

Gillern v Mahoney

2015 NY Slip Op 32017(U)

October 26, 2015

Supreme Court, New York County

Docket Number: 805213/2013

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 8

----- X
 JACQUELINE A. GILLERN, as Administrator
 of the Estate of JOHN J. GILLERN, JR.,
 Individually, K.G., a minor under the
 age of 18 years by her mother and
 natural guardian JACQUELINE A. GILLERN,
 J.G., a minor under the
 age of 18 years by her mother and
 natural guardian JACQUELINE A. GILLERN,

DECISION & ORDER
 Index No. 805213/2013

Plaintiffs,

- against-

ED MAHONEY, MEMORIAL SLOAN KETTERING, THE
 ROCKEFELLER UNIVERSITY HOUSING DEPARTMENT,
 and ROCKEFELLER UNIVERSITY CONDOMINIUM
 ASSOCIATION,

Defendants.

----- X
JOAN M. KENNEY, J.S.C.:

In this wrongful death action, defendants Memorial Sloan Kettering (Sloan), Ed Mahoney (Mahoney), a vice-president of Sloan who is sued individually, Rockefeller University Housing Department, and Rockefeller University Condominium Association (collectively, the Rockefeller defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Plaintiff Jacqueline A. Gillern, the widow and administrator of the estate of John J. Gillern, Jr. (Gillern), seeks damages on behalf of herself and her twin minor infant daughters for the death of her husband, who, at the time of his death, was employed as a lieutenant in the security department of Sloan. Plaintiff, who at the time was a nurse employed by Sloan, drove Gillern home from the annual Sloan facilities department holiday party, at which he became intoxicated. The party was held on December 7, 2012,

starting at 4 p.m., and ending at 9 p.m. Gillern died of asphyxiation in the backseat of his wife's Honda CRV station wagon at their home in Washingtonville, N.Y., in Orange County, approximately three hours after leaving the party.

Plaintiff alleges that defendants were negligent in the conduct of the party, creating both a public and a private nuisance, and that the Rockefeller defendants breached their duty to maintain the premises in a safe condition. Plaintiff further alleges that Sloan and Mahoney, who is Sloan's vice-president of facilities, acted negligently with respect to how Gillern was handled after he became intoxicated, and that, by undertaking to remove Gillern from the party and hand him over to the custody of his wife, by having three Sloan employees lift Gillern and place him on his side in the backseat of her car, these Sloan employees undertook a duty not to leave him worse off than they found him.

Defendants argue that they owed no duty to Gillern to provide medical treatment, that they breached no duty owed to Gillern in the conduct of the party, that there is no causal connection between placing Gillern in the vehicle and his death, and, if there were a causal connection, it is too remote in time and place, and that there are intervening causes, including the fact that Gillern, who was sleeping when plaintiff arrived at their home, was left alone in the car for at least 40 minutes after arriving, during which time he apparently suffered his fatal episode.

The party took place in a large room called the Solarium that is owned by defendant Rockefeller University, and operated by defendant Rockefeller University Condominium Association. Sloan leases 40% of the condominium units in the building where the Solarium is located. The Solarium is part of the common area of the building. As a tenant, Sloan is permitted to use it without fee, merely by filling out a form.

Paul Gabriel (Gabriel) was in charge of organizing the party (exhibit K to Gitnick affirmation at 61). At the time, Gabriel was Sloan's director of housing and parking. At the time of his deposition he had been promoted to vice-president of housing and facilities administration. Gabriel and Mahoney contributed a total of \$2,400 to the cost of the party. These funds were collected from Sloan employees on a pro rata basis, calculated approximately on each employee's level of compensation.

More than \$6,000 was spent on liquor and food. Sloan did not contribute any funds or otherwise officially sanction the party, but, in earlier years, the party had been held in the offices of Sloan. There was no security hired for the party.

At least three volunteer Sloan employees served as bartenders, only one of whom had any formal training as a bartender. There was no limit on how many drinks a guest would be allowed. The bartenders served wine and liquor. Beer was available in kegs on a self-serve basis. Gillern brought his own 12-pack of beer to the

party because he did not like the brand being served.

By all accounts, the party lived up to its reputation for being festive with free-flowing alcohol. It is alleged that more than 300 people attended the party. Plaintiffs allege that this exceeded the legal limit for the Solarium, but Alexander Kogan (Kogan), an associate vice-president of Rockefeller University in charge of plant operations and housing, testified that there was no legal capacity limit in 2012. There were at least two written complaints, made after the party, by residents, of overcrowding, rowdiness in the lobby, and drinking in other parts of the building, and that excess amounts of trash were found in rest rooms on the following day.

Gillern was observed drinking both beer and shots of tequila. At 8:00 p.m., Mahoney observed Gillern in an apparently intoxicated condition, slouching in a chair with his eyes closed, and not verbally responsive. At 8:30 p.m., Gabriel and Mahoney both observed Gillern sitting on the floor next to the chair. Gabriel directed Sloan employees to make Gillern comfortable, and get wet towels and cups of water. One of the Sloan security guards had Gillern's head raised and was feeding him cold water in an attempt to revive him.

In consultation with Gabriel, Sloan security guards placed Gillern on a luggage rack with the intention of taking him down to the lobby to be picked up by plaintiff and driven home. When

Gabriel informed Mahoney of the plan to take Gillern to the lobby to await being picked up by his wife, Mahoney suggested that the luggage rack, with Gillern sitting on it, be placed in a corridor leading away from the elevator until his wife arrived, so that Gillern would not be sitting in the lobby any longer than necessary and would not be embarrassed by being seen by the junior security guards who reported to him.

Mahoney checked on Gillern repeatedly while he was in the corridor, and then returned to help clean up after the party. While on the cart in the hallway, Gillern vomited clear liquid only, and his colleagues continued to administer wet compresses and feed him water from dixie cups.

One of the Sloan security guards called plaintiff to come and pick Gillern up. Plaintiff was delayed because Gillern had the keys to her car and she had to come and get them. Gillern remained in the corridor for fifteen minutes, after which he was taken down in the elevator, still sitting on the luggage cart, to meet his wife at the front entrance.

Gabriel testified at his deposition that, before Gillern was placed on the cart, he heard Gillern say "okay, alright" and that he responded non-verbally with grunts and by shaking his head, but that after he was on the cart, Gillern was no longer acknowledging Gabriel's attempts to communicate (exhibit J to Gitlin affirmation at 167-168). While in the lobby, according to the desk log,

Gillern was "dead drunk," and was vomiting on the luggage rack (Abramoff affirmation, exhibit 3). Plaintiff asserts that Gillern was unconscious in the lobby, and never regained consciousness before he died (Abramoff affirmation, ¶ 63). She testified that he was snoring in the backseat of the car when she arrived at home.

At Gabriel's direction, three Sloan employees lifted Gillern from the luggage rack and placed him on his side, facing the rear, in the back seat of his wife's Honda CRV compact station wagon. Plaintiff testified in her deposition that she asked the Sloan security guards who lifted Gillern into the car whether Gillern needed to go to the hospital and she was told that he did not have to go to the hospital, that he had just had too much to drink and needed to sleep it off. There is evidence that a nurse temporarily employed by Sloan was present while Gillern was on the luggage rack and advised that Gillern needed emergency care, but that her suggestions were not taken and she did not persist (exhibit 5 to Abramoff affirmation).

Plaintiff, accompanied by John Callahan (Callahan), a Sloan employee who lived upstate. Plaintiff stopped once on the FDR Drive to check on Gillern, and then dropped Callahan at his car in a commuter parking lot, and then arrived at her home approximately 15 minutes later, at 11:20 p.m. Gillern was snoring in the back seat. She left him in the car, and went to check on her two minor daughters to make sure they were sleeping. Only her daughters and

her elderly father were present in the home when plaintiff arrived. She then exchanged text messages with a friend who lived nearby to ask whether she could bring Gillern to her house to sleep and recover. She returned to the car at approximately midnight, and found Gillern looking grayish and not breathing. She called an ambulance that arrived promptly.

According to the deposition testimony of the responding EMS technician, Arthur Nodar (Nodar), he arrived simultaneously with a Washingtonville police officer. Nodar immediately ascertained that Gillern was not breathing and had no heartbeat. He observed that Gillern was on the floor of the vehicle, wedged between the front bucket seats and the backseat, that his jacket was covered in vomit, and there was a large quantity of vomit in his mouth (exhibit M to Gitnick affirmation at 34-35). With the help of the police officer and a neighbor, Nodar then removed Gillern from the car. It took four or five attempts. The police officer got in the car and pushed, while Nodar lifted Gillern by the waist, and the neighbor helped pull the legs.

Nodar then intubated Gillern and administered medication in an attempt to restart his heart. Nodar had to use the tip of the tracheoscope to remove vomit from Gillern's airtube in order to intubate him. He was pronounced dead at 1:00 a.m. on the following morning, although no estimation of the precise time of death is recorded.

The autopsy report (exhibit 6 to Abramoff affirmation) attributes the cause of death to "the combined effects of alcohol intoxication and positional asphyxia" (*id.*). The report notes that "truncal obesity" was a contributing cause of death, and characterizes the death as "accidental" (*id.*). As part of the final diagnosis, the autopsy report states that Gillern had an enlarged heart and an enlarged spleen, fluid in the lungs, a "fatty metamorphosis of the liver," and symptoms on the neck that are consistent with asphyxiation. Gillern's blood alcohol concentration (BAC) at the time was .28% (*id.*), apparently measured at least four hours after his last drink. Gillern was five feet nine inches tall, and weighed 260 pounds.

The complaint contains six causes of action. The first is for negligence against all defendants. The second is for both public and private nuisance. The third is for wrongful death. The fourth through sixth, although stated as causes of action, are actually claims for elements of damage for loss of services for plaintiff and each of the two minor daughters, as part of the wrongful death cause of action.

Whether stated as common-law negligence or statutory wrongful death, the essence of the first and third causes of action is negligence, which has three elements: "(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Solomon v City of New York*, 66

NY2d 1026, 1027 [1985]).

The threshold issue in any negligence action is whether the defendant owes a legal duty of care to the plaintiff (see *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232 [2001]; *Sanchez v State of New York*, 99 NY2d 247, 252 [2002]). "[T]he existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations" (*Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 138 [2002]; see *Darby v Compagnie Natl. Air France*, 96 NY2d 343, 347 [2001]).

In order to prevail on this motion, the moving defendants must present sufficient evidence to demonstrate as a matter of law that no question of fact on the issue of negligence is presented (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). That determination, of course, must be made in relation to the court's determination as to the existence and scope of any duty owed by each defendant to Gillern.

The evidence submitted includes the pleadings and bill of particulars, deposition transcripts of the parties and persons who attended the party or responded to the 911 call, as well as the front desk log of the building where the party was held (exhibit 2 to Abramoff affirmation), the university policies of the human resources department (*id.*, exhibit 3), the front desk handbook (*id.*), the affidavit of Ross Mallor, a private investigator (*id.*, exhibit 4), the expert affidavit of Russell Kolins, a security

consultant (*id.*, exhibit 5), and the autopsy report (*id.*, exhibit 6).

All defendants have submitted sufficient evidence to make a *prima facie* showing that they were not negligent in connection with either the conduct of the party or the voluntary intoxication of Gillern, shifting the burden to plaintiff to come forward with sufficient evidence to demonstrate the existence of a question of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The evidence also establishes as a matter of law that no question of fact is presented whether any defendant created a public or private nuisance. Nuisance is an offense against the enjoyment of property, and is actionable by the party whose rights have been disturbed (see *Copart Indus., Inc. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 568 [1977]). This tort does not apply to this case. Even if the party were found to have constituted a nuisance, no factual issue is presented whether the conditions at the party proximately caused Gillern's injury.

Plaintiff erroneously relies upon *D'Amico v Christie* (71 NY2d 76 [1987]) to argue that defendants had a duty to prevent harm to Gillern as a result of his voluntary intoxication. *D'Amico* stands only for the rule that a property owner may have a duty to control the conduct of an intoxicated person to prevent injuries caused by such intoxicated person (*id.* at 85). Nothing in *D'Amico* recognizes, what has not previously existed: "a common-law cause of

action against providers of alcoholic beverages in favor of persons injured as a result of their own voluntary intoxication" (*Sheehy v Big Flats Community. Day, Inc.*, 73 NY2d 629, 636 [1989]).

The remaining basis of liability for negligence is plaintiff's contention that the Sloan employees who undertook to remove Gillern from the lobby of the building where the party was held, and place him on his side in the backseat of plaintiff's car, assumed a duty where none had existed, and they breached that duty by leaving Gillern worse off than when they found him.

In *Seeger v Marketplace* (101 AD3d 1691 [4th Dept 2012]), the plaintiff fainted and collapsed inside a J.C. Penney store. A store employee undertook to place her in a wheelchair and transport her to her car, which she then crashed into the store building. The Appellate Division, First Department, held that

"by intervening when she appeared to be in ill health, defendant's employee voluntarily assumed a duty to plaintiff as a matter of law and, as a result, defendant became obligated to act with due care in her regard based upon the doctrine of respondeat superior. Whether plaintiff's subsequent actions were reasonable and whether they were the proximate cause of her injuries should be resolved by the finder of fact, not on a motion for summary judgment [citations omitted]"

(*Seeger v Marketplace*, 101 AD3d at 1692.

The court holds as a matter of law that the Sloan employees who decided to place Gillern in the backseat of plaintiff's car assumed a duty to act with due care in regard to Gillern. As stated in *Seeger*,

"one does not owe a duty to come to the aid of a person in peril, whether the peril is medical or otherwise Where a party voluntarily assumes a duty to act, the party may not place the person to whom the duty is owed in a position of peril equal to that from which [the person] was rescued, nor may the party change the person's position for the worse by unreasonably putting the person back into the same peril, or into a new one [internal quotation marks and citations omitted]"

(*id.* at 1691).

Sloan has failed to demonstrate as a matter of law that no factual question is presented whether its employees did not place Gillern in a greater peril by removing him from the proximity of a medical establishment and placing him on his side in the cramped backseat of a compact vehicle where he was possibly at greater risk.

Plaintiff has made a sufficient *prima facie* showing that the alleged negligence of Sloan's employees in placing Gillern in the car in the custody of plaintiff was a substantial cause of Gillern's death. Factual issues are presented whether the risk was foreseeable that this 260-pound man could, and did, end up essentially in the sole custody of the plaintiff, who was powerless by herself to remove him from the vehicle, a task that took three men, and was also at risk of death from asphyxiation under the circumstances. As the Court of Appeals has described the burden on summary judgment:

"[t]o carry the burden of proving a *prima facie* case, the plaintiff must generally show that the defendant's negligence was a substantial cause of

the events which produced the injury. Plaintiff need not demonstrate, however, that the precise manner in which the accident happened, or the extent of injuries, was foreseeable [citations omitted]"

(*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]).

Thus, Sloan's defense that there is no proximate causation because of the remoteness in time and location of Gillern's death cannot be determined as a matter of law (see generally *Pagan v Goldberger*, 51 AD2d 508, 509 [2d Dept 1976]; *Schirmer v Yost*, 60 AD2d 789 [4th Dept 1977]).

Sloan has also failed to establish as a matter of law that it is not answerable under the doctrine of respondeat superior for the actions of its employees. A factual issue is presented whether Gabriel and the security guards who lifted Gillern into the vehicle were acting within the scope of their employment (see *Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999]).

Under that standard, an employer can be held liable "so long as the tortious conduct is generally foreseeable and a natural incident of the employment . . . and [the employee is not acting] for solely personal motives unrelated to the furtherance of the [employer's] business" (*id.* at 933). It cannot be said as a matter of law that employees attending a holiday party sponsored by a department of such employee's employer, while attempting to help a senior employee in their department, who is apparently in an intoxicated state, are not acting in furtherance of the employer's

business.

The motion of the Rockefeller defendants for summary judgment dismissing the complaint as against them is granted. As an owner-
lessor in possession of the common area where the party was held,
the Rockefeller defendants' duty is to inspect the common areas and
maintain them "in a reasonably safe and suitable condition
[citations omitted]" (*Wynn v T.R.I.P. Redevelopment Assoc.*, 296
AD2d 176, 179 [3d Dept 2002]). There is "no special duty at common
law incumbent upon an owner of premises to protect a party thereon
from the results of his voluntary intoxication" (*Allen v County of
Westchester*, 109 AD2d 475, 477 [2d Dept 1985]).

I hold, as a matter of law, that the Rockefeller defendants
did not breach any legal duty based on the fact that the
Rockefeller employees at the front desk did not call 911 in
accordance with the procedure in the desk manual for a medical
emergency (exhibit 3 to Abramoff affirmation at 86) when Gillern
was brought into the lobby apparently intoxicated, or stop the
party when there were complaints pursuant to the "three strike
rule" contained in the front desk handbook. That rule, which
applies to complaints of noise or loud music, provides for a
warning to the host on the first and second complaint, and then
shutting the party down on the third complaint (*id.* at 20).
Plaintiff has not demonstrated that a factual question is presented
whether the desk clerk had a sufficient basis to stop the party

before Gillern became intoxicated and was placed in the vehicle, or whether stopping the party would have prevented plaintiff's injuries.

There is no merit to plaintiff's contention that, because the Rockefeller defendants are involved in medicine, albeit research, they have a duty to provide medical care to Gillern, under the circumstances. The Rockefeller defendants were merely the lessors of the space, and there is no evidence of a doctor-patient relationship.

Simply put, neither Gillern's intoxication nor the alleged excesses of the party constituted an unreasonably unsafe condition on the premises.

The motion of Mahoney for summary judgment dismissing the complaint against him is granted. Plaintiff has failed to come forward with sufficient evidence to raise a factual question whether any actions taken by Mahoney proximately caused Gillern's death. There is no evidence that Mahoney was involved in the decision to place Gillern on the luggage rack, or to have his wife come and take him home, or to place him on his side in the backseat of her car. The only evidence of Mahoney's involvement was that he was aware that Gillern was going to be transported to the lobby on a luggage rack to be driven home by plaintiff, that he suggested that Gillern not be taken to the lobby before plaintiff's arrival, so that he would not be embarrassed, and that he checked up on

Gillern several times after Gillern became intoxicated before he was taken to the lobby. By the time Mahoney went down to the lobby, Gillern had left with his wife. The evidence shows only that Mahoney was involved in raising money for the party, and that he tried to revive Gillern when he became intoxicated, and attempted to minimize Gillern's embarrassment by advising that the luggage cart on which he was sitting not be in the lobby while plaintiff was delayed.

Mahoney had no duty to prevent Gillern from voluntarily becoming intoxicated, and there is no evidence that Mahoney had knowledge of Gillern's compromised liver or enlarged heart and spleen. For a corporate officer to be liable for the tortious conduct attributed to the corporation, "[i]t must be shown that the officer was a participant in the wrongful conduct" (*Clark v Pine Hill Homes*, 112 AD2d 755, 755 [4th Dept 1985]). The only actionable negligence alleged was the placing of Gillern, in an unconscious and apparently intoxicated state, on his side in the car, under the care of his wife. There is no evidence that Mahoney had any involvement in that decision.

The motion of Sloan for summary judgment is granted, only to the extent of dismissing the second cause of action, sounding in public and private nuisance.

Accordingly, it is

ORDERED that the motion of defendant Ed Mahoney for summary

judgment dismissing the complaint as against him is granted, with costs and disbursements as taxed by the Clerk of the Court, upon presentment of an appropriate bill of costs, and the complaint is severed and dismissed as against defendant Ed Mahoney; and it is further

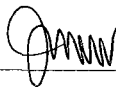
ORDERED that the motion of defendants, The Rockefeller University Housing Department and Rockefeller University Condominium Association, for summary judgment dismissing the complaint as against them is granted, with costs and disbursements as taxed by the Clerk of the Court, upon presentment of an appropriate bill of costs, and the complaint is severed and dismissed as against defendants The Rockefeller University Housing Department and Rockefeller University Condominium Association; and it is further

ORDERED that the motion of defendant Memorial Sloan Kettering for summary judgment dismissing the complaint as against it, is granted, only to the extent of dismissing the second cause of action and is otherwise denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 10/26/15

ENTER:



JOAN M. KENNEY
J.S.C.