

McCrae v New York City Tr. Auth.

2014 NY Slip Op 30111(U)

January 15, 2014

Sup Ct, New York County

Docket Number: 402947/05

Judge: Douglas E. McKeon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DOUGLAS E. McKeon
Justice

PART 38

MARY McCRAE
-v-
NEW YORK CITY TRANSIT AUTHORITY ET AL

INDEX NO. 402947/05

MOTION DATE _____

MOTION SEQ. NO. (004)

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

*motion and cross motion are decided as per
the ANNEXED memorandum decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JUN 16 2014

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/15/14

Douglas E. McKeon, J.S.C.
Douglas E. McKeon
Justice Supreme Court

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
MARY MCCRAE, as Administratrix of the Goods,
Chattels Which Were of SHA-KEIA MCCRAE and
MARY MCCRAE, Individually,

Plaintiffs,

-against-

NEW YORK CITY TRANSIT AUTHORITY,
NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION and BELLEVUE HOSPITAL
CENTER,

Defendants.

MEMORANDUM DECISION
Index No. 402947/05

FILED

JAN 16 2014

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HON. DOUGLAS E. MCKEON:

Motions, by defendants New York City Transit Authority (“Transit”) and New York City Health and Hospitals Corporation (“HHC”), for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint in its entirety on the grounds that no material issue of fact exists is denied. Plaintiff’s cross-motion to strike HHC’s answer for alleged spoliation, to preclude HHC from offering proof at trial and for sanctions under 22 NYCRR Part 130 is denied.

This is an action brought by Mary McCrae as “Administratrix of the Goods, Chattels Which Were of Sha-keia McCrae” and Mary McCrae, individually. Plaintiff alleges, among other things, that on December 27, 2003, at approximately 3:00 a.m., Sha-Keia McCrae was struck in the head by a sandbag while standing on a public street located below the elevated Rockaway Avenue train station of the No. 3 line in Brooklyn, New York. Plaintiff alleges that the sandbag was thrown from the platform station. There is no indication in the record who released the sandbag. Sha-Keia McCrae later died at Bellevue Hospital.

Plaintiff alleges that Transit was negligent in its failure to maintain its premises in a reasonably safe condition, including its failure to properly secure the sandbags on the platform so

as to prevent access to the sandbags by the public.

With respect to that aspect of defendant's motion seeking summary judgment as to Transit, defendant argues that Transit cannot be held liable for failure to provide adequate police protection and the plaintiff cannot prove that the sandbag that struck McCrae was owned by Transit.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 (1985). Once the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action. *See Zuckerman v. City of New York*, 49 NY2d at 562. When considering a motion for summary judgment, the court must view the evidence in the light most favorable to the party opposing the motion. *See Makaj v. Metropolitan Transport Authority*, 18 AD3d 625, 626 (2d Dep't 2005).

The evidence and testimony submitted on these motions lead to the reasonable inference that the sandbag came from the sandbox on the elevated platform that was under the control of Transit. This Court finds that this case involves a proprietary function, rather than a governmental function, of Transit to maintain its premises in a reasonably safe condition and there is a question of fact as to whether it failed to do so. At the least, plaintiff demonstrated that material issues of fact exist, such that defendant Transit's motion for summary judgment be denied.

With respect to that aspect of defendant's motion seeking summary judgment as to HHC, a defendant moving for summary judgment in a medical malpractice action must make a prima facie

showing of entitlement to judgment as a matter of law by showing that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not a proximate cause of the injuries alleged. *See Roques v. Nobel*, 73 AD3d 204, 206 (1st Dep't 2010). To satisfy the burden, a defendant must present expert opinion testimony which is supported by the facts in the record and addresses the essential allegations in the bill of particulars. *Id.* If the movant makes a prima facie showing, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact. *Id.*

Plaintiff claims that there was a failure by HHC, at Bellevue Hospital Center, to properly treat Sha-Keia McCrae, who had suffered a fractured cervical vertebrae and resultant paralysis. Defendant argues with support from its experts that the medical care and treatment of Sha-Keia McCrae was within the applicable standards of medical care and that none of the medical treatment proximately caused an injury to her. More specifically, HHC asserts that the following treatment measures were appropriate: the use of antibiotics; the pre-operative work-up for surgical intervention; the attempts to intubate and resuscitate the decedent. HHC also asserts that the events concerning the decedent's clinical status changed due to the rapid development of fever, hypotension and Syndrome of Inappropriate Antidiuretic Hormone Secretion, which ultimately culminated in sepsis (overwhelming widespread infection). HHC concludes that the cascade of symptoms could not all be treated before she died.

Plaintiff opposes defendant's motion with the support of expert affirmations from an internist with a specialty in infectious disease and a radiologist. Plaintiff's infectious disease expert opined that the obvious presence of pneumonia on December 29th dictated that a course of antibiotics was essential for treatment. He elaborates by stating that discontinuing antibiotics given the decedent's symptoms was a departure from the standard of care that caused her symptoms to worsen and

progress, culminating in an overall septic condition that was a substantial factor contributing to her untimely and unnecessary death. Plaintiff's radiologist detailed shortcomings as a result of the absence of diagnostic studies.

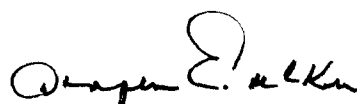
Upon a full review of the submitted papers, this court determines that defendant NYCHHC has not tendered sufficient evidence to eliminate any material issues of fact from this case. *See Zuckerman v. City of New York*, 49 NY2d 557 (1980). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 (1985). Even assuming HHC did make a prima facie showing, plaintiff has demonstrated that material issues of fact exist.

Plaintiff's motion pursuant to CPLR 3126 for an order striking defendant HHC's answer and sanctioning defendant HHC and counsel for alleged spoliation of evidence is denied. While defendant HHC and counsel could have been more diligent in locating the films earlier in the course of this litigation, this Court finds that their actions or lack thereof do not rise to the level warranting sanctions. Moreover, the conduct here does not fall under the categories set forth in 22 NYCRR 130-1.1. *See Sakow v. Columbia Bagel, Inc.*, 32 AD3d 689 (1st Dep't 2006). Accordingly, plaintiff's motion for an order striking defendant HHC's answer and sanctioning same defendant is denied.

This constitutes the decision and order of the court.

Date: January 15, 2014
New York, New York

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NEW YORK
COUNTY CLERK'S OFFICE


Douglas E. McKeon, J.S.C.

Douglas E. McKeon
Justice Supreme Court