

**Friedman v City of New York**

2004 NY Slip Op 30164(U)

February 3, 2004

Supreme Court, New York County

Docket Number: 0113112/1999

Judge: Eileen Bransten

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN BRANSTEN

PART 6

Justice

BERNICE FRIEDMAN, as Executrix of the Estate of JOSEPH FRIEDMAN, and BERNICE FRIEDMAN, Individually,

Plaintiffs,

-against-

CITY OF NEW YORK and ST. VINCENT'S HOSPITAL AND MEDICAL CENTER OF NEW YORK,

Defendants.

INDEX NO. 113112/99  
MOTION DATE 12/9/03  
MOTION SEQ. NO. 04  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion to renew and deny summary judgment.

PAPERS NUMBERED

1 **FILED**  
2 FEB 10 2004  
4

Notice of Motion & Cross-Motions/ — Affidavits — Exhibits

Answering Affidavits — Exhibits

Replying Affidavits--Including supplemental aff. permitted by Court

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ORDERED that plaintiffs' motion is DENIED. Plaintiffs Bernice Friedman, as Executrix of Joseph Friedman, and Bernice Friedman, Individually seek leave to renew defendants' motion and cross-motion for summary judgment dismissal of this action.

In a Decision and Order dated October 10, 2002, this Court denied the motions for summary judgment and refused to dismiss the action, holding that questions of fact precluded summary adjudication of the case.

Disagreeing, the Appellate Division, First Department reversed on July 31, 2003. The Appellate Division concluded that (1) defendants established entitlement to summary judgment, and (2) plaintiffs failed to establish a triable issue of fact as to any departure from the applicable standards of paramedical practice that may have been a substantial factor in causing the decedent's death. *Friedman v. City of New York*, 307 A.D.2d 227 (1st Dep't 2003).

Dated: \_\_\_\_\_ Dec p 4

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

N/CASE IS RESPECTFULLY REFERRED TO

J.S.C.

MT JS DT

Specifically, the Appellate Division explained that plaintiffs':

"theory that the St. Vincent's team had not been equipped with sufficient supplies of oxygen, and therefore had failed to provide adequate oxygen therapy, rested entirely upon a statement in the affidavit of decedent's co-worker, who witnessed the incident, that, as the St. Vincent's team 'was getting ready to take [the decedent] to the hospital, they began to run out of oxygen.' This conjectural statement by a lay bystander, who identified no basis for his belief, is entirely without foundation and therefore does not constitute admissible evidence that there was actually a failure to supply the decedent with adequate oxygen." *Id.*

Now, plaintiffs would like an opportunity to cure what they perceive to be the fatal defect that caused dismissal of their action. They ask this Court, as the court of original jurisdiction, to grant renewal of the motion based on "new evidence"--namely, deposition testimony given by decedent's co-worker that provides the basis for the co-worker's beliefs.

At his deposition, the co-worker testified that the emergency paramedics stated that "they needed more equipment, and it was specifically the oxygen that they wanted." Attorney's Affirmation (in Support of Motion to Renew) ("Supp. Aff."), Ex. C, at 40. The co-worker further stated that "the two ambulance drivers conversed, and they specifically said, 'We need more oxygen,' and one said, 'Call for backup,' you know, 'We're going to run out' or something in those respects." *Id.*, at 42. In response to a question asking whether he heard the ambulance workers tell anyone at the scene that they had in fact run out of oxygen, the co-worker testified "No, I don't recall that; no." *Id.*, at 78. The co-worker very clearly testified "I really don't know whether or not the oxygen ran out." *Id.*, at 93.

Plaintiffs maintain that the co-worker's deposition testimony was not available to them when the motions were submitted. They argue that:

"Unfortunately, the EHT was held one month after this case appeared on the motion calendar (July 16, 2002) and the transcript was not received until after this Court had rendered its decision and order. Thus, the EBT transcript, which clearly and unequivocally demonstrates the 'basis' for Mr. Sands'

statement that the EMT's 'ran out of oxygen' was based upon the Hospital paramedics *own admissions* that they needed more oxygen." Supp. Aff., at ¶ 4 (emphasis in original).

The law is well-settled. "A request for renewal should be rejected when the moving party fails to offer a reasonable excuse for not submitting the new material on the previous motion." *Cuccia v. City of New York*, 306 A.D.2d 2 (1st Dep't 2003); *see also, Forsythe & Lincoln Assocs., Inc. v. Sylvan Lawrence Co.*, \_\_\_ A.D.2d \_\_\_, 767 N.Y.S.2d 600 (1st Dep't 2003); *Loperena v. Buona*, 309 A.D.2d 592 (1st Dep't 2003); *C.R. v. Pleasantville Cottage School*, 302 A.D.2d 259 (1st Dep't 2003).

In *Cuccia v. City of New York*, for example, the Appellate Division, First Department reversed the trial court's grant of renewal. The Appellate Division concluded that the plaintiff there did not offer an adequate explanation as to why the expert, when providing an affidavit on the initial motion, failed to earlier make the same inspection that he performed and incorporated into his revised affidavit for the renewal motion. *Cuccia v. City of New York, supra*, 306 A.D.2d, at 3; *see also, Burgos v. City of New York*, 294 A.D.2d 177, 178 (1st Dep't 2002) (more detailed affirmation offered by plaintiff in motion to renew was properly rejected for lack of an explanation as to why such *was* not offered on the original motion).

Similarly, here, plaintiffs were able to get the co-worker's affidavit to oppose defendants' motions for summary judgment. They have not offered any reason why they did not obtain a more thorough affidavit to initially oppose the summary judgment motions. They easily could have and should included the basis for the co-workers beliefs in the original affidavit that was submitted in opposition to the summary judgment motions.

Regardless of whether the evidence was somehow available to plaintiffs, however, it is clear that the deposition testimony would not warrant denial of the summary judgment motions.

The co-worker's deposition testimony highlights the fact that plaintiffs have not set forth any evidence that the ambulance workers actually ran out of oxygen. At his deposition, the co-worker candidly and unequivocally admitted that he did not know whether the oxygen actually ran out. It is now perfectly plain that contrary to plaintiffs' assertion, the coworker did not opine that "the ambulance attendants ran out of oxygen," *See*, Supp. Aff., at 10. He indicated that he had absolutely no knowledge of whether that ever happened. Plaintiffs have still failed to evidence that "there was actually a failure to supply the decedent with adequate oxygen." *Friedman v. City of New York, supra*, 307 A.D.2d 227. Thus, the Appellate Division's determination must remain undisturbed.

Accordingly, it is

ORDERED that plaintiffs' motion is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York  
 February 3, 2004

ENTER



Hon. Eileen Bransten