At an IAS Term, Part MMESP-7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 19th day of October 2021. (PF)

PRESENT:
HON. PAMELA L. FISHER,
J.S.C.

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DANICA GODDARD, as Administrator of the Goods, Chattels, and Credits which were of DENAISHA WILLIAMS, deceased,

Plaintiff,

- against -

NEW YORK CITY FIRE DEPARTMENT, NEW YORK CITY EMERGENCY MEDICAL SERVICES, THE CITY OF NEW YORK, AMBREEN KHAN, M.D., ESTHER KWAK, M.D., KINGS COUNTY HOSPITAL CENTER, and NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendants.

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DECISION/ORDER

Index No: 513175/2019

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	1, 2, 3
Opposing Affidavits (Affirmations)	4, 5
Reply Affidavits (Affirmations)	6

Upon the foregoing papers in this medical malpractice action, defendants, the City of New York and the City of New York s/h/a New York City Fire Department and New York City Emergency Medical Services ("the City"), move, pursuant to CPLR § 3211(a)(7), to dismiss plaintiff's complaint with prejudice for failure to state a cause of action. In the alternative, defendants move, pursuant to CPLR § 3212, for summary judgment, dismissing plaintiff's complaint with prejudice. Since the Note of Issue has already been filed, the Court will consider defendants' motion as a motion for summary judgment.

PROCEDURAL HISTORY

Plaintiff, decedent's mother, served a Notice of Claim upon defendants on June 18, 2018 (Defendants' Affirmation in Support ¶ 4; Notice of Claim, annexed as Exhibit A to defendants' motion papers). Plaintiff testified at General Municipal Law § 50-h hearings on August 14, 2018 and September 13, 2018 (Defendants' Affirmation in Support ¶ 8). Plaintiff commenced this action by filing a summons and complaint on June 14, 2019 (*Id.* at ¶ 5; Summons & Complaint, annexed as Exhibit B to defendants' motion papers). Issue was joined as to defendants, New York City Health and Hospitals Corporation and Kings County Hospital Center on July 2, 2019 (Defendants' Affirmation in Support ¶ 7; Answers annexed as Exhibit C to defendants' motion papers). Issue was joined by the City on July 11, 2019, by Dr. Khan on July 18, 2019, and by Dr. Kwak on August 6, 2019 (*Id.*; Defendants' Affirmation in Support ¶ 7). Plaintiff served a bill of particulars on or about September 19, 2019 (*Id.*; Verified Bill of Particulars annexed as Exhibit D to defendants' motion papers). Plaintiff filed the Note of Issue and Certificate of Readiness on February 25, 2021 (Defendants' Affirmation in Support ¶ 9). In March 2021, the parties executed stipulations discontinuing the case against Dr. Kwak, Dr. Khan, Kings County Hospital Center, and New York City Health and Hospitals Corporation (*Id.* at ¶ 9; NYSCEF # 37-40).

In her Notice of Claim and complaint, plaintiff alleges that the City "assumed, through their promises or actions, an affirmative duty to act on behalf of [plaintiff's] decedent Denaisha Williams," that defendants "knew and/or should have known that their inaction could lead to harm," that "there was direct contact between [defendants] and [plaintiff's] decedent Denaisha Williams and/or her immediate family," and that her family "justifiably relied on [defendants'] affirmative undertaking" (Notice of Claim ¶ 3; Complaint ¶¶ 48-51). Further, plaintiff claims that defendants departed from good and acceptable medical practice in their treatment of the decedent on March 31, 2018 by "failing to properly intubate the decedent," and "failing to recognize that" "a laryngoscope bulb had broken off

and remained in" "decedent's airway" (Notice of Claim ¶ 2; Verified Bill of Particulars ¶ 19). As a result of defendants' alleged malpractice, plaintiff claims that decedent sustained the following injuries: "respiratory arrest," "cardiac arrest," "anoxia," "hypoxia," "respiratory failure," "severe pain and suffering of the afflicted areas as well as emotional pain, anxiety, anguish and distress," "fear of dying," and "wrongful death" (Notice of Claim ¶ 4; Verified Bill of Particulars ¶ 3).

FACTS

The following facts are not in dispute. Decedent, who was four years old at the time of her death, was diagnosed with asthma when she was an infant (Defendants' Affirmation in Support ¶¶ 39, 10; Plaintiff's Affirmation in Opposition at 4). Her asthma was treated using a nebulizer machine, Albuterol, and Budesonide (*Id.*). Prior to March 31, 2018, decedent's parents took her to the Emergency Room at Kings County Hospital for asthma attacks approximately five times (*Id.* at 4-5). On March 31, 2018, at around 4:30 a.m., decedent "woke up with asthma-related coughing," and plaintiff administered Albuterol to decedent, and she fell back to sleep (*Id.* at 5; Defendants' Affirmation in Support ¶ 11). Decedent woke up two more times that morning with "asthma-related coughing," and plaintiff gave her Albuterol (*Id.*). After the third dose, decedent's parents decided to take her to Kings County Hospital (*Id.*). When decedent's father put her in the car, he noticed that "she didn't look right," her eyes "rolled back," and she lost consciousness (*Id.* at ¶ 12). Decedent's father located two police officers who were across the street, and handed the decedent to one of the officers (*Id.*; Plaintiff's Affirmation in Opposition at 6). The officer put decedent on the ground, and called 911 (Defendants' Affirmation in Support ¶ 12). Then, decedent's father picked her up, and took her to the nursing home across the street (*Id.*). As they approached the nursing home, he handed her to plaintiff, who entered the nursing home with decedent, and "yelled for help" (*Id.*). At approximately 8:41 a.m., the "security guard at the front desk [of the nursing home] called 911" (*Id.*). The nursing home staff "escorted" plaintiff and decedent to the second floor (*Id.* at ¶ 13). On the second floor, the staff "placed

an oxygen mask" on decedent, "who remained unconscious" (*Id.*). At 8:43 a.m., an "FDNY engine crew of Certified First Responders ("CFR") arrived," and at 8:44 a.m., "an ambulance with two FDNY paramedics, Polishchuk and Campbell" arrived (*Id.*). Shortly after the paramedics entered the nursing home, an "EMT basic life support ("BLS") crew arrived" (*Id.*). Campbell "removed the decedent's oxygen mask," and "began cardiopulmonary resuscitation," as decedent was in cardiac arrest (*Id.*). She attached an "ALS monitor," which indicated that decedent "was asystole, or flat line" (*Id.*). Campbell used a "bag valve mask ("BVM")" "to properly ventilate" the decedent (*Id.*). Plaintiff provided decedent's medical history to the paramedics, and as "the CFRs/firefighters continued CPR, Campbell continued using the BVM, and Polishchuk continued administering medications, including epinephrine" (*Id.* at ¶ 15). Decedent "was not breathing, and was pulseless" (*Id.*). She was also in cardiac arrest (*Id.*). At 9:04 a.m., Campbell intubated decedent, using a Miller-1 blade (*Id.* at ¶¶ 15, 17). She "remove[d] the tube due to a lack of capnography readings" (*Id.* at ¶ 17). Then, Campbell "resumed utilizing the BVM to deliver oxygen directly to [the decedent]" (*Id.* at ¶ 18). The paramedics "placed decedent on a stretcher while she was attached to an ALS monitor," and "wheeled her to the elevator to transport her to the hospital" (*Id.* at ¶ 19). Defendants "left the nursing home at 9:16:28 a.m." (*Id.*). On the way to the hospital, decedent "was attached to an EKG machine, the ALS monitor, and was receiving ventilation through the BVM" (*Id.* at ¶ 19). CPR was "continuously administered," and epinephrine was administered via decedent's "tibia bone" (*Id.*). Campbell attempted to intubate decedent again during the ambulance ride to Kings County Hospital (*Id.* at ¶ 20). She "noticed that a laryngoscope lightbulb" "was missing from her Miller-1 blade that she used for the first intubation attempt" (*Id.* at ¶ 21). Campbell testified at her deposition that she believed that the bulb had fallen out, and was "in the equipment bag or on the floor somewhere" (*Id.*). For the second intubation attempt, she decided to use "the Mac-2 blade," but this attempt also "produced a low capnography reading" (*Id.*). Therefore, Campbell "deemed the attempt unsuccessful," and continued to "provide ventilation

through the BVM" for the remainder of the trip (*Id.*). Defendants arrived at Kings County Hospital at 9:23 a.m. (*Id.* at ¶ 22). The "EMS personnel" provided a history to Dr. Khan, and "Kings County Hospital personnel continued performing CPR and using BVM to ventilate the decedent" (*Id.*). They also "gave the decedent a dose of epinephrine," and intubated her (*Id.*). Decedent was pronounced dead at 9:45 a.m. (*Id.*). An autopsy was performed, and the cause of death is listed as "acute bronchial asthma and interstitial pneumonia of viral etiology" (*Id.* at ¶ 23; Autopsy Report annexed as Exhibit S to defendants' motion papers). The missing laryngoscope bulb was found in decedent's throat during the autopsy (Defendants' Affirmation in Support ¶ 23).

PARTIES' CONTENTIONS

In support of their motion for summary judgment, defendants argue that the claims against the New York City Fire Department and New York City Emergency Medical Services must be dismissed as they are "non-suable entities" pursuant to Section 396 of the New York City Charter (*Id.* at ¶ 26). Defendants maintain that the claims against the City of New York must also be dismissed, as plaintiff has failed to provide facts to "support the existence of a special relationship" between the decedent and the City (*Id.* at ¶¶ 27, 31). Further, defendants contend that even if the paramedics were negligent, the City is not liable, as the paramedics were exercising their discretion (*Id.* at ¶¶ 34-35). Defendants claim that their actions were not the proximate cause of the decedent's death, and plaintiff's cause of action for lack of informed consent must be dismissed, as informed consent is not applicable in cases where treatment is rendered in an emergency situation (*Id.* at ¶¶ 36, 39).

In opposition, plaintiff alleges that there are triable issues of fact regarding whether a special relationship existed between the decedent and the City (Plaintiff's Affirmation in Opposition at 2). Relying on the holdings of *Applewhite v. Accuhealth, Inc*, 21 NY3d 420 (2013), and *Lynch v. Town of Greenburgh*, 61 Misc.3d 459 (Sup Ct, Westchester County 2018), plaintiff contends that there are issues of fact as to whether the decedent's parents "[r]eli[ed] upon the responding [p]aramedic[s']

actions and conduct," "lull[ing]" them "into a false sense of security," resulting in them not "seeking an alternative method for transporting [their] child to the nearby hospital" (Plaintiff's Affirmation in Opposition at 14-15). Plaintiff affirms that defendants have failed to submit expert testimony on the issue of whether treating decedent at the scene as opposed to immediately transporting her to the hospital "deprived her of a better outcome and chance of a full recovery" (*Id.* at 16). Plaintiff also maintains that defendants are not entitled to summary judgment "on the grounds that their paramedics properly exercised their medical discretion and/or that the paramedics' actions were not the proximate cause of the decedent's death" since they have failed to submit an expert affirmation in support of their motion (*Id.*).

In reply, defendants assert that the claims against New York City Fire Department and New York City Emergency Medical Services must be dismissed, as plaintiff failed to oppose this portion of the motion (Reply Affirmation ¶ 3). Further, the cause of action for lack of informed consent must also be dismissed, as plaintiff also did not oppose that relief (*Id.*). Defendants reiterate that they are entitled to summary judgment, since plaintiff has failed to establish that a "special duty was created," as "there were no promises or assurances made by the emergency medical personnel upon which plaintiff justifiably relied" (*Id.* at ¶ 7). Further, defendants argue that the fact that plaintiff had a car available to take decedent to the hospital is irrelevant, in the absence of a promise or assurance by the emergency medical personnel (*Id.* at ¶ 11). Defendants also allege that they are entitled to immunity for the discretionary acts of its emergency medical personnel, even though they did not submit an expert affirmation in support of this claim (*Id.* at ¶ 14).

LAW

SUMMARY JUDGMENT

On a motion for summary judgment, the movant is required to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of

any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the defendant meets its burden, the burden then shifts to the plaintiff to "raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing" (*Stukas v. Streiter*, 83 AD3d 18, 24 [2d. Dept. 2011]). Conclusory allegations that are "unsupported by competent evidence" "are insufficient to defeat" "defendant['s] summary judgment motion" (*Deutsch v. Chaglassian*, 71 AD3d 718, 719 [2d. Dept. 2010]).

LAWSUITS AGAINST AGENCIES OF THE CITY OF NEW YORK

Pursuant to Section 396 of the New York City Charter, "[a]ll actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the city of New York and not in that of any agency, except where otherwise provided by law" (New York City Charter § 396; *see also Verponi v. City of New York*, 31 Misc.3d 1230(A), at *4 [Sup Ct, Kings County 2011] (dismissing complaint against New York City Police Department and New York City Fire Department Emergency Medical Services, pursuant to Section 396 of the New York City Charter)).

LAWSUITS AGAINST THE CITY OF NEW YORK FOR NEGLIGENCE IN PROVIDING EMERGENCY MEDICAL SERVICES

A municipality "cannot be held liable" for "provid[ing] ambulance service by emergency medical technicians in response to a 911 call," "unless it owed a special duty to the injured party" (*Holloway v. City of New York*, 141 AD3d 688, 689 [2d. Dept. 2016]; *see also Applewhite v. Accuhealth, Inc.*, 21 NY3d 420, 423-24 [2013]). A municipality "owe[s] a special duty to the injured party" "where [it] voluntarily assumed a duty" "beyond what was owed to the public generally" (*Holloway*, 141 AD3d at 689). To establish the existence of a special duty or relationship, plaintiff must prove four elements: "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the

municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (*Id.* at 690). In order to satisfy the first element, the promise "must be definite enough to generate justifiable reliance by the defendant" (*Dinardo v. City of New York*, 13 NY3d 872, 874 [2009]). In order to show justifiable reliance, plaintiff must allege facts to support that defendant's actions "lulled [plaintiff] into a false sense of security and thereby induced [him]" "either to relax his own vigilance or to forego other" alternatives (*Badillo v. City of New York*, 35 AD3d 307, 308 [1st Dept. 2006]; *Cuffy v. City of New York*, 69 NY2d 255, 261 [1987]).

GOVERNMENTAL FUNCTION IMMUNITY DEFENSE

Under the governmental function immunity defense, "[g]overnment action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" (*DiMeo v. Rotterdam Emergency Med. Servs., Inc.*, 110 AD3d 1423, 1424 [3d. Dept. 2013]; *Valdez v. City of New York*, 18 NY3d 69, 76-77 [2011]). An act is discretionary if it "involves the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (*DiMeo*, 110 AD3d at 1424). A plaintiff must "establish the existence of a special duty before it becomes necessary for the court to address whether the governmental function immunity defense applies" (*Id.*).

ANALYSIS

All claims against New York City Fire Department and New York City Emergency Medical Services must be dismissed, as these are "non-suable entities" pursuant to Section 396 of the New York City Charter, and plaintiff did not submit any opposition to the dismissal against these defendants (Defendants' Affirmation in Support ¶ 26; New York City Charter § 396). Further, plaintiff's cause of action for lack of informed consent must also be dismissed, as plaintiff also did not oppose this portion of the motion.

Defendants' motion, pursuant to CPLR § 3212, for summary judgment is granted, as defendants met their prima facie burden to demonstrate that the City owed no duty to the decedent "beyond what was owed to the public generally" and plaintiff has failed to raise a triable issue of fact in opposition (*Holloway*, 141 AD3d at 689). Although plaintiff states the elements of a special relationship in her complaint, she has not pleaded any facts in support of each element. Plaintiff has failed to submit any evidence that defendants "assumed an affirmative duty to act on behalf" of the decedent "through promises or actions," as both plaintiff and decedent's father testified that they had "no conversations with the paramedics," other than "providing a medical history" (*Id.* at 690; Defendants' Affirmation in Support ¶ 32; Plaintiff's EBT tr. 73, lines 19-25, at 74, lines 1-2; annexed as Exhibit F to defendants' motion papers; Mr. Williams' EBT tr. 92, lines 4-10; annexed as Exhibit J to defendants' motion papers). In opposition to this motion, plaintiff alleges that a special duty was created by the emergency medical personnel's treatment of the decedent at the scene, rather than immediately transporting her to Kings County Hospital (Plaintiff's Affirmation in Opposition at 16). However, merely commencing treatment at the scene does not create a special duty (*See Applewhite*, 21 NY3d at 426-430; *Holloway*, 141 AD3d at 689; *Kupferstein v. City of New York*, 101 AD3d 952, 953 [2d. Dept. 2012]). Even if plaintiff had established that defendants had "an affirmative duty to act on behalf of the decedent," she has not alleged any facts in support of the justifiable reliance element (*Koyko v. City of New York*, 189 AD3d 811, 813 [2d. Dept. 2020]). Plaintiff's claim that decedent's father could have transported decedent to the hospital in his car does not raise a triable issue of fact as to whether she justifiably relied on defendants' "affirmative undertaking" to her "detriment" (*Id.*). Plaintiff has not submitted any evidence that she was "induced by defendants' agents to forgo" this alternative, or "that reliance on the defendants placed the decedent in a worse position than she would have been in if they never assumed the duty to help" (*Id.*).

Further, the cases cited by the plaintiff in her opposition papers, are distinguishable. For example, in *Applewhite*, plaintiff's mother asked the EMTs to take her daughter to the hospital, but they "continued performing CPR and allegedly indicated that [they] were awaiting the arrival of ALS ambulance personnel" (*Applewhite*, 21 NY3d at 431). The Court held that there was a "question of fact as to whether the EMTs, through their actions or promises, assumed an affirmative duty in deciding to have ALS paramedics undertake more sophisticated medical treatment rather than transporting the child to a hospital" (*Id.*). The Court also determined that there was an issue of fact as to "whether the EMTs lulled plaintiffs into a false sense of security" (*Id.*). However, the facts in *Applewhite* are different, since plaintiff in this case never requested that the EMTs or paramedics immediately transport her daughter to the hospital. *Lynch v. Town of Greenburgh*, is also distinguishable, as the decedent in that case said, "no," and "gestured to the ambulance" when the first responders attempted to treat him at the scene (*Lynch*, 61 Misc.3d at 461). The Court in *Lynch* found that there were issues of fact as to whether a special relationship existed between the first responders and decedent, since "a jury could conclude that the decedent wanted to leave for the hospital immediately," but the "first responders' affirmative actions prevented that from happening" (*Id.* at 467-68). In this case, plaintiff has presented no evidence that either decedent, herself, or decedent's father made any gestures or said anything to the EMTs or paramedics that would indicate that they wanted to leave immediately for the hospital and/or that the emergency medical personnel prevented them from leaving for the hospital. Therefore, since plaintiff has failed to raise a triable issue of fact as to whether a special relationship existed between decedent and the emergency medical personnel, defendants' motion for summary judgment is granted. As plaintiff has failed to establish that defendants owed plaintiff or decedent a special duty, the Court is not required to consider whether the governmental function immunity defense applies, and whether an expert affirmation is required to establish this defense (*DiMeo*, 110 AD3d at 1424).

This constitutes the decision and order of the Court.

ENTER:

Hon. Pamela L. Fisher
J.S.C.

HON. PAMELA L. FISHER