

Hammer v National Health Care Assoc., Inc.
2024 NY Slip Op 35653(U)
November 22, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 611423/2020
Judge: Frank A. Tinari
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SHORT FORM ORDER

INDEX No. 611423/2020
 CAL. No. 202200173OT

SUPREME COURT - STATE OF NEW YORK
 I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. FRANK A. TINARI
 Justice of the Supreme Court

MOTION DATE 3/7/22 (002)
 MOTION DATE 8/30/22 (003)
 ADJ. DATE 9/28/23
 Mot. Seq. # 002 MD
 Mot. Seq. # 003 MD

-----X
 PAUL JOSEPH HAMMER, as Executor of the
 Estate of SONIA ERLICH,

Plaintiff,

- against -

NATIONAL HEALTH CARE ASSOCIATES,
 INC. and HUNTINGTON HILLS CENTER FOR
 HEALTH AND REHABILITATION,

Defendants.
 -----X

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion and supporting papers by plaintiff, filed June 6, 2022; Notice of Cross-Motion and supporting papers by defendants, filed August 10, 2022; Answering Affidavits and supporting papers by plaintiff, filed August 31, 2023; Replying Affidavits and supporting papers by defendants, filed September 27, 2023; Replying Affidavits and supporting papers by plaintiff, filed September 27, 2023; Other ; it is

ORDERED that the motion by plaintiff for summary judgment on the issue of liability is denied; and it is further

ORDERED that the cross-motion by defendants for summary judgment in their favor is denied.

Sonia Erlich (hereinafter Ms. Erlich) commenced this action to recover damages for injuries she allegedly sustained while she was a patient at defendant Huntington Hills Center for Health and Rehabilitation (hereinafter Huntington Hills), which is allegedly affiliated with defendant National Health Care Associates, Inc. The complaint alleges that on February 13, 2020, while Ms. Erlich was a patient at Huntington Hills, she was injured when she was “dropped by two aides who while assisting her were arguing.” It alleges that defendants were negligent in, among other things, dropping Ms. Erlich

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or permitting her to fall, permitting her to remain on the floor for an extended period of time, failing to develop an adequate care plan, and in violating New York Public Health Law §§ 2801-d, 2803-c, and 2903-c, 10 NYCRR §§ 415.3 and 415.12, and various subsections of 42 CFR 483. The court, having been advised in August 2022 that Ms. Erlich passed away, stayed the action pending the substitution of a duly appointed representative for decedent. Subsequently, Paul Joseph Hammer was substituted as plaintiff in this action.

Plaintiff now moves for summary judgment on the issue of defendants' liability, arguing that Huntington Hills was negligent in failing to assess Ms. Erlich as a fall risk and in failing to implement the necessary safety protocols. In support of the motion, plaintiff submits the pleadings, Ms. Erlich's medical records, the parties' deposition transcripts, and the affidavit of Mindy S. Langweil.

Defendants oppose plaintiff's motion and cross-move for summary judgment dismissing the complaint against them, arguing that they implemented appropriate fall prevention measures and did not proximately cause Ms. Erlich's injuries, and that plaintiff cannot plead Public Health Law § 2801-d in conjunction with negligence. In support of their motion, defendants submit the pleadings, the parties' deposition transcripts, Mr. Erlich's medical records, and the affidavit of Cheryl Stene Frenkel, R.N. In opposition, plaintiff argues, among other things, that defendants' motion is untimely, and submits the affidavit of Dr. Bernard Schayes.

To establish prima facie entitlement to judgment as a matter of law, a movant must come forward with evidentiary proof, in admissible form, demonstrating the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 48 NYS2d 316 [1985]). If such a showing is made, the burden shifts to the party opposing the motion for summary judgment, who must proffer evidence in admissible form sufficient to establish the existence of any material issue of fact which requires a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

"A hospital or medical facility has a general duty to exercise reasonable care and diligence in safeguarding a patient" (*Jeter v New York Presbyterian Hosp.*, 172 AD3d 1338, 1339, 101 NYS3d 411, 413 [2d Dept 2019]). "A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" (*Muniz v SPO Rest., LLC*, 227 AD3d 1002, 1003, 212 NYS3d 163, 165 [2d Dept 2024]; *see Rushton v State*, 189 AD3d 1488, 134 NYS3d 752 [2d Dept 2020]). A defendant moving for summary judgment in a negligence action must meet its prima facie burden of demonstrating that it was not at fault in the happening of the accident (*see Sottosanti v St. Francis Hosp.*, ___ AD3d ___, 2024 NY Slip Op 05603 [2d Dept 2024]). Additionally, a motion for summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Baab v HP, Inc.*, 211 AD3d 783, 783, 181 NYS3d 124, 125 [2d Dept 2022] [internal quotations and citations omitted]).

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Initially, the court notes that defendants' cross-motion for summary judgment is untimely inasmuch as it was not served within 120 days of the filing of the note of issue dated February 4, 2022 (*see* CPLR 3212 [a]). Instead, the cross-motion was filed on August 10, 2022, approximately two months after the deadline. Defendants' counsel has not provided an explanation or "good cause" for the late service of the cross-motion (*see Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]; *Thompson v Leben Home for Adults*, 17 AD3d 347, 792 NYS2d 597 [2d Dept 2005]). Nevertheless, an untimely cross-motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds (*see Alexander v Gordon*, 95 AD3d 1245, 945 NYS2d 397 [2d Dept 2012]; *Grande v Peteroy*, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]; *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]). Thus, the court will consider defendants' untimely cross-motion on the merits (*see Alexander v Gordon*, 95 AD3d 1245, 945 NYS2d 397).

In her affidavit, plaintiff's expert, Mindy S. Langweil, states that she is a registered nurse and advanced nurse practitioner. She states that Ms. Erlich was evaluated by nurse Teddi LaRosa (hereinafter Nurse LaRosa) upon her admission to Huntington Hills, and that Nurse LaRosa determined that, while Ms. Erlich required two-person transfer for all activities, she was not a fall risk. Plaintiff's expert opines that because Ms. Erlich had mobility issues and cognitive deficits, defendants deviated from the standard of care in not deeming her to be a fall risk. She asserts that defendants deviated from the standard of care for preventing falls, which requires utilizing bed alarms, chair alarms, or floor mats, none of which were provided to Ms. Erlich. She also states that while documentation indicates that Ms. Erlich required an abduction pillow while in bed, "there was no abduction pillow present at the time of her fall."

Defendants submit the affidavit of Cheryl Stene Frenkel, who states that she is a New York state nursing home administrator and registered nurse. She asserts that she is familiar with the standard of care in residential health care facilities and with New York Public Health Law §§ 2801-d and 2803-c. She opines that defendants complied with good and accepted standards of nursing practice in the care and treatment of Ms. Erlich, and that they did not proximately cause her injuries. She asserts that defendants and Nurse LaRosa conducted a "comprehensive fall risk assessment upon admission which reflected [Ms. Erlich] was at high risk for falls based on a score of 17." She further asserts that defendants implemented fall interventions consisting of "appropriate footwear and therapy screen," and that these interventions were appropriate and in accordance with good and accepted standards of nursing and nursing home practice. Defendants' expert opines that according to the Center for Medicare and Medicaid Services, bed and chair alarms that make an audible noise near the resident are classified as a "restraint," which can only be used when deemed medically necessary. She asserts that floor mats are "utilized with great caution because they present as a tripping hazard," that they are typically only indicated for residents with a proclivity for falling out of bed, and that they are typically only placed at night while the resident is asleep. She further asserts that defendants were not required to provide Ms. Erlich with a walker because she was "educated to use the call bell to ask for assistance as needed."

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Plaintiff and defendants each failed to establish their prima facie entitlement to summary judgment as a matter of law as there are material questions of fact as to how the accident occurred and whether Ms. Erlich was determined to be a fall risk (see *Smith-Joyner v Barahona*, 227 AD3d 924, 211 NYS3d 495 [2d Dept 2024]; *Currie v Oneida Health Sys., Inc.*, 222 AD3d 1284, 202 NYS3d 789 [3d Dept 2023]; *Baab v HP, Inc.*, 211 AD3d 783, 181 NYS3d 124; see generally *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93 [1968]). The complaint alleges that Ms. Erlich was injured when she was “dropped by two aides who while assisting her were arguing, so that plaintiff struck the floor.” Ms. Erlich testified that two aides who brought her to the shower were having a “very loud” and “animated” conversation with each other in another language. Ms. Erlich stated that she could not recall whether she was sitting or standing, and could not recall leaving the shower. She testified her last recollection was of “being in that shower,” and that she did not know “for how long or how I got to be on a floor in the bedroom” or how she got “from one place to the other.” Paul Hammer testified that Ms. Erlich informed him that the staff “sounded like they were arguing about something and . . . weren’t paying attention to her,” and that she believed she was “dropped in a shower room or bathroom and that somehow she ended up on the floor there.”

However, Mr. Hammer also testified that when he arrived at Huntington Hills on February 13, 2020, he walked into Ms. Erlich’s room and observed her lying on the floor, “moaning” and “writhing in pain,” and that he did not see anyone else in the room with her. Moreover, Cheryl Joseph (hereinafter Nurse Joseph), a nurse supervisor, testified that Ms. Erlich fell on the floor in her room and that, according to her accident report, when she asked Ms. Erlich how she fell to the floor, she reported that she “got up to get something from the drawer” and fell.

In her affidavit, plaintiff’s expert asserts that Huntington Hills failed to follow the standard of care for preventing falls by using bed alarms, chair alarms, or floor mats. Significantly, she fails to address the allegation and conflicting testimony indicating that Ms. Erlich was dropped by two aides while in the shower, and fails to explain how the use of bed alarms, chair alarms, or floor mats would have prevented Ms. Erlich’s injuries if she was indeed dropped in the shower.

Moreover, there is a question of fact as to whether Ms. Erlich was determined to be a fall risk upon admission to Huntington Hills. Nurse LaRosa testified that she is an RN supervisor at Huntington Hills and that her job duties include assessing new patients at the facility. Nurse LaRosa testified that Ms. Erlich was not a “fall risk” because she was alert, oriented, understood the use of the call bell, and did not have any falls within a month prior to her admission at the facility. She further testified that, although Ms. Erlich required two staff members to assist her in getting out of bed and using the bathroom, she did not require a bed alarm, chair alarm, wander alarm, or floor mats. However, Nurse Joseph was asked at her deposition whether Ms. Erlich would have been deemed a fall risk based on documentation indicating that she had prior falls, to which she responded, “[i]f she has a history of falls definitely she’s a fall risk.” She testified that typically, precautions for residents who are deemed to be fall risks include a low bed, floor mats, and, when possible, a room closer to the nursing station.

In her affidavit, defendants’ expert states that Nurse LaRosa properly assessed Ms. Erlich and determined that she was at a high risk for falls, and that defendants implemented fall interventions

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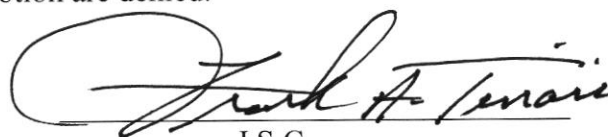
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consisting of “appropriate footwear and therapy screen.” However, she fails to explain how these interventions would have prevented Ms. Erlich’s injuries. She further fails to support or explain her assertion that further interventions “would not have reduced the risk of falls and/or injury.”

The court rejects defendant’s argument that plaintiff cannot plead Public Health Law § 2801-d in conjunction with negligence, as Article 28 of the Public Health Law “contains nothing that would indicate an intent to equate its private right of action with one for either medical malpractice or ordinary negligence” (*Zeides v Hebrew Home for Aged at Riverdale*, 300 AD3d 178, 179, 753 NYS2d 450, 452 [1st Dept 2002]). A cause of action for negligence is “separate and distinct from, and involves considerations different from, a cause of action to recover damages for deprivation of rights pursuant to Public Health Law § 2801-d” (*Sullivan v Our Lady of Consolation Geriatric Care Ctr.*, 60 AD3d 663, 665, 875 NYS2d 116, 118 [2d Dept 2009]). Additionally, the statutory basis for liability under Public Health Law § 2801-d is not a deviation from accepted standards of medical practice or a breach of a duty of care. Rather, the statute “contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule” (*Zeides v Hebrew Home for Aged at Riverdale*, 300 AD3d at 179, 753 NYS2d at 452). Here, defendants failed to meet their burden of demonstrating their prima facie entitlement to summary judgment on Public Health Law § 2801-d (see *Henry v Sunrise Manor Ctr. for Nursing & Rehabilitation*, 147 AD3d 739, 46 NYS3d 649 [2d Dept 2017]; *Vissichelli v Glen-Haven Residential Health Care Facility, Inc.*, 136 AD3d 1021, 25 NYS3d 639 [2d Dept 2016]).

Accordingly, plaintiff’s motion and defendants’ motion are denied.

Dated: 11/22/24


J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION