

McGovern v St. Luke's-Roosevelt Hosp. Ctr.

2023 NY Slip Op 30885(U)

March 23, 2023

Supreme Court, New York County

Docket Number: Index No. 150602/2020

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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INDEX NO. 150602/2020

MICHAEL MCGOVERN, LAURA MCGOVERN,

MOTION DATE 10/24/2022

Plaintiff,

MOTION SEQ. NO. 003

- v -

THE ST. LUKE'S-ROOSEVELT HOSPITAL CENTER,
MOUNT SINAI HEALTH SYSTEM, INC., MOUNT SINAI
HEALTH NETWORK, INC.

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70 were read on this motion to/for JUDGMENT - SUMMARY.

This action arises out of injuries sustained by plaintiff while at a location responding to a medical emergency. Defendant moves for summary judgment, plaintiff opposes. For the reasons set forth below, the motion is granted, and the complaint is dismissed in its entirety.

During oral argument, and in plaintiff's papers, it is conceded that the only remaining cause of action is negligence, as plaintiff seeks to recover from defendants on the legal theory of vicarious liability.

Plaintiff was at the time of this incident, a New York City Firefighter. It is undisputed that both the plaintiff and defendants, through its non-party employees, responded to the subject location because of a call regarding a medical emergency. It is also undisputed that once the non-party patient was conscious, as a result of a sternum rub given by the non-party Emergency Medical Technicians (EMTs), he was agitated and aggressive, so much so that throughout both of the parties papers and related documents, that non-party patient is referred to as an EDP, an emotionally disturbed person.

It is also undisputed that a physical altercation ensued between the non-party EMT and the non-party patient, and that the plaintiff intervened in the altercation resulting in physical injuries. Although unable to be uploaded to the NYSCEF system, there are two videos of the incident that have been provided by the parties and reviewed by the Court. Both are extremely short in duration, but both clearly show one of the EMT's shoving the non-party patient, the plaintiff retraining the non-party, the same EMT throwing a punch in the direction of the non-party patient and the plaintiff, causing the plaintiff and the non-party patient to fall to the ground.

Summary Judgment Standard

It is conventional practice that the “function of summary judgment is issue finding, not issue determination.” *Assaf v Ropog Cab Corp.* 153 AD2d 520 [1st Dept 1989]. Further, summary judgment should not be granted where there is any doubt as to the existence of material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562, 427 [1980]. The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v Ropog Cab Corp.* 153 AD2d 520 [1st Dept 1989].

Discussion

The crux of plaintiff's position is that defendants' employees were negligent in following protocol by not creating a safe zone and not calling the police, with these failures causing plaintiff to intervene in a physical altercation between the non-party patient and the non-party

employee paramedic. However, the Court finds that, consistent with the defendants' position, the ensuing physical altercation and the intervention by plaintiff does not impute vicarious liability onto the defendants.

A prima facie case of negligence requires plaintiff to establish "first, the existence of a duty owing by the defendant to the plaintiff; second, defendant's failure to discharge that duty; third, injury to plaintiff proximately resulting from such failure" *Peresluha v City of New York*, 60 AD2d 226, 230 [1st Dept 1977].

The Court finds that whether the non-party EMT was in fact negligent in failing to follow the proper protocols, that conduct was not the proximate cause of plaintiff's injuries. The Court finds the non-party EMT's conduct to be intentional, therefore not in the purview of negligence.

The law is well established that there cannot be vicarious liability for the intentional tort of an employee when the underlying act is outside of the scope of employment (*see e.g. Adams v NY City Tr. Auth.*, 88 NY2d 116, 119 [1996]; *Horvath v L & B Gardens, Inc.*, 89 AD3d 803 [2d Dept 2011]; *Bowman v State*, 10 AD3d 315, 315 [1st Dept 2004]).

Although defendants contend that the location of the incident is dispositive here, in a deli versus in a hospital, the Court is not persuaded by that argument. Rather, under no interpretation of the video can the shoving of the non-party patient and the attempted punching of the non-party patient by the non-party EMT Fernando Correa be viewed as patient care in furtherance of defendants' business, that would impute vicarious liability onto defendants. The Court cannot make that leap, nor does it find that any reasonable finder of fact will find differently. The Court declines to find that the conduct of non-party EMT Correa is in the furtherance of defendants' business of providing medical care or assistance, or a foreseeable natural incident of employment

that can be imputed onto the defendants nor has plaintiff cited to any authority to support that contention.

Plaintiff attempts to focus on the actions of the non-party EMT Correa prior to the physical altercation to create a question of fact with respect to negligence. However, as stated above, this argument is not persuasive. Even assuming that non-party EMT Correa was negligent, plaintiff has not established that he is owed a duty of care and that the negligence was a proximate cause of his injuries, rather it is clear from the video that plaintiff's conduct broke the causal chain of the alleged negligence to the subsequent injuries.

The Court does not intend to imply that non-party EMT Correa is without fault or liability, however, the Court is limited to the issue of vicarious liability and finds that based on the intentional conduct of the non-party there cannot be vicarious liability as to defendants as a matter of law. Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed in its entirety.

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LYLE E. FRANK, J.S.C.

3/23/2023
DATE

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APPLICATION:

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