

Schalman v Lopez

2020 NY Slip Op 32720(U)

August 20, 2020

Supreme Court, New York County

Docket Number: 154355/2019

Judge: W. Franc Perry

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

-----X

LYNNE SCHALMAN, LYNNE SCHALMAN,
Plaintiff (s),

INDEX NO. 154355/2019

MOTION DATE 09/04/2019

MOTION SEQ. NO. 002

- v -

JORDI LOPEZ, RON CALDERON, DAVID RAMBHOGH
Defendant.

DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 51, 52, 53, 54

were read on this motion to/for DISMISSAL

Motion Sequences 001 and 002 are hereby consolidated for disposition.

This matter is the second case arising out of the death of Stephen Bergen ("decedent"). Mr. Bergen was a resident of 300 East 85th Street New York, NY, ("premises") when he died in the swimming pool located on the premises on April 26, 2016.

In the first action, plaintiffs sued 300 East 85th Street ("Owner"), the owner of the premises and Rose Associates ("Rose"), who was hired by owner to manage the premises. Plaintiffs also sued Aquatic Recreational Management ("Aquatic"), who was hired by Rose, to provide lifeguards at the pool. In addition, plaintiffs sued Jordi Lopez, an employee of Aquatic, in his individual capacity. Mr. Lopez was the lifeguard on duty when Mr. Bergen died. In addition, plaintiffs sued Martin Weiss, an employee of Owner.

Plaintiffs, in the first action, claimed that the defendants breached a duty of care to Mr. Bergen the moment that their employees saw him unresponsive and that the employees were negligent in failing to properly appreciate his condition and his need for medical assistance. According to plaintiffs, defendants' negligence and breach of duty led to Mr. Bergen's death.

Defendants Owner and Rose then moved for a default judgment on their cross claims against Jordi Lopez in that action . On June 18, 2018, Judge Robert Kalish denied the default motion and dismissed the first action against Jordi Lopez, pursuant to CPLR 306-b, finding that plaintiffs failed to timely and properly serve him. Thereafter, all parties moved for summary judgment.

On March 29, 2019, Judge Kalish denied plaintiff's summary judgment motion and granted the summary judgment motions of defendants, dismissing the action in its entirety. Plaintiffs then filed a Notice of Appeal of Judge Kalish's decision and also moved to reargue that decision.

In his March 29th decision, Judge Kalish found that neither Owner, Rose, nor Aquatic owed any duty to the decedent. Specifically, Judge Kalish concluded that, given the facts of the case, Aquatic did not breach the duty to render aid to the decedent, to call 911, or to do anything more than it did prior to when the decedent went underwater. The court found that there was no evidence in admissible form to establish that Mr. Bergen was visibly in distress or communicating a need for assistance prior to his death. The court also noted that there is no common-law duty to come to the aid of a person suffering from a medical emergency and were such a duty created for lifeguards, in particular, they would become insurers of the health and safety of all persons in any location where they served. As such, the court declined to extend that "duty" to Aquatic.

The court also concluded that while Aquatic did have a duty to supervise Mr. Lopez, that duty had been performed by Aquatic. To the extent that Aquatic assumed a duty of care with respect to the pool, such duty only extended to the operation and maintenance of the pool and did not extend to protect an individual from an unknown medical emergency.

The court stated that its decision was supported by the undisputed medical evidence which showed that Mr. Bergen's death was not caused by drowning or anything done or not done by the defendants' employees. Mr. Bergen died due to a cardiac episode which was unrelated to his presence in the pool.

Judge Kalish also granted summary judgment, dismissing that part of the complaint sounding in negligence pursuant to a violation of GBL§627-a. The court found that under the statute, the premises was not a "health club" and that plaintiff made no showing that the pool at the premises was not subject to the supervision requirements of 10 NY ADC §6-1.23.

The court concluded by dismissing the negligent hiring claims against Aquatic, Owner and Rose, finding that there was no evidence that neither Mr. Lopez, Mr. Weiss nor any of the building employees acted outside of the scope of their employment at any time on the day of Mr. Bergen's death. In addition, the court found no evidence supported plaintiffs' claim that Owner and/or Rose was aware of "Aquatic's alleged propensity to provide lifeguards that fail to recognize emergency medical situations."

The court ultimately concluded that no claim for negligent hiring, retention, training or supervision could be raised against Owner, Aquatic or Rose and therefore dismissed the case.

On April 26, 2019, plaintiffs filed this action. Here, plaintiffs once again sue Jordi Lopez, an employee of Aquatic in his personal capacity. Plaintiffs also sue Ron Calderon and David Rambhogh, employees of Owner, in their personal capacities. It should be noted that plaintiffs' complaint alleges the identical causes of action against the within defendants that were asserted and dismissed against their employers in the first case.

In the case at bar, each defendant moves to dismiss the complaint based upon the doctrines of collateral estoppel and res judicata. Additionally, defendant Jordi Lopez moves to dismiss the complaint alleging that pursuant to CPLR 306(b) plaintiffs have, yet again, failed to make any showing that service was completed upon him within 120 days after the commencement of this action. Mr. Lopez also argues that plaintiffs have failed to make a good cause showing that they should be granted an extension of the time to complete the defective service. These are the identical grounds upon which the first case was dismissed against Mr. Lopez

Mr. Lopez reiterates the arguments made before Judge Kalish, now including the argument that even though plaintiff had every opportunity during the last proceeding and at the commencement of his proceeding to attempt service upon him and also had an opportunity to seek a default either independently or in tandem with the other three co-defendants, plaintiff did not do so.

Plaintiff opposes this portion of Mr. Lopez' motion arguing that Mr. Lopez was served pursuant to CPLR 306. Plaintiff asserts that although they failed to file to an affidavit of service with the Court, service was properly effectuated upon Mr. Mr. Lopez, by documents which were mailed to his home address.

This motion is granted. As the prior court lacked jurisdiction over Mr. Lopez, so does this court. Plaintiffs failed to take any steps to properly join Mr. Lopez in the first action and have failed to join him here. *Leader v. Maroney*, 97 NY2d 95. In addition, plaintiffs have not only failed to demonstrate good cause for not effectuating service but also failed to show how the interests of justice would be served should this court excuse their failure to serve and grant them an opportunity to do so now.

A court may exercise its discretion to extend the 120-day period in CPLR 306-b to enable a plaintiff to properly serve a defendant upon good cause shown or in the interest of justice, extend the time for service. A “good cause” extension requires a showing of reasonable diligence in trying to effect proper service upon a defendant. *Henneberry v. Borstein*, 91 AD3d 496. Good cause has been found that where “the plaintiffs’ failure to timely serve process is a result of circumstances beyond its control.” *Bumpus v. New York City Transit Authority*, 66 AD3d 26.

An extension “in the interest of justice” is broader and more flexible than a “good cause” extension. A court “may consider plaintiffs diligence or lack thereof, along with any other relevant factors, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the promptness of a plaintiffs request for the extension of time and prejudice to the defendant.” *Henneberry*, 91 AD3d at 496.

Plaintiffs have demonstrated neither an entitlement to an extension “in the interest of justice” nor for “good cause. Based upon the evidence presented here, this court declines to exercise its discretion to award plaintiffs any extension of time to serve defendant Lopez, as plaintiffs fail to offer any reason or excuse for their neglect to complete proper service, not do they show any diligence to effectuate completed service upon Mr. Lopez.

This matter is hereby dismissed against Jordi Lopez, pursuant to CPLR 306-b and CPLR 3211 (a)(8) with prejudice, as both the Wrongful Death and Negligence Statute of Limitations have expired.

The remaining defendants move for dismissal pursuant to CPLR 3211 (a)(5), claiming that this case is barred by the doctrines of res judicata and collateral estoppel. The defendants argue that Justice Kalish’s decision resolved all of the liability issues as related to the defendants in the prior matter and the defendants in this matter.

Plaintiffs oppose dismissal asserting that Judge Kalish's dismissal decision was "procedural in nature" and was made without prejudice for plaintiffs to relitigate unresolved issues in the case. This argument fails.

The motions to dismiss are granted in their entirety.

Judge Kalish was clear and unequivocal in his well-reasoned decision. He stated that plaintiffs failed to produce admissible evidence sufficient to prove prima facie negligence on behalf of the defendants in the first case. He also found that the plaintiffs failed to produce admissible evidence sufficient to rebut defendants' prima facie showing of the absence of negligence in that case. There is no indication that the dismissal was based on anything but solid legal grounds. There is no suggestion that the dismissal was rendered on procedural grounds.

Justice Kalish's summary judgment decision also contains a comprehensive discussion of the voluminous evidence, parsing out that which was admissible and that which was not. Movant correctly states that "nowhere in the decision does J. Kalish allude to there being a lack of admissible evidence, such that he was unable to make a final decision on the merits, as to the liability of the defendants."

Plaintiffs within claims are also barred by the doctrines of collateral estoppel and res judicata. Res judicata precludes plaintiffs from relitigating the issues of whether the defendants breached any duty to the decedent in either "ignoring him and/or failing and/or refusing to assist him in the pool on the date of his death". This issue was material to the first action, and was essential to Judge Kalish's decision, which determined that the defendants were acting within the scope of their authority of their respective employers. Judge Kalish found that "no claim for negligent hiring, retention, training or supervision may lie against their employers".

Under New York's transactional approach to the doctrine of res judicata, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred even if based upon different theories or seeking a different remedy. *O'Brien v. City of Syracuse*, 54 NY2d 353. New York Courts have held that res judicata bars successive litigation based upon the "same transaction or series of connected transactions if; 1) there is a judgment on the merits rendered by a court of competent jurisdiction, and 2) the party against whom the doctrine is involved was a party to the previous action or in privity with a party who was." *Matter of People v. Applied Card Systems, Inc.*, 11 NY3d 105.

In the case at bar, the within claims are based upon the same "transaction" as in the first case, which was dismissed. Plaintiffs had a full and fair opportunity to litigate their claims for any actions or inactions of Mr. Lopez, Mr. Calderon and Mr. Rambhogh, in the first action by virtue of the claims asserted against their respective employers in that action. Accordingly, res judicata bars the litigation of this action.

Collateral estoppel also precludes plaintiffs from relitigating, in this action, issues clearly raised in the prior action, which were decided against them. *Yan v. New York Telephone Co.*, 62 NY2d 494. Plaintiffs are precluded from relitigating whether the defendants breached their duty to Mr. Bergen by "ignoring him and/or failing and/or refusing to assist him in the pool and/or pool area, and as a result of that breach, Mr. Bergen suffered severe injuries which lead to his premature death. Defendants in this action were employees of the defendants in the first action at the time of Mr. Bergen's death and any actions or inactions taken by them could have been litigated in the first proceeding.

There is also no question as to whether privity exists between the defendants and their employers. The interests of the defendants were represented in the first proceeding via their employers, as the causes of actions asserted by plaintiffs in this action arose out of the same series of transactions as those raised in the initial action. *Bayer v. City of New York*, 115 AD3d 897.

If the defendants were not found to be acting outside of the scope of their employment and their employers were not negligent in hiring, supervising or training them, the defendants cannot be held to be personally liable for simply being present on the scene at the time of the decedent's demise.

This is the Decision and Order of the Court.

8/20/2020
DATE


W. FRANC PERRY, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
--------------------------	--------------

<input type="checkbox"/>	SUBMIT ORDER
--------------------------	--------------

CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
--------------------------	----------------------------

<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
--------------------------	-----------------------	------------------------------------