Baard v Wantagh Levittown Volunteer Ambulance Corp, Inc.
2021 NY Slip Op 33182(U)
March 15, 2021
Supreme Court, Nassau County
Docket Number: Index No. 605578/2018
Judge: Christopher G. Quinn

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU CIVIL TERM PART 22

Present: HON. CHRISTOPHER G. QUINN
Justice of the Supreme Court

MIRIAM BAARD,

Plaintiff,

INDEX No: 605578/2018

-against-

MOTION SEQ. No. 1 - MG

WANTAGH LEVITTOWN VOLUNTEER AMBULANCE CORP, INC.,

Defendants.

The following papers were read on this motion:

(1) Notice of Motion/Affirmation/Exhibits A-H
(2) Affirmation in Opposition/Exhibits A-E
(3) Reply

Defendant seeks an Order granting it summary judgment dismissing the claims against it pursuant to CPLR § 3212. Plaintiff opposes.

Counsel for the defendant claims that they are entitled to summary judgment as NYS Public Health Law § 3013 requires gross negligence by the defendant in order to maintain the claim. In addition they claim that the cause of action alleging the defendant failed to properly "hire, train and supervise its staff" requires a knowledge of an employee's prior proclivities for malfeasance, and cannot be inferred by a mere happening of an event.

It is undisputed that the defendant is a not-for-profit organization that operates as a volunteer ambulance corporation using volunteer personnel to provide emergency care. Plaintiff

alleges that she sustained injuries under the care of one of these volunteers when they shifted her on a stretcher which was transporting her to a hospital on April 26, 2016.

In her complaint plaintiff claims that she requested transport to the hospital due to complications from an orthopedic spinal surgery on April 14, 2016. Plaintiff was approximately five foot six inches tall and two hundred fifteen pounds at the time of the incident.

At her deposition plaintiff alleges that the defendant's volunteer EMT, whom she referred to as "the boy" attempted to remove the stretcher from the ambulance at the hospital, he did so with one hand, resulting in the locks not working and the stretcher slamming to "the ground with me on it and he fell on me" (Plaintiff's EBT, Exh. C). She testified that the drop was three to four feet (Plaintiff's EBT, Exh. C). She opined that she thought he was doing it to "show off." She claims that this exacerbated her other injuries.

The defendants produced the EMT, Scott Fabricant, for deposition. Mr. Fabricant testified that he and three other EMTs were in the ambulance. He testified that the incident occurred upon arrival at the hospital. He testified that he pushed a lever on the stretcher and attempted to lock it. He testified that he and two other EMTs got out of the ambulance to remove the stretcher. He and another EMT, Leslie Rivero, began to remove the stretcher, but the red handle on the stretcher was not properly placed, that the stretcher dropped one notch. He testified that this was approximately eight inches, causing the plaintiff to cry out in pain. He testified that he believed he and the other EMT had mis-communicated, and that resulted in the red handle not being properly placed (Fabricant's EBT, Exh. D).

Two other EMTs testified that they did not observe the stretcher being removed from the ambulance.

Defendant claims that it is entitled to summary judgment dismissing the complaint as the plaintiff has failed to set forth a *prima facie* case that the defendant or its volunteer personnel

committed any gross negligence or intentional wrong doing in its care of the plaintiff [*Estate of Klinger v. Corona Cnty. Ambulance Corps.*, 301 AD2d 495 (2nd Dept 2003)].

Gross negligence is conduct that evidences a reckless disregard for the rights of others and lack of intentional wrongdoing. There must be a finding that the actor failed to exercise even slight diligence. Defendants argue that a review of the evidence shows that the plaintiff has made no demonstration that he engaged in "gross negligence" the claims against the defendant due to his actions must be dismissed.

Summary judgment may be granted on "gross negligence" claims where the evidence fails to show the "reckless indifference' required [*Lubell v. Samson Moving & Storage Inc.*, 307 AD2d 215(1st Dept 2003); *Landis v. GYR Powers, Inc v. Berley Indus., Inc.*, 298 AD2d 435 (2nd Dept 2002)]. Counsel for the plaintiff argues that there is a triable issue of fact whether the EMTs committed gross negligence in their care of the plaintiff. Plaintiff claims that there are other issues of fact which preclude summary judgment. This testimony, counsel argues, could lead a jury to find that the volunteer was in fact grossly negligent.

A review of the plaintiff's deposition testimony offers no facts to raise a triable issue of fact by which a reasonable person could find gross negligence. The plaintiff's testimony is largely based not on complete observations, but on opinions and speculation. Her testimony regarding the participants is not supported by any evidence regarding training and experience of the EMTs and volunteers treating her. Her testimony regarding the incident itself is contradicted by the defendant, but also, upon review, is based somewhat on speculation as she concedes that she was strapped down on top of the stretcher. There is no explanation how she could observe what the EMT did with the mechanisms under the stretcher. There is no evidence that the EMT's actions, even if he were moving her with "one hand," is a gross deviation from standard procedure.

The plaintiff testified at her deposition that she had multiple chronic conditions, and an extensive medical history prior to the date of incident. She testified that she had degenerative

spinal issues, was on numerous medications and did not work due to her disabilities. She testified to a substantial history of pain management and surgical treatment of her joints, neck and spine. She testified that in the three years prior to the date of incident, she was regularly treated for her spinal injuries.

Plaintiff testified that she called for an ambulance due to swelling and her pain which she attributed to colitis. She testified that she had surgery days earlier and was experiencing back pain but was on pain medication. (Exh. C) She testified that she called "911" in the middle of the night and that two EMTs and three "high school students" arrived. She testified that there were "one small boy, nerdy boy and two popular girls", along with two male EMTs. She testified that she did not have any conversation with the EMTs, but was treated in the ambulance by the "kids". She testified that she was secured to the stretcher with straps and that her blood pressure and pulse were checked, and that the "boy" took her medical history. She testified that he was talking to her about high school and that she believed he was in high school. She testified that she told him that she experienced pain during the ride at times.

The plaintiff testified that the "boy", "I think was showing off" and went to take her out with one hand, and "do what the EMT's do to lock the wheels of the stretcher in one hand". She testified that the "boy" apologized.

The plaintiff later testified that the "boy" was at her feet at the time and she did not know where the EMTs were and that the girls were near her head. She testified that she did not discuss the fall with anyone other than a triage nurse in the hospital ER. She testified that she told her gastroenterologist of it but he said he was only dealing with her stomach issues. She was treated and released and traveled back to her home by a taxicab. She testified that she started to feel pain relating to this occurrence a couple of months later. The plaintiff conceded in her testimony that she was not aware that the stretcher had different locking levels.

That testimony is the only evidence relied upon by the plaintiff in opposing summary judgment. The exercise of diligence by the alleged grossly negligent party is judged by the diligence with which a person of common sense, not an expert or specialist in a field should

exercise in such a field [*Dalton v. Hamilton Hotel Operating Co.*, 242 NY 487 (1926)]. The plaintiff's reliance on her own testimony to demonstrate negligence, is insufficient. Plaintiff testified to the event from her point of view, not as an eye witness to the exact steps taken by the EMTs in her transport. There is no such evidence presented which contradicts the testimony of the EMT offered by the defendant. (Motion, Exh. C).

Based on the proof presented, that portion of the motion seeking to dismiss the first cause of action pursuant to CPLR§ 3212, is Granted.

As to the negligent hiring cause of action, in order to maintain this claim a plaintiff must offer evidence that the employer knew or should have known that the employee had a propensity for the conduct which caused the injury [*Kenneth R. V. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159 (2nd Dept)]. To find that an entity has breached its duty to provide adequate supervision, a plaintiff must show that the defendant had sufficiently specific knowledge or notice of potential dangerous conduct and that the failure to take reasonable precautions was the proximate cause of the injuries sustained [*Nocilla v. Middle Country Central School District*, 302 AD2d 573 (2nd Dept 2003)].

In this instance the plaintiff has not alleged that the defendant's volunteer staff had a propensity for improper action. The only evidence presented regarding training is that there was extensive training for EMTs. He testified that he participated in a six-month training program and had to sit for and pass an exam to be certified an EMT. This included a written examination and skills test. He testified that he was certified as an EMT-b, basic life support, at the time of the incident. He testified that he was unsure if Leslie Rivero was a certified EMT on the date of incident.

The plaintiff certified that all discovery was complete and filed a Note of Issue. Counsel provides no evidence regarding the hiring and training of the EMT staff to oppose summary judgment on this cause of action. The Court finds that the plaintiff has not raised a triable issue

of fact in dispute to rebut that offered by the movant. The defendant's motion for summary judgment dismissing that cause of action is also Granted.

Based on the foregoing, the defendant's motion seeking to dismiss the matter pursuant to CPLR § 3212, is Granted.

It is **SO ORDERED**.

HON. CHRISTOPHER G. QUINN, J.S.C.

Dated: March 15, 2021