

Alexander v American Med. Response

2008 NY Slip Op 32376(U)

July 24, 2008

Supreme Court, Suffolk County

Docket Number: 0004193/2005

Judge: Ralph F. Costello

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

P R E S E N T :

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 12-14-07 (004)
MOTION DATE 3-10-08 (005, 006, 007 & 008)
ADJ. DATE 4-29-08
Mot. Seq. # 004 - MG; CASE DISP; # 005 - XMG
006 - MD; # 007 - XMD; # 008 - XMD

-----X			
PATRICIA ALEXANDER, as Administratrix of	:	NAPOLI BERN RIPKA, LLP	
the Estate of HELEN MYLOTT, deceased,	:	Attorneys for Plaintiff	
	:	115 Broadway, 12 th Floor	
	:	New York, New York 10006	
	:		
Plaintiff,	:	RAVEN & KOLBE, LLP	
	:	Attorneys for Deft American Medical Response	
- against -	:	126 East 56 th Street, Suite 202	
	:	New York, New York 10022	
AMERICAN MEDICAL RESPONSE, MID-	:		
ISLAND CENTER FOR THE AGING, INC.,	:	WENICK & FINGER, P.C.	
THE GURWIN JEWISH GERIATRIC CENTER,	:	Attorneys for Deft Gurwin Jewish Geriatric Center	
JOHN DOE 1 and JOHN DOE 2,	:	28 East 28 th Street, 13 th Floor	
	:	New York, New York 10016-7900	
Defendants.	:		
-----X			

Upon the following papers numbered 1 to 64 read on these motions and cross motions for summary judgment, to compel discovery, and to quash subpoenas; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; 20 - 32; Notice of Cross Motion and supporting papers 14 - 19; 33 - 43; 59 - 62; Answering Affidavits and supporting papers 44 - 52; 63 - 64; Replying Affidavits and supporting papers 53 - 54; 56 - 58; Other 55 (copy of reply); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (004) by defendant American Medical Response for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and any and all cross-claims as against it is granted; and it is further

ORDERED that this cross-motion (005) by defendant The Rosalind and Joseph Gurwin Jewish Geriatric Center of Long Island, Inc. s/h/a Mid-Island Center for the Aging, Inc. and The Gurwin Jewish Geriatric Center for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and any and all cross-claims as against it is granted; and it is further

ORDERED that this motion (006) by defendant American Medical Response for an order quashing plaintiff's subpoena seeking post note of issue discovery is denied as moot; and it is further

ORDERED that this cross-motion (007) by plaintiff for an order compelling defendants to provide outstanding discovery is denied as moot; and it is further

ORDERED that this cross-motion (008) by defendant The Rosalind and Joseph Gurwin Jewish Geriatric Center of Long Island, Inc. s/h/a Mid-Island Center for the Aging, Inc. and The Gurwin Jewish Geriatric Center for an order quashing plaintiff's subpoena seeking post note of issue discovery is denied as moot.

Plaintiff commenced this action to recover damages for injuries allegedly sustained by plaintiff's then 66 year old mother, Helen Mylott, on February 14, 2002 allegedly as a result of defendants' negligence¹ when plaintiff's decedent fell backwards from the doorway of an ambulette that was to transport her back to her home from an outpatient day care program at the skilled medical care facility of defendant The Rosalind and Joseph Gurwin Jewish Geriatric Center of Long Island, Inc. s/h/a Mid-Island Center for the Aging, Inc. and The Gurwin Jewish Geriatric Center (Gurwin) located at 68 Hauppauge Road, Commack, New York. After her fall, plaintiff's decedent was transported in a different vehicle to St. Catherine of Sienna Hospital where an x-ray revealed a fractured right hip. Seven days later, plaintiff's decedent underwent hip surgery and then one week later she was diagnosed with an infection of the right hip. Then, on April 13, 2002 plaintiff's decedent had a cardiac arrest and kidney failure. On May 20, 2002, plaintiff's decedent was transferred from St. Catherine of Sienna Hospital to Winthrop University Hospital to undergo a mitral valve replacement, which occurred five days later. Plaintiff's decedent remained in the CCU of Winthrop University Hospital until the day she died, August 10, 2002. Plaintiff commenced this action two and a half months after plaintiff's decedent's death.

By her complaint, plaintiff alleges identical first and second causes of action as against defendant Gurwin, its agents and employees, as owner of the subject premises based on negligence in its control, maintenance, repair and inspection of its driveway and sidewalk abutting the premises creating an unsafe, hazardous, dangerous and trap-like condition. In addition, plaintiff alleges that defendant Gurwin, its agents and employees were negligent in their care and supervision of plaintiff's decedent. Plaintiff's third cause of action as against defendant American Medical Response alleges that it provided transportation services for patients of Gurwin pursuant to an agreement; that on February 14, 2002 defendant American Medical Response provided transportation services to plaintiff's decedent; and that while under the care, control and supervision of said defendant, its agents and employees, plaintiff's decedent fell and sustained serious injuries as a result of their negligence. Plaintiff alleges fourth and fifth causes of action as against John Doe 1 and John Doe 2, respectively, that while plaintiff's decedent was under their care, control and supervision, plaintiff's decedent fell and sustained serious injuries as a result of their negligence.

The answer of defendant American Medical Response contains general denials as well as a cross-claim as against co-defendant Gurwin that liability, if any, be determined as and between themselves and

¹Although plaintiff alleges wrongful death claims in her bill of particulars, plaintiff has not alleged any such claims in her complaint and has not amended her complaint to add such claims. In any event, any wrongful death claims would have been untimely inasmuch as the action was commenced more than two years after plaintiff's decedent's death and the two-year Statute of Limitations for wrongful death claims is not tolled during the pendency of the application for letters of administration (see, EPTL § 5-4.1; Public Adm'r of Kings County v Canada Dry Bottling Co. of New York, 16 AD3d 397 [2nd Dept 2005]).

for the apportionment of damages. Defendant Gurwin's answer contains a cross-claim against all of its co-defendants for indemnification and/or contribution.

By her bill of particulars, plaintiff alleges that defendant American Medical Response was negligent in, among other things, failing to properly support and secure plaintiff's decedent while escorting her and boarding her onto the ambulette.

Defendant American Medical Response now moves (004) for summary judgment in its favor dismissing the complaint and all cross-claims as against it on the grounds that there is no admissible evidence establishing that it either caused or contributed to plaintiff's decedent's alleged injuries. Specifically, defendant American Medical Response asserts that the evidence establishes that plaintiff's decedent's accident was caused by her own failure to wait to be escorted into the ambulette and her decision to attempt to board the ambulette on her own, rather than to wait for the driver to return and assist her up and into the ambulette. In addition, defendant American Medical Response asserts that plaintiff is unable to present any admissible evidence as to how the subject accident occurred. Defendant Gurwin cross-moves (005) for summary judgment in its favor dismissing the complaint and any and all cross-claims as against it, incorporating by reference the aforementioned arguments of its co-defendant as well as pointing to the medical transportation service agreement between Gurwin and American Medical Response.

The mere fact that an accident occurs does not mean that a defendant is liable unless the plaintiff can show how the defendant's breach of some duty caused or contributed to the plaintiff's mishap (see, Braithwaite v Equitable Life Assur. Soc. of U.S., 232 AD2d 352 [2nd Dept 1996]).

A landowner or lessee has a duty to exercise reasonable care in order to maintain its property in a safe condition (Basso v Miller, 40 NY2d 233 [1976]; Tagle v Jakob, 97 NY2d 165 [2001]). A common carrier "is under a duty to provide prospective passengers with a reasonably safe, direct entrance onto the vehicle, clear of any dangerous obstruction or defect which would impede that entrance" (Blye v Manhattan & Bronx Surface Tr. Operating Auth., 124 AD2d 106, 111 [1st Dept 1987], *aff'd* 72 NY2d 888 [1988]).

Plaintiff testified at her deposition on November 18, 2005 that plaintiff's decedent had fallen at a dance recital in June 2001 sustaining a fracture of the right arm and that plaintiff's decedent was receiving physical therapy on an outpatient basis for said injury at the day care program of Gurwin Geriatric Center at the time of the subject incident. In addition, plaintiff testified that plaintiff's decedent received therapy three days a week. Plaintiff also testified that she was not present with plaintiff's decedent on the date of the subject incident; she did not know who the ambulette driver was on said date, she had never met him; plaintiff did not know if plaintiff's decedent took her cane or her walker on said date; and she did not know the name of the female Gurwin aide who was allegedly assisting plaintiff's decedent at the time of the incident. Plaintiff further testified that plaintiff's decedent had told her that a female Gurwin aide who had been assisting plaintiff's decedent onto the ambulette by holding onto one arm and helping plaintiff's decedent up into the ambulette had become distracted causing plaintiff's decedent to fall backwards. Plaintiff stated that plaintiff's decedent had also told her prior to the date of this incident, she had been transported into the ambulette with the assistance of either the aide or the driver. According to plaintiff, a

staff physician at Winthrop University Hospital, a cardiothoracic surgeon, whose name she could not recall, indicated that all of plaintiff's decedent's subsequent conditions which ultimately resulted in her death arose from the sepsis infection that she contracted from the hip fracture after the subject fall.

Thomas Doherty (Mr. Doherty) testified at his deposition on May 4, 2007 that from 1999 to August 12, 2002 he was employed as a driver for American Medical Response. He recalled plaintiff's decedent as a day care client. Mr. Doherty testified that on the day of the subject incident, he was in the ambulette loading clients in the rear, he turned around and observed plaintiff's decedent falling out of the passenger door. He stated that he observed that plaintiff's decedent's feet were on the first step, the black hard plastic step after the running board, as she was falling backwards. Mr. Doherty stated that he did not know where plaintiff's decedent's hands or arms were at the time but that he did not see anyone holding her. He explained that normally when clients were being boarded onto the ambulette they would have one hand on the door frame of the ambulette. Mr. Doherty noted that there was a hand bar on the front passenger side door but no type of railing or bar for someone to hold onto with the double doors. In addition, Mr. Doherty testified that he did not know how plaintiff's decedent got to that spot and that the general procedure was that all clients were supposed to be escorted either by him, another driver or a Gurwin aide from the exit door of Gurwin to the ambulette. Mr. Doherty explained that it was for the general safety of the client.

Non-party witness John Woolsey (Mr. Woolsey) testified at his deposition on October 11, 2007 that he was a registrant in the same day care program as plaintiff's decedent and that he was present at the time of the subject incident. Mr. Woolsey explained that he and plaintiff's decedent were taken to and from the day care program by an ambulette for ambulatory participants which did not have a lift. In addition, Mr. Woolsey testified that the subject incident occurred on a sunny Tuesday afternoon at approximately 2:35 p.m. Mr. Woolsey also testified that on that afternoon he and plaintiff's decedent walked unassisted by either the ambulette driver or anyone from the staff of Gurwin, he in front and plaintiff's decedent behind him using a cane, from the day care center entrance to the open double doorway of the ambulette parked curbside about eight to ten feet from the day care center entrance. He explained that if the client was ambulatory enough, the client would walk out pretty much on his or her own directed by the client's ambulette driver or a Gurwin staff member. He added that the ambulette driver would generally assist plaintiff's decedent to board the ambulette by holding her under the arm.

According to Mr. Woolsey, just prior to the subject incident, he was standing on the sidewalk holding the left door of the double doors of the ambulette, which was parked right up against the sidewalk, and plaintiff's decedent was behind him when the driver, who was inside the ambulette assisting someone into a seat, said "okay, hold on a minute" and continued to assist that person inside the ambulette. Mr. Woolsey stated that at that point he turned to the right and looked back to the front entrance of the day care center to see if anyone else was coming out. According to Mr. Woolsey, there were no Gurwin staff members present outside of the day care center. However, prior to turning back around, Mr. Woolsey heard "Oh, my God!" and when he did turn around he saw plaintiff's decedent on the ground looking up towards the sky. Mr. Woolsey did not actually witness how plaintiff's decedent got to the ground. It was his understanding that she was attempting to board the ambulette from behind him. According to Mr. Woolsey, the only thing that plaintiff's decedent said was "Oh, my God, oh, my God, my back." He testified that he was not aware of anyone who actually witnessed the incident.

Joyce E. Flynn (Ms. Flynn) testified on behalf of defendant Gurwin on June 18, 2007 stating that she was the director of the Adult Day Health Program and that on the date of the subject incident, she was on vacation. In addition, Ms. Flynn testified that on the date of said incident, Gurwin had a written agreement with American Medical Response regarding the transportation of people to and from the day care center. Ms. Flynn described the procedure when the clients were to leave as follows: Gurwin would have two staff members in the lobby who would call out the names of the clients who would be leaving on a particular ambulette; then a staff member would escort or assist those clients to the main lobby; and then the ambulette driver would take the client from the lobby to the ambulette. According to Ms. Flynn, if a client was cognitively or physically challenged, a certified nursing assistant would assist the ambulette driver in taking the client out to the ambulette, but not in putting the client in the ambulette. She also testified that if the ambulette driver was putting a client in the ambulette and the next client was in need of assistance, an aide would take the client out to the ambulette but not into the ambulette and would remain with the client until the driver came to the client. Ms. Flynn further explained that cognitively challenged would be somebody with dementia or mental retardation and that physically challenged could be someone who was wheelchair bound, was unsteady, had poor vision or had poor hearing. She stated that the procedure for clients who did not fit the category of cognitively or physically challenged would involve the ambulette driver coming to the lobby or the door and then escorting a client or a small group of clients to the ambulette. Ms. Flynn testified that plaintiff's decedent had been determined by a physical therapy assessment to be safe in ambulation with a cane indoors and a walker outside.

However, Ms. Flynn testified that she did not know if on the date of the subject incident plaintiff's decedent showed any indication of weakness in walking; what she was being treated for during the period up to February 14, 2002; whether plaintiff's decedent had a cast or sling on her arm on the date of the incident; whether plaintiff's decedent used a cane or walker on the date of the incident; or whether plaintiff's decedent had a heart condition on said date. According to Ms. Flynn, plaintiff's decedent was permitted to walk from the facility to the ambulette with the use of a cane or a walker and it would be the responsibility of the ambulette driver to see that plaintiff's decedent got on the ambulette safely. She stated that if a person was on the ambulatory van and was not challenged in any way, the ambulette driver would take them to the ambulette. According to Ms. Flynn, she learned of the subject incident from a nursing supervisor who had retired about two years prior to the deposition. Ms. Flynn also testified that plaintiff's decedent's physical therapy assessment stated that she should use a cane for indoors and a walker for outside and that she was aware that plaintiff's decedent had a cane and a walker.

Initially, the Court notes that there is no evidence in the record to support those claims as against defendant Gurwin based on premises liability alleging that plaintiff's decedent's injuries resulted from defendant Gurwin's negligence in its control, maintenance, repair and inspection of its driveway and sidewalk abutting the premises. Specifically, there is no evidence of any unsafe, hazardous, dangerous or trap-like condition in the area where plaintiff's decedent was standing prior to her fall.

In addition, the proffered proof reveals that an ambulatory day care client such as plaintiff would exit the day care center's entrance, either alone or in a small group, accompanied by the ambulette driver to the ambulette and that the ambulette driver would assist the client(s) in boarding the ambulette under the ambulette driver's direction. However, there was no requirement on the part of defendant Gurwin or defendant American Medical Response that either a Gurwin staff member or an ambulette driver wait with

the clients waiting to board the ambulette. There is no proof from anyone who actually witnessed plaintiff's decedent just prior to her fall as she was attempting to board the ambulette. The deposition testimony of the ambulette driver, Mr. Doherty, who transported plaintiff's decedent to Gurwin's day care program on the day of the incident and witnessed plaintiff's decedent falling from the ambulette's doorway that afternoon and the deposition testimony of another day care program client, Mr. Woolsey, who took the same ambulette as plaintiff's decedent and was standing next to her when she fell reveals that the ambulette driver was assisting another client to be seated in the rear of the ambulette and stated, "okay, hold on a minute," directing plaintiff's decedent and Mr. Woolsey, who were standing outside the ambulette waiting to board. It appears that plaintiff's decedent did not follow said direction and attempted to board the ambulette on her own when Mr. Woolsey, who was either next to her or in front of her, turned around at the ambulette's doorway. It would be sheer speculation to conclude that plaintiff's decedent's fall was caused by some defect of the ambulette without any proof of the manner in which she attempted to board the ambulette or exactly what caused her to fall backwards. Moreover, there is no evidence that the ambulette driver directed plaintiff's decedent to enter the ambulette without his assistance (see, Foley v Golub Corp., 252 AD2d 905 [3rd Dept 1998]; compare, Garcia v Hope Ambulette Service Corp., 307 AD2d 860 [1st Dept 2003]). Furthermore, without proof of how plaintiff's decedent's fall actually occurred, it would also constitute speculation to conclude that any negligence by defendant Gurwin in failing to have a staff member standing with plaintiff's decedent while she waited to board the ambulette caused plaintiff's decedent's fall.

Plaintiff's submissions in opposition to the defendants' requests for summary judgment fail to raise a triable issue of fact (see, Zuckerman v City of New York, 49 NY2d 557 [1980]). Plaintiff's testimony that plaintiff's decedent had told her that a female Gurwin aide, whose name she did not know, who was assisting plaintiff's decedent onto the ambulette became distracted causing plaintiff's decedent to fall backwards, without more, constitutes inadmissible hearsay (see, Ventriglio v Staten Island Univ. Hosp., 6 AD3d 525 [2nd Dept 2004]). Inasmuch as plaintiff's decedent's injuries allegedly occurred as a result of falling from the ambulette and not while walking to the ambulette, plaintiff's contentions that plaintiff's decedent was unsteady while ambulating due to wearing a cast and sling on her right arm compounded by the unsafe use of a cane rather than a walker in walking from the Gurwin entrance to the ambulette lacks probative value. Plaintiff has proffered no medical evidence or proof that plaintiff's decedent's arm was in a cast and a sling at the time of the subject incident such that she would have required a Gurwin staff member to escort her to the ambulette. Even plaintiff's contentions that the subject accident was caused by the alleged negligence of defendants in allowing multiple clients to be taken from the Gurwin lobby to the ambulette and in failing to have a Gurwin staff member or an ambulette driver standing next to the clients waiting to board the ambulette are rendered speculative without evidence of the manner in which the accident occurred. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a motion for summary judgment (see, Zuckerman v City of New York, supra; see also, Earle v Channel Home Center Inc., 158 AD2d 507 [2nd Dept 1990]).

Plaintiff also submits the affidavit of an orthopedist who was not personally familiar with plaintiff's decedent but who had reviewed her medical records and the deposition transcripts of the instant action for the purposes of rendering the affidavit. Said orthopedist opines to a reasonable degree of medical certainty that the injuries sustained by plaintiff's decedent were proximately caused by deviations

Alexander v American
 Index No. 05-4193
 Page No. 7

from the standards of care of defendants Gurwin and American Medical Response in improperly monitoring and supervising plaintiff's decedent and leaving her unattended as well as in failing to assist her in boarding the ambulette despite their obligations to plaintiff's decedent as a "physically challenged" patient under their care. Said affidavit of plaintiff's expert contains only conclusory opinions regarding the defendants' alleged negligence, which were insufficient to raise a triable issue of fact (see, Gargiulo v Geiss, 40 AD3d 811 [2nd Dept 2007]). Plaintiff's remaining contentions lack merit.

Moreover, plaintiff's assertions concerning the necessity of further discovery, including obtaining items of discovery that were requested during defendants' depositions as well as the need to conduct other depositions, in order to oppose the requests for summary judgment pursuant to CPLR 3212 (f) lack merit inasmuch as plaintiff filed her note of issue and the certificate of readiness for trial indicating that discovery proceedings known to be necessary were completed; that there were no outstanding requests for discovery; and that the case was ready for trial. A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence, and the plaintiffs failed to make the requisite evidentiary showing (see, Panasuk v Viola Park Realty, LLC, 41 AD3d 804 [2nd Dept 2007]). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion (see, Kimyagarov v Nixon Taxi Corp., 45 AD3d 736 [2nd Dept 2007]). Therefore, defendants American Medical Response and Gurwin are entitled to summary judgment dismissing the complaint and any and all cross claims as against them.

In light of the above, the cross-motion (007) by plaintiff to compel defendants to provide outstanding discovery and the motion (006) by defendant American Medical Response and the cross-motion (008) by defendant Gurwin for protective orders quashing plaintiff's subpoenas duces tecum dated January 15, 2008 served upon them are denied as moot.

Accordingly, the motion (004) by defendant American Medical Response and the cross-motion (005) by defendant Gurwin for summary judgment dismissing the complaint and any and all cross claims as against them is granted. In addition, the cross-motion (007) by plaintiff to compel and the motion (006) by defendant American Medical Response and the cross-motion (008) by defendant Gurwin for protective orders are denied as moot. The remaining causes of action as against John Doe 1 and 2 are dismissed and the complaint is dismissed in its entirety.

Dated: July 24, 2008


 J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION