

Madrid v Alvarez

2018 NY Slip Op 33737(U)

July 9, 2018

Supreme Court, Orange County

Docket Number: EF001328-2017

Judge: Catherine M. Bartlett

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
GREGORIA MADRID,

Plaintiff,

-against-

DULCE ALVAREZ, a/k/a DULCE CHEVEREZ-
ALVAREZ, YESENIA CHEVEREZ, NEW YORK
STATE CATHOLIC HEALTH PLAN, INC. d/b/a
FIDELIS CARE, et al.,

Defendants.

To commence the statutory time
period for appeals as of right
(CPLR 5513 [a]), you are
advised to serve a copy of this
order, with notice of entry,
upon all parties.

Index No. EF001328-2017

Motion Date: May 17, 2018

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The following papers numbered 1 to 5 were read on the motion of defendant New York
State Catholic Health Plan, Inc. to dismiss the Complaint for failure to state a claim:

Notice of Motion - Affirmation / Exhibits	1-2
Affirmation in Opposition / Exhibit	3
Reply Affirmation / Exhibits	4
Supplemental Affirmation / Exhibit	5

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is an action to recover for personal injuries sustained Plaintiff Gregoria Madrid on
November 30, 2015. The Complaint alleges *inter alia* that Plaintiff was injured to the negligence
of defendant Dulce Alvarez in operating a motor vehicle owned by defendant Yesenia Cheverez

in the course and scope of her employment with defendant New York State Catholic Health Plan, Inc. d/b/a Fidelis Care (“Fidelis”).

A. Fidelis’ Motion To Dismiss

Fidelis moves pursuant to CPLR §3211(a)(7) to dismiss the claim against it on the ground that it bears no liability herein because Ms. Alvarez, its employee, was not acting in the course and scope of her employment when the accident occurred.

In support of its motion, Fidelis proffered in-court testimony by Ms. Alvarez as follows:

Q[O]n November 30, 2015, were you transporting the plaintiff, Gregoria Madrid in the course of your employment with [Fidelis]?

A It wasn’t during the course of my employment, sir. It was not part of my job.

Q It was not part of your job to transport any of your customers?

A No, sir.

Q Your job was as a Medicare sales representative?

A Yes, sir.

Q After this accident occurred, your employer, [Fidelis], advised you that you weren’t supposed to be doing this?

A They did more than that, sir. I got written up and I lost my commissions for that time. I didn’t get paid.

Q Just so I’m clear, ma’am, part of your job as a Medicare sales representative with [Fidelis] does not include transporting customers to doctor’s appointments?

A Yes, sir. It does not include that.

Q Ms. Alvarez, on November 30, 2015, at the time when you had Ms. Madrid in your vehicle, were you working at the time for Fidelis?

A Yes, I was. I was on company time, yes.

- Q When you initially met Ms. Madrid, was that through your employment with [Fidelis]?
- A Yes, I met Ms. Madrid at – I’m a representative of selling Medicare policies and she was – I met her through that course of – through that.
- Q So, ma’am, just so we’re clear, part of your job as a Medicare sales representative does not include transporting patients to their doctor’s appointments?
- A Absolutely not. That’s in the company policy. I’m not to do that at any time during my time of employment. I am not allowed and I broke the rules. I did it.

B. Plaintiff’s Opposition

Plaintiff proffered her own deposition testimony in opposition to Fidelis’ motion to dismiss. Plaintiff testified *inter alia* to the following:

- (1) Plaintiff was a Fidelis client of Ms. Alvarez.
- (2) On the morning of November 30, 2015, Ms. Alvarez picked her up at her home, drove her to the Medicaid office in Goshen, New York. Ms. Alvarez had previously driven Plaintiff on two other occasions.

Q Did you at some point prior to the conversation on November 30, 2015 inform Ms. Dulce Alvarez that you needed to go to Goshen?

A She told me that that was where I had to go with her.

Q When did she tell you that?

....

A When she began to fill out the papers for me for Fidelis, because she works with Fidelis.

- (3) Ms. Alvarez helped Plaintiff in processing a Medicaid application.
- (4) Medicaid wanted Plaintiff to get a letter from her primary doctor (Cornerstone a/k/a the “Family Center” in Newburgh, New York).

Q When you were leaving Goshen was it the intention to drop you off at your house or to drop you off at the Family Center?

A The intention was to leave me at my home, but I told her to bring me, to drop me off at Family Center to get a letter from my primary doctor.

(5) Ms. Alvarez drove Plaintiff to the Family Center, where the accident occurred.

C. Fidelis' Reply and Supplemental Submission

On reply, Fidelis submitted a "Corrective Action" document dated December 29, 2015.

In pertinent part, it states:

On 12/29/15 Ms. Dulce Alvarez notified human resources of an incident from 11/30/15 involving herself and a member. Ms. Alvarez stated that on 11/30/15 she transported a Fidelis Care member with her personal vehicle to a clinic visit. Upon exiting Ms. Alvarez's vehicle the member fell on the sidewalk, and paramedics were called.

Ms. Alvarez failed to report the incident to any member of the Fidelis Care leadership team, and is in direct violation of Human Resources Policy #508, Section 1.8, which requires incidents to be reported to a Supervisor within 48 hours in the event an accident has occurred while traveling on Fidelis Care business. Additionally, Ms. Alvarez is in violation of Human Resources Policy #508, Section 1.1, which states personal vehicles may not be used to provide transportation for members, potential members, etc.

(emphasis added).

At the Court's direction, Fidelis made a supplemental submission consisting of the transcript of Ms. Alvarez' deposition testimony. Ms. Alvarez testified *inter alia* to the following:

- (1) Ms. Alvarez was employed by Fidelis as a licensed Medicare representative, signing up people for Medicare through Fidelis.
- (2) On November 30, 2015, Ms. Alvarez picked up Plaintiff at her home, as she had done on two prior occasions, to drive to the Medicaid office in Goshen to follow up on her Medicaid application.
- (3) Ms. Alvarez had driven one other client to the Medicaid office to submit an original Medicaid application.
- (4) Ms. Alvarez acknowledged that if she had to transport clients, she would do so, and submit the mileage for reimbursement.

- (5) On the other hand, she testified that Fidelis was not aware she was transporting clients, and that it was not part of her job to do so.
- (6) According to Ms. Alvarez, there was a written policy that during work hours employees were not to place clients in their cars and take them places.
- (7) After finishing at the Medicaid office in Goshen, Ms. Alvarez was driving Plaintiff home.

Q Did you go straight from the 111 Quarry Road in Goshen to Ms. Madrid's home?

A No.

Q Where did you go next?

A She had asked me if I could drop her at the doctor's office, Cornerstone.

Q Why did she ask you to do that?

A She said to me that she wasn't feeling well, she had felt dizzy, and wanted to consult with her doctor.

....

Q Was your intention to go to the appointment with Ms. Madrid?

A No.

Q What was your intent?

A Drop her off and continue to my next appointment.

...

Q Did she tell you she needed a doctor's note?

A No, she didn't.

Q Did she need a doctor's note to finish the Medicaid process?

A Not to my knowledge, no.

Q How's the process once someone applies for Medicaid? Do they have to receive a doctor's note?

A Not unless they are applying for disability and Ms. Madrid was not applying for disability.

D. Legal Analysis

1. The Standard Governing CPLR §3211(a)(7) Motions

“On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory [cit.om.]. A court ‘may consider affidavits submitted by the plaintiff to remedy any defects in the complaint and, upon considering such affidavits, the facts alleged therein must also be assumed to be true’ [cit.om.]. Where, as here, evidentiary material is submitted and considered on a motion pursuant to CPLR 3211(a)(7), and the motion is not converted to one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate [cit.om.].” *Karimov v. Brown Harris Stevens Residential Mgt., LLC*, 117 AD3d 910, 911 (2d Dept. 2014).

2. The Doctrine of Respondeat Superior

“[T]he doctrine of Respondeat superior renders a master vicariously liable for a tort committed by his servant while acting within the scope of his employment.” *Riviello v. Waldron*, 47 NY2d 297, 302 (1979).

An act is deemed to be within the scope of employment if it was “done while the servant was doing his master’s work, no matter how irregularly, or with what disregard of instructions.” *Riviello v. Waldron, supra*. “[T]he determination of whether a particular act was within the scope of the servant’s employment is so heavily dependent on factual considerations, the

question is ordinarily one for the jury.” *Id.*, 47 NY2d at 303. “Among the factors to be weighed are: the connection between the time, place and occasion for the act; the history of the relationship between employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one that the employer could reasonably have anticipated.” *Id.*

3. Dismissal Is Unwarranted Because Fidelis Has Failed To Demonstrate That Plaintiff’s Allegation That Ms. Alvarez Was Acting Within The Scope Of Her Employment Is Not A Fact At All

The evidence before the Court fails to establish that Plaintiff’s allegation that Ms. Alvarez was acting within the scope of her employment with Fidelis at the time of the accident herein is simply not a fact at all. Indeed, the “Corrective Action” document proffered by Fidelis itself contains an implicit *admission* that Plaintiff’s accident did occur in the course of Fidelis business. The document states:

[Ms. Alvarez] is in direct violation of Human Resources Policy #508, Section 1.8, which requires incidents to be reported to a Supervisor within 48 hours in the event **an accident has occurred while traveling on Fidelis Care business.**

There is additional evidence in the record from which, according Plaintiff the benefit of every possible favorable inference, it might reasonably be found that Ms. Alvarez’ transporting Fidelis members such as Plaintiff to assist them with Medicaid applications was within the scope of her employment with Fidelis. She performed this function three times for Plaintiff and once for another Fidelis member, and submitted her mileage for reimbursement. In doing so, she may have violated a Fidelis policy that “personal vehicles may not be used to provide transportation for members.” However, that does not preclude a finding of Fidelis’ vicarious liability herein,

for an act “done while the servant was doing his master’s work” is within the scope of employment “no matter how irregularly [done], or with what disregard of instructions.” *Riviello v. Waldron, supra* (emphasis added). Fidelis has proffered neither documentary evidence – e.g., an employee handbook, a policy manual, a job description, an employment contract – nor testimonial evidence from Fidelis management demonstrating that Ms. Alvarez’ conduct was altogether outside the scope of her employment.

Of course, a finding that transport of Fidelis members to assist them with Medicaid applications was within the scope of Ms. Alvarez’s employment would not conclude the matter here. There remains the further issue whether travel to Cornerstone, the situs of the accident, was undertaken for that purpose. Plaintiff and Ms. Alvarez have given conflicting testimony on that very point, Plaintiff testifying that the trip was to made to procure a doctor’s note in support of her Medicaid application, Ms. Alvarez testifying to the contrary that she drove Plaintiff to Cornerstone in common charity because “she wasn’t feeling well, she had felt dizzy, and wanted to consult with her doctor.” Once again, however, Fidelis failed to come forward with evidence conclusively rebutting Plaintiff’s allegation – confirming with documentary evidence, for example, Ms. Alvarez’ testimony that a doctor’s note was simply not required for Plaintiff’s Medicaid application – and thereby showing that a material fact claimed by Plaintiff was not a fact at all.

In view of the foregoing, Fidelis has not shown that Plaintiff’s Complaint fails to state a cause of action predicated on its vicarious liability for alleged actions by Ms. Alvarez within the course and scope of her employment with Fidelis. Consequently, its motion to dismiss the Complaint pursuant to CPLR §3211(a)(7) must be denied.

It is therefore

ORDERED, that the motion of defendant New York State Catholic Health Plan, Inc. to dismiss the Complaint as against it is denied.

The foregoing constitutes the decision and order of this Court.

Dated: July ⁹____, 2018 ENTER
Goshen, New York



HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE