SHORT FORM ORDER

INDEX No. 09-31914

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 11-13-14
ADJ. DATE 3-5-15
Mot. Seq. # 001 - MD

EMILY COSTANZA, Plaintiff, - against - FRIENDS HOME CARE, LLC and SHAYNA ROSS, Defendants.	FREKHTMAN & ASSOCIATES Attorney for Plaintiff 60 Bay 26th Street Brooklyn, New York 11214 MILBER MAKRIS PLOUSADIS & SEIDEN, LLP Attorney for Defendants 3 Barker Avenue, 6th Floor White Plains, New York 10601

Upon the following papers numbered 1 to 36 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 17 - 24; Replying Affidavits and supporting papers 25 - 36; Other __; it is,

ORDERED that the motion by defendants for summary judgment dismissing the complaint is denied.

Plaintiff Emily Costanza commenced this action to recover damages for personal injuries she allegedly suffered on January 27, 2009, when defendant Shayna Ross, a home care worker employed by defendant Friends Homecare, LLC, transferred her from a stool to a wheelchair. Plaintiff, who suffers from congenital Chiara malformation, tethered spinal cord syndrome, and other neurologic conditions, had paraplegia and was receiving 24-hour home health care services at the time of the alleged incident. The bill of particulars alleges, among other things, that defendants were negligent in failing to provide properly trained and experienced personnel; in failing to provide reasonable care to plaintiff; in failing to exercise reasonable care to avoid harming plaintiff; in failing to properly train personnel "on how to transfer patients from wheelchair to bed [sic]." It also alleges that defendant Ross was negligent "in failing to avoid her hand from slipping from the [plaintiff's] waist and to underneath the [plaintiff's] ribcage which caused a subluxation injury to [plaintiff's] arm and shoulder," in failing to provide the care and supervision necessary to prevent an injury to plaintiff, and in failing to assess plaintiff's injury

after the incident. It further alleges that, as a result of defendants' negligence, plaintiff sustained a braxial plexus injury, resulting in the loss of mobility in her right arm and hand, as well as a loss of sensation in the arm, except at the fingertips.

Defendants now move for summary judgment dismissing the complaint. In support of their motion, they submit copies of the pleadings and bill of particulars, transcripts of the deposition testimony of plaintiff and defendant Ross, an affirmation of Dr. Monette Basson, an affidavit of Margaret Gallagher, R.N., and a handwritten report prepared by an employee of Affinity Skilled Living and Rehabilitation Center, Dr. Nurcan Gursoy. At defendants' request, Dr. Basson, a neurologist, conducted an examination of plaintiff on July 29, 2014, and reviewed certain medical records relating to plaintiff's alleged conditions. Defendants argue that plaintiff's claims sound in medical malpractice, and that the deposition testimony and affidavit of Nurse Gallagher show defendant Ross departed from "good and accepted nursing practice" when transferring plaintiff from the stool to the wheelchair. Defendants further assert that Dr. Basson's affirmation and plaintiff's deposition testimony establish a *prima facie* case that plaintiff did not suffer a brachial plexus injury due to the alleged improper transfer by defendant Ross.

Plaintiff opposes the motion, arguing, in relevant part, that her claims sound in negligence, not medical malpractice, and that defendants' submissions are insufficient to meet their burden on the motion. In opposition, plaintiff submits the parties' deposition transcripts, uncertified hospital records related to treatment sought by plaintiff from Southside Hospital in January 2009, and an affidavit and an unsworn report of Dr. Justin Willer. Plaintiff asserts that the affidavit of Dr. Willer, a neurologist who examined her in January 2015, raises triable issues as to whether defendant Ross used reasonable care when lifting her from the stool to the wheelchair, whether she suffered injury to her brachial plexus, and whether defendant Ross' alleged actions when transferring her to the wheelchair were a proximate cause of such injury. Plaintiff also asserts that the doctrine of *res ipsa loquitur* applies in this action, permitting an inference of negligence solely from the happening of the alleged incident. In addition, plaintiff contends that, even if the instant action is found by the Court to sound in medical malpractice, Dr. Willer's affidavit raises a triable issue as to whether defendants' departed from accepted medical practice in their care of plaintiff.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the

existence of material issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

A plaintiff seeking to prove a negligence claim must demonstrate the existence of a duty owed by the defendant, a breach of that duty, and injury to such plaintiff proximately caused by such breach (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Ruiz v Griffin***, 71 AD3d 1112, 898 NYS2d 590 [2d Dept 2010]; ***Solan v Great Neck Union Free School Dist.***, 43 AD3d 1035, 842 NYS2d 52 [2d Dept 2007]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). A negligence action against a person or business which has been hired to provide home care services for an adult individual is based on a duty to exercise reasonable care and diligence in safeguarding such individual, with the scope of such duty measured, in part, on the capacity of the individual to provide for his or her own care (*see* ***Garcia v All Metro Health Care***, 108 AD3d 742, 970 NYS2d 255 [2d Dept 2013]; ***Lagner v Primary Home Care Servs., Inc.***, 83 AD3d 1007, 922 NYS2d 431 [2d Dept 2011]; ***Thibault v Franzese***, 24 AD2d 903, 264 NYS2d 783 [2d Dept 1965]; *see also* ***Esposito v Personal Touch Home Care***, 288 AD2d 337, 733 NYS2d 468 [2d Dept 2001]). A medical malpractice action, which is species of negligence, involves three basic duties of care owed to a patient by a professional health care provider: (1) the duty to possess the same knowledge and skill that is possessed by an average member of the medical profession in the locality where the provider practices; (2) the duty to use reasonable care and diligence in the exercise of his or her professional knowledge and skill; and (3) the duty to use best judgment applying his or her knowledge and exercising his or her skill (*see* ***Nestorowich v Ricotta***, 97 NY2d 393, 740 NYS2d 668 [2002]; ***Pike v Honsinger***, 155 NY 201, 49 NE 760 [1898]). A plaintiff asserting a claim for medical malpractice, therefore, must present proof: (1) that the defendant a deviated or departed from accepted standards of medical practice; and (2) that such deviation or departure was a proximate cause of his or her injury or damage (*see* ***Duvidovich v George***, 122 AD3d 666, 995 NYS2d 616 [2d Dept 2014]; ***Schmitt v Medford Kidney Ctr.***, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]; ***Ahmed v Pannone***, 116 AD3d 802, 984 NYS2d 104 [2d Dept 2014], *lv dismissed* 25 NY3d 964, 8 NYS3d 261 [2015]; ***Lau v Wan***, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; ***Castro v New York City Health & Hosps. Corp.***, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; ***DiMitri v Monsouri***, 302 AD2d 420, 754 NYS2d 674 [2d Dept 2003]).

Initially, the Court rejects defendants' argument that plaintiff's claim sounds in medical malpractice. "The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can be assessed on

the basis of the common everyday experience of the trier of facts (***Miller v Albany Med. Ctr. Hosp.***, 95 AD2d 977, 978, 464 NYS2d 297 [3d Dept 1983]). A claim sounds in medical malpractice when the conduct at issue constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician (***Bleiler v Bodnar***, 65 NY2d 65, 72, 489 NYS2d 885 [1985]; *see* ***Scott v Uljanov***, 74 NY2d 673, 543 NYS2d 369 [1989]; ***Spiegel v Goldfarb***, 66 AD3d 873, 889 NYS2d 45 [2d Dept 2009]; ***Pacio v Franklin Hosp.***, 63 AD3d 1130, 882 NYS2d 247 [2d Dept 2009]). Conversely, a claim sounds in negligence when "the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the hospital's [or medical provider's] failure in fulfilling a different duty," such as protecting a patient against a risk of falling or adopting proper procedures and regulations (***Bleiler v Bodnar***, 65 NY2d 65, 73, 489 NYS2d 885; *see* ***Weiner v Lenox Hill Hosp.***, 88 NY2d 784, 650 NYS2d 629 [1996]; ***D'Elia v Menorah Home & Hosp. for the Aged & Infirm***, 51 AD3d 848, 859 NYS2d 224 [2d Dept 2008]; ***Halas v Parkway Hosp.***, 158 AD2d 516, 551 NYS2d 279 [2d Dept 1990]). Here, the allegations of negligence asserted in the complaint and the bill of particulars are not treatment related, and do not involve the exercise of specialized medical knowledge or skills on the part of defendants. Rather, the gravamen of plaintiff's claim is that defendants, having undertaken to provide in-home living assistance, failed to exercise due care to ensure no harm came to her while she was with a home health aide (*see* ***Garcia v All Metro Health Care***, 108 AD3d 742, 970 NYS2d 255; ***Lagner v Primary Home Care Servs., Inc.***, 83 AD3d 1007, 922 NYS2d 431; *see also* ***Cochran v Cayuga Med. Ctr. at Ithaca***, 90 AD3d 1227, 935 NYS2d 154 [3d Dept 2011]; ***Reardon v Presbyterian Hosp. in City of N.Y.***, 292 AD2d 235, 739 NYS2d 65 [1st Dept 2002]).

Defendants' submissions are insufficient to establish a *prima facie* case of entitlement to judgment in their favor. At an examination before trial conducted in May 2012, plaintiff testified that defendant Ross was placed with her as a home health aide by defendant Friends Homecare in January 2008. Plaintiff testified that she was confined to a wheelchair and required 24-hour assistance from live-in home health aides at the time defendant Ross began working with her. She testified that defendant Ross helped her with cooking, bathing, transferring to and from a wheelchair, and other daily tasks. Plaintiff explained that when she was transferred to or from a wheelchair, she would place her arms around defendant Ross' neck, and that defendant Ross would place her hands on plaintiff's hips and lift her up. Plaintiff testified that on the afternoon of January 27, 2009, defendant Ross transferred her from a wheelchair to a stool in the bathroom so she could wash herself. She testified that after she was finished washing, defendant Ross moved her from the stool to the wheelchair. According to plaintiff, as she was being lifted from the stool, defendant Ross's left hand slipped off of plaintiff's right hip and moved up the side of plaintiff's ribcage, stopping a few inches under her right armpit. Plaintiff testified that she immediately felt severe pain on her right side and in her right arm, and lost the use of both arms. She testified that though she regained movement in her left arm approximately one hour later, and in her right hand and wrist in 2012 after receiving occupational therapy, she has not regained any movement in her right arm.

Defendant Ross testified that prior to working from Friends Homecare, she was employed by Region Care, a home care service provider located in Hempstead, New York, which required that she undergo in a two-week training program before working as a health care aide. She testified the training program at Region Care included instruction on house cleaning, cardiopulmonary resuscitation (CPR), bathing clients, and transferring clients from beds and wheelchairs. Defendant Ross, who left her position with Region Care in 2006 after working for eight or nine months, testified she was hired by Friends Homecare in 2007. She testified that Friends Homecare did not require her to undergo any training; instead, she had to watch an hour-long video in class approximately every six months. Defendant Ross testified that she began working as a home health aide for plaintiff in January 2008, and that plaintiff was the only client she had that was confined to a wheelchair. When questioned about the alleged incident on January 27, 2009, defendant Ross testified that plaintiff complained of pain in her right arm while they were in the bathroom, but denied that her hand slipped off of plaintiff's waist area as she was transferring plaintiff from the stool to the wheelchair. Defendant Ross testified that after plaintiff got washed and dressed, they went together to a store located across the street from plaintiff's apartment to eat lunch. She testified that while they were at the store, plaintiff called her aunt to tell her she was experiencing arm pain. She testified that, upon the advice of plaintiff's aunt, plaintiff called for an ambulance and was brought from the store to Southside Hospital for treatment. Defendant Ross further testified that, at the direction of a supervisor at Friends Homecare, she prepared a report explaining plaintiff had been brought to the hospital complaining of pain in her right arm.

Defendants failed to establish a *prima facie* case that they did not breach a duty of care owed to plaintiff. Here, the conflicting testimony of plaintiff and defendant Ross about the happening of the alleged incident raises credibility questions, creating a triable issue as to whether defendant Ross was negligent in transferring plaintiff from the bathroom stool to the wheelchair (*see* ***Miller v United Parcel Serv., Inc.***, __ AD3d __, 2015 NY Slip Op. 06790 [2d Dept 2015]; ***Lipe v Albany Med. Ctr.***, 85 AD3d 1442, 925 NYS2d 258 [3d Dept 2011]; ***Scott v Long Is. Power Auth.***, 294 AD2d 348, 741 NYS2d 708 [2d Dept 2002]). Contrary to the conclusory assertions by defense counsel, the affidavit of Nurse Gallagher, which avers that, based on the deposition testimony regarding the technique used by defendant Ross to transfer plaintiff to and from a wheelchair, defendant Ross "complied with good and accepted nursing practice," does not satisfy defendants' burden of proof. As plaintiff's claim sounds in negligence, not medical malpractice, an issue for the trier of fact is whether defendants exercised reasonable care to protect plaintiff from harm, not whether defendant Ross deviated from accepted nursing practices (*see* ***Reardon v Presbyterian Hosp. in City of N.Y.***, 292 AD2d 235, 739 NYS2d 65).

Moreover, the vague and conclusory affirmation of Dr. Basson is insufficient to establish as a matter of law that defendant Ross's alleged failure to exercise reasonable care when transferring plaintiff to the wheelchair was not a proximate cause of the pathology in plaintiff's

arm and shoulder (*see* ***Hecker v Liebgold***, 130 AD3d 572, 13 NYS3d 179 [2d Dept 2015]; ***Dmytryszyn v Herschman***, 98 AD3d 715, 950 NYS2d 401 [2d Dept 2012]). Here, Dr. Basson states that "[t]here is no evidence whatsoever that there was an injury to the brachial plexus as a result of the subject transfer," that other medical conditions suffered by plaintiff "could account for upper extremity paralysis," and that, based on the description by plaintiff of how she was transferred on the date of the accident, "there was nothing that Shayna Ross did during that transfer which could have caused any injury to the plaintiff which would result in a loss of use or function of her right upper extremity." After noting that plaintiff did not undergo any magnetic resonance imaging or nerve conduction studies after the alleged incident, Dr. Basson concludes that the "significant decrease in function of [plaintiff's] right upper extremity is due to or related to one or more of her neurologic conditions, and is wholly unrelated to the transfer performed by defendant Ross on January 27, 2009." Absent from Dr. Basson's affirmation, however, is any discussion of which pre-existing condition or conditions could cause the sudden onset of severe pain and upper extremity paralysis described by plaintiff. As a general rule, a party moving for summary judgment does not carry its burden by pointing to gaps in the opposing party's case, but must affirmatively demonstrate through admissible evidence the merit of its claim or defense (***George Larkin Trucking Co. v Lisbon Tire Mart***, 185 AD2d 614, 615, 585 NYS2d 894 [4th Dept 1992]; *see* ***Ranno v Cantor***, 129 AD3d 699, 9 NYS3d 586 [2d Dept 2015]; ***Velasquez v Gomez***, 44 AD3d 649, 843 NYS2d 368 [2d Dept 2007]).

Accordingly, defendants' motion for summary judgment is denied.

Dated: October 6, 2015

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**