

Polanco v Six Ten Mgt. Corp.

2025 NY Slip Op 33629(U)

September 22, 2025

Supreme Court, New York County

Docket Number: Index No. 152587/2022

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

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ENRIQUE POLANCO as Administrator of the Estate of
MATILDE ROSALINDA POLANCO, deceased, and ENRIQUE
POLANCO, Individually,

Plaintiffs,

- v -

SIX TEN MANAGEMENT CORP., BEST CARE, INC., and
ELDERPLAN, INC. D/B/A HOMEFIRST

Defendants.

-----X

INDEX NO. 152587/2022

07/25/2024,

07/25/2024,

MOTION DATE 08/29/2024

MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 58, 59, 60, 61, 62, 63,
64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 107, 118, 119,
120, 121, 122, 123, 135, 138, 140

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 88, 89, 90, 91, 92, 93,
94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 108, 124, 125, 126, 127, 128, 129, 136, 139, 141,
142, 143, 144, 145, 146, 147, 148

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 109, 110, 111, 112,
113, 114, 115, 116, 117, 130, 131, 132, 133, 134

were read on this motion to/for STRIKE PLEADINGS

Upon the foregoing documents, and after a final submission date of July 8, 2025, motion
sequence 001 through 003 are consolidated for disposition and decided as follows:

- A. Defendant Elderplan, Inc. d/b/a Homefirst ("Elderplan")'s motion for summary judgment
("Mot. Seq. 001") dismissing Plaintiffs' Enrique Polanco as Administrator of the Estate of
Matilde Rosalinda Polanco ("Matilde") and Enrique Polanco, ("Enrique") individually' s
(collectively "Plaintiffs") Amended Complaint is granted in part and denied in part.
B. Defendant BestCare, Inc. /s/h/a Best Care, Inc. ("Best Care") motion for summary judgment
dismissing Plaintiffs' Amended Complaint and all crossclaims asserted against it is denied.

C. Plaintiffs' motion to strike the errata sheet dated July 24, 2024 and signed by Judy Seltzer is granted.

I. Background

Enrique and Matilde were married and lived at 610 Academy Street, Apartment 3, New York, New York (the "Premises") (NYSCEF Doc. 74 at 13). According to Enrique, Matilde had difficulty walking and required a home health care aide (NYSCEF Doc. 74 at 59-60). In 2013, Matilde became a member of Elderplan, a long-term care plan program for people who qualify for Medicaid and require ongoing care. Elderplan assessed Matilde as requiring assistance in safely managing stairs and outdoor ambulation (NYSCEF Doc. 81 at 67). Enrique likewise testified Matilde needed help navigating stairs, and he always held her to help her balance (NYSCEF Doc. 74 at 59-60). Matilde's son, Jose Polanco, advised Elderplan that Matilde's condition was deteriorating, and she needed a walker (NYSCEF Doc. 76 at 45-46). Jose also testified he helped his mother remain steady while moving (NYSCEF Doc. 76 at 49-50).

Elderplan contracted Best Care to provide home health care aides to Elderplan's members. Rosina Filpo ("Filpo"), employed by Best Care, was Matilde's aide (NYSCEF Doc. 78 at 75). Ms. Filpo knew Matilde required special precautions to protect her from falling (NYSCEF Doc. 79 at 74). She also knew Matilde had a grab bar in the shower, but claimed she never asked why, nor did she believe she had to ask if a patient had a history of falls (NYSCEF Doc. 78 at 54-55)

On April 9, 2021, Filpo and Matilde were walking up the stairs to enter the Premises when Matilde fell. The entrance to the Premises was not level with the sidewalk and contained three sets of staircases and two landings; the staircase closest to the door lacked handrails (NYSCEF Doc. 74 at 87-88; NYSCEF Doc. 103). Filpo was escorting Matilde back from a physical therapy appointment to treat Matilde's leg weakness. According to Filpo, Matilde collapsed on the

staircase closest to the door, which lacked handrails, (NYSCEF Doc. 79 at 27-28). Filpo testified she never touched Matilde to help her balance while walking (NYSCEF Doc. 78 at 46). Matilde was hospitalized, intubated, and passed away on April 19, 2021 (NYSCEF Doc. 75 at 66-71).

Judy Seltzer, Best Care's quality coordinator, testified that Surin Rodriguez, the Best Care coordinator, and Filpo, completed an incident report on April 14, 2021, but did not complete a statement about Matilde's fall until April 22, 2021, even though it was required policy for a report and statement to be completed within 48 hours (NYSCEF Doc. 80 at 30; 35). Ms. Seltzer also testified Filpo should have had a hand on Matilde while she walked up the stairs (NYSCEF Doc. 80 at 49).¹ Polina Voskoboynik, employed by Elderplan, testified she knew of Matilde's fall risk (NYSCEF Doc. 81 at 45-46). Just three days prior to Matilde's fall, Ms. Voskoboynik wrote Matilde could ambulate independently by "holding on to furniture and walls" (NYSCEF Doc. 84 at bates no. 0009). Voskoboynik likewise recognized on April 1, 2021 that Matilde needed a cane and grab bars, and noted her diagnoses of chronic pain, low back pain, polyosteoarthritis, diabetes, and schizophrenia (NYSCEF Doc. 84 at bates no. 0012). Elderplan possessed records of Matilde's prior fall in March of 2019 during a hypoglycemic episode and a worsening, chronic cognitive deficit (NYSCEF Doc. 84 at bates no. 1072).

Voskoboynik testified that Matilde's service plan was not sent to Best Care, nor did Elderplan directly communicate Matilde's fall risk to Best Care (NYSCEF Doc. 81 at 46; 54). Elderplan relied on Matilde to place the service plan on her refrigerator, and for the Best Care home health aide to find the service plan and read it (NYSCEF Doc. 81 at 47-48). Even though Matilde, Enrique, and Filpo only speak and read Spanish, the service plan was allegedly provided in

¹ She later contradicted herself and stated that Filpo simply needed to stand near Matilde as she walked.

English.² Ms. Filpo admitted she never discussed the service plan with anyone that worked at Best Care (NYSCEF Doc. 78 at 68-69). Now, Elderplan and Best Care seek summary judgment dismissing Plaintiff's Complaint. Plaintiff moves to strike the errata sheet of Judy Selzer's deposition transcript. The motions are consolidated for disposition and decided as follows.

II. Discussion

A. Standard

“Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact.” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's “burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, 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 (*See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

B. Elderplan's Motion (Mot. Seq. 001)

Elderplan's motion for summary judgment is granted in part and denied in part. Elderplan proffers three arguments in support of its motion for summary judgment. First, it argues it complied with the standard of care. Second, it argues it cannot be liable for failure to modify Matilde's care plan because care plan assessments were suspended during the Covid-19 pandemic. Third, it argues it cannot be held liable for the negligent hiring, training and supervision of Ms. Filpo.

As a preliminary matter, the Court rejects Elderplan's argument that Plaintiff's expert affidavit proffered in opposition is insufficient because it is proffered by a registered nurse rather

² Filpo, who testified through a Spanish interpreter, stated she could read and understand a little bit of English (NYSCEF Doc. 78 at 69).

than a physician (*see Rodriguez v Isabella Geriatric Center Inc.*, 227 AD3d 485 [1st Dept 2024]). The care at issue in this case is not care provided by a physician, but care plans generated and care provided by registered nurses and home health aides at Elderplan and Best Care. Plaintiff's expert, Lorraine B. Blade, RN, attests to her forty-five years of experience in both clinical care and oversight of care to elderly patients and has herself developed comprehensive care plans for patients with mobility impairments, trained staff in best practices, and provided direct supervision in settings involving elderly populations at risk of falls (*see* NYSCEF Doc. 120). Thus, the Court finds Nurse Blades is qualified to provide an expert opinion on the standard of care at issue. To the extent Elderplan attacks the Nurse Blades' pedigree, this goes to the weight and credibility of her testimony, which is an issue for the jury.

However, in opposition to Elderplan's motion, Plaintiff argues only that Elderplan breached its duty of care by failing to sufficiently communicate with Best Care Elderplan's evaluation of Matilde's medical conditions and fall risks. Therefore, allegations of a departure from the standard of care for failing to provide a walker, and failing to provide a gait belt are dismissed (*see, e.g. Connor v Gluck*, 214 AD3d 448, 448-49 [1st Dept 2023] [failure to proffer medical expert refuting defendants' expert opinion requires dismissal of those claimed departures from standard of care]). Likewise, Nurse Blades does not address Elderplan's argument that it could not have modified Matilde's care plan because the New York State Department of Health suspended periodic re-assessments from March 18, 2020, through July 26, 2021. Therefore, any allegations regarding a departure from the standard of care related to a failure to modify Matilde's care plan from March 18, 2020 through July 26, 2021 are dismissed.

Issues of fact require denying the remainder of Elderplan's motion. Nurse Blades, and the accompanying medical records and testimonial evidence, raise issues of fact as to whether

Elderplan properly created Matilde's care plan, specifically regarding the assistance she required when walking outdoors, and whether Elderplan was negligent in supervising and coordinating Matilde's care with Best Care given the lack of communication regarding Matilde's deteriorating condition and the failure to provide Elderplan's assessment of Matilde directly to Best Care. Although the Covid-19 pandemic may have prevented Elderplan from formally updating Matilde's care plan, there is no expert testimony establishing pandemic guidelines prevented Elderplan from advising Best Care that according to Matilde's son and power of attorney, Matilde's condition was deteriorating, and increased care was needed to assist Matilde while walking.

Moreover, given Matilde's history of prior falls, including medical records showing it may have resulted from diabetes related hypoglycemia; Matilde's prescribed physical therapy treatment for her legs; her diagnoses of chronic pain, dementia, schizophrenia and polyosteoarthritis; her required use of a grab bar while showering; Enrique and Jose's testimony that they frequently held Matilde while walking with her, and Elderplan's recommended use of a cane, a reasonable jury may find that Elderplan departed from the standard of care in creating a care plan that required Matilde only be "supervised" rather than closely held when walking (*see also Marino v Jamison*, 189 AD3d 1021, 1022 [2d Dept 2020] ["[i]n light of the conflicting claims as to how the injury occurred and its causation, the expert's affidavit and the defendants' additional submissions in support of their motion failed to eliminate all triable issues of fact as to whether the home health aide was negligent as she transferred the injured plaintiff from her wheelchair to her bed"] citing *Pullman v Silverman*, 28 NY3d 1060, 1063 [2016]).

A jury could likewise find Elderplan should have communicated this information to Best Care, so that the Best Care aide would be fully informed about Matilde's multiple conditions and diagnoses. There is a further issue of fact as to whether Elderplan should have provided a care plan

to Matilde and her family in Spanish, as Elderplan knew Matilde and Enrique did not speak English, and they likewise knew or should have known that the home healthcare aide assigned to treat Matilde had limited proficiency in reading and speaking English.

Based on these issues of fact, which deal with Elderplan's active negligence rather than mere passive negligence and/or vicarious liability, Elderplan's argument that it should be granted summary judgment because it cannot be held liable for the acts of its independent contractors is without merit. The theory of liability asserted against Elderplan is not solely one for vicarious liability – rather it is that Elderplan failed to properly evaluate Matilde, failed to properly coordinate her care, and failed to ensure Best Care had the necessary information to provide Matilde with the assistance she needed. Given these issues of active negligence, Elderplan's reliance on *Jones v. U.S. Healthcare, et al.*, 282 A.D.2d 347 (1st Dept. 2001) is misplaced.

Therefore, Elderplan's motion is granted solely to the extent that allegations of negligence regarding the failure to prescribe a walker; the failure to prescribe a gait belt; and the failure to modify Matilde's care plan from March 18, 2020, through the date of her death are dismissed. The remainder of Elderplan's motion is denied.

C. Best Care's Motion (Mot. Seq. 002)

Best Care's motion for summary judgment is denied. Best Care concedes that Matilde required human assistance when ambulating outside but argues that it did not breach the standard of care because "human assistance" only requires supervision, not physical assistance. However, an issue of fact is created by Best Care's own witness, Judy Seltzer's testimony.³ According to Ms. Seltzer, she stated that she would have expected Ms. Filpo to maintain a hand on Matilde on as Matilde ascended the stairs (NYSCEF Doc. 97 at 48). She also testified human assistance in the

³ Judy Seltzer is a registered nurse.

context of ambulating stairs means an aide would be physically touching the patient while the patient ascends stairs (NYSCEF Doc. 112 at 46-48]). While Ms. Seltzer later changed her answer during the deposition, this creates a credibility issue for the jury (*Rozon v Schottenstein*, 204 AD3d 94 [1st Dept 2022]; *Dixon v Sum Realty, Co.*, 190 AD3d 584, 585 [1st Dept 2021]).

In any event, there is an issue of fact as to whether Ms. Filpo departed from the standard of care when she was put on notice of Matilde's prior fall history due to her knowledge of the grab bars in the shower, but Ms. Filpo admittedly decided not to inquire into Matilde's prior history or conditions. According to Plaintiff's expert, Nurse Blades, Ms. Filpo's failure to learn or inquire about Matilde's medical conditions and diagnoses constituted a breach of the standard of care for a home health aide. Likewise, according to Nurse Blades, given Matilde's prior fall history, and her care plan which required Matilde be provided human assistance while walking outdoors, Ms. Filpo should have provided hands-on assistance, especially as Ms. Filpo was escorting Matilde back home from a physical therapy session to treat pain and weakness in the legs. These issues of fact preclude summary judgment (*see e.g. Rodriguez v Isabella Geriatric Center Inc.*, 227 AD3d 485, 485-86 [1st Dept 2024]; *see also Freidmann v New York Hospital-Cornell Medical Center*, 65 AD3d 850, 851 [1st Dept 2009]).

D. Plaintiffs' Motion (Mot. Seq. 003)

Plaintiffs' motion to strike the errata sheet dated July 24, 2024 and signed by Judy Seltzer regarding her deposition taken on March 12, 2024 is granted. Pursuant to CPLR 3116(a), an errata sheet allows a witness to correct mistakes but does not allow a witness to make a substantive change to material testimony (*see 514 West 44th Street, Inc. v Whalen*, 203 AD3d 566 [1st Dept 2022]). Ms. Seltzer is attempting to change her testimony regarding whether the standard of care required Ms. Filpo to maintain physical contact with Matilde while Matilde ascended the stairs.

She claims she was confused by the question. Whether the Defendants breached their standard of care in assisting Matilde ascend the stairs is an issue at the heart of this case. Ms. Seltzer cannot change this critical testimony post note of issue, over four months after she gave testimony, and one day before the parties filed their motions for summary judgment. The errata sheet is therefore stricken. Ms. Seltzer may offer testimony at trial and try to explain to the jury why she provided mistaken testimony, but she cannot alter her deposition transcript.

Accordingly, it is hereby,

ORDERED that Elderplan’s motion for summary judgment (Mot. Seq. 001) is granted solely to the extent that allegations of negligence regarding the failure to prescribe a walker; the failure to prescribe a gait belt; and the failure to modify Matilde’s care plan from March 18, 2020 through the date of her death are dismissed, and the remainder of Elderplan’s motion is denied; and it is further

ORDERED that Best Care’s motion for summary judgment is denied; and it is further

ORDERED that Plaintiffs’ motion to strike the errata sheet dated July 24, 2024 and signed by Judy Seltzer regarding her deposition taken on March 12, 2024 is granted; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

9/24/2025
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input type="checkbox"/> |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> |
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