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| <b>Estate of DeMarco v All Is. Ambulette, Inc.</b>                                                                                                                                                                         |
| 2010 NY Slip Op 30835(U)                                                                                                                                                                                                   |
| April 7, 2010                                                                                                                                                                                                              |
| Supreme Court, Suffolk County                                                                                                                                                                                              |
| Docket Number: 07-18864                                                                                                                                                                                                    |
| Judge: Ralph T. Gazzillo                                                                                                                                                                                                   |
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The defendants now move for summary judgment dismissing the complaint against them on the grounds that the plaintiffs' allegations are based entirely on inadmissible hearsay. In support of their motion, the defendants submit the deposition testimony of plaintiff Rose Ann Allen who testified that her father, Mr. DeMarco, suffered a stroke in 1990, and as a result he was paralyzed on his right side and confined to a wheelchair. She explained that four days a week Mr. DeMarco would attend a facility called the Islip Adult Day Care Center (hereinafter "the Center"), and that he would get to and from the Center by an All Island ambulette. Ms. Allen further testified that a home health aide would normally get Mr. DeMarco out of bed and ready to go in the morning, and then the ambulette would pick up Mr. DeMarco to take him to the Center.

Ms. Allen alleged that on July 31, 2006, she received a phone call from her father's nurse at the Center, telling her that her father had been in an accident in the van on the way to the Center. She alleged that the nurse told her that they were going to put ice on her father's leg and "watch it." Ms. Allen explained that later that day, she went over to her father's house and she spoke to his aide. She alleged Mr. DeMarco's aide told her that when Mr. DeMarco came home from the Center, she did not like the way his leg looked, and that she had called the family physician. Ms. Allen alleged that after talking to the aide, she spoke to Mr. DeMarco and he told her that: he injured his right leg; that he was in the van, but was not strapped in properly; that the driver was driving recklessly and very fast; and that he hit his leg on the bar that was in the van. She alleged that the incident occurred on the way to the facility. Ms. Allen also stated that her father went to the Center the next day, but was sent to the hospital because he had a fever. She alleged that her father stayed in the hospital for two weeks where the doctors treated an open wound; then he went to a nursing home for less than a week; and finally, because he again had a fever, he was readmitted to the hospital, where he passed away on August 23, 2006.

The defendants also submit the deposition testimony of Frank Lucarelli who testified that he has been employed by defendant All Island as a driver for approximately three years, and that in July of 2006, he would pick up elderly passengers and take them to day care. Mr. Lucarelli explained that when he began his employment with All Island he was shown the basics for tying down passengers' wheelchairs, and that he had prior experience from years ago when he drove a handicapped school bus. He further explained that prior to driving the van he always checked the tie-downs to make sure they were not broken, and he would also inspect the brakes, horn, and lights every morning. Mr. Lucarelli alleged that he would complete this pre-trip check list on a daily basis, sign it, and then turn it in at the office, where it would be kept until the next Department of Transportation inspection. He alleged that Department of Transportation performs an inspection of the van every six months. In addition, Mr. Lucarelli stated that he would pick up Mr. DeMarco about nine o'clock in the morning, that Mr. DeMarco had an electric wheelchair, and that he would not push Mr. DeMarco's chair at all. Mr. Lucarelli explained that the wheelchair weighed about 300 pounds and could not be pushed without the motor. Mr. Lucarelli also explained that Mr. DeMarco would get the wheelchair on the lift on his own, and get the wheelchair into the van on his own.

Mr. Lucarelli further testified that he did not specifically remember picking up Mr. DeMarco on the morning of July 31, 2006, and thought the alleged incident was on August 1, 2006. Mr. Lucarelli alleged that if a person was injured in the van he was required to fill out an incident report. He stated that he never filled out an incident report in this case, that he never learned that Mr. DeMarco injured his

leg, and that no one ever told him that Mr. Demarco injured his leg. Mr. Lucarelli testified that when he had Mr. DeMarco in the back of the van, the wheelchair was stationary and it could not be budged. Mr. Lucarelli maintained that he picked up Mr. DeMarco a couple of times after July 31, 2006, and he never had any conversation with Mr. DeMarco about Mr. DeMarco injuring himself.

Additionally, the defendants submit the deposition testimony of Frank Stella, the defendants' general manager. Mr. Stella testified that he himself made weekly inspections of all of the vans, including checking the tie-downs, and that he had checked the subject van on July 30, 2006, and everything was in working order. Mr. Stella also testified to the effect that his duties required him to be at the Center on a daily basis to make sure when the vans came in, they were unloaded properly. Mr. Stella alleged that he remembered Mr. Lucarelli dropping off Mr. DeMarco at the Center on the morning of July 31, 2006. Mr. Stella stated that he untied the rear tie-downs and Mr. Lucarelli untied the front tie-downs. Mr. Stella explained that once the tie-downs were removed from the chair, Mr. DeMarco backed himself onto the lift, and the lift was lowered. Mr. Stella alleged that he told Mr. DeMarco to have a nice day and Mr. DeMarco never told him that he had injured himself that day, and Mr. DeMarco made no complaints. Mr. Stella testified that approximately five days later, he was notified by an administrator at the Center that Mr. DeMarco was injured.

Lastly, the defendants submit the deposition of Nicole Charlotin, who was Mr. DeMarco's home health aide and was waiting for him at his home on July 31, 2006. Ms. Charlotin testified to the effect that when Mr. DeMarco returned from the Center that afternoon, Mr. DeMarco was crying in pain and told her that the driver did not lock the wheelchair in the van and it rolled into an iron bar and he hit his right leg. Ms. Charlotin also testified that Mr. DeMarco told her the incident occurred on the way to daycare. Ms. Charlotin was of the opinion that Mr. DeMarco had not told the daycare center about his injury on the day of the accident, because they would have called an ambulance. Ms. Charlotin alleged that when she looked, she saw a mark in the middle, and in the front, of his right leg. She also alleged that the doctor came to the house and checked the leg, and told her that the leg was broken. She alleged that the doctor prescribed Motrin because Mr. DeMarco did not want to go to the hospital. In addition, Ms. Charlotin testified in pertinent part that Mr. DeMarco wanted to go to daycare the next day and that before she left the house, she left a note on the door for the driver, asking him what happened to Mr. DeMarco in the van and asking him to call her cell phone number. Ms. Charlotin alleged that the driver called her from Mr. DeMarco's telephone and told her that when he was driving Mr. DeMarco to daycare, Mr. DeMarco hit his leg in the van. However, Ms. Charlotin alleged several times that the driver never said the wheelchair was not locked.

The defendants argue that any determination as to how Mr. DeMarco injured his leg would be premised upon pure speculation. They contend that Ms. Allen's testimony regarding the alleged incident is based upon the hearsay statements of her father and the double hearsay statements of the home health aide. They allege that Ms. Charlotin's deposition testimony regarding the alleged incident is likewise based entirely on inadmissible hearsay. The defendants contend that it is undisputed that neither of these women witnessed or have personal knowledge of the alleged incident. The defendants assert that because the record is devoid of any admissible evidence as to how Mr. DeMarco injured his leg, their motion for summary judgment should be granted.

The plaintiffs oppose this motion, submitting the same deposition testimony of Ms. Charlotin, Mr. Lucarelli, and Mr. Stella. They argue that the testimony of Ms. Charlotin regarding her conversation with Mr. DeMarco immediately following the accident is admissible. The plaintiffs contend that Mr. DeMarco's statements to Ms. Charlotin that he injured his leg when the wheelchair unexpectedly rolled forward into a metal bar, is admissible under declaration of present pain and suffering made in contemplation of treatment exception to the hearsay rule. The plaintiffs allege that such declarations are admissible as an exception to the hearsay rule regardless of the availability of the declarant. The plaintiffs state that the out of court declarant must subjectively believe that the statement is being made in anticipation of treatment or diagnosis. They maintain that, in this case, Mr. DeMarco was describing what had happened to his primary care giver. They contend that Mr. DeMarco's statements were obviously relevant to Ms. Charlotin's examination and ability to discover the cause of the pain and whether further medical treatment was necessary. Additionally, the plaintiffs allege that the testimony of Ms. Charlotin regarding the phone call she received from the driver, in which the driver admitted that Mr. DeMarco injured his leg in the van, is also admissible. The plaintiffs argue that admissions by a party of any fact material to the issue are admissible competent evidence against him. Thus, contend the plaintiffs, Mr. Lucarelli's statement that Mr. DeMarco injured his leg while aboard the van clearly falls under this exception to hearsay.

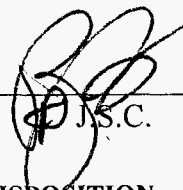
Initially, the Court finds that the defendants have established their prima facie entitlement to summary judgment by demonstrating through the deposition testimony of Mr. Lucarelli and Mr. Stella that the wheelchair was properly secured on the morning of July 31, 2006, and that their actions did not cause Mr. DeMarco's injury. The defendants have also established that the plaintiffs have no personal knowledge as to the cause of Mr. DeMarco's injury and that the plaintiffs' allegations regarding the wheelchair not being properly secured and rolling into a metal bar were based entirely on hearsay (*see Rodriguez v Sixth President, Inc.*, 4 AD3d 406, 771 NYS2d 368 [2004]).

In opposition, the plaintiffs have failed to raise a triable issue of fact. "Although hearsay evidence may be considered in opposition to a motion for summary judgment, it is insufficient to bar summary judgment if it is the only evidence submitted" (*Stock v Otis Elevator Co.*, 52 AD3d 816, 817; 861 NYS2d 722, 723 [2008], *quoting Rodriguez v Sixth President, Inc.*, 4 AD3d 406, 407 [2004]). Moreover, Ms. Charlotin's statement that Mr. DeMarco told her that the driver did not lock the wheelchair and that the wheelchair rolled to the front of the van where he struck his leg, is not, as claimed by the plaintiffs, admissible under the exception to the hearsay rule dealing with declarations of present pain and suffering in contemplation of treatment. The Court notes that a treating doctor and healthcare provider may testify to the history obtained from a patient if it is relevant to the diagnosis and treatment (*see Scott v Mason*, 155 AD2d 655, 547 NYS2d 889 [1989]; *see also* 1-8-8 New York Evidence Courtroom Manual §1). However, where a statement attributed to the patient is not germane to the diagnosis or treatment, it does not fall within this exception to the hearsay rule and must be excluded (*see Echeverria v City of New York*, 166 AD2d 409, 560 NYS2d 473 [1990]; *see also People v Thomas*, 282 AD2d 827, 725 NYS2d 102 [2001], *lv denied* 96 NY2d 925 [2001]). Here, Mr. DeMarco's statement identifying the driver's alleged failure to secure the wheelchair as the cause of his injured leg, was not relevant to Mr. DeMarco's diagnosis and treatment, and is thus inadmissible. Furthermore, the driver's statement to Ms. Charlotin that Mr. DeMarco hit his leg in the van did not constitute an admission against interest (*see George Carmel, Inc. v H.W. Schwab Textile Corp.*, 122

NYS2d 873 [1953]). There is no acknowledgment by the driver that he caused the injury by failing to secure the wheelchair. In fact, Ms. Charlotin specifically testified that the driver did not say what caused the injury. "[A]ny determination as to how the accident occurred would be based on speculation" (*Stock v Otis Elevator Co.*, 52 AD3d 816, 861 NYS2d 722, 723 [2008]). Here, the injury could have been caused by any number of reasons, including Mr. DeMarco's own actions, as he controlled the chair getting in and out of the van.

Accordingly, the defendants' motion for summary judgment is granted. The Court further notes that the derivative claim of plaintiff Rose Ann Allen for loss of services must fall with the other causes of action as against the defendants (*see Wittrock v Maimonides Medical Center- Maimonides Hospital*, 119 AD2d 748, 501 NYS2d 684 [1986], *lv denied* 68 NY2d 607 [1986]).

Dated: 4/7/10

  
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J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION