

**Brando v East Northport Residential Health Care
Facility, Inc.**

2024 NY Slip Op 35515(U)

March 18, 2024

Supreme Court, Nassau County

Docket Number: Index No. 608110/2021

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAUPresent: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 2

SUSAN BRANDO, as the Executor of the Estate of
WILHELMINA ALLOGIAMENTO,

Plaintiff,

Index No.: 608110/21
Motion Seq...03, 04, 05
Motion Date...10/12/23

-against-

EAST NORTHPORT RESIDENTIAL HEALTH CARE
FACILITY, INC., SUSAN OSTREICHER, DORIS LAUFER,
DAVID LIPSCHITZ, GERALD NEUMAN,
CONSTELLATION HOME CARE, LLC, PREFERRED
THERAPY SOLUTIONS, LLC and ROCKVILLE
OPERATING, LLC,Defendants.

Papers Submitted:

Notice of Motion (Seq. 03).....	x
Affirmation in Opposition.....	x
Reply Affirmation.....	x
Notice of Motion (Seq. 04).....	x
Affirmation in Opposition.....	x
Reply Affirmation.....	x
Notice of Motion (Seq. 05).....	x
Affirmation in Opposition.....	x
Reply Affirmation.....	x

Upon the foregoing papers, the motion (Seq. 03) by the Defendant, CONSTELLATION HOME CARE, LLC (“Constellation”), seeking an Order, pursuant to CPLR § 3212, granting it summary judgment dismissing the complaint of the Plaintiff, SUSAN BRANDO, as the Successor Executor of the Estate of WILHELMINA ALLOGIAMENTO (“Plaintiff”), and severing them from this action; and the motion (Seq.

04) by the Defendant, PREFERRED THERAPY SOLUTIONS, LLC (“Preferred Therapy”), seeking an Order, pursuant to CPLR § 3212, granting it summary judgment dismissing the Plaintiff’s complaint and severing them from this action; and the motion (Seq. 05) by the Defendant, ROCKVILLE OPERATING, LLC (“Grand Pavilion”), seeking an Order, pursuant to CPLR § 3212, granting it summary judgment dismissing the Plaintiff’s complaint and any cross-claims as asserted against it, are consolidated for disposition and determined as set forth hereinafter.

Background and Procedural History

This is an action to recover damages for alleged medical malpractice, negligence, and violation of the Public Health Law. On January 15, 2016, Plaintiff’s decedent, Wilhelmina Allogiamento (“the decedent”) suffered a stroke, while in the confines of her home and at the age of 81 years old. Consequently, the decedent was hospitalized at St. Joseph Hospital and later at Southside Hospital. On February 26, 2016, the decedent was released from Southside Hospital and transferred to the Defendant herein, EAST NORTHPORT RESIDENTIAL HEALTH CARE FACILITY, INC. d/b/a HUNTINGTON HILLS (“Huntington Hills”), for treatment and rehabilitation. The decedent’s diagnoses, upon release from Southside Hospital, included, *inter alia*, dysphagia following cerebral infraction; hypertension; pure hypercholesterolemia; peripheral vascular disease; and heart disease of a native coronary artery.

While at Huntington Hills, the decedent underwent a physical therapy evaluation with Jennifer Tiseo (“Tiseo”), an employee of PREFERRED THERAPY

SOLUTIONS, LLC¹ (“Preferred Therapy”). Tiseo concluded that the decedent lacked, among other things, strength and balance and determined that the decedent would benefit from physical therapy. Subsequently, Farbod Barzideh (“Barzideh”), a physical therapist and employee of Preferred Therapy, was assigned to provide physical therapy to the decedent several times a week.

During the decedent’s physical therapy sessions, Barzideh determined that the decedent would benefit from an ankle-foot orthosis (“AFO”) brace, which is used to stabilize a patient’s ankle/knee during physical therapy. On March 4, 2016, Barzideh began utilizing the AFO brace during the decedent’s physical therapy sessions and used the AFO brace several times thereafter. During the sessions, Barzideh testified that it was his practice to check the decedent’s skin prior to and after removing the AFO brace. On March 30, 2016, a nurse at Huntington Hills observed and documented a pressure ulcer on the decedent’s right heel. Barzideh then evaluated the decedent and discontinued the use of the AFO brace. Barzideh continued to provide physical therapy to the decedent, without the use of the AFO brace, until the decedent was discharged from Huntington Hills.²

On April 22, 2016, the decedent was discharged from Huntington Hills to the care of her husband, Louis Allogiamento (“the decedent’s husband”). Moreover, upon the order of Huntington Hills, a home health care plan (“care plan”) was created and

¹The evaluation was ordered by an employee of Huntington Hills. However, Preferred Therapy, is an independent entity that contracts with Huntington Hills to provide physical, occupational, and speech therapy to patients as needed.

²It is alleged that upon the decedent’s discharge from Huntington Hills, she suffered from several pressure ulcers.

CONSTELLATION HOME CARE, LLC (“Constellation”) was assigned to provide physical therapy, occupational therapy, and in home nursing assistance to the decedent from April 24, 2016 to June 22, 2016. The care plan provided that Constellation’s duties included, among other things, teaching the patient and caregiver the signs of wound infection; assessing the patient and caregiver’s current knowledge of wound care regimen; teaching the patient and caregiver regarding the prevention of pressure ulcers and skin breakdown; assessing the patient’s skin integrity; performing wound care and dressing change daily; and assessing the patients risk for developing ulcers. In addition to Constellation’s services, the decedent was treated weekly at Mercy Hospital for wound care. It is alleged that during Constellation’s care, the decedent’s pressure ulcers worsened, and several other ulcers developed throughout the decedent’s body. On August 4, 2016, Constellation’s services with the decedent concluded.

On October 4, 2016, the decedent was hospitalized at St. Joseph Hospital for, among other things, pressure ulcers. Subsequently, on October 13, 2016, the decedent was discharged to ROCKVILLE OPERATING, LLC d/b/a GRAND PAVILION (“Grand Pavilion”) for further treatment and rehabilitation. At the time of the decedent’s admission, it is alleged that the decedent suffered from pressure ulcers on numerous parts of her body. Specifically, on her right buttock, left buttock, sacrum, right heel, left heel, and right lateral shin. Throughout the decedent’s stay at Grand Pavilion, it is alleged that numerous care plans were put in place to address the decedent’s pressure ulcers and it is alleged that the decedent’s pressure ulcers improved. On January 4, 2017, the decedent was discharged from Grand Pavilion.

On August 8, 2018, the decedent's husband commenced this action on behalf of the decedent by the filing of a summons and complaint in the Supreme Court of the State of New York, Kings County against, among others, Huntington Hills and Constellation ("the Kings County action"). The decedent's husband's complaint alleged that due to Huntington Hills and Constellation's medical malpractice, negligence, negligence *per se*, and violation of the Public Health Law, the decedent suffered injuries, such as pressure ulcers, which caused the decedent, among other things, pain and suffering. On October 14, 2018, the decedent passed away. The death certificate lists her cause of death as cardiopulmonary arrest as a consequence of pneumonia and cerebrovascular accident, non-traumatic.

On October 1, 2019, a second action was commenced in the Supreme Court of the State of New York, Nassau County ("the Nassau County action") by the decedent's estate against Preferred Therapy and Grand Pavilion alleging that due to Preferred Therapy's and Grand Pavilion's medical malpractice, negligence, negligence *per se*, and violation of the Public Health Law, the decedent suffered injuries, such as pressure ulcers, which caused the decedent, among other things, pain and suffering. On March 11, 2020, all parties stipulated to transfer the Kings County action to the Supreme Court of the State of New York, Nassau County. On October 5, 2020, the decedent's husband passed away and Susan Brando ("Brando"), daughter of the decedent, was appointed as successor executor. On April 9, 2021, the parties stipulated to amend the Kings County action caption to reflect Brando as successor executor to decedent's estate. On July 14, 2021, the parties stipulated to consolidate the Kings County action with the Nassau County action.

On May 8, 2023, Constellation moved for an order pursuant to CPLR § 3212 seeking summary judgment dismissing Plaintiff's complaint on the ground, among other things, that its nurses did not depart from the standard of accepted nursing care, while caring for the decedent. Further, Constellation avers that the decedent's injuries were not caused by its care for the decedent. On July 28, 2023, Plaintiff submitted opposition. On August 15, 2023, Constellation submitted a reply.

On May 9, 2023, Preferred Therapy moved for an order pursuant to CPLR § 3212 seeking summary judgment dismissing Plaintiff's complaint on the grounds that its staff did not depart from the accepted standards of physical therapy and that it did not commit negligence or negligence *per se*. On July 28, 2023, Plaintiff submitted opposition. On August 17, 2023, Preferred Therapy submitted a reply.

On May 9, 2023, Grand Pavilion moved for an order pursuant to CPLR § 3212 seeking summary judgment dismissing Plaintiff's complaint on the grounds that the decedent's pressure ulcers were pre-existing; that Grand Pavilion was not negligent; and that its staff did not depart from the standard of care for skilled nursing facilities. On July 28, 2023, Plaintiff submitted opposition. On August 31, 2023, Grand Pavilion submitted a reply.

Legal Analysis

“The proponent of a summary judgment motion 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. Failure to make such *prima facie*

showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

“Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party 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” (*Zuckerman v New York*, 49 NY2d 557 [1980]). “Only the existence of a bona fide issue of fact and not one based on conclusory or irrelevant allegations will suffice to defeat a summary judgment motion” (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]).

Constellation’s Motion (Seq. 03)

Constellation moves for an order pursuant to CPLR § 3212 granting summary judgment dismissing Plaintiff’s complaint alleging causes of action for medical malpractice, negligence and negligence *per se*. In support of its motion, Constellation submits, *inter alia*, the expert affidavit of Leslie Ann Felsen ED.S, MA, APRN-BC (“Felsen”), a board-certified advanced practice registered nurse; the expert affirmation of Cameron Hernandez, M.D. (“Hernandez”), a board certified physician; the deposition testimony of Brando dated January 4, 2022; the deposition testimony of Deborah Williams (“Williams”), an employee of Huntington Hills, dated March 23, 2022; the deposition testimony of Ivy Rockitter (“Rockitter”), an employee of Constellation, dated July 6, 2022; the deposition testimony of Barzideh dated August 3, 2022; the decedent’s medical records from Huntington Hills; and, the decedent’s medical records from Constellation.

“In order to establish liability for medical malpractice, a plaintiff must prove that the defendant deviated or departed from accepted community standards of practice and that such departure was a proximate cause of the plaintiff's injuries. On a motion for summary judgment, a defendant has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause” (*Novick v S. Nassau Communities Hosp.*, 136 AD3d 999, 1000–01 [2d Dept 2016][internal citations and quotations omitted]).

Furthermore, “the elements of a cause of action alleging common-law negligence are a duty owed by the defendant to the plaintiff, a breach of that duty, and a showing that the breach of that duty constituted a proximate cause of the injury. Accordingly, even when negligence and injury are both properly found, the negligent party may be held liable only where the alleged negligence is found to be a proximate cause of the injury” (*Roberson v Wyckoff Heights Med. Ctr.*, 123 AD3d 791, 792 [2d Dept 2014][internal citations and quotations omitted]).

Here, Constellation avers that it did not depart from the accepted standards for nursing care for in home patients and further did not cause the decedent's injuries. Constellation relies upon the affidavit of Felsen, who concluded that Constellation's nurses did not depart from accepted nursing standards in their care of the decedent. Felsen opines that Constellation's nurses' care was limited in scope as their visits lasted approximately an hour per visit. Furthermore, Felsen opines that Constellation's nurses were not obligated to attend to the decedent daily, that the care plan required visits no more than five times

per week, and that Constellation's nurses rendered appropriate wound care to the decedent. Moreover, in his affirmation, Hernandez concluded that the decedent's injuries were not caused by any negligence by Constellation. Based on the foregoing, Constellation avers that a dismissal of Plaintiff's complaint is warranted.

In opposition, Plaintiff submits, *inter alia*, the expert affidavit of Karim J. Khimani, M.D. ("Khimani"), a physician. In his affidavit, Khimani concluded that the skilled nursing care provided by Constellation departed from good and accepted medical and nursing standards. Further, Khimani opines that due to Constellation's departure and negligence, the decedent's pressure ulcers worsened, and additional pressure ulcers developed as a result. Overall, Khimani opines that Constellation failed to comply with the care plan which required daily wound care.

Here, Constellation has established its *prima facie* entitlement to judgment as a matter of law by submitting the expert affidavit of Felsen and expert affirmation of Hernandez, who opined that Constellation did not depart from accepted community standards of practice and that its conduct was not the proximate cause of the decedent's injuries. In opposition, however, the Plaintiff has raised a triable issue of fact. There is a question of fact as to what Constellation's duties were pursuant to the care plan implemented by Huntington Hills. Specifically, there is a question of fact as to whether Constellation was required to provide daily wound care to the decedent as opposed to wound care approximately five days a week as testified to by Rockitter, a nurse employed by Constellation. As there are conflicting expert opinions, summary judgment in

Constellation's favor is not appropriate (*see Rosario v Our Lady of Consolation Nursing and Rehabilitation Care Center*, 186 Ad3d 1426 [2d Dept 2020]).

Regarding the Plaintiff's negligence *per se* cause of action against Constellation, Plaintiff has failed to submit opposition to Constellation's arguments and therefore Plaintiff's negligence *per se* claim against Constellation is deemed abandoned (*see 114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757, 761–62 [2d Dept 2019]). Accordingly, the branch of Constellation's motion seeking summary judgment dismissing Plaintiff's medical malpractice and negligence cause of action as asserted against them is denied. The branch of Constellation's motion seeking to dismiss Plaintiff's negligence *per se* cause of action is granted.

Preferred Therapy's Motion (Seq. 04)

Preferred Therapy moves for an order pursuant to CPLR § 3212 granting summary judgment dismissing Plaintiff's complaint alleging causes of action for negligence and negligence *per se*. In support of its motion, Preferred Therapy submits, among other things, the expert affidavit of Thomas B. Gallagher ("Gallagher"), physical therapist; Preferred Therapy's medical records for the decedent; the deposition testimony of Williams; and the deposition testimony of Barzideh.

Preferred Therapy avers that it did not depart from the accepted standards of care for physical therapy and that its employees were not negligent in their care to the decedent. Preferred Therapy relies upon Gallagher affidavit, who concludes that the care and treatment provided by Preferred Therapy to the decedent did not depart from the accepted practice for physical therapy and further that its conduct did not proximately cause

the decedent's injuries. Gallagher opines that there is no evidence that Preferred Therapy improperly performed physical therapy. Further, Gallagher opines that it was appropriate for Barzideh to use the AFO brace during sessions, and that it is only appropriate for a physical therapist to comment on a patient's skin when there was an abnormality. Moreover, Gallagher opined that a physical therapist has no role in treating wounds.

In opposition, Plaintiff submits, *inter alia*, the expert affidavit of Khimani, who concluded that Preferred Therapy was negligent and reckless in its care of the decedent and further that Preferred Therapy departed from the acceptable standard of care for physical therapists. Khimani opined that Barzideh failure to, among other things, monitor the decedent's skin and to perform skin checks, was the proximate cause of the deterioration of the decedent's pressure ulcers.

Here, Preferred Therapy has established its *prima facie* entitlement to judgment as a matter of law by submitting Gallagher's expert affidavit who opined, based on his review of the medical records, that the care and treatment provided by Preferred Therapy did not depart from the accepted practices for physical therapy and that its conduct was not the proximate cause of the decedent's injuries. In opposition, the Plaintiff has failed to raise a triable issue of fact. Khimani's affidavit is speculative. Contrary to Plaintiff's contentions, it was not Preferred Therapy's duty to monitor the use of the AFO brace outside of the scope of the decedent's therapy sessions and further it was not Preferred Therapy's duty to treat any pressure ulcers that may have developed on the decedent while in the care of Huntington Hills.

Regarding Plaintiff's negligence *per se* cause of action against Preferred Therapy, Plaintiff has failed to submit opposition to Preferred Therapy's arguments and therefore Plaintiff's negligence *per se* claim against Preferred Therapy is deemed abandoned (*see 114 Woodbury Realty, LLC at 178 AD3d 757*). Accordingly, Preferred Therapy's motion seeking summary judgment dismissing Plaintiff's complaint is granted.

Grand Pavilion's Motion (Seq. 05)

Grand Pavilion moves for an order pursuant to CPLR § 3212 granting summary judgment dismissing Plaintiff's complaint alleging causes of action for negligence, negligence *per se*, and violation of the Public Health Law and any cross-claims asserted against them. In support of its motion, Grand Pavilion submits, among other things, the expert affirmation of Jeffrey Levine ("Levine"), M.D., physician; the deposition testimony of Brando; the deposition testimony of Rockitter; the deposition testimony of Barzideh; the deposition testimony of Jose Araneta ("Araneta"), employee of Grand Pavilion dated March 1, 2023; the deposition testimony of Rhoda Cajuelan ("Cajuelan"), employee of Grand Pavilion, dated February 23, 2023; and Grand Pavilion's medical records for the decedent.

Grand Pavilion avers that the decedent's pressure ulcers were pre-existing, that the decedent's wounds improved while at its facility, and that its staff did not depart from the accepted standards of care provided in nursing facilities. Grand Pavilion relies upon the affirmation of Levine, who concluded that Grand Pavilion complied with good and accepted standards of medicine and nursing care and that the decedent's injuries were not proximately caused by the negligence or acts of Grand Pavilion.

Levine opined that the decedent's pressure ulcers existed upon her admission to Grand Pavilion. Further, Levine opined that, in reviewing Grand Pavilion's medical records for the decedent, the decedent's pressure ulcers improved and did not worsen during her admission. Moreover, Levine opined that Grand Pavilion took all reasonable measures to prevent any violations of the Public Health Law.

In opposition, Plaintiff submits, *inter alia*, the expert affirmation of Khimani, who concluded that Grand Pavilion provided inadequate care to the decedent and due to Grand Pavilion's negligence, the decedent's pressure ulcers worsened. Khimani relies upon Grand Pavilion medical records, which exhibits, in his opinion, that Grand Pavilion failed to meet the standard of care necessary to treat the decedent's injuries. Specifically, he addresses progress notes compiled by Grand Pavilion's employees, which documented the decedent's wounds deteriorating while in the care of Grand Pavilion.

Here, Grand Pavilion has established its *prima facie* entitlement to judgment as a matter of law by submitting Levine's expert affidavit, who opined that, based on his review of the medical records, the care and treatment provided by Grand Pavilion did not depart from the accepted practices for nursing facilities and that their treatment was not the proximate cause of the decedent's injuries. Furthermore, Levine opinion that Grand Pavilion was not negligent. In opposition, however, the Plaintiff has raised a triable issue of fact. A question of fact exists as to whether the decedent's pressure ulcers improved or deteriorated while in the care of Grand Pavilion. Further, a question of fact exists as to whether Grand Pavilion provided the appropriate treatment and equipment needed to care for and prevent the decedent's pressure ulcers. As there are conflicting expert opinions,

summary judgment in Grand Pavilion's favor is not appropriate (*see Rosario at* 186 Ad3d 1426). Accordingly, Grand Pavilion's motion is denied.

Accordingly, it is hereby

ORDERED, that the branch of Constellation's motion (Seq. 03) seeking to dismiss Plaintiff's medical malpractice and negligence causes of action is hereby **DENIED**; and it is further

ORDERED, that the branch of Constellation's motion (Seq. 03) seeking to dismiss Plaintiff's negligence *per se* cause of action is hereby **GRANTED**; and it is further

ORDERED, that Preferred Therapy's motion (Seq. 04) seeking to dismiss Plaintiff's complaint is hereby **GRANTED** in its entirety, and the Plaintiff's complaint as asserted against Preferred Therapy, only, is hereby **DISMISSED**; and it is further

ORDERED, that Grand Pavilion's motion (Seq. 05) seeking to dismiss Plaintiff's complaint is hereby **DENIED** in its entirety; and it is further

ORDERED, that the Clerk of the Court is hereby directed to amend the caption of this matter to delete the dismissed Defendant therefrom accordingly as follows:

SUSAN BRANDO, as the Executor of the Estate of
WILHELMINA ALLOGIAMENTO,

Plaintiff,

Index No.: 608110/21

-against-

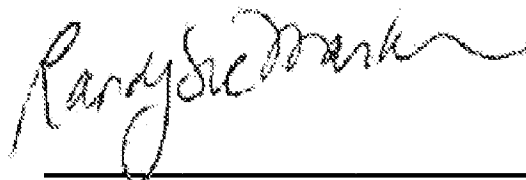
EAST NORTHPORT RESIDENTIAL HEALTH CARE
FACILITY, INC., SUSAN OSTREICHER, DORIS LAUFER,
DAVID LIPSCHITZ, GERALD NEUMAN,
CONSTELLATION HOME CARE, LLC and ROCKVILLE
OPERATING, LLC,

Defendants.

X

This constitutes the decision and order of this Court.

DATED: Mineola, New York
March 18, 2024



Hon. Randy Sue Marber, J.S.C.

ENTERED

Mar 18 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE