Ortiz v Fort Tyron Rehabilitation & Nursing Ctr.

2023 NY Slip Op 32778(U)

August 8, 2023

Supreme Court, New York County

Docket Number: Index No. 151657/2016

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** *Justice* **PART** **34M**

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HECTOR ORTIZ,

Plaintiff,

- v -

FORT TYRON REHABILITATION AND NURSING CENTER, FORT TYRON CENTER FOR REHABILITTION AND NURSING, INC., FORT TYRON REHABILITATION AND HEALTH CARE FACILITY LLC, JOHN-JANE DOE

Defendant.

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INDEX NO. 151657/2016

MOTION DATE 05/01/2023

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141

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

In February 2016, plaintiff Hector Ortiz and now-deceased plaintiff Vicky Ortiz[1] commenced this action against defendants Fort Tryon Rehabilitation and Nursing Center, Fort Tyron Center for Rehabilitation and Nursing, Inc., and Fort Tryon Rehabilitation and Health Care Facility LLC (hereinafter, "Fort Tryon"). The complaint asserts a negligence cause of action and various violations of New York Public Health Law arising from the medical care Vicky Ortiz received at Fort Tryon's nursing home during two stays—one beginning in December 2015 and the other in January 2016. In this motion sequence (005), Fort Tyron moves for summary judgment pursuant to CPLR 3212. Plaintiff opposes the motion in its entirety. For the following reasons, the motion is denied.

BACKGROUND

On December 9, 2015, Vicky Ortiz was admitted to Fort Tryon's nursing facility from New York Presbyterian Hospital, with various illnesses including idiopathic gout, multiple myeloma, chronic kidney disease, and anxiety/bipolar disorders. (NYSCEF doc. no. 111 at 1, Ortiz patient chart.) While she was in their care, Fort Tryon conducted a Fall/Injury Risk Evaluation, in which she was determined to be an "11," or at a high risk of falling. (NYSCEF doc. no. 132 at 7-8, fall assessment.) In a Care Area Assessment Summary, Fort Tryon

[1] In March 2022, the Court granted Hector Ortiz's motion for leave to serve an amended complaint and to amend the caption to substitute Vicky Ortiz for Hector Ortiz, as the temporary administrator of the Estate of Vicky Ortiz. The amended complaint alleges the same causes of action as the original.

determined that Ortiz presented with impaired vision and required extensive assistance with ADL (activities of daily living), including with dressing herself, toilet use, moving within the facility, and transferring between surfaces like beds and chairs. (NYSCEF doc. no. 133 at 2-3, care assessment.) In addition, the Care Area Assessment noted that "Resident is at risk for falls/injury" and "Resident has fall and injury [sic]." (*Id.* at 4.)

Despite knowing Ms. Ortiz was at increased risk of injury and required extensive supervision, plaintiff alleges several instances in which the medical staff failed to properly care for her. According to her patient progress report, on January 5, 2016 (still during her first stay at the facility), Ms. Ortiz was "found" "sitting in a wheelchair, partly clothed in the hallway;" on January 6, Fort Tryon received a resident alert and determined that she "wasn't able to describe place and time accurately" and was "half-naked in bed with a diaper on the floor;" and on January 7, Mrs. Ortiz "sustain[ed] a fall from her bed" "trying to transfer independently and slipped to the floor." (NYSCEF doc. no. 131 at 12-16, patient progress notes.) Thereafter, Ms. Ortiz was sent to the hospital for left leg pain attributed to her gout diagnosis.

After Ms. Ortiz returned to their facility, Fort Tryon placed bed and wheelchair sensors to notify staff members when Ortiz was no longer in the bed or chair. (*Id.* at 21.) Plaintiff alleges that Fort Tyron failed to properly monitor the sensors. On February 2, Fort Tryon staff discovered her "wandering the unit" with an "unstable gait" (*Id.* at 28); later that same day, nurses found her bleeding on the floor outside a neighbor's room (*Id.* at 28-29); and that night, she was "going from room to room" and "she got out of bed and was found sitting in front of room 502," bleeding again. (*Id.*) Ms. Ortiz's fall was also documented in triage notes created on February 3, in which the attending doctor noted she was found sitting on floor with small amount of bleeding and that her inability to provide history as to the events of that day "does indicate that she had fallen, hit her head." (NYSCEF doc. no. 137 at 5, triage notes.)

Hector and Vicky Ortiz commenced the instant action approximately one month later, and asserted a negligence causes of action and Public Health Law violations. At her deposition, Ms. Ortiz testified that on multiple occasions she complained that Fort Tryon failed to change her sheets for days at a time (NYSCEF doc. no. 138 at 57, Vicky Ortiz deposition) and that she noticed rodents in her room and the surrounding areas. (*Id.* at 63.)

The Instant Motion

Fort Tryon now moves for summary judgment pursuant to CPLR 3212. Relying upon, Dr. Lawrence Diamond's expert affidavit, they argue that, as a matter of law, its conduct neither deviated from acceptable standards of medical care and nor caused Vicky Ortiz's injuries, and that their conduct did not deprive her of rights established under the New York Public Health Law. In opposition, plaintiff submits its own expert report from Dr. Perry Starer, who concluded that Fort Tryon's conduct failed to comply with New York's Public Health Law and various provisions of New York Compilation of Codes, Rules, and Regulation defining minimum standards of care in long-term health care facilities like Fort Tryon.

DISCUSSION

Summary judgment is appropriate where "the proponent makes a 'prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material issues of fact' and the opponent fails to rebut that showing." (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v prospect Hosp.*, 68 NY2d 320, 324; see also CPLR 3212 [b].) Here, Fort Tryon's expert affidavit is clearly insufficient to demonstrate as a matter of law it is entitled to summary judgment.

New York Public Health Law § 2801-d (1) imposes liability on any residential health care facility that deprives its patients of "any right or benefit" that arises by means of private contract and/or state or federal statute, code, rule, and/or regulation. (Public Health Law § 2801-d.) Plaintiff alleges that Fort Tryon care failed to meet minimum standards imposed by 10 NYCRR § 415.5 (h) and 42 CFR § 483.10, two regulations—one state, one federal—that both require long-term health care facilities to provide, among other things, (1) a safe, clean, comfortable homelike environment, (2) housekeeping and maintenance services to maintain a sanitary, orderly, and comfortable interior, (3) clean bed and bath linens. Additionally, by failing to supervise and/or monitor Ms. Ortiz's through the bed and chair sensors, plaintiff alleges Fort Tryon violated 10 NYCRR § 415.12 (h) and its federal counterpart 42 CFR § 483.25 (d), both of which require residential environments "remain as free of accident hazards as is possible" and that "each resident receives adequate supervision and assistance devices to prevent accidents."

While Diamond opines that "Fort Tryon cared for the decedent within the adequate standards of medical practice," that they properly administered Ms. Ortiz's medication, and that "a review of the medical records show no evidence or indication that Fort Tryon failed to provide decedent with clothing, sheets, or pillows, or any medical care for her disorientation" (NYSCEF doc. no. 110 at ¶ 42, 39, 44, Diamond's affidavit), Diamond does not address any of the cited regulations and how Fort Tryon's care comported with each. For example, Diamond appears to address § 415.5 and § 483 by suggesting there is no evidence or indication of a failure to provide clean bedsheets and linens, but he fails to explain how it is that medical records (which he specifically identified as the source of this opinion) would reveal the type of information needed to adequately assess Fort Tryon's housekeeping procedures and the condition of the bedsheets and linen. Moreover, given that Ms. Ortiz testified that she complained specifically as to this issue, his affidavit fails to establish that Fort Tryon had provided adequate housekeeping and maintenance. In fact, though he reviewed the deposition testimony, he ignores Ms. Ortiz's testimony altogether.

As to §§ 415.12 and 483.25, Diamond concludes that Fort Tryon provided adequate supervision and assistance devices to prevent accidents (NYSCEF doc. no. 110 at ¶ 47) without additional explanation. There is no reference to Ms. Ortiz's January 7th or February 2nd falls, both of which are described in her medical records. Nor does he explain how it could be that Fort Tryon provided adequate supervision when, from the records themselves, it appears that she was left unsupervised in both situations and was only later discovered to have injured herself. Lastly, Diamond does not address how Fort Tryon provided adequate supervision when, after the first fall, they installed bed and chair sensors to monitor and ensure Ms. Ortiz was not left to wander alone, only for her to suffer another fall while "going room to room." Since bare legal

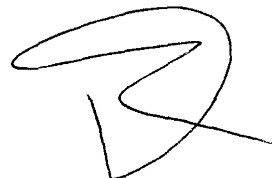
conclusions like the ones provided by Diamond are plainly insufficient to demonstrate entitlement to summary judgment. (*See Macias v Ferzli*, 131 AD3d 673, 677 [2d Dept 2015] ["'Bare conclusory assertions' such as those contained in the affidavit proffered by the medical expert...are insufficient to demonstrate the absence of any triable issues of fact."]) and since Fort Tryon's medical expert affidavit fails to address essential factual allegation in plaintiff's complaint and bill of particulars (*Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]), Fort Tryon's motion is denied.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that defendants Fort Tryon Rehabilitation and Nursing Center, Fort Tyron Center for Rehabilitation and Nursing, Inc., and Fort Tryon Rehabilitation and Health Care Facility LLC's motion for summary judgment is denied; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order, along with notice of entry on all parties within twenty (20) days of entry.

This constitutes the Decision and Order of the Court.



8/8/2023	
DATE	DAKOTA D. RAMSEUR, 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	