SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

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LYNNE SCHALMAN, as Executor of the Estate of STEPHEN BERGEN, Deceased, and LYNNE SCHALMAN, Individually,

Index No. 160482/2016

Plaintiffs,

-against-

AQUATIC RECREATIONAL MANAGEMENT, INC., NEW YORK AQUATICS, LLC, ROSE ASSOCIATES, INC., 300 EAST 85TH STREET HOUSING CORP., and 300 E. 85TH HOUSING CORP.,

Defendants.

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Kalish, J.

Motion sequence numbers 003, 004, and 005 are hereby consolidated for disposition.

This is a wrongful death action stemming from an incident on April 26, 2016, when Stephen Bergen (Bergen) passed away while in a pool at 300 East 85th Street (the Premises).

In motion sequence number 003, defendant Aquatic Recreational Management, Inc. (Aquatic) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint.

In motion sequence number 004, plaintiff Lynne Schalman, as executor of Bergen's estate and in her individual capacity (together, plaintiff) moves pursuant to CPLR 3212 for summary judgment in her favor on her negligence (wrongful death) claim as against Aquatic, Rose Associates, Inc. (Rose), and 300 East 85th Housing Corp. s/h/a 300 East 85th Street Housing Corp. (300 East).[1]

[1] Pursuant to a decision and order dated June 18, 2018, the complaint and all cross-claims were dismissed as against defendant Jordi Lopez. In addition, pursuant to a stipulation dated September 7, 2018, all claims against defendant Martin Weiss were discontinued with prejudice. New York Aquatics, LLC has never appeared in the action, and no affidavit of service of process was ever filed as to it, nor was any motion made for a default judgment as to it. Further, it appears that defendants 300 East 85th Street Housing Corp. and 300 E. 85th Housing Corp. are the same entity, movant in seq. 005, 300 East 85th Housing Corp., and the court will treat them as a single entity.

In motion sequence number 005, 300 East and Rose move pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims as against them.

The complaint alleges causes of action for negligence (wrongful death), negligent hiring, training, retention and/or supervision, and loss of services.

As is discussed fully herein, defendants' motions are granted, plaintiff's motion is denied, and the complaint is dismissed.

BACKGROUND

On April 26, 2016, 300 East owned the Premises, a high-rise apartment building in Manhattan with several amenities, including an indoor pool located in the basement (the Pool). Rose, the management company for the Premises, hired Martin Weiss as the building superintendent. Rose also hired Aquatic to provide lifeguard services at the Pool. Pursuant to the contract between Rose and Aquatic (the Contract), Aquatic was to "provide all lifeguards and supervisory personnel necessary to operate [the Pool] . . . in a safe manner and in accordance with all laws and regulations" (Rose's notice of motion, exhibit M, ¶ 2, the Contract).

Plaintiff and Bergen, her husband, were tenants of the Premises. Bergen was 65 years old. He was an insulin-dependent diabetic and wore a subcutaneously implanted insulin pump and blood sugar monitor (court tr, dated January 15, 2019, at 5). Nearly every day, Bergen swam at the Pool for approximately two hours. On the day of the incident, Jordi Lopez was Aquatic's lifeguard on duty at the Pool. It was his first day on the job.

At approximately 5:00 p.m. on the day of the incident, Bergen went to the Pool and began swimming laps. He wore swim trunks, dark goggles and earplugs. As seen on security camera footage (the Security Footage), for the next hour and forty-five minutes, Bergen swam

without incident (Plaintiff's notice of motion, exhibit O, the Security Footage).[2] At approximately 6:45 p.m., Lopez announced that the Pool would be closing in 15 minutes. People began to exit the pool area, but Bergen continued to swim. At approximately 6:50 p.m. Bergen swam to a corner of the Pool that cannot be seen on the Security Footage, though the parties agree that he remained in the pool, standing in approximately four feet of water.

The Events Leading up to the Incident

According to Aquatic's incident report (the Incident Report), which was signed by Lopez, at approximately 6:45 p.m., Lopez told Bergen that the pool was going to close. Lopez stated the following:

> "I warned him I was going to close the pool. He looked at me and didn't say anything. Then 10 minutes later, I warned him again that I was going to close the pool at 7 pm. I got the same response . . . . When the clock hits 7 pm I go back to tell him that I have to close the pool and again I get the same response, he looks at me and doesn't say anything to me. So I go to the call box and I ask for somebody to escort the gentleman out of the pool. . . . After the doorman spoke to [Bergen], [Bergen] looked at him and didn't say anything."

(Aquatic's notice of motion, exhibit N, the Incident Report). Subsequently, a second building employee came down to ask Bergen to leave, and again, Bergen allegedly looked at him and did not speak.

It was at this time – approximately 7:08 p.m. – that, according to the Incident Report, Bergen "started shaking for like 2 seconds, made an 'uugh' sound then dropped in the pool" (*id.*). Immediately thereafter, Lopez and the doorman left the pool area to find Weiss and ask him to get Bergen to leave the Pool.

[2] Though there is no time stamp on the Security Footage, the parties do not dispute that the Security Footage begins at 5:00 p.m.

At approximately 7:10 p.m., Bergen's legs, submerged under the water, become visible on the Security Footage. At 7:13 p.m. the Security Footage shows that someone jumped into the water and removed Bergen from the pool.[3]

Plaintiff does not disagree with the general timeline set forth in the Incident Report. In fact, plaintiff relies heavily on the Incident Report's recitation of events. Plaintiff asserts that between 6:50 p.m. and 7:13 p.m., Bergen was not merely standing in the Pool, but that he was actively and visibly in distress.

Specifically, plaintiff testified that she heard from others, including a building porter (who was not present, but who had purportedly spoken with Lopez after the incident), that between 6:50 and 7:13, Bergen was standing in the Pool, in a "fugue state," "speaking gibberish" and "flailing" his arms in the air (plaintiff's tr at 89 and 128). Plaintiff also testified that she heard from a building employee who purportedly witnessed the incident, that Bergen's skin was discolored and that his "face looked purple" when he fell in the water (*id.* at 98). Plaintiff also points to the testimony of Sarah Schalman-Bergen, plaintiff's daughter, who testified that she spoke with two building employees who gave her a similar description of events (Schalman-Bergen tr at 43-45).

The Events Immediately After the Incident

Weiss testified that, at 7:13 p.m., he received a call from the doorman asking him for assistance with a tenant who "wouldn't get out of the pool" (Weiss tr at 148). Weiss arrived at the pool three minutes later. He testified that "by the time [he] got down there, [Bergen] was out of the pool" and lying on the pool deck, apparently unconscious (*id.*).

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[3] As noted, the angle of the security camera does not show the corner of the pool where Bergen was standing after 6:50 p.m. That said, feet can be seen walking on the pool deck near Bergen at 7:02 p.m., 7:05 p.m. and 7:08 p.m. These times roughly correspond to instances in the Incident Report where Lopez and/or a building employee allegedly spoke to Bergen (plaintiff's notice of motion, exhibit O, the Security Footage).

Weiss testified that Bergen was wearing "big goggles" and that his "face was swollen" (*id.* at 62). Weiss asked Lopez if he had performed CPR and Lopez indicated that he had not. Weiss immediately ran to the lobby and returned with a doctor. Weiss and the doctor began to perform CPR on Bergen. Weiss then called 911 at 7:17 p.m. (plaintiff's notice of motion, exhibit F, 911 dispatch notes).

Paramedics arrived, performed additional CPR, and took Bergen to the emergency room, where doctors were unable to revive him. Shortly thereafter, Bergen was pronounced dead.

The Following Day

The next day, Declan McGuone, MB, BCh (McGuone), a medical examiner with the Office of the Chief Medical Examiner, performed an autopsy and prepared his report (the Autopsy Report). McGuone determined that Bergen died of natural causes brought about by "atherosclerotic and hypertensive cardiovascular disease" with a contributory cause of "diabetes mellitus" (Aquatic's notice of motion, exhibit L, the Autopsy Report).

In addition, the police department prepared a "follow-up informational report" (the Police Report) that described a telephone interview between a detective and Lopez. The Police Report tracks the events described in the Incident Report (*id.*, exhibit L, the Police Report).

In McGuone's case notes (the ME Notes), McGuone stated that "there is nothing to support a diagnosis of drowning" and reiterated that Bergen's death was "natural and [was] not due to an accidental drowning" (*id.*, Exhibit L, the ME Notes). The ME Notes also state that an autopsy cannot medically determine whether, in the minutes before his death, Bergen was hypoglycemic (i.e. had very low-blood sugar), or whether he was in a "fugue state."

DISCUSSION

"[T]he proponent of a summary judgment motion 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

The Negligence Claims (Motion Sequence Numbers 003, 004 and 005)

Aquatic, Rose and 300 East (collectively, moving defendants) move for summary judgment dismissing the negligence claim on the ground that they owed no duty of care toward Bergen and that, even if they did owe Bergen a duty of care, their acts or omissions were not a proximate cause of Bergen's death.[4] Plaintiff moves for summary judgment in her favor on the negligence claim on the ground that moving defendants had a duty to protect Bergen once they were aware of an emergency, and that their failure to act caused Bergen's death.

[4] Unlike Aquatic, Rose and 300 East do not raise an argument regarding the existence of a duty of care in their papers. However, they did address this issue during oral argument on January 15, 2019. Plaintiff was afforded a full and fair opportunity to respond (court tr at 27-35). Accordingly, the court will consider the duty of care argument as to Rose and 300 East.

"In order to prevail on a negligence claim, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. . . . In the absence of a duty, as a matter of law, there can be no liability" (*Pasternack v Laboratory Corp. of Am. Holdings,* 27 NY3d 817, 825 [2016] [citations and internal quotation marks omitted]; *Rodriguez v Budget Rent-A-Car Sys., Inc.*, 44 AD3d 216, 221 [1st Dept 2007]).

In the first instance, as the parties made clear at oral argument before this court, plaintiff does not claim that defendants negligently allowed plaintiff to drown. The ME Notes establish prima facie that plaintiff did not drown. Rather, the alleged negligence on the part of the defendants is that, in the 20–30 minutes prior to Bergen's death, defendants failed in their duty to recognize Bergen's alleged hypoglycemic emergency and render first aid (*see* court tr at 5).

Aquatic

Aquatic asserts that, while it may be argued that it owed a duty of care to Bergen, under no stretch of the imagination did that duty include the duty to diagnose a hypoglycemic event or otherwise protect swimmers from undisclosed or unobservable medical conditions. Aquatic argues, in sum and substance, that there is no admissible evidence before the court establishing that Bergen was either in observable distress under the circumstances or at risk of drowning and, therefore, Aquatic had no duty or did not breach an existing duty. Moreover it had no common-law duty to come to Bergen's aid in the first instance (*Miglino v Bally Total Fitness of Greater New York, Inc.,* 92 AD3d 148, 159 [2d Dept 2011], *affd* 20 NY3d 342 [2013] [generally, "one does not owe a duty to come to the aid of a person in peril, whether the peril is medical or otherwise"]). Aquatic argues that Bergen's death was of natural causes and was brought about due to his severe medical conditions coupled with the inherent risk associated with exercise.

In opposition to Aquatic's motion and in support of her motion, plaintiff argues that Aquatic's contractual duty of care applied to Bergen and included diagnosing Bergen's hypoglycemic event and rendering first aid. Plaintiff further argues that Lopez's failure to render first aid in time was a proximate cause of Bergen's death.

Given the foregoing arguments, the threshold issue before the court is: what was Defendants'/the lifeguard's duty of care to Bergen? "The existence and scope of a duty of care is a question of law for the courts entailing the consideration of relevant policy factors" (*Church v Callanan Indus.*, 99 NY2d 104, 110-111 [2002]). "[C]ourts resolve legal duty questions by resort to common concepts of morality, logic and considerations of the social consequences of imposing the duty" (*Cohen v Cabrini Med. Ctr.*, 94 NY2d 639, 642 [2000], quoting *Tenuto v Lederle Labs., Div. of Am. Cyanamid Co.*, 90 NY2d 606, 612 [1997]).

> "These sources contribute to pinpointing and apportioning of societal risks and to an allocation of burdens of loss and reparation on a fair, prudent basis. . . . [W]hile the existence of a duty involves scrutiny of the wrongfulness of a defendant's action or inaction, it correspondingly necessitates an examination of an injured person's reasonable expectation of the care owed and the basis for the expectation and the legal imposition of a duty"

(*Palka v Servicemaster Mgt. Services Corp.*, 83 NY2d 579, 585 [1994]).

Here, one such basis for the legal imposition of a duty is the Contract, which requires only that Aquatic operate the pool "in a safe manner and in accordance with all laws and regulations" (Rose's notice of motion, exhibit M, ¶ 2, the Contract). Though the Contract is between Aquatic and Rose, it clearly "affect[s] the safety of all users of the premises who are entitled to rely on" Aquatic's non-negligent services (*Palka*, 83 NY2d at 586). Accordingly, Bergen, as a patron of the Pool, was owed some duty of care by Aquatic. The Court must now determine whether Aquatic's duty to operate the Pool "in a safe manner" extends to assisting an

undisclosed diabetic who was allegedly suffering from a hypoglycemic event while standing in the Pool.

In support of her argument defining the scope of Aquatic's duty, plaintiff submits the affidavit of John Gibbons, a certified lifeguard instructor, and a copy of the American Red Cross Lifeguard Manual (the Manual). Plaintiff cites to no binding authority establishing that the Manual sets forth a cognizable legal duty, or that a lifeguard's opinions, as a matter of law, establish a duty of care. Nevertheless, as persuasive authority, the court has considered the Manual and Gibbons' affidavit in the process of finding the duty at issue.

According to Gibbons, a lifeguard's responsibility to keep a pool safe includes more than protecting people from drowning. It also includes identifying emergency situations "such as seizures, diabetic emergencies and cardiac arrest" (Gibbons aff, ¶ 14). Gibbons then references the Manual for the proposition that lifeguards are taught to identify symptoms that would indicate that a person is in distress. Where a patron is suffering from a diabetic emergency, Gibbons states, lifeguards are trained to give the person "something with sugar" (*id.* ¶ 15). Based on this, Gibbons opines that Lopez breached the lifeguard's duty of care, as detailed in the Manual, by failing to identify Bergen's diabetic-related medical emergency and treat it.

The Manual largely deals with active and passive drowning situations, neither of which are applicable to the instant case. That said, as noted by Gibbons, it also discusses general procedures for identifying sudden illnesses that necessitate first aid. Specifically, the Manual instructs a lifeguard to be aware of the following conditions:

> "Changes in [levels of consciousness], nausea or vomiting, difficulty speaking or slurred speech, numbness or weakness, loss of vision or blurred vision, changes in breathing; the person may have trouble breathing or may not be breathing normally, changes in skin color (pale, ashen or flushed skin), sweating, persistent

> pressure or pain, diarrhea, paralysis or an inability to move, severe headache"

(plaintiff's notice of motion, exhibit G at 306, the Manual).

With respect to diabetes, the Manual states, in pertinent part, the following:

> "People who are diabetic sometimes become ill because there is too much or too little sugar in their blood. . . . The person may disclose that they are diabetic, or you may learn this from the information on a medical ID tag or from a bystander"

(*id.*). The Manual does not specifically detail what it means for a diabetic person to become "ill" or associate the specific symptoms detailed with a diabetic emergency per se, such as hypoglycemia. The Manual does not instruct otherwise on how to identify a diabetic swimmer.

If the basis for the lifeguard's duty in the instant circumstance arises from the Manual, such a duty cannot be so specific as to require a lifeguard to recognize outward indications, if any, that an otherwise normal-looking swimmer is diabetic and could be at a higher than normal risk when swimming. Rather, by not disclosing his diabetes and electing to swim in the Pool as per his usual, Bergen assumed the obvious and necessary risk of swimming without telling the lifeguard about his condition—that he would be away from his recovery sugar and could suffer a medical event with unknown presentations or complications (*see Heard v City of New York*, 82 NY2d 66, 70–72 [1993]).

The court has consulted other sources of persuasive authority in considering the scope of a lifeguard's duty. In Virginia, "[a] lifeguard's duty is twofold. First, he has some duty to observe swimmers for signs of distress; second, he has some duty at some point to attempt rescues of those in distress. In the performance of the second duty, a lifeguard must exercise the care that an ordinarily cautious lifeguard would exercise under similar circumstances" (*Phillips v Southeast 4-H Educ. Ctr.*, 275 Va 209, 214 [Sup Ct, VA 1999]). "Lifeguards are to aid those in

distress, and unless there is some cause to believe that one is in distress they cannot be expected to act" (*Blacka v James*, 205 Va 646, 651 [Sup Ct, VA 1964]). In Indiana, "a lifeguard owes a duty to help imperiled swimmers, but the lifeguard cannot possibly be an absolute insurer of the safety of swimmers" (*W.D.* ex rel *R.D. v City of Nappanee*, 968 NE2d 335, 338 [Ct of Apps, IN 2012]). The court also takes judicial notice of relevant sections of the sanitary code, discussed infra, having to do with lifeguards and swimming pools.

Based upon the foregoing, the court finds that a lifeguard's duty of care to swimmers extends to supervising them generally and to assisting swimmers exhibiting signs of drowning or distress, swimmers who might be engaging in activity dangerous to themselves or others, and swimmers who affirmatively communicate a request for such assistance.

Here, the record contains scant admissible evidence of what occurred between 6:45 p.m. and 7:13 p.m. on the day of the incident. Notably, the sole witness to the entirety of the event was Lopez. Having commenced this action in December 2016, well over two years ago, it is undisputed that plaintiff never served Lopez with process in this action, and in motion seq. 002, the Court dismissed the complaint as against Lopez. In motion seq. 002, on June 4, 2018, Lopez appeared by counsel for the first time in this action. Despite this appearance and plaintiff's ample opportunity to compel discovery from Lopez, Lopez has never been deposed. Further, the building employees who allegedly witnessed Bergen in the pool on two different occasions between 7:00 p.m. and 7:13 p.m. have also never been deposed.

The record as submitted establishes that Bergen was standing in the pool, in approximately four feet of water, wearing goggles and ear plugs, at approximately 6:50 p.m, based upon the Security Footage. Based upon the Incident Report, Bergen turned and looked at Lopez and a porter in response to demands that he leave the Pool, but he did not otherwise

communicate with anyone. There is no evidence in admissible form that establishes that Bergen was visibly in distress or communicating any need for assistance. Rather, it was characterized by Weiss, as to those who interacted with Bergen after 6:45 p.m. and prior to his submersion, based on the evidence submitted, it appeared that Bergen was merely someone who "wouldn't get out of the pool" after having been told to do so multiple times.

Based on the evidence before the court, it cannot be said that the lifeguard's limited duty to recognize and act with respect to an illness was triggered. Therefore, given the facts of this case, Aquatic did not breach a duty to render aid to Bergen, to call 911, or to do anything more than was done prior to when Bergen went underwater. As noted above, there is no common law duty to come to the aid of a person suffering from a medical emergency (*Miglino,* 92 AD3d at 159). Were such a duty created for lifeguards, they would become general insurers of health and safety for wherever they are assigned. The court declines to create such a broad duty.

To the extent there was a general duty to supervise, the court finds that duty was performed. It is undisputed that Lopez supervised the Pool while on duty. When it was 15 minutes until closing time, Lopez communicated that fact to Bergen. Bergen, wearing earplugs and dark goggles, regardless of plaintiff's contentions, was responsive to Lopez's communication in that he turned in his direction. As a patron of the Pool, Bergen had a "reasonable expectation" that the lifeguard would aid him if he was in danger of drowning (*Palka,* 83 NY2d at 585). Here, plaintiff sets forth no rationale establishing why or how Bergen would have had an expectation that the lifeguard would be aware of his diabetic condition and treat him accordingly, unless Bergen had informed him directly (*see* plaintiff's notice of motion, exhibit G at 306, the Manual).

Based upon the foregoing, the court finds that Aquatic has established prima facie entitlement to judgment as a matter of law dismissing the complaint as against it.

In opposition, plaintiff's theory of events is insufficient to raise an issue of fact as to whether Aquatic had a duty of care to recognize Bergen's medical condition, to administer aid to him at the Pool, or to call 911. The information plaintiff and her experts rely upon to establish that Bergen was visibly in distress – i.e. that Bergen was nonresponsive, in a "fugue state," disoriented, flailing, or that his skin was abnormally dark – is based entirely on the hearsay testimony of plaintiff and her daughter, who have no personal knowledge of the events at issue. Hearsay testimony, without some corroborating non-hearsay evidence, is insufficient to defeat summary judgment (*Rugova v Davis*, 112 AD3d 404, 404-405 [1st Dept 2013] [while "hearsay may be used to defeat summary judgment as long as it is not the only evidence submitted in opposition," a plaintiff fails to raise a triable issue of fact where he or she "submitted no other admissible evidence as to the happening of the accident in opposition to defendant's motion for summary judgment"]).

Further, where an expert's "ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002] *see also Hartman v Mountain Val. Brew Pub*, 301 AD2d 570, 571 [2d Dept 2003] ["speculative and conclusory assertions proffered by the plaintiffs' expert were insufficient to defeat summary judgment"]). Here, plaintiff's expert affidavits are based on hearsay, and plaintiff has put forth nothing else to support her theory of the incident. As such, the court finds that plaintiff has failed to raise an issue of fact by proof in admissible form that Bergen was in distress or presenting any of the symptoms that would trigger the lifeguard's duty.

Plaintiff also argues that Aquatic breached its duty because it left Bergen in the pool unattended for several minutes and that doing so was a proximate cause of his death. According to the Incident Report, Lopez left the pool area while Bergen was underwater. The court agrees that leaving the pool unattended was a breach of the lifeguard's duty to operate the Pool in a safe manner. Nevertheless, liability will only attach where this breach was a proximate cause of Bergen's death.

The record is clear that Bergen did not drown. Rather, he suffered a fatal cardiac event (Aquatic's notice of motion, exhibit L, the Autopsy Report). Essentially, Bergen's heart stopped, and he stopped breathing before his body submerged. Accordingly, the time that Bergen spent submerged was not a cause of his death, either in fact or proximately (*see e.g. Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 321 [2017] [discussing but-for and proximate causation]). Moreover, by exercising over the course of two hours, Bergen assumed the elevated risk of a cardiac event that attends intense exercise (*see Digiulio v Gran, Inc.*, 74 AD3d 450, 452 [1st Dept 2010], *affd* 17 NY3d 765 [2011] ["The decedent, in regularly using the club's treadmills, assumed the inherent risk of a heart attack that attends intense exercise").

Plaintiff's medical expert, Dr. Gupreet Sidhu, opines that Bergen would have been saved had Lopez performed CPR "within the first couple of vital minutes after Mr. Bergen collapsed into the pool" (Sidhu aff, ¶ 6). Dr. Sidhu's assertion is, ultimately, speculative. He relies entirely upon hearsay (i.e. that Bergen was in a "fugue state" and had "dark complexion") and unsupported assumptions regarding Bergen's medical condition (that he was hypoglycemic, that CPR would have revived him after he fell in the water). Accordingly, as Dr. Sidhu's assertions are not independently supported by admissible evidence in the record, they are insufficient to establish, as a matter of law, that Lopez's actions or inactions were a proximate cause of

Bergen's death (*Diaz*, 99 NY2d at 544; *Hartman,* 301 AD2d at 571; *Rugova*, 112 AD3d at 404-405). Nor are Dr. Sidhu's assertions sufficient to raise an issue of fact defeating Aquatic's summary judgment motion (*id.*).

Finally, plaintiff argues that Aquatic was negligent for failing to provide (and use) an automatic external defibrillator (AED) at the Pool.[5] Plaintiff, however, has not articulated any requirement that a lifeguard services company, such as Aquatic, must provide their own AEDs, and Gibbons' affidavit is silent as to any such requirement. Accordingly, even if Aquatic had a duty to render aid to Bergen, it cannot be said that Aquatic was negligent for failing to use a device that it was not required to possess and that was not at the Pool. As such, the court finds that Aquatic is entitled to summary judgment dismissing the negligence claims as against it, and plaintiff is not entitled to summary judgment in her favor on her negligence claims as against Aquatic.

300 East and Rose

Common-Law Claims

300 East is the owner of the Premises, and Rose is the property manager. Such entities "have a common-law duty to minimize foreseeable dangers on their property [but] they are not the insurers of visitors' safety" (*Maheshwari v City of New York,* 2 NY3d 288, 294 [2004]).

Here, plaintiff argues that 300 East and Rose had a duty to protect Bergen once they were made aware of an emergency. Specifically, plaintiff argues that 300 East and Rose breached a duty of care toward Bergen the moment that their employees saw that Bergen was "unresponsive" and were negligent in failing to properly appreciate Bergen's condition and recognize his need for medical assistance. As discussed previously, the record fails to establish

[5] An AED is a device that delivers a shock to the heart of a victim in cardiac arrest. The device can eliminate an abnormal heart rhythm and allow the normal heart rhythm to resume.

that Bergen was unresponsive or visibly in distress to an extent that warranted intervention or special attention.

Plaintiff also argues that, by providing the Pool as a service, 300 East and Rose assumed a duty to act with reasonable care toward Bergen and, by failing to recognize and treat his illness, breached that duty. In order to establish that a party breached an assumed duty, a plaintiff must have "show[n] reliance on the defendant's course of conduct, such that the defendant's conduct placed him or her in a more vulnerable position than he or she would otherwise have been in had the defendant done nothing" (*Richardson v Lenox Terrace Dev. Assoc.*, 41 AD3d 108, 109 [1st Dept 2007]).

To the extent that 300 East and Rose assumed a duty of care with respect to the Pool, such duty applied only to the operation and maintenance of the Pool. The mere operation and maintenance of a pool does not, however, create a duty to protect an individual from an unknown medical emergency, and plaintiff cites to no authority that would establish such a duty. In addition, plaintiff has not shown how Bergen relied upon defendants' conduct with respect to monitoring his undisclosed medical condition.

Moreover, the evidence shows that 300 East and Rose, through Weiss, called 911 and performed CPR on Bergen. These acts have been held to be sufficient to fulfill any common law duty of care that 300 East and Rose might have given the facts of this case (*see Miglino v Bally Total Fitness of Greater New York, Inc.*, 20 NY3d 342, 351 [2013] [health club employees "more than fulfilled their duty of care by immediately calling 911 and performing CPR"] [internal quotation marks and citations omitted]). Considering the foregoing, 300 East and Rose are entitled to summary judgment dismissing the common-law negligence claim as against them and plaintiff is not entitled to summary judgment in her favor for the same.

The Statutory Negligence Claims

Plaintiff argues that 300 East and Rose were statutorily negligent because they failed to provide an AED at the Premises, as required by General Business Law (GBL) § 627-a and Public Health Law (PHL) § 225 (5-c) (a).

GBL § 627-a

GBL § 627-a (the AED Statute) provides the following, in pertinent part:

> "1. Every health club as defined under [PHL § 3000-d (b)] whose membership is five hundred persons or more shall have on the premises at least one automated external defibrillator and shall have in attendance, at all times during staffed business hours, at least one individual performing employment or individual acting as an authorized volunteer who holds a valid certification of the completion of a course in the study of the operation of AEDs . . ."

GBL § 628, entitled "Private right of action" provides the following:

> "1. Any buyer damaged by a violation of this article may bring an action for recovery of damages. Judgment may be entered in an amount not to exceed three times the actual damages plus reasonable attorney fees."

A "buyer," as referenced in GBL § 628 is defined in GBL § 621 (5) as "any individual who enters into a contract for services with a health club."

PHL § 3000-d (b) defines a "health club" as:

> "[A]ny commercial establishment offering instruction, training or assistance and/or the facilities for the preservation, maintenance, encouragement or development of physical fitness or well-being. 'Health club' as defined herein shall include, but not be limited to health spas, health studios, gymnasiums, weight control studios, martial arts and self-defense schools or any other commercial establishment offering a similar course of physical training."

Here, GBL § 627-a is inapplicable to the Premises. It is undisputed that the Premises is a residential apartment building. As such, it is not a commercial establishment. As it is not a

commercial establishment, by definition, the Premises cannot be a "health club" as defined by GBL § 627-a and PHL § 3000-d (b).

Plaintiff fails to establish that a residential apartment building that offers a pool as an amenity to its residents legally transforms the residential apartment building into commercial health club, as defined by the statute. In addition, the record is silent as to whether Bergen was a "buyer" – i.e. whether he (or any other resident of the Premises) entered into "a contract for services" with 300 East or Rose in order to access the Pool (GBL § 621 [5]). As only a "buyer" under GBL § 628 has a private right of action, plaintiff's statutory claim under the GBL fails.

Moreover, even if the Premises were a health club as defined in section 627-a, "General Business Law § 627-a does not create a duty running from a health club to its members to use an AED required by that provision to be maintained on site" (*Miglino v Bally Total Fitness of Greater New York, Inc.*, 20 NY3d at 349 [noting that the statute contemplates "voluntarily using AEDs to aid stricken persons (which) indicates that its use is not obligatory" [internal quotation marks and citations omitted]). Accordingly, even if the Premises was required to have an AED, 300 East and Rose were under no duty to use it.

Thus, as the record fails to establish that the Premises was a health club that was required to have an AED, 300 East and Rose are entitled to summary judgment dismissing that part of the complaint sounding in negligence pursuant to a violation of GBL § 627-a, and plaintiff is not entitled to summary judgment in her favor for the same.

PHL § 225 (5-c) (a)

PHL § 225 is titled "Public Health Council." It delineates the scope of the council's powers with respect to several matters, including the sanitary code. Subsection 5-c provides the following, in pertinent part:

> "[T]he sanitary code shall:
>
> (a) provide that any public or private surf beach or swimming facility which is required by any other provision of law to be supervised by a surf lifeguard qualified according to the standards of such code, shall provide and maintain on-site [AED] equipment . . . ."

PHL § 225 is an enabling statute, permitting or directing the council to promulgate certain regulations which shall be codified as the sanitary code. Here, although the section cited by plaintiff appears to direct the council to promulgate a regulation having to do with providing AEDs at a "swimming facility which is required by any other provision of law to be supervised by a surf lifeguard qualified according to the standards of such code," Plaintiff has failed to cite to the relevant section of the sanitary code, if any, promulgated by the council, or to demonstrate, as would be plaintiff's burden, that the relevant code provision applies to the facts of this case. As such, insofar as plaintiff seeks relief based upon PHL § 225 (5-c) (a), a mere enabling statute, that application must be denied.

Moreover, the court, in reviewing the sanitary code, notes that the requirements of 10 NY ADC § 6-1.23[6], having to do with the levels of supervision required at certain types of swimming pools, do not apply to "Homeowner Swimming Pools" as defined in 10 NY ADC § 6-1.2 (o), which states that:

> "[h]omeowner swimming pool means a swimming pool owned and operated by a condominium (i.e., property subject to the article 9-B of the Real Property Law, also known as the Condominium Act), a property commonly known as a cooperative, in which the property is owned or leased by a corporation, the stockholders of which are entitled, solely by reason of their ownership of stock in the corporation, and occupy apartments for dwelling purposes, provided an "offering statement" or "prospectus" has been filed

[6] Codified under the Compilation of Codes, Rules and Regulations of the State of New York, Title 10, Department of Health, Chapter I, State Sanitary Code, Part 6, Swimming Pools, Bathing Beaches and Recreational Aquatic Spray Grounds, Subpart 6-1. Swimming Pools, Swimming Pools, Operation, Supervision and Maintenance, Section 6-1.23, Supervision. Authorized under Public Health Law § 225.

> with the Department of Law, or an incorporated or unincorporated property association, all of whose members own residential property in a fixed or defined geographical area with deeded rights to use, with similarly situated owners, a defined swimming pool, provided such swimming pool is used exclusively by members of the condominium, cooperative apartment project or corporation or association, and their family and friends."

Assuming for the sake of argument that plaintiff relied on Part 6 of the sanitary code, which she has not, plaintiff has made no showing that the Pool is not a Homeowner Swimming Pool not subject to the Supervision requirements. Even still, nothing in 10 NY ADC § 6-1.23 requires that an AED be present at the swimming pool. Rather, it appears the council recognized that the enabling statute referred to a "surf beach" and "surf lifeguard" and only included the requirement of an AED in 10 NY ADC § 6-2.17, having to do with supervision, personnel, and equipment at bathing beaches, specifically, and then only required them at "ocean surf beaches."

Notably, PHL § 229 governs violations of the sanitary code. It provides, in relevant part:

> "The provisions of the sanitary code shall have the force and effect of law and the non-compliance or non-conformance with any provision thereof shall constitute a violation punishable on conviction for a first offense by a fine not exceeding two hundred fifty dollars or by imprisonment for not exceeding fifteen days, or both . . . ."

PHL § 229 does not confer a private right of action on individuals pursuing civil relief. Rather it provides that violations are punishable by fines or imprisonment.

> "Where a penal statute does not expressly confer a private right of action on individuals pursuing civil relief, recovery under such a statute 'may be had only if a private right of action may fairly be implied' . . . . In assessing whether a private right of action can be implied, we have acknowledged that 'the Legislature has both the right and the authority to select the methods to be used in effectuating its goals, as well as to choose the goals themselves. Thus . . . a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme . . .'"

(*Hammer v American Kennel Club*, 1 NY3d 294, 299 [2003], quoting *Sheehy v Big Flats Community Day*, 73 NY2d 629, 633-635 [1989]).

The instant action is not a criminal action, and plaintiff does not seek to have law enforcement charge 300 East and Rose with violations of the statute. Rather, plaintiff seeks money damages pursuant to civil causes of action. Accordingly, even if the sanitary code provided that the Pool was required to have an AED, which it does not, the cited sections of the PHL and the sanitary code, which is a set of regulations, and not a statute, do not create a private right of action. As such, 300 East and Rose are entitled to summary judgment dismissing that part of the complaint sounding in statutory negligence pursuant to PHL § 225, and plaintiff is not entitled to summary judgment in her favor for the same.

The Negligent Hiring Claims (Motion Sequence Numbers 003 and 005)

Aquatic moves for summary judgment dismissing the negligent hiring claim. "[R]ecovery on a negligent hiring and retention theory requires a showing that the employer was on notice of the relevant tortious propensities of the wrongdoing employee" (*Gomez v City of New York*, 304 AD2d 374, 374 [1st Dept 2003]; *Bellere v Gerics,* 304 AD2d 687, 688 [2d Dept 2003] ["To hold a party liable under theories of negligent hiring, negligent retention, and negligent supervision, a plaintiff must establish that the party knew or should have known of the contractor's propensity for the conduct which caused the injury]). That said,

> "[W]here an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention"

(*Karoon v New York City Tr. Auth.*, 241 AD2d 323, 324 [1st Dept 1997]; *accord Kerzhner v G4S Govt. Solutions, Inc.*, 160 AD3d 505, 505 [1st Dept 2018]).

Here, plaintiff does not contest that Lopez was acting within the scope of his employment with Aquatic. It is also uncontested that plaintiff's claim against Aquatic is premised on a theory of respondeat superior. Accordingly, Aquatic is entitled to summary judgment dismissing the negligent hiring claim as against it.

Plaintiff also alleges a negligent hiring claim as against 300 East and Rose, for the alleged negligent hiring, retention and/or supervision of Aquatic, Weiss and the building employees who saw Bergen in the Pool.

Notably, while 300 East and Rose seek dismissal of the entirety of the complaint, their motion is silent with respect to the negligent hiring claim. That said, 300 East, Rose and Aquatic are all united in interest as to this issue, and Aquatic's argument and the law upon which it relies, is equally valid as to 300 East and Rose.

There is no evidence that Weiss or any of the building employees acted outside of the scope of their employment at any time (*Karoon,* 241 AD2d at 324). Likewise, there is no evidence that 300 East or Rose were aware of Aquatic's purported propensity to provide lifeguards that fail to recognize emergency medical situations (*see Bellere,* 304 AD2d at 688). Accordingly, no claim for negligent hiring, retention, training or supervision may lie against 300 East or Rose.

Thus, Aquatic, 300 East and Rose are entitled to summary judgment dismissing the negligent hiring claims against them.

Plaintiff's loss of services claim is dependent upon the negligence and negligent hiring claims. As these claims have been dismissed, the claim for loss of services must also be dismissed.

The parties remaining arguments have been considered and are unavailing.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that defendant Aquatic Recreational Management, Inc.'s (Aquatic) motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it is granted with costs and disbursements to Aquatic as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion of plaintiff Lynne Schalman, in her capacity as executor of the estate of Stephen Bergen, and individually (motion sequence number 004), pursuant to CPLR 3212, for summary judgment in her favor on the negligence claims against Aquatic, 300 East 85th Street Housing Corp. (300 East) and Rose Associates, Inc. (Rose) is denied; and it is further

ORDERED that 300 East and Rose's motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them is granted with costs and disbursements to 300 East and Rose as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the action is dismissed in its entirety as against New York Aquatics, LLC; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Dated: March 29, 2019

ENTER:

J.S.C.