

**Hernandez v Split Rock Rehabilitation & Healthcare  
Ctr.**

2024 NY Slip Op 34975(U)

November 8, 2024

Supreme Court, Bronx County

Docket Number: Index No. 20230/20

Judge: Joseph E. Capella

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This opinion is uncorrected and not selected for official publication.

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*E#2*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 23

ALMONTE, VICTORIA

Index No. 20230/2020E

-against-

Hon. JOSEPH E. CAPELLA

SPLIT ROCK REHABILITATION

Justice Supreme Court

The following papers numbered 1 to 3 were read on this motion ( Seq. No. 002 )  
for SUMMARY JUDGMENT noticed on 1/25/2024.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	<u>1</u>
Answering Affidavit and Exhibits + <u>MEMO OF LAW</u>	No(s).	<u>2</u> <u>3</u>
Replying Affidavit and Exhibits	No(s).	

Upon the foregoing papers, it is ordered that this motion is *granted in part*  
*as per decision dated 11/8/24.*

Motion is Respectfully Referred to Justice:  
Dated:

Dated: 11/8/24

Hon.   
JOSEPH E. CAPELLA J.S.C.

- 1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY  CASE STILL ACTIVE
- 2. MOTION IS.....  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE.....  SETTLE ORDER  SUBMIT ORDER  SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT  REFEREE APPOINTMENT

*C*  
*ET2*

**NEW YORK SUPREME COURT - COUNTY OF BRONX  
PART 23**

-----X  
**CECILIA HERNANDEZ, as Administrator of the  
Estate of VICTORIA ALMONTE, Deceased,**

Index #: **20230/20**  
**DECISION/ORDER**

Plaintiff,

- against -

Present:  
**Hon. Joseph E. Capella**  
J.S.C.

**SPLIT ROCK REHABILITATION AND  
HEALTHCARE CENTER,**

Defendant.

-----X  
The following papers numbered 1 to 3 read on this motion.

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION, AFFIDAVITS AND EXHIBITS	<b>1</b>
ANSWERING AFFIDAVITS AND MEMO OF LAW	<b>2 - 3</b>
REPLY AFFIRMATION	--

UPON THE FOREGOING CITED PAPERS, THIS MOTION IS GRANTED AND DENIED IN PART AS FOLLOWS:

Defendant seeks summary judgment (CPLR 3212) and dismissal of the instant complaint, which alleges, *inter alia*, that defendant failed to take necessary precautions to prevent decedent, a resident from January through March 5, 2019, from falling and suffering a fractured right hip on March 4, 2019. The various causes of action raised in the complaint include medical malpractice, negligence, lack of informed consent, and Public Health Law violations. As summary judgment relief is being sought, defendant must make a *prima facie* showing of an entitlement to same as a matter of law by tendering sufficient evidence to eliminate any material issues of fact. (*Alvarez v Prospect*, 68 NY2d 320 [1986].) If it does, then the burden shifts to plaintiff to produce

evidentiary proof in admissible form sufficient to create issues of fact to warrant a trial (*Alvarez*, 68 NY2d 320), and denial of summary judgment.

In support of its motion, defendant includes an expert affirmation by Dr. Lawrence N. Diamond, who is board certified in geriatric medicine, and opines that during decedent's residency the defendant and its staff exercised all care reasonably necessary to prevent and limit the deprivation of decedent's rights and any injuries claimed. According to Dr. Diamond, defendant properly recorded all assessments, accurately identified and evaluated the fall occurrence risks, and established proper safety precautions such as floor mats, bed alarm and 15 minute monitoring. Based on the aforementioned, the Court is satisfied that defendant has met its burden for summary judgment, (*Zuckerman v City of NY*, 49 NY2d 557 [1980]; *Kaffka v NY Hospital*, 228 AD2d 332 [1<sup>st</sup> Dept 1996]), which now shifts to plaintiff to demonstrate that issues of fact exist to warrant a trial.

In opposing the opinions by Dr. Diamond, plaintiff must come forward with a qualified expert who can, *inter alia*, opine to a reasonable degree of medical certainty that defendant departed from the standard of care, was negligent, that there was a lack of informed consent, and/or a violation(s) of the Public Health Law, (*Canter v Mulnick*, 93 AD2d 751 [1<sup>st</sup> Dept 1983]), and (emphasis added) that such departure, negligence, lack of informed consent and/or violation was a proximate cause of an injury to decedent. (*Mortensen v Memorial*, 105 AD2d 151 [1<sup>st</sup> Dept 1984].) Included in plaintiff's

opposition papers is an expert affirmation by a physician who is board certified in internal medicine, who opines in very general and conclusory terms that defendant departed from accepted medical practice in failing to prevent decedent from suffering an injury. The only specificity this expert provides is limited to the March 4 fall. According to plaintiff's expert, the bed alarm was not active, there was no 1:1 monitoring, the bed was not in a low position, and mats were not on the floor when decedent fell on March 4, resulting in a right hip fracture requiring surgical repair. Plaintiff's expert opines that these were departures from accepted medical practice and a violation of 10 NYCRR § 415.12(h)(1) and (h)(2).

It should be noted that the complaint conflates ordinary negligence and medical malpractice (i.e., departure from accepted standards of medical care), which neither side attempts to parse out, and both sides address this issue as one regarding an alleged failure to comply with standards of medical care. (*Van Deveerdonk v North Westchester*, 223 AD3d 702 [2d Dept 2024].) In addition, the opposition papers do not address lack of informed consent. Therefore, that portion of defendant's motion seeking dismissal of plaintiff's claims for negligence and lack of informed consent is granted. However, viewing the evidence in a light most favorable to plaintiff, (*O'Sullivan v Presbyterian*, 217 AD2d 98 [1<sup>st</sup> Dept 1995]), the Court is satisfied that plaintiff has come forward with enough issues of fact to warrant a trial as to whether there were departures and violations that caused decedent to fall on March 4 resulting in a right hip fracture. (*Alvarez v*

*Prospect*, 68 NY2d 320 [1986]; *Barnett v Fashakin*, 85 AD3d 832 [2<sup>nd</sup> Dept 2011].)

Except for the aforementioned medical malpractice and Public Health Law violation regarding the March 4 fall, the balance of the claims alleged in the complaint, including negligence and lack of informed consent, are dismissed. Plaintiff is directed to serve a copy of this decision with notice of entry upon all sides within 20 days of receipt of copy of same. This constitutes the decision and order of this court.

11/8/24  
Dated

Hon.   
Joseph E. Capella, J.S.C.