

Rodriguez v City of New York

2020 NY Slip Op 35697(U)

January 31, 2020

Supreme Court, Queens County

Docket Number: 706996/17

Judge: Kevin J. Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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Yolanda Rodriguez, as Administratrix of the Estate of Diana Rodriguez Diego and Yolanda Rodriguez, individually,

Index
Number: 706996/17

Plaintiff,
- against -

Motion
Date: 1/27/20

City of New York, Fire Department of The City of New York and Jamaica Hospital Medical Center,

Motion Seq. No.: 3

Defendants.

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The following papers numbered 1 to 9 read on this motion by defendant, Jamaica Hospital Medical Center, for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply.....	8-9

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Jamaica Hospital for summary judgment dismissing the complaint against it is granted.

Plaintiff's decedent committed suicide by shooting herself in the head in her home in Queens County on November 12, 2015. The record on this motion establishes that plaintiff called 911 at 9:05 a.m. on November 12, 2015 to report that her sister, the decedent, was threatening to harm herself. The City's EMTs were dispatched to the premises, where they arrived at 9:08 a.m. NYPD officers were also dispatched to the premises. The EMTs were able to gain entry to the premises at 9:28 a.m. after the NYPD officers on scene requested, and were granted by plaintiff over the telephone, permission to break down the door. Upon entry, decedent was found lying on the floor with a gunshot wound to the head, with an entry wound to the left portion of her forehead near her left eye, and brain matter and blood on the floor, but no active bleeding. Decedent arrived at the emergency room of Jamaica Hospital at 11:14 a.m. in a coma. She was given dopamine, and was transfused with four units of blood, beginning at 11:25 a.m. She was then

transported for a CT scan of the head, cervical spine, chest, abdomen and pelvis, followed by a neurological examination at 11:55 a.m. The examination showed that decedent had a Glasgow Coma Score of 3, the lowest possible, indicating no eye, motor or verbal responses, and that no pain was indicated. The neurosurgeon noted that no operative neurosurgery intervention was indicated. Notwithstanding that it was determined that there was nothing that could be done for her surgically, SICU management was continued and a palliative care physician performed a consultation at 3:39 p.m., and it was determined that decedent had only a matter of hours or days to live.

Plaintiff and decedent's family and friends were at her bedside by approximately 3:41 p.m., and were provided psychological support by a social worker. It is also undisputed that plaintiff and decedent's boyfriend had indicated that they were considering directing a DNR (do not resuscitate), but they directed that full care be continued until the boyfriend arrived from Ohio. The boyfriend arrived at approximately 7:30 p.m. after which they decided that no further escalation of care should be provided. Decedent was pronounced dead at 8:20 p.m.

The autopsy report of the Office of the Chief Medical Examiner performed on November 13, 2015 determined that the cause of death was a gunshot wound to the head and that the manner of death was suicide.

Jamaica Hospital annexes to its motion papers, inter alia, decedent's hospital records and an affirmation of neurologic surgeon, Dr. Alan Segal. He opines, in sum and substance, based upon those records, that the sole proximate cause of decedent's injuries and death was the self-inflicted gunshot wound that essentially destroyed her brain, with no possibility of recovery, and that physicians of Jamaica Hospital at all times comported with the standard of care. No affirmation of a physician is proffered in opposition to rebut the opinion of plaintiff's expert that physicians of Jamaica Hospital did not depart from good and accepted medical practice in their care and treatment of decedent, but that the sole proximate cause of her death, and any pain and suffering that she may have remotely experienced, was the gunshot wound itself.

Thus, Jamaica Hospital has established a prima facie entitlement to summary judgment by proffering unrebutted evidence that it did not depart from good and accepted medical practice in its care and treatment of decedent.

Jamaica Hospital has also established a prima facie entitlement to summary judgment dismissing plaintiff's individual cause of action sounding in negligent infliction of emotional

distress. Plaintiff's fourth cause of action, on her own behalf, seeks damages for "emotional anguish, distress, psychological damages and difficulties arising out of personally being misinformed of the tragic wrongful death of her sister".

Negligent infliction of emotional distress is a long-recognized independent tort for which a cause of action may be maintained (see generally Sheila C. v. Povich, 11 AD 3d 120 [1st Dept 2004]).

In Johnson v. State of New York (37 NY 2d 378 [1975]), defendant hospital sent a telegram erroneously reporting that plaintiff's mother had died and advising next of kin to make arrangements with an undertaker to retrieve the body for burial. At the wake, plaintiff realized that the corpse was not that of her mother, called the hospital and was informed that a mistake had been made and that her mother was alive and well in a different wing of the hospital.

The Court of Appeals recounted the general rule that but for two exceptions, a claim for negligent infliction of emotional distress is only permitted where the claim emotional trauma is backed up with contemporaneous physical injury or consequential physical manifestations. The rationale for this requirement was that contemporaneous or consequential physical harm provided an "index of reliability" otherwise absent in a claim where the claimed injury and its consequences are purely psychological.

The two exceptions noted by the Court of Appeals that had developed permitted recovery for purely psychological distress with no physical injury or manifestations in the situations where the emotional harm resulted from the negligent transmission by a telegraph company of a message erroneously announcing death and where emotional harm was suffered by a close relative from the negligent mishandling of a corpse. The Court of Appeals, in Johnson, rationalized these two exceptions, stating, "In both the telegraph cases and the corpse mishandling cases, there exists 'an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious'" (37 NY 2d at 382, quoting Prosser and Keeton, Torts §54, at 330 [4th ed]). The Court then found the fact pattern before it, which was essentially the same as the telegraph cases erroneously announcing death, as providing a similar guarantee of genuineness. The Court of Appeals held that the facts of that case constituted a special circumstance that served as a guarantee of the genuineness of the claim notwithstanding the lack of physical injury.

In our case, plaintiff has not set forth either in the complaint or in her bill of particulars that she suffered any

physical injury or physical manifestations by reason of her emotional distress. Indeed, she testified in her deposition that she only went to a therapist "a few times", that no diagnoses were given as a result of her therapy or any medications and that the only difference in her life after her sister's death is that she is sad, cries a lot, does not sleep well and is not as social as she used to be. She also testified that she only sees her general physician once a year for check-ups. Moreover, this testimony is in response to how her sister's actual death affected her. There is no testimony by plaintiff that she sustained any psychic injury attributable only to the premature news of her sister's death, over and above her general feelings of sadness that she has felt as a result of her sister's actual demise.

Plaintiff is apparently relying upon the "telegraph" line of cases allowing a cause of action for emotional harm based upon an erroneous communication to the plaintiff by the defendant that an immediate family member had died. In such cases, as heretofore noted, objective proof of physical injury or physical manifestations arising from emotional distress is unnecessary to provide a guarantee of the genuineness of the plaintiff's claim of emotional distress, since erroneous news that one's family member had died is itself considered a reasonable guarantee of the genuineness of the plaintiff's claim of psychic injury (see Ferrara v. Galluchio, 5 NY 2d 16 [1958]). The exception in those line of cases, however, has no application to the facts of this case.

The record demonstrates that plaintiff was not erroneously informed by any hospital personnel that her sister had died, but by a friend. Plaintiff testified in her deposition that when two police officers arrived at her place of employment at approximately 10 a.m. to pick her up and bring her to the police precinct, she spoke to a mutual friend of her's and her sister's, one "Jenny", presumably on the telephone, who was in front of decedent's home at the time, and this Jenny told plaintiff that "some people" who were walking out the door told her, "Sorry for your loss." Plaintiff related, "So at this point I thought she was dead."

It is undisputed, and there is no allegation, that the EMS technicians who were called to decedent's home and who transported her to Jamaica Hospital were not employees of Jamaica Hospital, and the NYPD officers who were at the premises certainly were not Jamaica Hospital staff. Therefore, whether any of them erroneously conveyed condolences to a third party who, in turn, informed plaintiff of such, which plaintiff took as implying that her sister had died, does not establish a cause of action by plaintiff against Jamaica Hospital for negligent infliction of emotional distress, as a matter of law, under any case law precedent in this State.

Even if, arguendo, plaintiff were erroneously informed

