

Walker-Rodriguez v City of New York

2019 NY Slip Op 32486(U)

August 22, 2019

Supreme Court, Kings County

Docket Number: 522819/2016

Judge: Marsha L. Steinhardt

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of August 2019.

P R E S E N T:

HON. MARSHA L. STEINHARDT,
Justice

----- X
ANITA WALKER-RODRIQUEZ AND DYNELL FOUNTAINE,

Plaintiff,

DECISION AND ORDER
Index No. 522819/2016

-against-

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, NEW YORK CITY FIRE DEPARTMENT EMERGENCY MEDICAL SERVICES AND NEW YORK CITY HEALTH AND HOSPITALS CORPORATION AND THEIR AGENTS SERVANTS AND EMPLOYEES,

Defendants.

----- X

The following papers numbered 1 to 3 read herein:

Papers Numbered

Notice of Motion _____

1

Opposition _____

2

Reply _____

3

Defendants THE CITY OF NEW YORK and THE CITY OF NEW YORK sued herein as NEW YORK CITY POLICE DEPARTMENT and NEW YORK CITY FIRE DEPARTMENT EMERGENCY MEDICAL SERVICES move pursuant to CPLR §3211(a)(7) for an order dismissing Plaintiffs' complaint or, in the alternative, for an order granting summary judgment in its favor pursuant to CPLR §3212. Plaintiff opposes.

This is an action sounding in prehospital care negligence malpractice against Defendant City. Plaintiffs allege that the 911 dispatcher negligently handled Plaintiffs' 911 call and that the responding New York City Fire Department (FDNY) Emergency Medical Services (EMS) Advanced Life Support (ALS) and Basic Life Support (BLS) were also negligent.

On December 22, 2015, Plaintiffs served a Notice of Claim alleging that the City was negligent in the handling of a 911 call made on November 3, 2015, and that there was a "negligent response by two, separate, Emergency Medical Services crews." The Notice of Claim further alleges "prehospital care negligence malpractice" against the two responding EMS crews. On December 22, 2016, Plaintiffs served a Summons and Complaint and issue was joined on January 17, 2017. On March 30, 2017, Plaintiffs served a Bill of Particulars claiming that the City is liable for the negligent dispatch of the 911 call, including initially assigning an ambulance that did not have advanced emergency medical training (ALS), as well as a delay in transport and negligent treatment by the EMS crew, resulting in Plaintiff Anita Walker-Rodriguez suffering, *inter alia*, hypoxia and brain damage. In response to the City's demands regarding the emergency calls and, specifically, what the caller was told by the operator, the Bill of Particulars stated that Dynell Fountaine called 911 and was informed by the 911 operator that an ambulance would be dispatched to the caller's residence.

FACTS

On November 2, 2015, Ms. Walker-Rodriguez woke up at approximately 7:00 a.m. and then proceeded to the shower. Once in the shower, she had difficulty breathing, jumped out of the shower, told her husband she could not breathe and ran to her bedroom to try and use her nebulizer. Mr. Fountaine, Ms. Walker-Rodriguez's husband, followed her into the bedroom and saw her using her nebulizer. He then sent his twin sons to school on their own.

At 7:45 a.m., Mr. Fontaine called 911. He advised that his wife was having an asthma attack and that she stated she could not breathe. The EMS dispatcher, assignment receiving operator David Romero, asked Mr. Fontaine if he was the patient and Mr. Fontaine said that his wife was. During the call, Ms. Walker-Rodriguez started to collapse. Mr. Fontaine continued to tell the operator that his wife could not breath. Operator Romero requested that Mr. Fontaine remain calm while he asked questions. Operator Romero asked if Ms. Walker-Rodriguez was breathing and awake and Mr. Fontaine stated, "She is, but she is on the floor". Mr. Romero then inquired about her age and asked if she was having an asthma attack. Operator Romero encouraged Mr. Fontaine to remain calm and informed him that answering his questions would not delay the ambulance.

Operator Romero then inquired if the patient had ever been intubated and Mr. Fontaine replied that he did not know. Mr. Fontaine advised Operator Romero that his wife was shaking and turning colors. Operator Romero tried asking how Ms. Walker-Rodriquez was doing and, again, if she had ever been intubated? Mr. Fontaine responded, "She cannot breathe, she cannot talk to you". Mr. Fontaine again stated that his wife was shaking and turning colors, and Operator Romero asked if she was turning blue. Mr. Fontaine said no, "but she's falling on the floor, she's trying to stand up. . .". Mr. Romero advised Mr. Fontaine that if he panics, he cannot help her. Mr. Fontaine then stated, "her eyes are rolling in her head." Operator Romero told Mr. Fontaine that he was sending an ambulance and began to provide instructions about the ambulance arrival. After that, there was a dial tone and another dispatcher on the line advised that Mr. Fontaine had hung up. After hanging up, Mr. Foutnaine tried to hold up his wife, but she collapsed. He then tried to perform CPR for a minute or two and then he left the apartment to meet the ambulance.

The call was entered at 7:46 a.m. with an FDNY call-type designation of "ASTHMAB" with the notation: "ASTHMA ATTACK . .UNK IF INTUBED. .CLR IS HYSTERICAL. ." Operator Romero chose the ASTHMAB call type, which resulted in a BLS ambulance being dispatched.

An FDNY BLS ambulance, staffed by EMTs Kristopher Nelson and Marilyn Villanueva, was dispatched at 7:47 a.m., arriving on the scene at 7:49 a.m. When the EMTs arrived, Mr. Fontaine met them by the front of the apartment building door. Mr. Fontaine first helped the female EMT to the apartment. Once they were in the apartment, Mr. Fontaine advised her about his wife's asthma attack, that she stopped breathing, and her allergies. He then ran out of his apartment and found the male EMT at the elevator bank and helped him to the apartment. When the male EMT arrived at the apartment, Mr. Fontaine again advised of his wife's asthma attack and allergies. They then talked about going to Woodhull Hospital. Since the EMT's had arrived, Mr. Fontaine left the apartment to take his two younger children to his mother's house so he could then go to Woodhull Hospital to meet the EMTs with his wife.

At about 7:50 a.m., EMT Nelson determined that Ms. Walker-Rodriguez was unconscious, and he requested ALS assistance from dispatch. The dispatcher advised EMT Nelson that an ALS team was estimated to arrive in 12 minutes. After requesting ALS, the EMTs attempted to place an oral airway adjunct (OPA), but discovered that Ms. Walker-Rodriguez was clenching down tight. They continued treating her by oxygenating her with a bag-valve-mask (BVM). Then they administered an epinephrine auto-injector (epinephrine). After that, they obtained another set of vital signs as well as continued to maintain her airway and circulation. The EMTs observed an improvement in Ms. Walker-Rodriguez's respiratory rate and considered transporting Ms. Walker-

Rodriguez to Woodhull. However, the EMTs had already requested ALS and Ms. Walker-Rodriguez needed ALS interventions so they continued to treat her until ALS arrived.

An FDNY ALS ambulance staffed by paramedics Louis Brunk and Jeremiah Hanson was dispatched at about 7:51 a.m. and arrived on scene at 8:00 a.m. The paramedics found the BLS crew using the BVM with Ms. Walker-Rodriguez in her bedroom. The ALS team made contact with Ms. Walker-Rodriguez at approximately 8:05 a.m. The ALS team communicated with the EMTs, performed their own assessment, and observed that Ms. Walker-Rodriguez was clenching down on her tongue. They were advised that the EMT's had given Ms. Walker-Rodriguez epinephrine, but they observed that she was still breathing slowly. They evaluated Ms. Walker-Rodriguez's vital signs at 8:11 a.m. Ms. Walker-Rodriguez remained unconscious. The ALS team then placed EKG pads on Ms. Walker-Rodriguez and attempted to intubate. During the intubation attempts, Ms. Walker-Rodriguez was off the BVM, but between intubation attempts she was being ventilated by the BVM. After the intubation attempts failed, the paramedics placed a nasopharyngeal airway (NPA) in her nose to assist with ventilation. In response to the constriction of Ms. Walker-Rodriguez's pupils and depressed respiratory rate, the paramedics decided to administer Narcan, a medication that can counter the effects of an opioid overdose, at approximately 8:16 a.m. Another dose of Narcan was administered at about 8:21 a.m. Ms. Walker-Rodriguez's vital signs were taken again at approximately 8:26 a.m. The paramedics and EMTs had difficulty removing Ms. Walker-Rodriguez from the apartment. The EMTs and paramedics departed for the hospital at 8:38 a.m. Irene Bell, Ms. Walker-Rodriguez's great-aunt¹, rode in the ambulance with Ms. Walker-Rodriguez.

¹ After the 911 call, Mr. Fontaine also called Irene Bell ("Aunt Cookie"), his wife's great-aunt who lived on the seventh floor of the same apartment building, to come down to the apartment because he wanted her to stay with his wife while he took his other two children to his mother's house. Ms. Bell came down to the apartment and observed Ms. Walker-Rodriguez on the ground in the bedroom. At some point, Mr. Fontaine left to bring his two daughters to his mother's home.

Ms. Walker-Rodriguez ultimately suffered hypoxia leading to anoxic brain injury. It was determined that her asthma attack caused respiratory failure, leading to a loss of oxygen to the brain. The hypoxia caused Ms. Walker-Rodriguez to suffer neurological damage.

DISCUSSION

In its motion, the City correctly contends that in order for liability to ensue, Plaintiffs are required to plead and establish that there was a special relationship with the City. The City argues that Plaintiff's failed to plead or establish that a special relationship existed. The City further contends, assuming, *arguendo*, that Plaintiffs can establish the necessary elements of a special relationship, that the City is immune from liability for the discretionary actions of its employees.

(1) Pleading Special Duty

“On a motion to dismiss pursuant to CPLR 3211(a)(7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory” (*Santaiti v. Town of Ramapo*, 162 AD3d 921, 924-925 [2d Dept 2018]). Here, construing the complaint liberally and according the Plaintiff the benefit of every possible favorable inference, the complaint was sufficient to allege the existence of a special relationship between the City and Plaintiffs. The complaint adequately alleged “direct communication between employee and/or agents” of the City and Plaintiffs, and that the City “assumed through promises or actions” an affirmative duty to act on behalf of Ms. Walker-Rodriguez to “promptly and properly provide emergency medical services and/or emergency transport to hospital facilities” (*see Cuffy v. City of New York*, 69 NY2d 255[1987]). In addition, the complaint adequately alleged that the City, through its “employees and/or agents, knew or

should have known that inaction and/or failure to provide prompt and proper emergency medical services, could cause harm to Plaintiffs”.

(2) Establishing Special Duty

“[A] municipality is immune from negligence claims arising out of the performance of its governmental functions unless the injured person establishes a special relationship with the municipality which would create a special duty of protection with respect to that individual” (*Gotlin v. City of New York*, 90 AD3d 605, 607 [2d Dept. 2011]; *Joline v. City of New York*, 32 AD3d 492, 494 [2d Dept. 200]); See, *Kircher v. City of Jamestown*, 74 NY2d 251, 255–256 [1989]; *Cuffy v. City of New York*, 69 NY2d 255, 260 [1987]). The elements required to prove the existence of a special relationship are “(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking” (*Cuffy v. City of New York*, 69 NY2d at 260 [citations omitted]; *Valdez v. City of New York*, 18 NY3d 69, 80 [2011]).

The City argues that Plaintiffs cannot establish the first or fourth *Cuffy* prongs. The first prong requires an assurance or assumption of a duty to act on behalf of the individual. The Court of Appeals has held that “[t]he assurance by the municipal defendant must be definite enough to generate justifiable reliance by the plaintiff” (*Dinardo v. City of New York*, 13 NY3d 872, 874 [2009]). The Court reiterated the long-standing principle underlying cases premised on a special relationship between municipality and Plaintiff that:

“the injured party's reliance is as critical . . . as is the municipality's voluntary affirmative undertaking of a duty to act . . . Indeed, at the heart of most of these ‘special duty’ cases is the unfairness that the courts have perceived in precluding recovery when a municipality's voluntary undertaking has lulled the injured party into a false sense of security and has

thereby induced [her] either to relax [her] own vigilance or to forego other available avenues of protection” (*id.* at 874 [internal citations omitted]).

Here, there can be no dispute that the City assumed an affirmative duty to act on behalf of Ms. Walker-Rodriquez arising from the conduct of the EMTs and paramedics and their interactions with Ms. Walker-Rodriquez and Mr. Fountaine. The EMTs and paramedics affirmatively acted by: (1) dispatching an ambulance without delay – the City’s EMS dispatcher told Mr. Fountaine that “talking to me doesn’t delay the ambulance” and that he was sending an ambulance which arrived within 4 minutes of the 911 call; (2) accompanying Mr. Fountaine to his wife, bringing in equipment and attending to Ms. Walker-Rodriquez; (3) telling Mr. Fountaine that they would bring his wife to Woodhull – the hospital 5 minutes away; (4) recognizing that Ms. Walker-Rodriquez required ALS interventions and then requesting ALS and continuing to treat Ms. Walker-Rodriquez until ALS arrived; and (5) transporting Ms. Walker-Rodriquez to the hospital. Clearly, the acts of the EMTs and paramedics went beyond assurances and promises. In this case, the EMTs and paramedics affirmatively acted and assumed a duty as to Ms. Walker-Rodriquez. A “special relationship” can arise from a duty voluntarily undertaken by a municipality to an injured person (*see McLean v. City of New York*, 12 NY3d 194 [2009]).

Similarly, there was a justifiable reliance by Mr. Fountaine that, based upon the EMTs evaluation, Ms. Walker Rodriquez needed to be transported to the hospital. Mr. Fountaine tried to expediate his wife’s transport to Woodhull as best he could. (1) He performed CPR on his wife while waiting for the ambulance to arrive; (2) he met the EMT crew at the front of the building and physically carried bags for them to his apartment to assist them to the apartment faster; (3) he urged them to “hurry up”; (4) he left the apartment to bring his two younger children to his mother’s only after the EMTs reassured him they were bringing his wife to Woodhull; and (5) he went straight to Woodhull, to meet the EMTs with his wife, after dropping off his children. It was

reasonable for Mr. Fountaine to rely on the EMTs' assurances rather than seek an alternative method for transporting his wife to Woodhull, especially since she was unconscious at this point. Given these circumstances, reliance by Mr. Fountaine on the expertise of the EMTs was clear and justified.

While the City argued that Plaintiffs did not meet the first or fourth prongs of *Cuffy*, Plaintiffs put forth evidence that the City assumed an affirmative duty to act which, as a matter of law, constituted an action that lulled the Plaintiffs into a false sense of security and generated justifiable reliance giving rise to a special relationship.

(3) Discretionary Immunity

The City argues that even if special duty is established, as discussed *supra*, the City must be granted summary judgment because the actions of its agents were discretionary. “If a municipality was acting in a governmental capacity, then the plaintiff must prove the existence of a special duty (*Turturro v. City of New York*, 28 NY3d 469, 478 [2016]). “Even if a plaintiff satisfies that burden, a municipality acting in a discretionary governmental capacity may rely on the ‘governmental function immunity defense’” (*id.* at 478, quoting *Valdez v. City of New York*, 18 NY3d at 75). A “state or municipal defendant engaging in a governmental function can avoid liability if it timely raises the defense and proves that the alleged negligent act or omission involved the exercise of discretionary authority” (*Valdez v. City of New York*, 18 NY3d at 76). The “governmental function immunity defense cannot attach unless the municipal defendant establishes that the discretion possessed by its employees was in fact exercised in relation to the conduct on which liability is predicated” (*id.* at 69). To prevail on a governmental function immunity defense, “a municipality must do much more than merely allege that its employee was engaged in activities involving the exercise of discretion” (*id.* at 79).

On a motion for summary judgment, the moving party has the initial burden to provide sufficient proof, in admissible form, to enable a court to determine that it is entitled to judgment as a matter of law. If this burden is not met, the court must deny the relief sought (CPLR § 3212; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). However, once the movant on a summary judgment motion has made a prima facie showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v. Oppenheimer*, 148 AD2d 493 [1989]; see also *Zuckerman*, 49 NY2d at 562).

The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury (see *Holbrook v. United Hosp. Med. Ctr.*, 248 AD2d 358, 359 [2d Dept 1998]). Therefore, on a medical malpractice motion for summary judgment, the movant must establish, prima facie, either that there was no departure from accepted standards of medical care or that any departure was not a proximate cause of the plaintiff's injuries (*Uchitel v. Fleischer*, 137 AD3d 1111, 1112 [2d Dept 2016]; *Senatore v. Epstein*, 128 AD3d 794, 795 [2d Dept 2015]).

To sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars (*Wall v. Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1044–1045 [2d Dept 2010]; *Grant v. Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 874 [2d Dept 2008]). Once this showing has been made, the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut the defendant's prima facie showing, but only “as to those elements on which the defendant met the prima facie burden” (*Harris v. Saint Joseph's Med. Ctr.*, 128 AD3d 1010, 1012 [2d Dept 2015]; see *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

“General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment” (*DiMitri v. Monsouri*, 302 AD2d 420, 421 [2003] [citations omitted]; *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]). Further, “[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions . . . [because] such credibility issues can only be resolved by a jury” (*Feinberg v. Feit*, 23 AD3d 517, 519 [2d Dept 2005] [internal citations omitted]).

In support of their motion, Defendants submitted an expert affirmation from Matt Friedman, M.D., a physician Board-Certified in emergency medicine and emergency medical services. Dr. Friedman opines that the New York City Prehospital Treatment Protocols (Protocols), used by the EMTs and paramedics, provide guidance for typical situations and that they are not to be applied rigidly to unusual or unpredictable circumstances. Dr. Friedman states that although the EMTs and paramedics “are trained to apply the protocols, prehospital care providers must be flexible in responding to conditions they encounter at the scenes of medical emergencies . . . because such emergencies are often unpredictable, EMTs and paramedics must use their judgment in assessing patients and deciding, often under acute time pressure, whether or when to deliver certain treatments”. Dr. Friedman further states that the “EMTs and paramedics who were dispatched to Walker-Rodriguez’s apartment faced complex and challenging circumstances including a patient who was in respiratory distress”. Dr. Friedman opines that the EMTs and paramedics “appropriately utilized their judgment in the treatment, stabilization, and transport of the patient . . . [and] EMTs and paramedics did not deviate from the standard of care of good and accepted emergency medical practices”.

In opposition, Plaintiff submitted an expert affirmation from Kevin Brown, M.D., an Emergency Medicine Attending physician with an additional specialty in Prehospital care. Dr. Brown, in reviewing the instant matter, reviewed the Protocols. It is his opinion that the point of these protocols is “to remove ‘judgment’ from this scenario, which instead is governed by strict protocol: ‘do not delay transport for any reason’”. Dr. Brown opines that in this instant matter, “the EMS Dispatcher improperly assigned a low level response (single, BLS unit) for what was clearly described by the 911 caller as severe respiratory distress. The clearly indicated action by the EMS Dispatcher (not a ‘judgment’ call) was to assign this call with the ambulance response for a patient in life-threatening emergency: ‘dual dispatch’ [ALS and BLS crew].” Dr. Brown states that “some EMS Dispatch decisions on whether to assign BLS or ALS may indeed call for use of ‘judgment’ - but not this one with clear statements defining a critically ill patient in severe respiratory distress”. It is Dr. Brown’s opinion that this was a clear deviation by EMS Dispatch which caused hypoxic brain damage. Dr. Brown specifically stated that it “was manifestly wrong (not ‘judgment’) to assign this call for simple BLS response.

Dr. Brown also rebuts Dr. Friedman. Dr. Brown states that it “was not a ‘judgment call’ whether BLS should have begun transporting the patient pending arrival of ALS, as asserted by Dr. Friedman, [but] . . . was mandated by General Operating Procedures . . . as the patient and BLS were only 5-6 minutes away from Woodhull with a critical and unresponsive patient, given an ETA for ALS of 12 minutes out. Immediate transportation was the clear standard of care.” Dr. Brown opines that had “BLS properly initiated transport when told ALS was ‘12 minutes out’ it would not have been left to paramedics to attempt to intubate and oxygenate a patient ‘clenching’ on her airway, who had already sustained prolonged hypoxia. BLS should already have been at Woodhull Emergency before ALS arrived.”

Here, the parties clearly present conflicting medical expert opinions about the exercise of discretion by the City. While Defendants expert presents somewhat of a conclusory opinion regarding the EMTs and paramedics discretion, or judgment, Plaintiffs expert presents specific examples of deviations from protocols and how these deviations were not discretionary or “judgment calls”. Moreover, Plaintiffs expert stated what the standard of care should have been, whereas Defendants expert merely concludes that the EMTs and paramedics did not deviate from the standard of care of good and accepted emergency medical practices.


This Court, therefore, finds that the conflicting expert opinions presented herein sufficiently establish the existence of questions of fact that require a jury’s determination.

Accordingly, it is

ORDERED, that Defendants motion for dismissal and summary judgment is denied in its entirety.

This constitutes the decision, opinion and order of this Court.

ENTER,



HON. MARSHA L. STEINHARDT
J.S.C.