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| Mulvaney v County of Westchester |
| 2019 NY Slip Op 34768(U) |
| April 23, 2019 |
| Supreme Court, Westchester County |
| Docket Number: Index No. 67063/2016 |
| Judge: Sam D. Walker |
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To commence the statutory time 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.

**SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
DEVAN MULVANEY, as Executor of the Estate of
DONALD MULVANEY, deceased, as Executor of
the Estate of LEDELL MULVANEY, deceased,
and as Administrator of the Estate of
KATHERINE MULVANEY, deceased,
Plaintiff,

DECISION AND ORDER
Index No: 67063/2016
(Prior Index No.
62649/2018)
Seq# 3

-against-

COUNTY OF WESTCHESTER, TOWN OF YORKTOWN,
YORKTOWN HEIGHTS ENGINE COMPANY #1, THE
MILLWOOD FIRE COMPANY NUMBER ONE, INC.,
MOHEGAN VOLUNTEER FIRE ASSOCIATION, INC.,
EMPRESS AMBULANCE SERVICE, INC., MOUNT
KISCO VOLUNTEER AMBULANCE CORPS, INC.
OSSINING VOLUNTEER AMBULANCE CORPS,
INCORPORATED, PEEDSKILL COMMUNITY
VOLUNTEER AMBULANCE CORP., and SOMERS
VOLUNTEER FIRE DEPARTMENT, INC.,

Defendants,

-----X
Town of Yorktown,

Third-Party Plaintiff,

-against-

Empress Ambulance Service, Inc.,

Third-Party Defendant

-----X
The following papers were reviewed on the motion seeking an order dismissing
the action as against the defendant, Peekskill Community Volunteer Ambulance Corp.:

Notice of Motion/Affirmation/Exhibit A-B
Affidavit in Support/Exhibit A

1-4
5-6

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|--------------------------------|-------|
| Affidavit in Support/Exhibit A | 7-8 |
| Memorandum of Law in Support | 9 |
| Affirmation in Opposition | 10 |
| Reply Affirmation/Exhibits A-B | 11-13 |

Based on the foregoing papers the motion is granted.

Factual and Procedural Background

The plaintiff commenced an action on November 14, 2016 against the County of Westchester and the Town of Yorktown, stemming from a vehicular accident that occurred on August 15, 2015, when a vehicle that was driving northbound on the Taconic State Parkway crossed the center embankment and collided with the Mulvaney's vehicle traveling southbound, resulting in personal injuries and the deaths of the plaintiff's father, mother and sister, Donald, Ledell and Katherine Mulvaney.

On November 17, 2017, the Town of Yorktown (the "Town") filed a third-party summons and complaint, against Empress Ambulance Service, Inc., and on August 15, 2018, the plaintiff commenced this action against the defendant, Peekskill Community Volunteer Ambulance Corp. ("PCVAC") and other named defendants.

PCVAC now files the instant motion seeking dismissal of the action against it, arguing that the parts of the complaint alleging wrongful death, must be dismissed as untimely, pursuant to CPLR 3211(a)(5) because the plaintiff failed to file suit within two years of the decedents' deaths and within two years six months, as required under CPLR section 214-a; and that the complaint must be dismissed, pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) for failure to state a cause of action where there is incontrovertible evidence, including documentary evidence, that the PCVAC crew that

responded to the incident did not provide any extrication, care, treatment or transport to the decedents in this case.

The plaintiff's attorney filed an affirmation in opposition, arguing that PCVAC failed to meet its burden and the requirement of demonstrating that it is entitled to judgment as a matter of law. The attorney also argues that the motion is premature, since PCVAC is in exclusive control of material information necessary for the plaintiff to raise a genuine issue of material fact and contends that he has not had an opportunity to verify the information in the affidavits asserting no involvement with the Mulvaney vehicle, which were submitted in support of the motion. He further states that, even though PCVAC argues that it neither performs nor has the equipment to conduct vehicular extractions, such does not clarify whether PCVAC aids other agencies in extractions.

The attorney argues that discovery has not been completed and PCVAC's assertion that it is shielded from liability stemming from claims of conscious pain and suffering due to a two year and six month statute of limitations, because it provides medical care by extension of a medical director's license to practice medicine, has not been verified, since PCVAC did not answer the complaint and no examinations before trial have been held.

In reply, PCVAC's attorney argues that the plaintiff's attorney's affirmation is insufficient to defeat the motion to dismiss, since the attorney has no personal knowledge of the facts. PCVAC's attorney also argues that the plaintiff's attorney fails to address the sworn affidavit from the trained technician at the scene of the accident,

stating that he had no role in the extrication, treatment or transport of the Mulvaney decedents and the president of PCVAC, who states that Peekskill does not equip its ambulances with any extrication equipment. The president further states that the technicians work under the direction and control of the medical director and the allegations for negligent medical care are actually allegations of medical malpractice. The president avers that PCVAC is required to create a Patient Care Report ("PCR") for each call, including calls where no patient contact is made and/or no care, treatment or transportation rendered and upon review of the records, he states that PCVAC was assigned to standby at this accident, but did not treat or transport any patients.

DISCUSSION

Rule 3211 of the Civil Practice Law and Rules provides, in relevant part that:

(1) a defense is founded upon documentary evidence; or

5) the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or

(7) the pleading fails to state a cause of action...."

N.Y. Civ. Prac. L. & R. 3211(a)(1), (a)(3), (a)(4), (a)(5) and (a)(7).

In moving to dismiss a cause of action pursuant to CPLR 3211(a)(5), a defendant must demonstrate that the time within which to commence the action has expired." (*Plain v Vassar Bros. Hosp.*, 115 AD3d 922, 923 [2d Dept 2014]). PCVAC asserts that the applicable statute of limitations for the wrongful death claim expired on August 15, 2017 for Katherine and Ledell Mulvaney and September 15, 2017 for Donald Mulvaney. The plaintiff did not file the action against PCVAC until August 15, 2018, therefore, that part of the action for wrongful death is dismissed.

With regard to the other claims, "[a] motion to dismiss pursuant to CPLR

3211(a)(1) may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*730 J & J LLC v Fillmore Agency, Inc.*, 303 AD2d 486 [2d Dept 2003]).

Further, under CPLR 3211(a)(7), initially "[t]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law...." (see *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]). A motion to dismiss pursuant to CPLR 3211(a)(7) will be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it. (*Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682, 683 [2d Dept 2012]).

PCVAC submitted affidavits from a NYS certified emergency medical technician, James Calbo ("Calbo"), who states that he was dispatched to the scene of the accident and on arrival, all patients were already being attended to by other providers. Calbo states that he was instructed by the incident commander to stand by in the event one of the emergency service providers required medical assistance. He avers that he and his partner remained with their ambulance available to assist and at no time were he or his partner called upon to assist in the extrication, medical treatment or transportation of anyone injured in the accident and had they treated or transported anyone, they would have been required to complete a Patient Care Report for that patient.

As previously stated, PCVAC also submitted an affidavit from the president, Don Wiesendanger, who confirms that Peekskill does not carry extrication equipment on its

ambulances and states that whenever a patient is transported, PCVAC completes a Patient Care Report upon a review of PCVAC's records for the date of the accident, the Patient Care Report states that PCVAC was assigned to stand by, but did not participate in the extrication, care, treatment or transport of any patients.

The plaintiff did not submit any evidence or documentation to rebut PCVAC's affidavits and documentation submitted. Therefore, the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law and a material fact as claimed by the plaintiff to be one, is not a fact at all and there is no dispute regarding it.

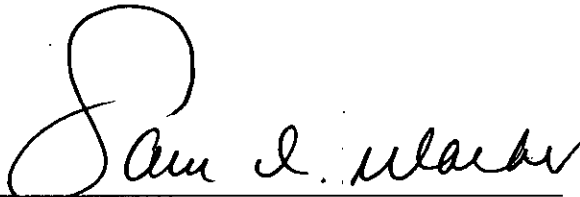
Accordingly, based on the foregoing, it is

ORDERED that the motion to dismiss granted and it is further

ORDERED that the action against Peekskill Community Volunteer Ambulance Corp., is dismissed.

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, New York
April 23, 2019



HON. SAM D. WALKER, J.S.C.