

**Alfarone v Robinson**

2010 NY Slip Op 30297(U)

January 19, 2010

Supreme Court, Queens County

Docket Number: 12134/07

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES  
Justice

PART 17

-----X  
SALVATORE ALFARONE,

Plaintiff,

-against-

Index No. 12134/07  
Motion Date: 1/13/10  
Motion Cal. No.: 2

PAMELA EADY ROBINSON, a/k/a PAMELA  
EADY, PAMELA EADY ROBINSON, as Trustee  
of the GLORIA C. EADY Irrevocable Trust and  
GLORIA C. EADY Irrevocable Trust,

Defendants.

-----X  
-----X

PAMELA EADY ROBINSON, a/k/a PAMELA  
EADY, PAMELA EADY ROBINSON, as Trustee  
of the GLORIA C. EADY Irrevocable Trust and  
GLORIA C. EADY Irrevocable Trust,

Third-Party Plaintiff,

-against-

PATRICIA GUZOWSKI, DR. ANGELA KEDZIOR  
and ELMHURST HOSPITAL CENTER,

Third-Party Defendants.

-----X

The following papers numbered 1 to read on this motion by Defendants/Third-party plaintiffs  
**PAMELA EADY ROBINSON, a/k/a PAMELA EADY, PAMELA EADY ROBINSON,**  
**as Trustee of the GLORIA C. EADY Irrevocable Trust and GLORIA C. EADY**  
**Irrevocable Trust,** for an order pursuant to CPLR 3212, granting summary judgment in  
their favor and dismissal of the complaint as against them; cross-motion by Third-party  
defendants **PATRICIA GUZOWSKI and DR. ANGELA KEDZIOR** for an order granting  
summary judgment in their favor pursuant to CPLR § 3212, and dismissal of the complaint as  
against them; and cross-motion by plaintiff for additional discovery.

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Upon the foregoing papers it is ordered that the motion by Defendants/Third-party plaintiffs PAMELA EADY ROBINSON, a/k/a PAMELA EADY, PAMELA EADY ROBINSON, as Trustee of the GLORIA C. EADY Irrevocable Trust and GLORIA C. EADY Irrevocable Trust, for an order pursuant to CPLR 3212, granting summary judgment in their favor and dismissal of the complaint as against them is granted; the cross-motion by Third-party defendants PATRICA GUZOWSKI and DR. ANGELA KEDZIOR for an order deleting Elmhurst Hospital from the caption and granting summary judgment in their favor pursuant to CPLR § 3212 and dismissal of the third-party complaint as against them is denied; and the cross-motion by plaintiff for additional discovery is denied, for the following reasons:

In an Order of this Court, dated February 28, 2008, the motion by defendants/third-party plaintiffs PAMELA EADY ROBINSON, a/k/a PAMELA EADY, PAMELA EADY ROBINSON, as Trustee of the GLORIA C. EADY Irrevocable Trust and GLORIA C. EADY Irrevocable Trust for an order pursuant to CPLR 3215 directing the entry of a default judgment against third-party defendants PATRICA GUZOWSKI, DR. ANGELA KEDZIOR and ELMHURST HOSPITAL CENTER in defendants/third-party plaintiffs' favor, was granted, without opposition. The Court found that Defendants/Third-party Plaintiffs were entitled to judgment over and against the third-party defendants Patrica Guzowski, Dr. Angela Kedzior and Elmhurst Hospital Center in the same amount, or in such proportionate amounts as third-party defendants acts and/or omissions contributed thereto.

In an order of this Court, dated, January 14, 2009, this Court denied defendant's motion for summary judgment, without prejudice to renewal after completion of discovery, if defendants be so advised. The Court found that since the motion was made very shortly after defendant Eady Robinson was deposed, plaintiff had not had an adequate opportunity to conduct discovery relating, among other things, to Eady Robinson's authority and opportunity to control her brother's conduct and her awareness of the need for such control. Additional discovery having been completed, defendants have renewed their motion for summary judgment.

According to the complaint, and the uncontested facts, as presented in the moving papers, this action stems from personal injuries plaintiff, a New York City Police Officer, sustained when he attempted to execute a mental-hygiene warrant on Eric Eady and Mr. Eady resisted arrest and had to be subdued. Eric Eady is not a party to this lawsuit, but, his sister, defendant Pamela Eady Robinson is as the trustee of defendant Gloria C. Eady Irrevocable Trust, and in her individual capacity. The Trust owns the premises where the incident occurred. Defendants commenced a third-party action against Patricia Guzowski, Dr. Angela Kedzior, and Elmhurst Hospital. Patricia Guzowski is a social worker who treated Eric Eady at the Mobile Crisis Center at Elmhurst Hospital. Dr. Angela Kedzior also treated Eric Eady at the Elmhurst Hospital.

Prior to the September 20, 2005 incident, Eric Eady had become depressed and withdrawn, apparently due to his father's death in 1994. By 2005, his condition was such that his sister Pamela contacted Elmhurst Hospital for help. She then met with third-party defendant Dr. Kedzior in the summer of 2005 and on several occasions they had tried to get Eric to voluntarily obtain help from their mental health clinic. When he refused, Dr. Kedzior recommended that she issue a mental hygiene warrant and take Eric into custody.

On September 20, 2005, plaintiff and his partner responded to a radio dispatch to assist with the issuance of a mental hygiene warrant on an emotionally disturbed person at 24-17 96<sup>th</sup> Street, Elmhurst, Queens, New York. Upon arrival, plaintiff spoke with third-party defendant Dr. Kedzior. She told him that Eric Eady, the subject of the mental hygiene warrant, was not a violent person and she did not expect any problems. Plaintiff also spoke with Eric's mother and sister, both of whom confirmed that Eric was not violent. Plaintiff was the ranking officer on the scene and prior to seeing Eric, he made the determination to "call off" emergency services support. Thereafter, plaintiff and the three other police officers went into the kitchen and waited for Eric to be called. Moments later, Eric entered the living room and plaintiff saw him and described him as 6'3" and 400 lbs. Eric indicated his refusal to leave the house and plaintiff then entered the living room with his handcuffs in hand. As plaintiff and the three other officers approached, Eric swung at the plaintiff and was then subdued by the police officers. As a result of this incident, plaintiff claims to have suffered physical injury and brought the instant action to recover his damages.

Plaintiff alleges that the failure of the above named parties ("the defendants" and "third party defendant") to exercise reasonable care to prevent Eric Eady from harming himself and others, particularly the plaintiff was the proximate cause of plaintiff's injuries. Plaintiff alleges that a purpose of the Trust was the care and supervision of the subject property and of Eric Eady. Eric Eady is a mentally challenged and mentally disturbed individual. The defendants brought a third-party action against three additional parties ("the third-party defendants") alleging in that the third-party defendants were in charge of Eric Eady, on September 20, 2005. The third-party defendants are Elmhurst Hospital Center, the physician in charge of Eric Eady, Dr. Angela Kedzior, and the social worker in charge of Eric Eady, Patricia Guzowski, both affiliated with Elmhurst Hospital Center. The third-party complaint alleges, *inter alia*, that the third-party defendants evaluated Eric Eady and failed to advise the New York Police Department and particular the plaintiff of Eric Eady's allegedly violent prior behavior.

Regarding the motion for summary judgment by Defendants/Third-party plaintiffs Pamela Eady Robinson, as Trustee of the Gloria C. Eady Irrevocable Trust and Gloria C. Eady Irrevocable Trust, they claim summary judgment in their favor and dismissal of the complaint is appropriate on the following grounds: plaintiff has not sued the proper party, the Gloria C.

Eady Irrevocable Trust, as landowner, did not have a duty to supervise Eric Eady, Eric's violent behavior was not foreseeable, the Trust did not have the ability to control Eric's conduct at the time of the incident, neither Pamela Eady Robinson, individually or as trustee of the Gloria C. Eady Irrevocable Trust, or the trust itself had a duty to supervise Eric Eady, and plaintiff was allegedly injured while he was engaged in, and as a consequence of, his official duties as a police officer.

Plaintiff opposes this motion claiming that it is premature since discovery is not complete. Plaintiff has requested, in his Cross Motion an in camera inspection of the records of the third-party defendant, Elmhurst Hospital Center with regard to the mental status and prior violent propensities of Eric Eady. He claims that, absent a final review by this Court of the aforementioned record, plaintiff will be severely prejudiced in his attempt to elicit information, which may bear on the third-party defendant and defendants' knowledge of the Eric Eady's violent propensities. He also claims that absent a review of the medical records of Eric Eady and all documents upon which the Mental Hygiene Warrant was based, the plaintiff will not be in a position to oppose the within motions for summary judgment, and will thus be severely prejudiced in prosecuting this matter. Third party defendants do not oppose the motion by defendants.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, Barr v. County of Albany*, 50 NY2d 247 (1980); *Miceli v. Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v. March*, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in *Daliendo v Johnson*, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

Initially, the Court notes that in support of their motion, defendants have submitted, *inter alia*, the pleadings, deposition transcript of Pamela Eady Robinson and plaintiff. In order to establish a prima facie case of negligence, the plaintiff must demonstrate: (1) a duty owed by defendant to plaintiff; (2) a breach of that duty; and (3) an injury suffered by plaintiff as the result of that breach. *Solomon v City of New York*, 66 NY2d 1026, 1027 (1985.) Landowners and business proprietors have a duty to maintain their properties in reasonably safe condition and this duty may extend to controlling the conduct of third persons who frequent or use the property, at least under some circumstances. *See, DiPonzio v Riordan*, 89 NY2d 578 (1997.) Liability for the negligent acts of a third party is not ordinarily imposed unless the defendant has the authority, as well as the ability, to control that party's actions; the mere fact that the

defendant could have exercised that control " 'as a practical matter' " does not create a duty to do so ( Purdy v Public Adm'r of County of Westchester, 72 NY2d 1, 8, quoting D'Amico v Christie, 71 NY2d 76, 88.)

Furthermore, it is an elementary tenet of New York law that the risk reasonably to be perceived defines the duty to be obeyed, otherwise stated, the inquiry is whether the accident was within the reasonably foreseeable risks. The particular facts and circumstances to a large extent determine whether a duty arises, however, considerations of public policy are also important. Thus, a person is held to be at fault only when the injury-producing occurrence is one that could have been anticipated. This policy is necessary since " every untoward consequence can theoretically be foreseen with the wisdom born of the event, the law draws a line between remote possibilities and those that are reasonably foreseeable because no person can be expected to guard against harm from events which are so unlikely to occur that the risk would commonly be disregarded." DiPonzio v Riordan, *supra*, at 583.

In the instant case, plaintiff was allegedly injured while attempting to take Eric Eady into custody. Plaintiff claims Pamela Eady and the Trust were negligent in failing to supervise and control Eric and his medical treatment. Plaintiff also alleges that these defendants failed to notify any treating physicians or the police department about Eric Eady's alleged history of violent or assaultive behavior. It has been held that a parent may be held liable in negligence for torts of mentally challenged adult where a) the mentally challenged adult issue is under care and control of parent, b) the parent has knowledge that mentally challenged adult issue has propensity to engage in vicious conduct, and c) has ability or opportunity to control conduct of mentally challenged adult issue, and fails to do so. Miltz v. Ohel, Inc., 165 Misc.2d 167, 627 N.Y.S.2d 891 (N.Y.Sup., 1995). Here, however, plaintiff has not sued Eric's parents or legal guardians. Rather, he commenced this action against an irrevocable trust that owns the property where the incident occurred and Eric Eady's sister. There is nothing before this Court that suggests either the trust or the sister should be held liable for Eric's negligence. Accordingly, defendants have established prima facie entitlement to judgment as a matter of law.

Defendants have also established that the Gloria C. Eady Irrevocable Trust, as landowner, did not have a duty to supervise Eric Eady. While the Trust is the landowner, there is nothing to indicate the Trust was in any way responsible for Eric's behavior. A landowner is not an insurer of the safety of those using property. No liability will be imposed when an injury does not result from unsafe condition but is the direct result of manner in which injured party engaged in voluntary activity and landowner neither participated in nor exercised any supervision and control over activity. *See*, Marino v. Bingler, 60 A.D.3d 645 (2 Dept. 2009.) Here, plaintiff has not identified any dangerous condition that existed on the premises.

Moreover, a premises owner has a duty to control or supervise the conduct of third

persons on the premises when the owner or occupant knows that he or she can and has the opportunity to control such person's conduct and is reasonably aware of the need for such control. Santos v. City of New York, 269 A.D.2d 585 (2d Dep't 2000). However, here, defendants have shown that Eric's behavior was not foreseeable and the Trust did not control or have the ability or authority to control Eric's behavior at the time of the incident. They have submitted evidence that shows Eric never had violent incidences prior to September 20, 2005 and was never diagnosed with a mental disorder until after the subject incident. They have also shown that neither his sister nor mother knew Eric would act violently on September 20, 2005. He had never threatened violence and was never arrested for any reason. Thus, defendants have shown that they had no notice of any purported propensity toward violence on the part of a third-person. *See*, Gordon v. Foster Apartments Group, 260 A.D.2d 540 (2d Dep't 1999).

Additionally, the facts reveal that Eric attempted to assault plaintiff and there is no duty on the part of a landowner to provide measures protecting persons from injuries resulting from criminal activity of third party absent notice of likelihood of criminal conduct which would endanger safety of person such as the one injured because foreseeability of harm is measure of landowner's duty of care. *See* Adiutori v. Rabovsky Academy of Dance, Inc., 149 A.D.2d 637 (2d Dep't 1989) To establish foreseeability, the conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location. Novikova v. Greenbriar Owners Corp., 258 AD.2d 149 (2d Dep't 1999). Defendants have established that Eric never assaulted anyone at the premises before the accident, and there is no evidence of any similar incidents at the premises.

Furthermore, defendants have established that the Trust did not have the ability to control Eric's conduct at the time of the incident. The duty to take reasonable measures to control the foreseeable conduct of third parties arises when there is an ability and opportunity to control such conduct. D'Amico v. Christie, 71 N.Y.2d 76 (1987) Here, defendants have shown plaintiff, a New York City Police Officer attempting to detain an emotionally disturbed person, had the sole ability and authority to control the conduct of all persons on the premises. In fact, if anyone attempted to control Eric's behavior and in some way interfere with plaintiff's duties, they would have been exposed to criminal charges. Penal Law § 195.05. As such, defendants have established that the Trust did not have control over Eric's conduct at the time of the incident. Additionally, there is no basis to impose a duty to supervise her brother, since there is no common-law duty for a sibling to supervise another sibling. *See*, Smith v. Sapienza, 52 N.Y.2d 82 (1981.)

Finally, contrary to defendants' contention, and as this Court has previously held, this action is not barred because plaintiff's injuries were sustained while he was engaged in, and as a consequence of, his official duties (General Obligations Law § 11-106 [1]; *see* Melendez v. City of New York, 271 AD2d 416 (2d Dept 2000).

Based on the above, defendants established their prima facie entitlement to summary judgment dismissing the complaint. In opposition to this branch of the motion, the plaintiff has failed to raise a triable issue of fact. Plaintiff has not specifically refuted any of the allegations made by defendants. Rather, as previously noted, plaintiff claims this motion is premature due to there being outstanding discovery. This discovery is sought in plaintiff's cross-motion.

Plaintiff filed his note of issue on or about February 11, 2009, certifying that discovery was complete and that the case was ready for trial. A trial date was set for February 4, 2010 and the instant motion was timely made returnable June 12, 2009, within the 120 days allowed under CPLR §3212(a). See Brill v The City of New York, 1 N.Y.3d 501 (2003). At calendar calls for this motion, plaintiff requested and received numerous adjournments, and then, in November, 2009, about nine months after he filed his note of issue and about five months after he was served with the instant cross-motion, plaintiff cross-moved for additional discovery. The additional discovery is an in camera inspection of the medical records of Eric Eady and a further deposition of the third-party defendant Dr. Angela Kedzior..

Pursuant to CPLR 3212 (f), the court has discretion to deny a motion for summary judgment, or to order a continuance to permit affidavits to be obtained or disclosure to be had, if facts essential to justify opposition to the motion may exist but cannot then be stated. For the court to delay action on the motion, there must be a likelihood of discovery leading to such evidence. The mere hope that evidence sufficient to defeat the motion may be uncovered during the discovery process is insufficient. Spatola v. Gelco Corp., 5 A.D.3d 469 (N.Y. App. Div. 2d Dep't 2004.) Here, plaintiff has only shown that he hopes to find certain evidence in this alleged outstanding discovery and this is not sufficient to deny this motion as premature, for a second time. His reliance upon allegations in the third party complaint does not render his claims less speculative since there is no evidence to support those claims. Moreover, the Court cannot ignore the plaintiff's failure to seek this additional discovery prior to his filing the Note of Issue and then waiting several months after the defendants' motion was filed. Accordingly, it would be an abuse of discretion to deny this motion, once again, as premature.

Similarly, the cross-motion by plaintiff seeking the additional discovery is denied. Post-note of issue discovery is allowed only under very limited circumstances. The note of issue is governed by CPLR § 3402 and the certificate of readiness by 22 NYCRR 202.21. In combination by filing them, the plaintiff informs the court that discovery is complete or has been waived. When a case is not ready for trial the plaintiff should not file the note of issue or certificate of readiness. This requirement has been strictly construed by the courts, absent any unusual circumstances. See Haviland v. Smith, 101 A.D.2d 626 (3d Dep't 1984).

After filing a note of issue, a court will only allow additional disclosure where the party seeking such discovery demonstrates "unusual or unanticipated circumstances" which developed after the note of issue was filed. 22 NYCRR 202.21[d]. Here, plaintiff has not set

forth either. Audiovox Corp, v. Benyamini, 265 A.D.2d 135 (2d Dep't 2000), First, there is no reason why the discovery sought could not have been requested before the filing of the Note of Issue. Id. The “unusual or unanticipated circumstances” must, the Court held, develop after the filing of the Note of Issue. Id. In the instant case, the plaintiff does not even try to make such a showing. At no time prior to filing the Note of Issue did plaintiff seek a court order for an in-camera inspection of Mr. Eady’s records. Nor is there any indication that he ever sought an authorization from Eric Eady himself for an authorization for his records. Plaintiff has offered no explanation as to his delay in seeking this discovery. His claim that an in camera review of Eric Eady’s medical records “might bear on the prior violent propensities of Eric Eady” does not set forth an “unusual and unanticipated” circumstance. Moreover, Eric Eady’s behavior has been the subject of this litigation since September 20, 2005, so plaintiff cannot claim the need for discovery on this issue was not anticipated.

Similarly his request for a further deposition of Dr. Kedzior to compel her to answer questions which were not previously answered because of the confidentiality constraints, does not meet the “unusual and unanticipated circumstances” standard. Defendant Dr. Kedzior was deposed on February 20, 2009 and plaintiff’s attorney was given notice of the deposition and failed to attend. He did not seek an adjournment and he did not seek to have the deposition rescheduled. He thereby waived his right to question the third party defendant. Thereafter, plaintiff’s counsel was timely provided with a transcript of the doctor’s testimony and he did not make a motion to seek another deposition or to have the Court order that Dr. Kedzior respond to the unanswered questions. Rather, he filed his Note of Issue. If plaintiff was not satisfied with the limitations placed on Dr. Kedzior’s ability to answer questions about Eric Eady’s care and treatment, he had the opportunity to rectify such prior to filing the Note of Issue.

Moreover, Dr. Kedzior responded to all proper questions put to her by the Eady Trust who, it should be noted, did not seek a further deposition or responses to the unanswered questions. As a health care provider, Dr. Kedzior was bound by New York’s Mental Hygiene Law as well as HIPPA to protect patient confidentiality of the non-party Eric Eady, who had not put his mental health at issue in this suit. Dr. Kedzior’s testimony was consistent with her obligations under the statutes which, were she to breach, she could be subjected to steep fines and other sanctions.

Based on the above, plaintiff has not made a showing under 22 NYCRR 202.21 (d) why he is entitled to any further discovery - either an in camera record review of Eric Eady’s medical records or another deposition of Dr. Kedzior. Singh v. 244 W. 39<sup>th</sup> St. Realty, Inc., 65 A.D.3d 1325 (2d Dep’t 2009.) Accordingly, plaintiff’s cross-motion is denied in its entirety and there is no basis to delay deciding the motion by defendant’s. As set forth above, defendants established their entitlement to summary judgment and plaintiff has not provided

any substantive basis to deny the motion. Accordingly, the motion by Defendants/Third-party plaintiffs PAMELA EADY ROBINSON, a/k/a PAMELA EADY, PAMELA EADY ROBINSON, as Trustee of the GLORIA C. EADY Irrevocable Trust and GLORIA C. EADY Irrevocable Trust, for an order pursuant to CPLR 3212, granting summary judgment in their favor and dismissal of the complaint as against them is granted.

The cross-motion by cross-motion by Third-party defendants PATRICA GUZOWSKI and DR. ANGELA KEDZIOR for an order deleting Elmhurst Hospital from the caption and granting summary judgment in their favor pursuant to CPLR § 3212 and dismissal of the third-party complaint as against them is denied. As mentioned above, by Order of this Court, dated February 28, 2008, these defendants were found to be in default. The Court records indicate that Order was never vacated, modified, or reversed on appeal. Accordingly, third-party defendants PATRICA GUZOWSKI, DR. ANGELA KEDZIOR and ELMHURST HOSPITAL CENTER cannot make the instant cross-motion. However, since the complaint is dismissed, there is no basis to find these defendants are liable to defendants for any damages stemming from plaintiff's alleged injuries on September 25, 2005. Accordingly, the third-party complaint is dismissed.

**DATED: JANUARY 19, 2010**

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**ORIN R. KITZES, J.S.C.**