

Munoz v Isabella Geriatric Ctr. Inc.

2024 NY Slip Op 32096(U)

June 18, 2024

Supreme Court, New York County

Docket Number: Index No. 152490/2017

Judge: Margaret A. Chan

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN PART 49M

Justice

-----X	INDEX NO.	<u>152490/2017</u>
JOSEPH MUNOZ, as Executor of the Estate of MARIA CAMPOVERDE, Deceased,	MOTION DATE	<u>10/10/2023, 10/10/2023</u>
Plaintiff,	MOTION SEQ. NO.	<u>MS 006 007</u>

- v -

ISABELLA GERIATRIC CENTER INC., JANET TORRES
Defendants.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion.006) 102, 103, 104, 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, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 161, 163, 164, 165, 167, 169, 170, 172, 174, 176, 178, 180, 181, 182, 183, 184, 185, 186, 194

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 007) 105, 106, 107, 160, 166, 168, 171, 173, 175, 177, 179, 187, 188, 189, 190, 191, 192, 193, 195

were read on this motion to/for DISMISSAL

Plaintiff Joseph Munoz brings this personal injury action as the executor of the estate of Maria Campoverde against defendants Isabella Geriatric Center, Inc. (Isabella Center), a nursing home in which Campoverde was a patient, and defendant Janet Torres was an employee. Plaintiff's second amended complaint alleged: First cause of action – negligence; second cause of action – violation of Public Health Law section 2801-d; third cause of action – intentional tort; fourth cause of action – negligent supervision, hiring and retention; and fifth cause of action for wrongful death and punitive damages. In MS 006, defendant Janet Torres moves to dismiss the complaint as against her in its entirety. In MS 007, defendant Isabella Center moves for partial summary judgment on the third and fourth causes of action and the claim for wrongful death and punitive damages and claims related to an incident on April 10, 2016.

Plaintiff did not timely oppose the motions despite the several extensions of time afforded plaintiff. By letters dated February 20, 2024, defendants request that plaintiff's late opposition, filed just before the return date of these motions, be rejected (NYSCEF ## 194, 195). Plaintiff has not responded to defendants' requests.

For the reasons stated below, defendants' request to reject plaintiff's untimely opposition is granted; defendant Janet Torres' motion to dismiss (MS 006) is granted in its entirety; and defendant Isabella Geriatric Center, Inc.'s motion is also granted.

BACKGROUND¹

According to plaintiff, Maria Campoverde, age 86, was admitted to Isabella Center on November 20, 2014, Campoverde resided in Isabella Center and, with the exception of medical appointments and hospital visits, was under Isabella Center's care from November 20, 2014, until June 12, 2017, when she passed away (SAC ¶ 25). Plaintiff alleges that defendant Janet Torres was a housekeeper, nurse, or nurse's aide at Isabella Center when Campoverde resided there (*id.* ¶¶ 35, 36). Torres' personnel file show that Torres was employed as a housekeeper in the Environmental Services Department (NYSCEF # 146).

Plaintiff states that on April 10, 2016, while under Torres' care at Isabella Center, Campoverde fell, which resulted in a fracture of the right distal femur (SAC ¶¶ 51-56). Campoverde fell again in Isabella Center on October 25, 2016, which exacerbated the fracture to her right distal femur (*id.* ¶ 57). Plaintiff claims that Campoverde's multiple falls were due to defendants' negligence, lack of skill and reasonable care (*id.* ¶¶ 63-64). Plaintiff adds that Isabella Center "fail[ed] to prevent Torres from pushing or bumping or otherwise making physical contact with [Campoverde] thereby causing her to fall and be seriously injured" (*id.* ¶ 64).

Defendants state that on November 20, 2014, the 88 year-old Campoverde (born in 1926) was admitted from New York-Presbyterian Hospital (the Hospital) to Isabella Center for long term rehabilitation (NYSCEF # 104 ¶¶ 1-2, 6; NYSECF # 118, Hospital's medical records). Three days earlier, on November 17, Campoverde was in the Hospital and was diagnosed with dementia, moderately impaired cognition, type II diabetes, cataracts, chronic joint pain, frequent falls, chronic urinary tract infections (UTI), and dehydration, among other illnesses (*id.* ¶ 1, 8; NYSECF # 119, Isabella Center's medical records at 57). Per the history obtained by the Hospital from Campoverde's daughter, who was Campoverde's primary caregiver, Campoverde was "severely cognitively impaired (would know her name, but not place or time, and may or may not identify family members) requiring 24hr supervision by family at home . . ." (NYSECF # 118 at 66).

The Hospital also assessed Campoverde as a "fall risk" with of score of 14 meaning "high risk for falls due to inability to get out of bed or chair without assistance . . ." and had a history of falls (*id.* ¶¶ 3, 4; NYSECF # 118, Hospital records at 53-54). Campoverde's score went up to 16 when Isabella Center assessed her upon her admission there (*id.* ¶ 10; NYSECF # 119 at 11, 57). Defendant states that Campoverde had multiple falls during her admission, with most of them occurring when she attempted to go to the restroom unassisted (*id.* ¶ 14; NYSECF # 19). The Nursing Admission Note indicated that Campoverde walked with a cane, fell often, and was non-compliant with her diabetic medication resulting in "poor glycemic control" (NYSECF # 104 ¶ 12; NYSECF # 119 at 57).

On April 10, 2016, at about 1:15 pm, a nurse, Sister Agnes Ouseph, RN, responded to Campoverde's room when the nurse heard Campoverde calling for help. Ouseph saw Campoverde almost completely off her wheelchair and holding on to the bathroom rails; no

¹ Except otherwise indicated, the facts in this background section are derived from the second amended complaint (SAC) (NYSECF # 21) and/or defendants' statement of material facts (NYSECF # 104 on MS 006; NYSECF # 107 on MS 007).

one else was in the room (*id.* ¶ 22; NYSCEF # 119 at 391-392; NYSCEF # 120, Incident Report/Investigation Report). Ouseph saw defendant Torres down the hall at the time of Campoverde's fall and called out to Torres and told her to get another nurse to Campoverde's room. The only time Torres was in Campoverde's room was at 9:30 am that day to clean the room (NYSCEF # 104 ¶ 23; NYSCEF 143, Accident and Incident Reports and NYSCDOH Investigation Records at 82-83; NYSCEF # 149, Torres tr at 141-151). While a laceration to Campoverde's right shin was treated, Campoverde was reported to have no complains of pain that day. But, two days later, on April 12, Campoverde complained of pain in her right knee and leg; an x-ray of her right leg was ordered. Upon a radiology report of a right distal femur fracture, Campoverde was transferred to the Hospital later that morning (NYSCEF # 104 ¶¶ 24-27).

The Hospital Records Report indicated that it was unclear how Campoverde fell (NYSCEF # 118 ¶ 236) but a later Orthopedic Surgery Consult Note (Consult Note) recorded that "no family member or healthcare provider [] could reliably relay the course of event for the patient at the time of interview" and noted that the history was obtained from electronic chart, records, the patient's daughter/ granddaughter and the patient" (NYSCEF # 118 at 238; NYSCEF 104 ¶ 29). The Consult Note further stated that "[Campoverde] normally uses a wheelchair for commute. [Campoverde] suffered a mechanical fall 2 days ago when she was using a RW to go to the bathroom without an aide when someone pushed her from behind. She landed directly onto her R knee on the toilet" (NYSCEF # 118 at 238).

Campoverde's family declined surgery for Campoverde, so her fracture was treated non-surgically (*id.* ¶ 28; NYSCEF # 120 at 445-447). After that, Campoverde returned to Isabella Center with a splint from her ankle to her thigh on her right leg (NYSCEF # 104 ¶ 30). With Campoverde's return to Isabella Center, an internal investigation on Campoverde's claim commenced (*id.* ¶ 32). The police department as well as the Department of Health also conducted their separate investigations; neither department found violations or wrongdoing (*id.* ¶ 33; NYSCEF # 143 – NYSDOH Investigation Records, bates stamped pages 65-66; NYSCEF # 145 – Police Report).

Dr. Angel Alcantara assessed Campoverde with Campoverde's son and two police officers (*id.* ¶ 34). Campoverde had stated that she walked to the bathroom by herself and felt as if someone pushed her but could not see who it was; she could not say whether this person was a staff member or her family member, and that she does not remember being in the Isabella Center despite being there for two years. Dr. Alcantara's psychiatric notes reported that the family believed Campoverde's allegations and denied Campoverde's history of dementia and claims that her memory is fine despite their previous accounts to him (*id.* ¶ 120 at 418). Campoverde's family reported to the police that Campoverde had no history of dementia, and her memory was fine. Dr. Alcantara told the police officers that "[Campoverde had] a long-standing unremitting and worsening history of dementia for years, she also has a history of behavioral disturbances and depression" (*id.*).

Dr. Alcantara testified that after the examination, Campoverde's son, Ariosto Mendieta, who disagreed with and was upset about Dr. Alcantara's assessment that Campoverde had severe dementia, chased down Dr. Alcantara to not write down that assessment (*id.* ¶ 37; NYSCEF # 152, Alcantara tr at 45-47).

Campoverde was finally taken off the non-weight bearing status on November 9, 2016, and was given restorative physical therapy. And by January 20, 2017, her right femur fracture was healed (NYSCEF # 104 ¶¶ 39, 41). But despite the physical and occupational therapy, her functional status declined due to her progressive dementia (*id.* ¶ 42). She started to intermittently refuse to eat, thus, she was given nutritional supplements, snacks, and IV fluids. On May 7, 2017, Campoverde's family agreed to palliative care with Do-Not-Intubate and Do-Not-Resuscitate Orders. Campoverde passed away on June 12, 2017, with pneumonia due to or as a consequence of Alzheimer's disease as a cause of death, and diabetes as a contributing factor (*id.* ¶¶ 47-49).

As to the claims involving defendant Janet Torres, Isabella Center hired her for the Environmental Services Department at Isabella Center after vetting her and upon three references. As to the intentional tort claim against Torres, defendants note that Torres worked at Isabella Center for 14 years without any incident related to the intentional tort claim. At worst, the complaints against Torres were for tardiness and absence, or cleanliness. There were no patient complaints against Torres (*id.* ¶¶ 50-51; NYSCEF # 146).

Plaintiff's Untimely Opposition

Plaintiff's opposition to both MS 006 and 007 was initially due on November 2, 2023 (NYSCEF #s 102, 105). Having failed to oppose by the initial due date, plaintiff stipulated with defendants on November 13, 2023, to extend the deadline for filing the opposition papers to December 22, 2023 (NYSCEF #s 162, 163). Just one day before that due date, the parties again stipulated to further extend this deadline to December 29, 2023 (NYSCEF # 167, 168). Plaintiff failed to meet the December 29, 2023 filing deadline. Thereafter, this deadline was adjourned to January 5, 2024, by another so ordered stipulation dated January 2, 2024 (NYSCEF #s 172, 173). Plaintiff again failed to comply with this deadline. The parties again submitted another stipulation dated January 16, 2024, extending plaintiff's deadline to January 19, 2024, to file his opposition; the stipulation was so ordered on January 18 with a notation: "No further adjournments on MS 006 and 007." (NYSCEF #s 178, 179). Plaintiff filed his opposition papers for MS 006 and 007 on February 16, 2024, one month after the stipulated and so ordered extended due date.

Plaintiff's counsel did not seek leave of court for the late filing. But to show good cause for the late filing, plaintiff's counsel simply lists the following reasons: defendants' filing error in MS 006 (which plaintiff's counsel concedes does not constitute good cause); plaintiff's counsel was out of the country for two weeks for his wedding (no dates provided); and plaintiff's expert delayed in preparing the expert affirmation (NYSCEF # 180, pltf's aff in opp ¶ 22). In that plaintiff's counsel would have known about his own wedding and given the multiple extensions of time granted to plaintiff, it would appear that defendants consented to plaintiff's requests for the extensions for the reasons plaintiff now offers. However, plaintiff does not show good cause for the further delay. Absent a showing of good cause, courts have the discretion to reject untimely opposition papers to summary judgment motions (*see Kurman v Messados*, 51 AD3d 982, 982 [2d Dept 2008] [refusing to consider plaintiff's untimely opposition to defense's summary judgment motion as plaintiff failed to set forth a reasonable excuse for the delay]; *Aneke v Parks*, 197 AD3d 601, 602 [2d Dept 2021] [striking plaintiff's opposition papers to summary judgment motion as untimely]).

Plaintiff's untimely submission is rejected as is plaintiff's disregard for court rules (*see Brill v City of New York*, 2 NY3d 646, 652 [2004]).

In any event, a brief scan of plaintiff's opposition papers shows errors and misstatements such that it is doubtful that consideration of the opposition papers would be helpful to plaintiff. The errors include: plaintiff's reference to Campoverde by a completely different name (NYSCEF # 180, pltf's aff in opp ¶ 2); the reduction of Campoverde's age by both plaintiff's counsel and medical expert despite the availability of her age throughout the medical records from both the hospital and Isabella Center – Campoverde, born in 1926, was 88 years old, not 86 as plaintiff asserts, when she was admitted to Isabella Center on November 20, 2014 (NYSCEF # 181, Pltf's Counter Statement of Facts ¶ 1; NYSCEF # 182, Expert Aff ¶ 8); the medical expert's significant misstatement – that after the investigation into the allegation involving Torres, the Director of Nursing, Miriam Paul, “concluded that abuse occurred” (*id.* ¶ 51 citing NYSCEF 143, Exhibit M, Investigative Report at 68, 69) – in fact, the finding was “No evidence of abuse/neglect,” (NYSCEF # 143 at 68) and “Ms. Paul did not find any abuse by anyone . . .” (*id.* at 69 [emphasis added]); and the medical expert's legal conclusions that punitive damages are warranted in this case (NYSCEF # 182 ¶ 91). These errors do not reflect well on plaintiff's submission.

DISCUSSION

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once that showing is made, the burden shifts to the party or parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). Although summary judgment is “considered a drastic remedy,” “when there is no genuine issue to be resolved at trial, the case should be summarily decided” (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In this regard, the court's task at this juncture “is issue finding, not issue determination” (*Lebedev v Blavatnik*, 193 AD3d 175, 184 [1st Dept 2021]).

Intentional Tort Claim and Negligent Hiring Claim

The crux of plaintiff's claims is that his grandmother, 88 year-old Maria Campoverde, who lived in Isabella Center, died because of Isabella Center's negligence in the care and treatment of Campoverde, preventing Campoverde from falling, and failing to supervise one of its employees (Torres) who physically caused Campoverde to fall on April 16, 2016, which resulted in a distal femur fracture to Campoverde's right leg. Campoverde passed away on June 12, 2017. As such, plaintiff asserts a wrongful death claim based on plaintiff's causes of action in intentional tort and negligence.

A cause of action for negligent hiring and retention requires allegations that an employer knew of its employee's harmful propensities, that it failed to take necessary action, and that this failure caused damage to others (*Gonzalez v. City of New York*, 133 AD3d 65, 67-68 [1st Dept 2015]). On plaintiff's cause of action against Isabella Center for

negligent hiring and supervision, Isabella Center has presented evidence that Torres was not a caretaker, nurse, or aide, as plaintiff alleges, but worked in Isabella Center's Environmental Services Department as a housekeeper. Torres's application included three references and Isabella Center hired her after vetting her. And Torres worked for Isabella Center for 14 years without any incident.

Plaintiff's allegation that Torres pushed Campoverde is unsupported and unsubstantiated. Campoverde made this allegation but her statements and her recollection are unclear. In contrast, defendants have shown that Torres's job does not include patient care and that Torres was not near Campoverde or in Campoverde's room at the relevant time for Torres to have pushed Campoverde. Moreover, aside from Isabella Center's internal investigation, the Police Department and the Department of Health also conducted separate investigations, and neither department found violations or wrongdoing.

In sum, there is nothing in this record that would point to negligent hiring and supervision by Isabella Center as related to Torres or an intentional tort by Torres. As such, plaintiff's Fourth Cause of Action alleging negligent hiring and supervision against Isabella Center is dismissed. Also, plaintiff's Third Cause of Action alleging intentional tort against defendants is dismissed. Consequently, the wrongful death claim related to Campoverde's fall on April 16, 2016, against Isabella Center is also dismissed.

Accordingly, it is

ORDERED that defendant Janet Torres's motion for summary judgment dismissing the complaint as against her is granted in its entirety; and it is further

ORDERED that defendant Isabella Geriatric Center, Inc.'s motion for partial summary judgment dismissing the Third and Fourth Causes of action, and the wrongful death claim and punitive damages as related to the April 16, 2016 incident of decedent Campoverde's fall is granted; and it is

ORDERED that the Clerk of the Court is to enter judgment as written; and it is further

ORDERED that counsel for defendants are to serve a copy of this Decision and Order with notice of entry upon plaintiff within 20 days of the date of this order; and it is further

ORDERED that the parties shall appear for a status conference on July 17, 2024, at 3:00 pm via TEAMS.

6/18/2024
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE