

**Rios v Visiting Nurse Serv. of N.Y.**

2023 NY Slip Op 30582(U)

February 22, 2023

Supreme Court, Kings County

Docket Number: Index No. 517935/17

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 360 Adams Street, Brooklyn, New York, on the 22nd day of February 2023.

P R E S E N T:

HON. GENINE D. EDWARDS,  
Justice.

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HENRY RIOS as Administrator of the Estate of  
ISABELLE RIOS, and HENRY RIOS, Individually,

Plaintiff,

-against-

VISITING NURSE SERVICE OF NEW YORK,  
NEW YORK-PRESBYTERIAN HOSPITAL, d/b/a NEW  
YORK PRESBYTERIAN/COLUMBIA UNIVERSITY MEDICAL  
CENTER, FORT TRYON CENTER FOR REHABILITATION &  
NURSING, INC., and COBBLE HILL HEALTH CENTER, INC.,

Defendants.

DECISION AND ORDER

Index No. 517935/17

Mot. Seq. No. 7-10

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VISITING NURSE SERVICE OF NEW YORK HOME CARE II,  
d/b/a VISITING NURSE SERVICE OF NEW YORK HOME,

Third-Party Plaintiff,

-against-

ALLIANCE FOR HEALTH, INC.,

Third-Party Defendant.

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The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion, Affirmations (Affidavits),  
and Exhibits Annexed.....172-203; 204-229; 231-256; 257-281  
Affirmations (Affidavits) in Opposition and Exhibits Annexed.....289-294  
Reply Affirmations.....298; 296; 299; 300

In this action to recover damages for medical malpractice and wrongful death,  
defendant/third-party plaintiff Visiting Nurse Service of New York Home Care II, d/b/a  
Visiting Nurse Service of New York Home Care (incorrectly sued herein as Visiting Nurse  
Service of New York) ("VNS"), defendant Cobble Hill Health Center, Inc. ("CHHC"), third-

party defendant Alliance for Health, Inc. (“AFHI”), and defendant Fort Tryon Center for Rehabilitation & Nursing, Inc. (“FTC”), move, in each instance, for (among other relief) summary judgment, pursuant to CPLR 3212, dismissing: (1) the complaint and AFHI’s cross-claim as against VNS; (2) the complaint as against each of CHHC and FTS; and (3) the third-party complaint as against AFHI (motion [mot.] sequence [seq.] 7 through 10). Plaintiff Henry Rios, individually and as the administrator of his late mother’s estate, Isabelle Rios (“plaintiff”), while objecting to FTC’s motion, does not object to VNS’s and CHHC’s respective motions. Nor does VNS object to AFHI’s motion for dismissal of VNS’s third-party complaint as against it.<sup>1</sup> Accordingly, the respective motions of VNS, CHHC, and AFHI are each granted without opposition, as more fully set forth in the decretal paragraphs below. The remainder of this decision/order addresses FTC’s motion as limited to the latter’s care for plaintiff’s decedent during her seven-week residence at FTC from October 7, 2015, to November 19, 2015 (the “FTC stay”).

### **Background**

On October 7,<sup>2</sup> Isabelle Rios (the “patient”) was discharged to FTC from the non-moving defendant, New York-Presbyterian Hospital, d/b/a New York Presbyterian/Columbia University Medical Center (“NYPH”). Five days prior, while at NYPH, she had an emergency open-reduction, internal-fixation surgery of her left hip following a fall at home. Upon admission to FTC, the patient, then 85 years old, was in the advanced stage of the

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<sup>1</sup> AFHI is a third-party (rather than a direct) defendant. By decision/order, dated April 1, 2021, plaintiff was denied leave to add AFHI as a direct defendant (NYSCEF Doc. No. 96).

<sup>2</sup> All references in this decision/order are to year 2015, unless otherwise indicated.

systemic-wide disease. The nursing assessment performed at FTC, during the admission process on October 7 at 8:45 p.m., found that the patient was suffering from: (1) Alzheimer's dementia with cerebral amyloid angiopathy; (2) two intracranial hemorrhagic strokes in October 2010 and February 2011;<sup>3</sup> (3) immobility (bedfast or chairfast) due to the combination of her then-recent left-hip surgery and her prior right-knee replacement; (4) incontinence of bladder and bowel; (5) hypertension; (6) osteoporosis; and (7) gastroesophageal reflux disease (collectively, the "preexisting comorbidities").<sup>4</sup>

Nevertheless, the patient's skin, at the time of her admission assessment in the evening of October 7, was generally intact, with the exception of some sacral redness, as more fully set forth in the margin.<sup>5</sup> In that regard, NYPH's discharge assessment likewise indicated that the patient exhibited no pressure sores at the time of her departure from NYPH to FTC earlier in the day of October 7.<sup>6</sup> Further, the patient's vital signs (blood pressure, pulse, respiration rate, temperature, and oxygen saturation on room air), as documented by FTC's admitting nurse on October 7, were all within normal limits.<sup>7</sup> Likewise, her essential laboratory values

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<sup>3</sup> Specifically: the right occipital infarct with hemorrhage in 2010, and the right temporal infarct with hemorrhage one year later in 2011 (NYSCEF Doc. No. 229) (NYPH's readmission record: Medicine Resident Admission Note, dated November 20 and timed at 9:31 a.m.).

<sup>4</sup> Progress Notes by Nurse Zdulska, timed at 8:45 p.m. on October 7 (FTC's records at NYSCEF Doc. No. 255). FTC's records as filed under NYSCEF Doc. No. 255 are referred to herein because they are certified.

<sup>5</sup> Progress Notes, timed at 8:45 p.m. on October 7, stating, in relevant part, that:

"Skin assessment shows bruising on [r]ight forearm and back of hand and left forearm. . . .  
*Sacral redness noted.* Rest of skin is intact. Skin warm and dry to touch." (emphasis added).

<sup>6</sup> Hospital & Community Patient Review Instrument, Item II ("Medical Events"), Section 16 ("Decubitus Level"), prepared by NYPH at the time of the patient's discharge (the Instrument is part of FTC's records).

<sup>7</sup> Progress Notes by Nurse Zdulska, timed at 8:45 p.m. on October 7.

(such as sodium and potassium) were all within normal range as of October 7.<sup>8</sup> Although the patient was non-cachectic on admission to FTC,<sup>9</sup> with her blood albumin value of 4.0 (normal range of 3.5 to 5.5),<sup>10</sup> the FTC staff providently put in place, as early as October 8, aspiration precautions due to her dysphagia (difficulty swallowing).<sup>11</sup> Nineteen days later on October 27, the patient was evaluated at bedside and diagnosed with cachexia (undernourishment and wasting) by FTC's consulting physician.<sup>12</sup> According to the consulting physician's note, the patient had not eaten for two consecutive days at the time of his October 27<sup>th</sup> consultation. The patient was then started on intravenous fluids (Dextrose and Normal Saline). On or after October 27, plaintiff was asked permission to have a nasogastric feeding tube placed.<sup>13</sup> No feeding tube was placed in the patient before her discharge from FTC.

In the course of the patient's seven-week stay at FTC, her initial sacral redness (at most, a Stage I pressure sore at the time) progressed to a deep wound reaching the muscles, ligaments, and bones of her sacrum (at best, a Stage IV decubitus ulcer; at worst, an unstageable decubitus ulcer). The patient's son, plaintiff herein, first became aware of the

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<sup>8</sup> As was the case with the patient's albumin, her sodium and potassium were measured only once (again, at the time of her admission to NYPH on September 30) and were found to be within the normal range (NYSCEF Doc. No. 229).

<sup>9</sup> Resident's Diagnosis Report, page 2 of 2, stating that the patient was diagnosed with cachexia on October 27 (or 20 days post-admission to FTC).

<sup>10</sup> The patient's albumin level was measured at NYPH only once which was on admission on September 30 (NYSCEF Doc. No. 229). It was not measured again in the course of her hospitalization at NYPH from September 30 to October 7.

<sup>11</sup> Care Plan Activity Report, "Aspiration Precaution," Nurse Villafania's note, dated October 8.

<sup>12</sup> Resident[s] Diagnosis Report, entry for October 27.

<sup>13</sup> Progress Notes, "MD Progress Note" by Dr. Hassanain, dated October 27 and timed at 10:42 a.m. *See also* Progress Notes, "MD Progress Note" by Dr. Hassanain, dated November 9 and timed at 4:30 p.m.

existence of the patient's Stage IV decubitus ulcer in connection with FTC's aborted attempt to discharge the patient home on November 11.<sup>14</sup> When the FTC staff showed plaintiff the patient's decubitus ulcer on November 11 in order to teach him how to care for it at home, he "almost passed out when [he] saw it."<sup>15</sup>

Fast-forward to the early morning of November 20 when the preceding events giving rise to this litigation were reviewed and summarized on readmission to NYPH. Hours after FTC discharged the patient home on the evening of November 19, plaintiff was changing her bandage when he noticed her to be "more altered" (in terms of her mental state) than what would otherwise have been normal for her.<sup>16</sup> Upon observing his mother's altered mental status, plaintiff immediately called for an ambulance to transport her to NYPH. The patient, on readmission to NYPH in the early morning of November 20, was in a systemic and neurologic failure; namely, she was: "[f]rail, contractur[ed], speaking incoherently, unable to nod to questions, . . . holding with both hands on bed rail [on her left side], rigoring [*i.e.*, shaking or shivering]."<sup>17</sup> Her Stage IV sacral decubitus ulcer (which, as noted, had developed during the course of her stay at FTC) progressed, by then, to a low point of being an "unstageable[,] necrotic decubitus ulcer, malodorous [or 'foul smelling' as described elsewhere in NYPH's readmission note], [with the] green-grey liquid coming out and soaking

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<sup>14</sup> FTC's failure to order an ambulance (rather than an ambulette) caused the November 11<sup>th</sup> discharge to be canceled. *See* Plaintiff's deposition tr at page 119, line 21 to page 120, line 9.

<sup>15</sup> Plaintiff's deposition tr at page 119, lines 8-17; at page 131, lines 5-8 and 14-16; at page 138, lines 11-16; at page 259, lines 5-12.

<sup>16</sup> According to plaintiff's pretrial testimony (at page 135, lines 23-25), the patient "looked like she was in a state of shock, maybe one step [away] from death."

<sup>17</sup> NYPH's readmission record; Medicine Resident Admission Note, dated November 20 and timed at 9:31 a.m. (NYSCEF Doc. No. 229).

the gauze inside [the ulcer].”<sup>18</sup> The patient was in “[s]evere sepsis with septic shock.”<sup>19</sup> Further, she was cachexic with the albumin value of 2.9 (as was measured on November 20 at 5:53 a.m.).<sup>20</sup> She was also suffering from hypernatremia (an abnormally elevated blood sodium level at 168)<sup>21</sup> – a further sign of malnutrition and poor oral intake – as well as from hypokalemia (an abnormally reduced blood potassium level). Further compounding those problems was the patient’s hypotension. Her blood pressure (in the early course of her readmission to NYPH) dropped to as low as 52/26, before it recovered to 106/63 following the administration of an additional bolus of intravenous normal saline.

The patient’s readmission to NYPH lasted a total of 37 days until December 27 when she was discharged to a different nursing home with the principal diagnosis of osteomyelitis (bone infection).<sup>22</sup> Following multiple admissions to, and discharges from, various institutions, the patient eventually passed away from respiratory failure at a nonparty hospital on March 24, 2016.

Thereafter, plaintiff commenced the instant action against FTC (among others) alleging causes of action sounding in violations of Public Health Law §§ 2801-d and 2803-c as predicated on 10 NYCRR § 415.12 (c) [bedsores], (i) [nutrition], and (j) [hydration] (collectively, the “statutory claims”) as well as in medical malpractice, negligence, and

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<sup>18</sup> *Id.*

<sup>19</sup> NYPH’s readmission record, “Clinical Summary,” “Health Issues,” “Acute Diagnoses,” as summarized in Dr. Ho’s note, timed on November 20 at 9:31 a.m. (NYSCEF Doc. No. 229).

<sup>20</sup> As noted, the normal range for the albumin blood level is between 3.5 to 5.5. An albumin blood value of 2.9, as was measured at re-admission to NYPH on November 20 at 5:53 a.m., was obviously low.

<sup>21</sup> The normal range for the blood sodium level is between 136 and 146 (NYSCEF Doc. No. 229).

<sup>22</sup> NYPH’s readmission record, “Clinical Summary,” “Health Issues,” “Discharge Diagnoses,” as summarized in Dr. Ho’s note, timed on November 20 at 9:31 a.m. (NYSCEF Doc. No. 229).

wrongful death (collectively, the “common-law claims”).<sup>23</sup> After FTC (among other defendants) answered the complaint, the parties engaged in discovery, culminating with plaintiff’s filing a note of issue/certificate of readiness on April 8, 2022. FTC timely served its summary judgment motion on June 8, 2022. Plaintiff timely opposed by way of (among other submissions): (1) the unsworn affirmation of infectious disease and wound physician Igor Melnychuk, M.D., dated September 2, 2022 (“plaintiff’s physician expert”) (NYSCEF Doc. No. 293); and (2) the affidavit of gerontological nurse Terry Walsh Gottlieb, RN-Gero, dated September 2, 2022 (“plaintiff’s nursing expert”) (NYSCEF Doc. No. 294). On October 14, 2022, the Court heard oral argument on FTC’s motion (among other motions), reserving decision. Additional facts are stated when relevant to the discussion below.

### Discussion

FTC established its prima facie entitlement to judgment as a matter of law through, inter alia, the expert affirmation of Yoav Borsuk, M.D., C.M.D. (Certified Medical Director), C.W.S.P. (Certified Wound Specialist Physician), dated June \_\_, 2022 (“FTC’s medical expert”).<sup>24</sup> FTC’s medical expert (a New York State-licensed physician with double board-certification in internal medicine and wound management) conducted a review of the patient’s medical records, the bill of particulars as to FTC, and the parties’ deposition testimony, including that of FTC’s nursing supervisor/wound care nurse. FTC’s medical expert opined, with a reasonable degree of medical certainty, that: (1) the FTC staff did not

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<sup>23</sup> The fourth, fifth, sixth, and tenth causes of action as pleaded in the verified complaint as against FTC (NYSCEF Doc. No. 157).

<sup>24</sup> No date appears in the copy of FTC’s expert affirmation filed with the Kings County Clerk at NYSCEF Doc. No. 261.

deviate, with respect to plaintiff's common-law claims, from the standard of care in their treatment of the patient, as it took all reasonably necessary actions and precautions; (2) the patient was not deprived of any statutory right or benefit; (3) in any event, the FTC staff's treatment and care of the patient did not proximately cause her claimed injuries or premature death; and (4) considering the patient's preexisting comorbidities, which limited her ability to heal the sacral ulcer, its development and progression during her stay at FTC were unavoidable. See *Cerrone v North Shore-Long Is. Jewish Health Sys., Inc.*, 197 AD3d 449, 152 N.Y.S.3d 147 (2d Dept., 2021); *Rosario v. Our Lady of Consolation Nursing & Rehabilitation Care Ctr.*, 186 A.D.3d 1426, 128 N.Y.S.3d 906 (2d Dept., 2020); *Korszun v. Winthrop Univ. Hosp.*, 172 A.D.3d 1343, 101 N.Y.S.3d 408 (2d Dept., 2019).

In opposition, plaintiff failed to raise a triable issue of fact for two reasons. First, the unsworn affirmation of plaintiff's physician expert, who is not licensed in the State of New York, did not constitute admissible evidence, in that CPLR 2106 (a) only authorizes physicians (among other professionals) licensed in this State to utilize an affirmation in lieu of a sworn affidavit. See *Nelson v. Lighter*, 179 A.D.3d 933, 116 N.Y.S.3d 360 (2d Dept., 2020); *Lieber v. City of New York*, 94 A.D.3d 715, 941 N.Y.S.2d 249 (2d Dept., 2012); *Worthy v. Good Samaritan Hosp. Med. Ctr.*, 50 A.D.3d 1023, 857 N.Y.S.2d 178 (2d Dept., 2008). Although affiants who are physically located outside the United States are permitted to submit unsworn affidavits in accordance with CPLR 2106 (b), nothing in plaintiff's physician expert's affirmation (other than his boilerplate statement that he was located outside the United States when he electronically signed his affirmation on September 2, 2022) indicated that he was, in fact, located outside the United States on that date. To the contrary,

plaintiff's physician expert's affirmation unambiguously indicated (immediately below his boilerplate out-of-the-country statement) that it was "[d]ated: Bayside, New York[:]  
September 2, 2022."

Second, the affidavit of a gerontological nurse, also submitted by plaintiff in opposition, was insufficient to raise a triable issue of fact as to the *common-law claims* because the gerontological nurse was not a medical doctor and, accordingly, lacked the qualifications to render a medical opinion as to the relevant standard of care, and whether FTC deviated from such standard. *See Novick v. South Nassau Communities Hosp.*, 136 A.D.3d 999, 26 N.Y.S.3d 182 (2d Dept., 2016); *Elliot v. Long Is. Home, Ltd.*, 12 A.D.3d 481, 784 N.Y.S.2d 615 (2d Dept., 2004). Further, the sworn affidavit of plaintiff's nursing expert devoted only five paragraphs (numbered 41 through 45) to argue generically the merits of plaintiff's *statutory claims*. Of the five paragraphs (numbered 41 through 45) allocated in her affirmation to her opinions on the *statutory claims*, plaintiff's nursing expert devoted a total of three paragraphs (numbered 41 through 43) to a mere recital of the underlying regulations at 10 NYCRR 415 (c) [bedsores], (i) [nutrition], and (j) [hydration], respectively. That the patient (according to plaintiff's nursing expert in ¶ 44 of the affidavit) allegedly lost 32.7 pounds (a difference between her alleged admission weight of 143.3 pounds and her alleged discharge weight of 110.6 pounds) during her seven-week stay at FTC did not, in and of itself, constitute a statutory violation; nor (contrary to plaintiff's nursing expert's contention in ¶ 45 of the affidavit) did such alleged weight loss amount to a "reckless and . . . w[a]nton disregard for [the patient's] rights." Most illustrative of the weakness of plaintiff's nursing expert's opinions on the *statutory claims* was her failure to address the patient's

preexisting comorbidities and their natural effect on the development/progression of her sacral decubitus ulcer, her malnutrition, and her electrolyte imbalance (particularly when juxtaposed against the background of plaintiff's opposition to the recommended placement of a nasogastric tube at FTC). Accordingly, dismissal of the complaint as against FTC is warranted, as more fully set forth in the decretal paragraphs below. *See Moore v. St. James Health Care Ctr., LLC*, 141 A.D.3d 701, 35 N.Y.S.3d 464 (2d Dept., 2016); *Gold v. Park Ave. Extended Care Ctr. Corp.*, 90 A.D.3d 833, 935 N.Y.S.2d 597 (2d Dept., 2011); *see also Ciccotto v. Fulton Commons Care Ctr., Inc.*, 149 A.D.3d 1030, 53 N.Y.S.3d 338 (2d Dept., 2017).

### Conclusion

Accordingly, it is

**ORDERED** that, in mot. seq. 7, the motion of defendant/third-party plaintiff Visiting Nurse Service of New York Home Care II, d/b/a Visiting Nurse Service of New York Home Care (incorrectly sued herein as Visiting Nurse Service of New York), is *granted without opposition*, and plaintiff's complaint and AFHI's cross-claim as against it are dismissed without costs or disbursements, and it is further

**ORDERED** that, in mot. seq. 8, the motion of defendant Cobble Hill Health Center, Inc. is *granted without opposition*, and plaintiff's complaint as against it is dismissed without costs or disbursements, and it is further

**ORDERED** that, in mot. seq. 9, the motion of third-party defendant Alliance for Health, Inc. is *granted without opposition from VNS*, and the third-party complaint is dismissed as against it without costs or disbursements, and it is further

**ORDERED** that, in mot. seq. 10, the motion of defendant Fort Tryon Center for Rehabilitation & Nursing, Inc. is *granted*, and the plaintiff's complaint is dismissed as against it without costs and disbursements, and it is further

**ORDERED** that defendant Visiting Nurse Service of New York Home Care II, d/b/a Visiting Nurse Service of New York Home Care (incorrectly sued herein as Visiting Nurse Service of New York); defendant Cobble Hill Health Center, Inc.; third-party defendant Alliance for Health, Inc.; and defendant Fort Tryon Center for Rehabilitation & Nursing, Inc., are each dismissed from this action, and the action is severed and continued as against the remaining defendant, with the amended caption to read as follows:

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HENRY RIOS as Administrator of the Estate of  
ISABELLE RIOS, and HENRY RIOS, Individually,

Plaintiff,

-against-

NEW YORK-PRESBYTERIAN HOSPITAL, d/b/a NEW  
YORK PRESBYTERIAN/COLUMBIA UNIVERSITY  
MEDICAL CENTER,

Defendant.


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; and it is further

**ORDERED** that FTC's counsel is directed to electronically serve a copy of this decision/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, and it is further

**ORDERED** that the parties are reminded of their next appearance for an Alternate Dispute Resolution conference on March 27, 2023, at 10 a.m.

This constitutes the decision/order of this Court.

ENTER,  
  
J. S. C.

**HON. GENINE D. EDWARDS**