

Pagan v Astra Home Care, Inc.

2024 NY Slip Op 34726(U)

February 5, 2024

Supreme Court, Kings County

Docket Number: Index No. 511692/2020

Judge: Ellen M. Spodek

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
BERNADETTE PAGAN as Proposed Administratrix
of the Estate of MIGUELINA TORRES, and
BERNADETTE PAGAN, Individually,

Index No. 511692/2020

ORDER
(Hon. Ellen Spodek)

Plaintiff,

-against-

ASTRA HOME CARE, INC. d/b/a TRUE CARE
HOME HEALTH CARE SERVICES and
PLATINUM HOME HEALTH CARE, INC.,

Defendants,

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**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS PLAINTIFF'S COMPLAINT**

This matter coming to be heard on Defendant ASTRA HOME CARE, INC. d/b/a TRUE CARE HOME HEALTH CARE SERVICES' ("True Care") motion, dated June 26, 2023, listed as Motion #4, seeking an order for summary judgment dismissing Plaintiff's Complaint with prejudice; and Defendant PLATINUM HOME HEALTH CARE, INC.'s ("Platinum") motion, dated July 20, 2023, listed as Motion #5, seeking an order for summary judgment dismissing Plaintiff's Complaint with prejudice and dismissing all causes of action asserted against Defendant pursuant to CPLR §3211(a)(1) and CPLR §3211(a)(7);

This lawsuit involves the home health care services rendered to the 87-year-old decedent. Defendants assigned home health aides ("HHA") to care for the decedent. The aides did not render medical or nursing care and treatment to the decedent and neither Defendant rendered skilled nursing care to the decedent, contrary to plaintiff's expert's attempts to argue otherwise. The plaintiff alleges that the home health aides from each defendant, in turn did not render appropriate care to the plaintiff's decedent, resulting in a pressure ulcer, which ultimately led to her death.

Defendant True Care submitted an expert from Dr. Lawrence Diamond, a Board-Certified Geriatrist in support of their motion. Defendant Platinum submitted an expert affirmation from Dr. Robert Kazenoff, a Board-Certified Internist in support of their motion. Both experts opined that it is not within the HHA's scope of qualifications to assess and evaluate a patient for pressure ulcers. The experts further opined that nothing done or allegedly not done by the aides from the respective agencies was a proximate cause of the decedent's injuries, and death.

Based on Defendants' experts' statements and the records, there is no evidence that the home health aide services provided to the decedent were negligent or that these services were the proximate cause of her alleged injurie(s) or her death.

Plaintiff submitted an expert Affirmation in opposition to the motions. Plaintiff's expert's Affirmation fails to raise a triable issue of fact sufficient to defeat the Defendant's motions. Plaintiff's expert makes various allegations and statements that are not supported by the medical records, including but not limited to the expert's statements that the decedent developed and died due to sepsis during her BronxCare hospitalization.

The plaintiff's expert affirmation did not distinguish acts of one defendant from the other. In a conclusory and speculative manner, the expert opined that the aides failed to provide skilled nursing care, without evidentiary support of this in the record, when the home health aides are not nurses. The expert affirmation submitted by the plaintiff was therefore insufficient to defeat the defendants' prima facie showing of entitlement to summary judgment.

In addition, Plaintiff's counsel submitted an Affidavit from Matilda Garcia, the Aunt of the plaintiff, and daughter of the decedent, in support of his opposition. As Ms. Garcia was never disclosed as a witness to the events at issue and was never produced for a deposition, this Affidavit was not considered by the Court in rendering its decision. When a party fails to provide such witness information in response to a discovery request, said party is precluded "from later offering

proof regarding that information" Kontos v Koakos Syllagos "Ippocrates", Inc., 783 N.Y.S.2d 653 (2d Dept 2004).

Summary judgment is a drastic remedy that deprives litigants of their day in court, and it "should only be employed when there is no doubt as to the absence of triable issues." Andre v Pomeroy, 35 NY2d 361 (1974); Bonaventura v Galpin, 119 AD3d 625 (2d Dept 2014); Stukas v Streiter, 83 AD3d 18 (2d Dept 2011). The function of the court on a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but merely determine whether such issues exist. Guadalupe v New York City Tr. Auth., 91 AD3d 716 (2d Dept 2012); Kolivas v Kirchoff, 14 AD3d 493 (2d Dept 2005). Importantly, in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party. Pearson v Dix McBride, LLC, 63 AD3d 895 (2d Dept 2009). The proponent of a summary judgment motion is required to tender sufficient evidence to demonstrate the absence of any material issues of fact, and the failure to do so requires denial of the motion regardless of the sufficiency of the opposing papers. Alvarez v Prospect Hosp., 68 NY2d 320 (1986)

In opposition to a summary judgment motion, the plaintiff's expert must address the contentions of the defense expert to establish an issue of fact. Failure to do so warrants dismissal of the action. Senatore v Epstein, 128 AD3d 794 (2d Dept 2015). "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment." Alvarez; *see also* Kramer v Rosenthal, 224 AD2d 392 (2d Dept 1996). Moreover, "where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation ... the opinion should be given no probative force and is insufficient to withstand summary judgment." Diaz v New York Downtown Hosp., 99 NY2d 542 (2002).

The Court heard oral argument on the motions on December 7, 2023, and issued a decision holding that Defendants made a *prima facie* showing of entitlement to judgment as matter of law.

In opposition, the Plaintiff's expert affirmation was conclusory, speculative, and misapprehended the facts, in that it opined on the standard of care applicable to a nursing home, and not to home health care agencies, and therefore failed to raise a triable issue of fact.

IT IS HEREBY ORDERED and ADJUDGED that Defendants PLATINUM HOME HEALTH CARE, INC. and ASTRA HOME CARE, INC. d/b/a TRUE CARE HOME HEALTH CARE SERVICES' motions are granted in their entirety and Plaintiff's Complaint is dismissed with prejudice.

Dated: 2/8/24

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