

Rodriguez v Isabella Geriatric Ctr. Inc

2023 NY Slip Op 30680(U)

March 8, 2023

Supreme Court, New York County

Docket Number: Index No. 152618/2017

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 14

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CYNTHIA RODRIGUEZ AS ADMINISTRATOR OF THE EO LUZ RIVERA DECEASED Plaintiff, - v - ISABELLA GERIATRIC CENTER INC, Defendant.	<table border="0"> <tr> <td style="padding-right: 10px;">INDEX NO.</td> <td style="border-bottom: 1px solid black; padding-left: 10px;">152618/2017</td> </tr> <tr> <td style="padding-right: 10px;">MOTION DATE</td> <td style="border-bottom: 1px solid black; padding-left: 10px;">02/15/2023</td> </tr> <tr> <td style="padding-right: 10px;">MOTION SEQ. NO.</td> <td style="border-bottom: 1px solid black; padding-left: 10px;">001</td> </tr> </table> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>	INDEX NO.	152618/2017	MOTION DATE	02/15/2023	MOTION SEQ. NO.	001
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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117

were read on this motion to/for JUDGMENT - SUMMARY.

Defendant’s motion for summary judgment is granted.

Background

This action arises out of a claim for negligence against defendant, a geriatric nursing facility. Plaintiff represents the estate of her now-deceased mother, Luz Rivera and asserts that under defendant’s care, Rivera suffered multiple falls and fall-related injuries. Plaintiff alleges that defendant deviated from the applicable standard of care for nursing home residents, ultimately resulting in Rivera’s death.

Rivera was admitted to defendant’s facility on December 21, 2012 after she fell in the grocery store. Upon admission, she was assessed for risk of ulcer development and falls. The

assessments concluded Rivera was a “low risk” for developing pressure ulcers and a “medium risk” for falls as her cognitive status was “relatively unimpaired” (NYSCEF Doc. No. 46 at 8). According to plaintiff, defendant’s assessment was inappropriate, stating that “defendant was well aware” of Rivera’s diagnosis of dementia, that she had impaired judgment, and was memory and judgment impaired (NYSCEF Doc. No. 102 at 7).

Rivera’s first recorded fall in the facility occurred on December 22, 2012, her first night there, where she was found sitting next to her bed on the floor at 5:40 a.m. In response to this fall, defendant reinforced call bell use instructions and reoriented Rivera to her new surroundings. Defendant also adjusted her care plan to include a low bed, floor mats and designated Rivera as a “falling star” to alert staff to her propensity to fall.

Between December 22, 2012 and April 14, 2016, defendant’s staff would record Rivera falling fourteen times, which is an average of about once every three months (NYSCEF Doc. No. 102 at page 5).

According to plaintiff, each fall was documented by defendant and sometimes resulted in injuries, including fractures. Plaintiff asserts the falls that occurred prior to 2014 are not at issue in this matter but maintains that they illustrate defendant’s alleged negligence in assessing Rivera’s propensity to fall. Plaintiff alleges violations of the federal Nursing Home Reform Act §§ 483.30 (Physician Services), 483.20 (Resident Assessment), and 483.25 (Quality of Care) as well as violations of New York regulations 10 NYCRR §§ 415.1 and 415.29 for failure to maintain a safe nursing facility, and Public Health Law §2801-d for violation of Rivera’s rights. Plaintiff claims that defendant failed to follow the accepted standard of care when it incorrectly assessed Rivera as a low fall risk and failed to correctly treat her pressure ulcers that plaintiff believes were caused by her falls.

Defendant contends that it complied with the accepted standard of care and was not a proximate cause of Rivera's alleged injuries. Defendant offers the expert testimony of Dr. Sharon Brangman, who is board certified in geriatric medicine (among other specialties) and who states that defendant developed, revised as appropriate, and implemented care plans in accordance with the standard of care for Rivera's cognitive and physical status based on her assessments. Defendant maintains that Rivera, as her dementia advanced, demonstrated a pattern of aggressive and combative behavior and such behavior had to be considered in balancing the risks and benefits of all the considered forms of intervention.

Further, in her affirmation (NYSCEF Doc 47), Dr. Brangman explained that defendant's facility is an alarm-free facility, meaning they do not use bed or chair alarms, based on a growing body of research indicating alarms result in increased incidences of falls. Defendant alleges plaintiff was aware of the lack of alarms and did not object at the time of her mother's admission.

Defendant further claims that Rivera's development of a pressure ulcer on March 28, 2015 is beyond the statute of limitations. Defendant alleges that plaintiff is attempting to relate Rivera's ulcer to fall claims in order to subvert the three-year statute of limitations, which would have expired in 2018. Defendant's expert also noted that based on the documentation provided, Rivera's ulcer was caught in the early stages (and before it caused any pain) and was treated following the standard of care; treatment was successful, and the ulcer healed. Finally, defendant contends there was no violation of the Public Health Law, or Federal and New York State regulations as, according to Dr. Brangman, none of Rivera's rights were deprived from her, and there was no failure to provide adequate treatment.

In response, plaintiff offers the affidavit of a registered nurse, Ellen Kurtz. Nurse Kurtz claims defendant failed to appropriately assess Rivera upon admission, and defendant should have categorized her as a high risk for falls. Nurse Kurtz also opines that defendant was aware of Rivera's cognitive impairment, namely her dementia and cognitive deficits (Plaintiff Rodriguez alleges that she visited her mother and when staff demonstrated the call button, but Rivera did not demonstrate it back to them, demonstrating a cognitive deficit). Additionally, Nurse Kurtz maintains that a person with dementia would be dependent on caregivers, unable to provide her own safety and welfare needs, thus Rivera's self-categorization reflecting that she was not a high risk for falls was inappropriate and outside the standard of care.

In reply, defendant contends Nurse Kurtz is not qualified to opine on deviations from the standard of care for claims based in medical malpractice. Defendant claims Nurse Kurtz's opinion focuses on proper assessments for fall risk and that the care plan put in place was inappropriate for Rivera, and such an opinion is based in medical malpractice. Because Nurse Kurtz's assertions are rooted in medical malpractice claims, she is unqualified to opine on the standard of care as she is not a medical doctor. Defendant further alleges that Nurse Kurtz is underqualified to opine on the relevant care at all, claiming she has no experience within skilled nursing facilities or nursing homes. Finally, defendant asserts it is entitled to summary judgment because plaintiff failed to raise an issue of fact by using an unqualified expert.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York*

Univ. Med. Ctr., 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court grants defendant's motion for summary judgment. As an initial matter, plaintiff's expert is a registered nurse, not a medical doctor. Defendant supplied the expert opinion of a medical doctor stating that defendant did not deviate from the relevant standard of care in assessing Rivera's propensity for falling or treating her pressure ulcer. While plaintiff's expert has years of experience caring for a variety of patients, it is clear she does not specialize in treating elderly patients and she is not a doctor. On the other hand, Dr. Brangman is a medical doctor and board certified in geriatric medicine (among other certifications). In order to raise a material issue of fact to contradict a defendant's doctor, it is necessary for a plaintiff to have an expert who is a medical doctor, who possesses the qualifications necessary to render a medical

opinion (*see Elliot v Long Island Home, Ltd.*, 12 AD3d 481, 482, 784 NYS2d 615 [2d Dept 2004] [granting summary judgment to defendant because plaintiff's expert was a registered nurse, not a medical doctor, and was not qualified to opine on the relevant standard of care]).

Unfortunately, plaintiff's mother fell several times. As Dr. Brangman explained, while a patient is living in the facility, it is their home and they are entitled to a dignified existence, free of restraints (NYSCEF 47, ¶ 64). Bed alarms are considered a form of restraint, especially in the mind of a person with dementia. The alternative to allowing the patient to live without restraints, which leaves them open to a possible fall, is to either physically or chemically restrain them; that is a nice way to say the alternative to risking a fall is to strap them down to the bed or wheelchair or use powerful drugs. Dr. Brangman affirmed that restraints were impermissible in the circumstances here, where the falls happened late at night after she was in bed (NYSCEF 47, ¶ 49). The Court adds that the falls were not frequent – although she sometimes did have injuries, she did not fall every week or even every month or every other month. She fell on average of once every three months and was free from restraints the entire three- and one-half years she lived in defendant's facility.

Just because Ms. Rivera fell and had a pressure ulcer does not mean that defendant did anything wrong. It does not mean that defendant failed to administer proper care. Plaintiff was aware of defendant's policies for preventing falls, namely that the facility did not utilize alarm systems on wheelchairs and beds because, in their professional opinion, it was more harmful than helpful. Plaintiff did not object to this while her mother was in defendant's care. Based on the facts alleged, and the defendant's expert's uncontroverted opinion, this Court dismisses this case.

Accordingly, it is hereby

ORDERED that defendant’s motion for summary judgment is granted and the Clerk is directed to enter judgment accordingly in favor of defendant and against plaintiff along with costs and disbursements upon presentation of proper papers therefor.

3/8/2023

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE