

**Garcia v Rainbow Ambulette Serv. Inc.**

2019 NY Slip Op 35183(U)

May 23, 2019

Supreme Court, Bronx County

Docket Number: Index No. 30354/2018E

Judge: John R. Higgitt

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This opinion is uncorrected and not selected for official publication.



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 14

-----X  
GARCIA, JOSE

Index No. 30354/2018E

- against -

Hon. JOHN R. HIGGITT,

RAINBOW AMBULETTE SERVICE INC., et ano.

A.J.S.C.

-----X  
and a third-party action.

The following papers numbered 10 to 19 and 21 in the NYSCEF System were read on this motion for **DISMISSAL**, noticed on May 10, 2019 and duly submitted as No. 35 on the Motion Calendar of May 10, 2019

	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	10-17
Notice of Cross-Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	18-19
Replying Affidavit and Exhibits	21
Filed Papers	
Memoranda of Law	
Stipulations	

Upon the foregoing papers, third-party defendants’ motion pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the third-party complaint is denied, in accordance with the annexed decision and order.

Dated: 05/23/2019

Hon.   
JOHN R. HIGGITT, A.J.S.C.

**Check one:**

- Case Disposed in Entirety
- Case Still Active

**Motion is:**

- Granted  GIP
- Denied  Other

**Check if appropriate:**

- Schedule Appearance
- Fiduciary Appointment
- Referee Appointment
- Settle Order
- Submit Order

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 14

-----X  
JOSE GARCIA,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 30354/2018E

RAINBOW AMBULETTE SERVICE INC. and "RICKY  
SHELBY," intended to be the driver,

Defendants.  
-----X

RAINBOW AMBULETTE SERVICE INC.,

Third-Party Plaintiff,

Third-Party Index No.  
43031/2019E

- against -

NATIONAL HOME HEALTH CARE – QUEENS,  
ALLEN HEALTH CARE SERVICES, INC. and LAURA  
MATA GUEVARA,

Third-Party Defendants.  
-----X

John R. Higgitt, J.

Upon third-party defendants' April 12, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; defendants' and third-party plaintiffs' May 1, 2019 affirmation in opposition; third-party defendants' May 9, 2019 affirmation in reply; and due deliberation; third-party defendants' motion pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the third-party complaint is denied.

Plaintiff's complaint alleges that he was a wheelchair-bound passenger in the vehicle owned by defendant Rainbow Ambulette Service Inc. and driven by defendant Ricky Shelby, and that plaintiff sustained injuries when defendants' vehicle stopped suddenly, as a result of defendants' negligence in the operation of their vehicle and in their failure to properly secure plaintiff within the vehicle. The third-party complaint alleges that third-party defendant Mata Guevara, a home health aide assigned to assist plaintiff on behalf of third-party defendant

National Home Health Care – Queens and/or third-party defendant Allen Health Care Services, Inc., failed to properly supervise or assist plaintiff by, among other things, failing to ensure that plaintiff was secured in defendants' vehicle by, generally, any available safety device and, specifically, a seatbelt. The third-party complaint asserts claims for common-law contribution and indemnification.

In support of the motion, third-party defendants submit the transcripts of the deposition testimony of third-party defendant Mata Guevara and defendant Shelby taken in the related action entitled *Mata v Rainbow Ambulette Service Inc.*, Index No. 300872/2016.

A motion seeking dismissal pursuant to CPLR 3211(a)(1) “may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326 [2002]; see also *AG Capital Funding Partners, L.P. v State St. Bank & Tr. Co.*, 5 NY3d 582 [2005]). “A paper will qualify as documentary evidence only if it satisfies the following criteria: (1) it is unambiguous; (2) it is of undisputed authenticity; and (3) its contents are essentially undeniable” (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 2019 NY Slip Op 02437, at \*3 [1st Dept 2019] [internal citations and quotation marks omitted]). Deposition transcripts do not constitute documentary evidence for purposes of CPLR 3211(a)(1) (see *Amsterdam Hosp. Group, LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431 [1st Dept 2014]; *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651 [1st Dept 2011]; *Baron v Suissa*, 44 Misc 3d 1229[A], 2014 NY Slip Op 51379[U] [Sup Ct, Suffolk County 2014]); this aspect of the motion is therefore denied.

“On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), it is well settled that courts must liberally construe a pleading, accept all the facts

alleged therein to be true, and accord those allegations the benefit of every possible favorable inference in order to determine whether those facts fit within any cognizable legal theory” (*Molina v Phoenix Sound, Inc.*, 297 AD2d 595, 596 [1st Dept 2002]). “A CPLR 3211 dismissal ‘may be granted where documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law’” (*Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 571 [2005] [citations omitted]). “[A] defendant can submit evidence[, such as affidavits or testimony,] in support of [a CPLR 3211(a)(7)] motion attacking a well-pleaded cognizable claim” (*Basis Yield Alpha Fund (Master) v Goldman Sachs Grp., Inc.*, 115 AD3d 128, 134 [1st Dept 2014]). The affidavits or testimony submitted in support of a motion to dismiss must conclusively establish the lack of a claim or cause of action (*see Godfrey v Spano*, 13 NY3d 358 [2009]; *Anonymous v Anonymous*, 165 AD3d 19 [1st Dept 2018]).

Third-party defendant Mata Guevara testified that plaintiff, who weighed approximately 450 pounds, was using a walker, not a wheelchair, on the day of the accident. She further testified that plaintiff sat in one of the bench seats behind the driver, and was unable to use the available seatbelts because of his size. Plaintiff requested a seatbelt extension from the driver and was refused. When the ambulette stopped suddenly during their trip, plaintiff fell to the floor and was injured.

Defendant Shelby testified that the ambulette was not equipped with a seatbelt extension to accommodate a passenger of plaintiff’s size, but that defendant Shelby constructed a makeshift extension by tying two available seatbelts together, and offered it to plaintiff. Plaintiff, however, declined to use the makeshift extension when asked by defendant Shelby, assuring defendant Shelby that he would be fine. While traveling, defendant Shelby encountered a speed bump and, because he was aware that plaintiff was not wearing a seatbelt, attempted to slow

down before negotiating it. Defendant Shelby, however, stopped short, and the ambulette “jerked” heavily, propelling plaintiff to the floor.

Third-party defendants assert that they owed no duty to plaintiff or third-party plaintiffs, and that defendant Shelby’s actions were the sole proximate cause of the accident. Third-party defendants assert that because plaintiff, as an adult rear-seated passenger, had no duty to wear a seatbelt in the vehicle (*see* Vehicle and Traffic Law § 1229-c[3], [9]), a higher burden may not be imposed upon them. They rely on the plaintiff-appellant’s brief on the appeal leading to the Appellate Division, Second Department’s decision in *Muzammil v Singh*, 275 AD2d 398 (2d Dept 2000). In *Muzammil*, however, the court held only that “where ... the failure to wear a seat belt is alleged to be the cause of the accident, the conduct of the plaintiff ... in failing to wear a seat belt may be considered on the issue of liability” (*id.* at 399). The court’s decision does not stand for any of the propositions urged by third-party defendants.

“The definition and scope of an alleged tortfeasor’s duty owed to a plaintiff is a question of law” (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]). “Although a jury determines whether and to what extent a particular duty was breached, it is for the court first to determine whether any duty exists, taking into consideration the reasonable expectations of the parties and society generally” (*Rivera v Nelson Realty, LLC*, 7 NY3d 530, 534 [2006]; *see also Holdampf v A.C. & S., Inc. (In re New York City Asbestos Litig.)*, 5 NY3d 486 [2005]).

“[C]ourts ... fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability” (*532 Madison Ave. Gourmet Foods, Inc. v Finlandia Ctr., Inc.*, 96 NY2d 280, 288 [2001] [citation and quotation marks omitted]). “[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. Servs. Corp.*, 83 NY2d 579, 585 [1994]). "[Whenever] one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he [or she] did not use ordinary care and skill in his [or her] own conduct with regard to the circumstances he [or she] would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger" (*Havas v Victory Paper Stock Co.*, 49 NY2d 381, 386 [1980] [citation omitted]).

Vehicle and Traffic Law § 1299-c imposes a burden upon the *operator* of a motor vehicle to ensure that certain passengers -- as is relevant here, mainly children -- use available seatbelts (*see Thurel v Varghese*, 207 AD2d 220 [2d Dept 1995]). A *passenger*, such as third-party defendant Mata Guevara, generally has no duty to ensure that a fellow passenger, such as plaintiff, uses a seatbelt (*see Horan v Brown*, 43 AD3d 608 [3rd Dept 2007]; *Thurel, supra*).

It is, nevertheless, apparent that the statutory duty of care relied upon by third-party defendants, and the fact that plaintiff and third-party defendant Mata Guevara were co-passengers, do not determine the scope of the third-party defendants' common-law duty, if any, to plaintiff (or any other party), given that the purpose of third-party defendant Mata Guevara's presence on the ambulette was to provide some sort of assistance to plaintiff. A defendant's responsibility for caring for another individual may result in liability where the defendant abandons such responsibility, even briefly (*see Reavey v State*, 125 AD2d 656 [2d Dept 1986]), and such abandonment contributes to the individual's injury (*see Auer v Affiliated Home Care of Putnam, Inc.*, 63 AD3d 972 [2d Dept 2009]; *Lozada v Arco Mgt. Corp.*, 8 Misc 3d 1014[A],

2005 NY Slip Op 51097[U] [App Term 1st Dept 2005]).

The record, as developed herein, does not conclusively establish third-party defendants' entitlement to dismissal of the third-party complaint on the ground of a lack of duty. Notably, there is no description of the nature, extent and effect of plaintiff's health conditions -- regardless of his apparent need for an ambulette service and a home health attendant -- to assist the court in determining the type of care and attention that should reasonably have been expected from the third-party defendants, so as to assess whether third-party defendants breached their duty to exercise reasonable care under all attendant circumstances (*see Rodriguez v Home Health Mgt. Servs. Inc.*, 2018 NY Slip Op 31862[U] [Sup Ct, N.Y. County 2018]). For these same reasons, third-party defendants have failed to conclusively establish that defendants' operation of the ambulette was the sole proximate cause of plaintiff's injuries.

Accordingly, it is

ORDERED, that third-party defendants' motion pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the third-party complaint is denied.

The parties are reminded of the June 21, 2019 preliminary conference before the undersigned.

This constitutes the decision and order of the court.

Dated: May 23, 2019

  
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John R. Higgitt, A.J.S.C.