, NY. The premises is called "Baku Palace" and is a large restaurant and catering facility in Sheepshead Bay. Plaintiff commenced the first action on March 6, 2018 against defendant MSR Baku International Inc. (hereafter "Baku"), where she states that the date of the accident was October 25, 2016, and that defendant was negligent on the date of the accident because the restaurant's "stairway between the main and bathroom level of the

premises was allowed to remain in a dangerous, defective, and unsafe condition, by the presence of a waitress employed by the defendant who was negligently ascending the aforementioned stairway” and which they “affirmatively created” or “had actual and constructive notice of” [Complaint ¶¶ 5, 8 and 10]. In this first complaint, her name is spelled Nadia Gertsyauk. The plaintiff then commenced a second action, under index number 518662/2018, brought by a different law firm, on September 14, 2018, against defendant Atlantic Adult Day Care (hereafter “Atlantic”). In that complaint, plaintiff’s name is spelled Nadiya Gertsyuk, and there is no date for the accident in her complaint. To be clear, both the plaintiff’s first and second name are spelled differently in the second complaint when compared to the first complaint. There is one cause of action in the second complaint, for negligent supervision, and it states that defendant Atlantic breached its duty to her as she was in its care. The two actions were consolidated pursuant to an order dated June 14, 2019, following a motion brought on April 2, 2019 by the attorneys for plaintiff in the second action, but the motion was made in the first action, under this index number, although the law firm that made the motion did not represent anyone in this case as yet. The motion was granted without opposition and the two actions were consolidated under this index number, with this caption’s spelling of the plaintiff’s name. No consent to change attorneys for the plaintiff has been filed in this action.

In motion sequence #6, defendant Atlantic moves for summary judgment dismissing the complaint. Movant states [Doc 127 ¶3] “The crux of Plaintiff’s allegations against Atlantic is that an Atlantic employee should have accompanied Plaintiff down the stairs. . . . Plaintiff was more than capable of walking down stairs independently. Accordingly, Atlantic did not breach any duty to Plaintiff. In any event, even if Atlantic did breach a duty, the breach was not a proximate cause of the accident” [Doc 127 ¶3]. Atlantic’s motion also

states that “Plaintiff’s statutory allegations should be dismissed because they are not applicable to Atlantic.” Plaintiff opposes the motion, as does co-defendant Baku. Atlantic replied to both sets of opposition papers. Plaintiff then submitted a “sur-reply” [Doc 170] to reply to the movant’s reply, which was not previously permitted by the court, and thus was not considered.

Atlantic supports its motion with a statement of material facts, an attorney’s affirmation, the pleadings and the EBT transcripts of plaintiff and of defendant, and an affidavit from Dmitry Tsepenyuk, who states he is the “owner” of Atlantic, a corporation. He states in his affidavit [Doc 136] that “Atlantic operates a social day care center for senior citizens at 111 West End Avenue in Brooklyn, New York. Atlantic is licensed by the New York City Department for the Aging. Atlantic is not licensed by or regulated by any other governmental agencies, including the New York State or New York City Department of Health.” The witness produced for deposition by defendant Atlantic was Anna Titomir, who testified that she was, on the date of plaintiff’s accident, the “activity director” for Atlantic. Her first EBT was suspended as she requested a Russian interpreter. It resumed on another date. She was not aware of the requirements for being accepted into Atlantic’s program, other than [Doc 137 Page 11] “they need to be authorized from insurance company.” She did not know how the center becomes appraised of a participant’s disability, other than that there was an exam of some sort. She said a social worker evaluates every “member” of the center. She was asked [Doc 138 Page 11] “Do you know if any of these evaluations noted whether or not [plaintiff] needed assistance in ambulating and/or walking?” and she responded “no.”

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in

court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

“[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” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; see also *Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; see also *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v*

American Export Isbrandtsen Lines, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; see also *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; see also *Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

Here, the grounds for Atlantic's motion are unclear. Counsel's affirmation argues "Atlantic did not breach any duty of care owed to plaintiff" and "even if Atlantic breached its duty to supervise plaintiff, lack of supervision was not a proximate cause of the accident." These will be addressed below. First, however, the court wishes to address the branch of the defendant's motion which seeks an order dismissing plaintiff's claims under NY Public Health Law § 2801-d and 42 CFR § 483 "because it is not a long-term care facility or skilled

nursing facility.” Neither of these claims are in the complaint, which has not been amended, and, if somehow plaintiff’s attorney believes they are asserted in this lawsuit by referencing these statutes in plaintiff’s bill of particulars, the court agrees that they are only applicable to nursing homes and other residential care facilities, which Atlantic is not. In any event, a cause of action cannot be asserted in a bill of particulars. Paragraph 20 of plaintiff’s bill of particulars, which asserts these claims, is hereby stricken.

Turning to the one cause of action in the complaint, for negligent supervision, the defendant’s submissions are insufficient to make a prima facie case for summary judgment. The law is clear that to prove that there was negligent supervision of a plaintiff by a program or facility or a person subject to regulatory requirements, expert testimony is required (see *Amadon v State of New York*, 182 AD2d 955, 956-957 [3d Dept 1992]). The issue is the "standard of care customarily exercised [by] similar facilities in the community" (see *Yamin v Baghel*, 284 AD2d 778, 779 [3d Dept 2001]; *Cruz v Alhambra Day Treatment Ctr.*, 2003 NY Slip Op 50909[U], *2 [App Term 2003]; *Jacobs v Newton*, 1 Misc 3d 171 [Civ Ct Kings Co 2003]). The reverse is also true. To prove the absence of negligent supervision requires an expert. Thus, it is not possible to make a prima facie case on a motion for summary judgment dismissing a cause of action for negligent supervision without an expert’s affidavit.

The facts of this accident, at least those which seem to be uncontroverted, are that plaintiff was a program participant in Atlantic’s program for about a year before her accident, which took place on October 25, 2016. She once lived in Brooklyn but lived on West 137th Street in Manhattan on the date of the accident. She had a home attendant for a few hours a day. She participated in Atlantic’s program in Manhattan Beach Brooklyn because Atlantic is a program where the staff and participants speak Russian, as does the plaintiff.

She was brought by bus from her home to the program in Manhattan Beach on the three days per week she participated, pursuant to a contract between Atlantic and a bus or van company. On the day of her accident, either a group of the Atlantic program participants or more than one group of them went to Baku for lunch, music, and dancing. Plaintiff's affidavit states that there were about 150 program participants present. Baku is the capital of Azerbaijan, and presumably they offered food and music familiar to the program participants. Baku is a large restaurant and catering facility which has several floors and a basement. On the day of plaintiff's accident, the large group from Atlantic were seated in a catering hall on the second floor. They reached their assigned catering hall by means of an elevator. The bathrooms on the second floor were not operational, and the bathrooms on the ground floor were said to be unavailable, as there was another event being held on that level, which is reachable by the elevator, so the program participants from Atlantic were told that they could only use the restrooms in the basement, which were not reachable by the elevator, as the elevator did not go to the basement. Plaintiff took the elevator to the first floor and then went over to the staircase and started down the stairs. She then fell on the stairs and she claims she lost consciousness [Doc 152 ¶9]. She was brought to a hospital emergency room. She claims she was injured and has brought this action for damages.

Defendant Atlantic is not being forthright when Mr. Tsepenyuk states that Atlantic is not subject to any governmental regulatory requirements. At oral argument, it was explained that plaintiff was a participant in Atlantic's program, which is categorized as a "Social Adult Day Care" program, and plaintiff provides the applicable rules and regs in her opposition papers. A Social Adult Day Care Program is governed by 9 NYCRR § 6654.20, and is overseen by the New York State Office for the Aging, which requires all participants in the program to be "functionally impaired", which is defined in subsection (b)(3) as

“needing the assistance of another person in at least one of the following activities of daily living: toileting, mobility, transferring or eating; or needing supervision due to cognitive and/or psycho-social impairment.” This regulation states that “The program shall admit an individual only after an assessment of the individual’s functional capacities and impairments has been completed,” and “Each participant shall receive services only in accordance with an individualized written service plan which has been developed by the program staff in conjunction with the participant and, if applicable, the participant’s authorized representative.” In addition, in New York City, such programs must be registered with the New York City Office for the Aging and comply with local laws, including NYC Administrative Code §21-204.

It is not determinable from the motion papers what the plaintiff’s functional impairment was determined to be when she was accepted into the program and Atlantic was permitted to bill for her participation. At oral argument, defendant’s counsel seemed to have relied on Mr. Tsepenyuk’s misrepresentations and had no idea what condition qualified plaintiff for the program. Thus, the court must conclude that defendant Atlantic has failed to make out a prima facie case for summary judgment dismissing the complaint as against it.

To be clear, plaintiff is claiming that there should have been staff supervising the program participants, that there were too few staff present at the event to do so, and that if she had been accompanied to the bathroom by a staff person, even the one in the basement, she would not have fallen. The "evaluation of the appropriate level of supervision implicates the professional standard of care . . . and, as such, must be proven by expert testimony." (*Amadon v State of New York*, 182 AD2d 955, 957 [3d Dept 1992]; see also *Cruz v Alhambra Day Treatment Ctr.*, 2003 N.Y. Misc. LEXIS 616, 2003 NY Slip Op 50909[U], *2 [App Term, 2d & 11th Jud Dists 2003]). This is because the alleged

breach of Atlantic's duty of care involves the professional assessment of plaintiff's mental and physical condition, rather than "common sense and judgment," so expert testimony is required. The cases analyze this by considering the "standard of care customarily exercised [by] similar facilities in the community." (see *Yamin v Baghel*, 284 AD2d 778, 779, [3d Dept 2001]; *Jacobs v Newton*, 1 Misc 3d 171 [Civ Ct Kings Co 2003]).

Defendant's counsel argued at oral argument and in his papers that the case *Marksamer v Engel Burman Senior Hous. at Massapequa, LLC*, 95 AD3d 963 [2d Dept 2012] supported defendant's argument that this action should be dismissed. The court has located the papers for that motion, and the facts are completely unrelated to those here. Different facts lead to different legal conclusions. In that case, the plaintiff was residing in a private pay "enriched housing program" and as such, did not need to have any "functional impairments" to reside there. He went on a group outing to a bowling alley. There was a staff person sitting on the bench, where you keep the score, only a few feet from the plaintiff, when plaintiff got up from the bench, picked up a bowling ball, and after releasing the ball down the alley, lost his balance and fell. He sued, then passed away, and his son was appointed estate representative and was substituted as plaintiff. The issue on appeal was not negligent supervision, but common law negligence, and his claim, as stated in the cited decision, was that "the defendant was negligent in allowing the decedent to participate in the bowling outing." His claim of negligent supervision was dismissed by the trial court, and that part of the decision was not appealed. The appeal was filed by the facility. The Appellate Division reversed the trial court's denial of summary judgment on the issue of negligence, finding that the defendant established that it did not breach any duty of care owed to the plaintiff. The facility argued that the accident was not preventable, as it happened so quickly and right in front of the staff member, that he went bowling on his own

volition, and assumed the risks of the activity, which included the risks of slipping on the alley surface, and that the facility was not on notice of any disability or physical impairment which would have disqualified him from going bowling, that there was no order of a physician they needed to obey, that they had no authority to prevent plaintiff from participating in the outing, and that they provided the supervision required for an enriched housing facility, which is not a nursing home. Clearly, the plaintiff in the case before the court did not assume the risk of a sports activity when she tried to go to the bathroom in the Baku catering hall. Furthermore, there is no question that she had to have some type of functional impairment or she would not have qualified for this adult day care program, and movant's counsel makes no mention of this in the motion papers, concluding, without any evidence to support this claim, that she was capable of taking herself to the bathroom. At oral argument, he said he had provided evidence on this point, as plaintiff testified at her EBT that she did not need help to go to the bathroom. Perhaps that would have been true if the bathroom was on the same floor as the luncheon. But without knowing what her impairment was, the court cannot rely on her testimony to grant defendant's motion. Specifically, she was asked [Doc 144 P 129] if she had ever requested help going up or down stairs, and she replied "No, I didn't need that. . . I am a rational person." The court must conclude that defendant does not make out a prima facie case that it did not breach its duty of care.

Accordingly, it is **ORDERED** that the branch of defendant Atlantic's motion which seeks to dismiss plaintiff's claims that defendant Atlantic violated the NY Public Health Law and the federal laws which regulate nursing homes is granted. Paragraph 20 of plaintiff's bill of particulars, which asserts these claims, under NY Public Health Law § 2801-d and 42 CFR § 483, is hereby stricken.

It is further **ORDERED** that the branch of defendant's motion which seeks summary judgment dismissing the complaint is denied.

This shall constitute the decision and order of the court.

Dated: February 9, 2022

ENTER:



Hon. Debra Silber, J.S.C.