

Quarshi v Lovelace

2022 NY Slip Op 32461(U)

January 3, 2022

Supreme Court, Queens County

Docket Number: Index No. 714363/20

Judge: Robert I. Caloras

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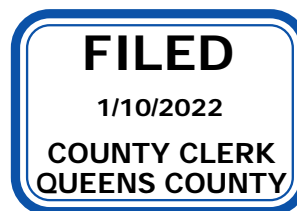
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Short Form Order
NEW YORK SUPREME COURT - QUEENS COUNTY
PRESENT: HON. ROBERT I. CALORAS
Justice

PART 36

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MERCY QUARSHI, as Administrator of the
Estate of DAVID OBUANYE MENSAH, deceased,
and MERCY QUARSHI, Individually,
Plaintiffs,
-against-
MAWASI LOVELACE, JOSEPH GBENGA
SOLEDOLU and INDEPENDENT SUPPORT
SERVICES, INC.,
Defendants.

Index No. 714363/20
Seq. No. 1, 2



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The following papers EF19-EF39, EF43-EF52 read on this motion by defendant Independent Support Services, Inc. (ISS) to dismiss certain causes of action in the complaint of plaintiffs Mercy Quarshi (Quarshi), as Administrator of the Estate of David Obuanye Mensah, deceased (Decedent) and Mercy Quarshi, individually, pursuant to CPLR 3211(a)(5) and (7); a cross motion by defendant Joseph Gbenga Soledolu (Soledolu) to dismiss certain causes of action in the complaint pursuant to CPLR 3211(a)(5) and (7), and to dismiss and/or direct plaintiffs to re-plead their complaint respect to certain causes of action pursuant to CPLR 3013 and 3014 and/or 3024; a cross motion by plaintiffs for leave to amend the complaint pursuant to CPLR 3025(b); a separate motion by defendant Mawasi Lovelace (Lovelace) to dismiss certain causes of action in the complaint pursuant to CPLR 3211(a)(5) and (7); and a cross motion by plaintiffs for leave to amend the complaint pursuant to CPLR 3025(b).

Papers
Numbered

Notices of Motion - Affidavits - Exhibits..... EF 18-28
Notices of Cross Motion - Affidavits - Exhibits... EF 29-39
Answering Affidavits - Exhibits..... EF 43-46
Reply Affidavits..... EF 47-52

Upon the foregoing papers it is ordered that these motions and cross motions are consolidated for purposes of disposition and determined as follows:

Decedent was an autistic, severely disabled 28-year-old individual who was wholly reliant on his mother, Quarshi, for his everyday living and well-being. Defendants, who provided him with home care disability services. Plaintiffs, suing in Quarshi’s individual capacity as well as that of administrator of the estate of Decedent, commenced this action in connection with an incident on October 10, 2018, in which Decedent sustained personal injuries after jumping and/or falling from a third-story window during the course of defendants’ services, resulting in his death on November 5, 2018. At the time of the accident, ISS employees Lovelace and Soledulu were acting within the scope of their employment in providing disability services to Decedent. Among other things, plaintiffs contend that defendants negligently failed to secure the premises and properly supervise Decedent by ensuring that two assigned aides were at the assigned job at all times, as required by his care plan.

The court necessarily turns first to plaintiffs’ cross motions for leave to amend the complaint. The proposed amended complaint annexed to plaintiffs’ cross motions reorganizes the many claims in the original complaint into five causes of action against all defendants for negligence, gross negligence,

wrongful death, and negligent infliction of emotional distress, “wrongful death – recovery of mental anguish,” a sixth cause of action against ISS under the doctrine of “respondeat superior,” plus derivative claims by Quarshi with a demand for punitive damages.

Generally, leave to amend is freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit, and will not prejudice or surprise the opposing party (CPLR 3025[b]; *see Caldara v County of Westchester*, 197 AD3d 607, 608 [2021]; *Reese v Jahan Contr.*, 120 AD3d 1399, 1400 [2014]). The determination of whether to grant such leave is within the broad discretion of the court (*see Tarek Youssef Hassan Saleh v 5th Ave. Kings Fruit & Vegetables Corp.*, 92 AD3d 749, 750 [2012]).

Here, defendants do not oppose the branches of plaintiffs’ cross motions seeking to amend the complaint with respect to the causes of action for negligence or wrongful death. However, defendants contest the sufficiency of plaintiffs’ proposed causes of action sounding in gross negligence, the attendant demand for punitive damages, and negligent infliction of emotional distress, as well as Quarshi’s demand for damages for her mental anguish due to Decedent’s wrongful death. ISS also opposes the gross negligence claim insofar as plaintiffs refer to all defendants as directly grossly negligent (rather than vicariously, as based on the alleged actions of ISS’s employees).

Turning first to gross negligence, such cause of action requires a showing that a party’s conduct evince a “reckless disregard for the rights of others or smack[] of intentional wrongdoing” (*Bennett v State Farm Fire & Cas. Co.*, 161 AD3d 926, 929 [2018] [internal quotation marks and citations omitted], quoting *Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823–824 [1993]; *Chan v Counterforce Cent. Alarm Servs. Corp.*, 88 AD3d 758 [2011]). “Stated differently, a party is grossly negligent when it fails to exercise even slight care or slight diligence” (*Ryan v IM Kapco, Inc.*, 88 AD3d 682, 683 [2011] [internal quotation marks and citations omitted]). Generally, the question of gross negligence is a matter to be determined by a jury (*see Bennett*, 161 AD3d at 929, *citing Food Pageant v Consolidated Edison Co.*, 54 NY2d 167, 172-173 [1981]; *Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2014]). Moreover, punitive damages are warranted for a finding of gross negligence where the conduct of the party being held liable evidences a high degree of moral culpability, or where the conduct in question evidences a high degree of moral culpability, or is so flagrant as to transcend mere carelessness, or where the conduct constitutes willful or wanton negligence or recklessness (*see Brown v Maple3, LLC*, 88 AD3d 224, 235 [2011]; *Kraycar v Monahan*, 49 AD3d 507, 508 [2008]; *Buckholz v Maple Garden Apts., LLC*, 38 AD3d 584 [2007]).

Plaintiffs’ proposed amended complaint alleges that defendants acted in a “conscious and voluntary disregard for human life [and] conscious disregard for the need to use reasonable care which caused foreseeable grave injury to [Decedent]” by intentionally throwing Decedent’s crayons out the window, knowing he would follow and attempt to retrieve them due to his autism and fascination with coloring, crayons and coloring books. Contrary to defendants’ contentions that such claims are devoid of merit, plaintiffs allege that defendants appreciated the risk of throwing Decedent’s beloved crayons out the window, given his obsession with crayons and their knowledge that he would proceed out the open window due to his uncontrollable compulsion and severe autism. The court thus finds that such allegations sufficiently plead the material elements of a cause of action for gross negligence with respect to the individual defendants, and vicarious liability therefor with respect to ISS (CPLR 3013; *see Bennett*, 161 AD3d at 929; *Dolphin Holdings, Ltd.*, 122 AD3d at 903; *cf. Heller v Louis Provenzano, Inc.*, 303 AD3d 20, 30 [1st Dept 2003]; *Lee v Health Force, Inc.*, 268 AD2d 564 [2000]). Likewise, despite defendants’ contentions, a viable basis exists for a request for punitive damages where a defendant’s conduct can be found to be grossly negligent (*see Bennett*, 161 AD3d at 929-930; *Gipe v DBT Xpress, LLC*, 150 AD3d 1208 [2017]). However, whether the complaint will later survive

a motion for summary judgment, or whether plaintiff will ultimately be able to prove its causes of action, plays no part in the determination of this prediscovery CPLR 3211 motion to dismiss (*see Moskowitz v Masliansky*, 198 AD3d 637 [2021]; *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2006]).

However, plaintiffs fail to plead a facially sufficient cause of action with respect to negligent infliction of emotional distress, as the proposed amended complaint contains no allegations that defendants' conduct unreasonably endangered either Decedent's or Quarshi's physical safety, or caused either to fear for his or her own safety (*see Sacino v Warwick Val. Cent. Sch. Dist.*, 138 AD3d 717, 719 [2016]). Similarly, Quarshi fails to allege any duty owed by defendants to her individually, and also does not allege that she was in any "zone of danger" as necessary to support a claim that she suffered negligent infliction of emotional distress by observing the death or serious physical injury of an immediate family member (*see Greene v Esplanade Venture Partnership*, 36 NY3d 513, 521-522 [2021]).

Next, the court considers the branch of the plaintiffs' cross motion seeking leave to amend the complaint regarding recovery by Quarshi for her mental anguish due to Decedent's wrongful death. Plaintiffs allege that Decedent was completely dependent on defendants for his care and safety, and that Quarshi, as his mother and guardian, had a distinct relationship with defendants given their shared objective to care for Decedent. Quarshi also seeks damages for her pain, suffering, and mental anguish due to defendants' breach of duty, arguing that the wrongful death statute is inadequate to compensate her for the mental and emotional injuries she sustained as a result of Decedent's injuries, trauma and ultimate death. Quarshi maintains that after her son's accident, she suffered weeks of emotional distress as he underwent many unsuccessful surgeries and procedures before he eventually died due to his extensive injuries.

While acknowledging that recovery for mental and emotional injuries is awarded to a very limited set of circumstances, plaintiffs urge the court to analogize the instant matter to *Broadnax v Gonzalez* (2 NY3d 148 [2004]), in which the Court of Appeals overturned prior precedent and allowed a mother to recover for emotional injuries sustained when medical malpractice caused a stillbirth or miscarriage, even in the absence of her own physical injury, independent from that suffered by the fetus. However, the holding in *Broadnax* was intended to remedy an injustice to a "narrow, but indisputably aggrieved, class of plaintiffs" (*Id.*, at 154) when a negligent medical caregiver is otherwise immunized for malpractice that causes a miscarriage or stillbirth, since the fetus cannot commence suit and the parent cannot assert a cause of action to recover damages for wrongful death where there was no birth (*id.*; *see also Ward v Safajou*, 145 AD3d 836, 837-838 [2016]). Although plaintiffs argue that Decedent is akin to the stillborn baby in *Broadnax* because he was unable to advocate or care for himself due to his autism, such contention is unavailing, as Quarshi still has recourse under the wrongful death statute (Estates, Powers and Trusts Law § 5-4.3), which expressly provides only for pecuniary injuries. Thus, the instant facts are inapposite, recovery for Quarshi's emotional injuries are unavailable under existing precedent, and the proposed amendment is palpably insufficient and patently devoid of merit (*see Prisco v Pinaldi*, 166 AD3d 1026, 1027 [2018]; *Martin v Rizzatti*, 142 AD3d 591, 594 [2016]).

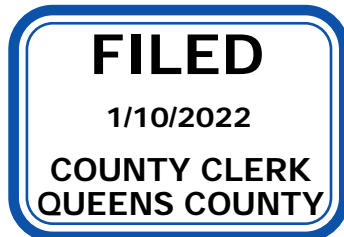
Insofar as the court has accepted the amended complaint, to the extent discussed above, defendants' respective motions and cross motion to dismiss are rendered moot.

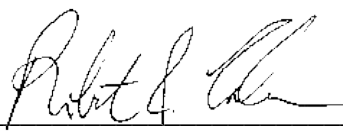
Accordingly, plaintiffs' cross motions for leave to amend the complaint are granted to the extent of including causes of action for negligence, gross negligence (and attendant punitive damages), wrongful death, and claims against ISS under the doctrine of respondeat superior, but denied regarding negligent infliction of emotional distress, damages for emotional injuries such as mental anguish, and

in all other respects. ISS's and Lovelace's respective motions to dismiss and Soledulu's cross motion to dismiss are denied.

Plaintiffs are directed to serve upon defendants an amended complaint that conforms to this decision within twenty (20) days of service of a copy of this order with notice of entry.

DATED: January 3, 2022





ROBERT I. CALORAS, J.S.C