

Morgan v St. Lukes Roosevelt Hosp. Ctr.

2023 NY Slip Op 34376(U)

December 1, 2023

Supreme Court, Kings County

Docket Number: Index No. 515935/2022

Judge: Ingrid Joseph

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 13th day of December 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

Index No: 515935/2022

-----X
JOSHUA MORGAN

Plaintiff(s)

-against-

ORDER

ST LUKES ROOSEVELT HOSPITAL CENTER,
HEALTHCARE RISK ADVISORS INC. and DENNIS
KALOGEROPOULOS

Defendant(s)

-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Affirmation in Support/Affidavits Annexed

1-20; 28

Exhibits Annexed/Reply.....

21-25

Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....

In this matter, Mount Sinai St. Lukes i/s/h/a St. Luke’s Roosevelt Hospital Center (“St. Luke’s”), Healthcare Risk Advisors Inc. (“HRA”), and Dennis Kalogeropoulos (“Kalogeropoulos”) (Collectively “Defendants”) move (Motion Seq. 1) for an order pursuant to CPLR §§3211(a)(1) and (7) dismissing all claims asserted by Joshua Morgan (“Plaintiff”) against all Defendants; or, alternatively for an order pursuant to CPLR § 3212 dismissing the claims asserted by the Plaintiff against all Defendants; or alternatively, for an order pursuant to CPLR §§ 3211(a)(1) and (7) dismissing all claims asserted by Plaintiff against HRA Plaintiff has opposed the motion on the grounds that Defendants have not satisfied their burden to establish entitlement to dismissal or summary judgment.

This action arises from a motor vehicle accident which occurred on February 6, 2022, on Flatbush Avenue at or near the intersection of Foster Avenue in Brooklyn, New York. In his complaint, Plaintiff alleges that he was involved in an accident with an ambulance operated by Defendant Kalogeropoulos while he was in the course of his employment with St. Luke’s and/or HRA.

In support of its motion, Defendants argue that the submitted dash camera footage indicates that St. Luke’s ambulance was traveling down Flatbush Avenue in traffic with a green light and that Plaintiff’s vehicle was double parked in the ambulance’s lane of travel. Defendants

state that Plaintiff either walked in between his vehicle and the ambulance and/or opened his car door into the ambulance. In any event, Defendants claim that the footage clearly establishes that St. Luke's ambulance did not strike Plaintiff and therefore was not negligent. Furthermore, Defendants submit an affidavit of Robert Prianti ("Prianti"), the Senior Director of Emergency Medical Services at St. Luke's. In his affidavit, Prianti states that on the date of the accident, St. Luke's owned the ambulance at issue and the driver, Defendant Kalogeropoulos, was employed by them and operating the ambulance within the scope of his employment as an EMT. Additionally, Defendants submit an affidavit of Duane Perricelli ("Perricelli"), the Vice President of HRA. In his affidavit, Perricelli states that HRA did not own the ambulance at issue and is therefore not a proper party to this action. Defendants also submit the vehicle's registration and the police report evidencing that the ambulance was not owned by HRA. Defendants argue that based on its submitted affidavits and documents including the dash camera footage, vehicle registration, and police report that Plaintiff's claims against HRA must be dismissed pursuant to CPLR § 3211(a)(1) as well as for failure to state a cause of action pursuant to CPLR § 3211 (a)(7).

In the alternative, Defendants argue that it has met its burden for an order of summary judgment, pursuant to CPLR § 3212, warranting dismissal of Plaintiff's complaint as a matter of law. Defendants claim that the submitted documents establish that there are no triable issues of facts regarding negligence on behalf of the Defendants. Additionally, Defendants state that Plaintiff's vehicle was double parked in violation of Vehicle Traffic Law § 1214 and that Kalogeropoulos was operating the ambulance while transporting a patient during an emergency thus Defendants are immune from any liability.

In opposition, Plaintiff argues that the ambulance was stopped in the traffic lane next to his car. In his affidavit, Plaintiff states that he walked to the driver's side door and noticed that the traffic light was red and the ambulance was stationary. Plaintiff claims that as he began to open his car door, the ambulance suddenly began to move forward, and Plaintiff's hand was caught and crushed between the rear box of the ambulance and his car door. Plaintiff argues that the ambulance was not responding to an emergency at the time of the accident because neither the emergency lights nor the siren were in use and that the ambulance and EMTs remained on scene after the incident and did not mention any emergency to him. Additionally, Plaintiff claims issues of fact are present precluding dismissal in favor of any of the Defendants. Plaintiff states

that on May 16, 2022, National Liability and Fire Insurance Company by Carol Cleaver, Claims Department sent a Notice of Denial to Plaintiff's attorney which listed HRA as the insured under the insurance policy providing coverage for the Plaintiff's date of loss on February 6, 2022. Thus, dismissal against HRA is not warranted. Furthermore, Plaintiff states that the documents submitted by the Defendants do not qualify as documentary evidence pursuant to CPLR § 3211 (a)(1) and that their dash camera footage is inadmissible because it was not properly authenticated by someone who, was either a witness to the recorded events or was an operator of the equipment. Assuming arguendo that the video footage is admissible, Plaintiff argues that it also does not accurately depict how the accident happened because it happened off screen and thus is impossible to determine the cause of the accident. Furthermore, Plaintiff states that the video does not depict the time, date, or any visible indication connecting it to the ambulance involved. In any event, Plaintiff states that he has properly plead causes of action for negligence against the Defendants and has raised triable issues of material facts regarding whether Kalogeropoulos failed to maintain a proper lookout for Plaintiff and whether a jury could find that his negligence caused or contributed to the happening of the accident. Additionally, Plaintiff argues that if Defendants claim that they were responding to an emergency then the "reckless disregard" standard should apply because ordinary negligence applies to an operator of a vehicle during an emergency unless the prohibited activity is specifically protected under Vehicle Traffic Law § 1104(b) and that in the absence of an actual emergency, the ordinary negligence standard is applied.

In addressing the Defendants' application pursuant to CPLR § 3211, it is well understood that the court must afford Plaintiff's pleading a liberal construction, accept the facts alleged in the complaint as true, accord Plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Goshen v. Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]; *Leon v. Martinez*, 84 NY2d 83, 87 [1994]). Pursuant to CPLR § 3211(a)(1), a defendant may seek dismissal of a complaint when the defense is founded upon documentary evidence. Moreover, under CPLR § 3211(a)(7), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action.

Upon a motion to dismiss pursuant to CPLR 3211 (a)(1), dismissal is warranted where documentary evidence refutes plaintiff's factual allegations and establishes a defense as a matter

of law (*Leon* at 88; *Goshum v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]; *Brio v Roth*, 121 A.D.3d 733 [2d Dept. 2014]). To constitute documentary evidence, the evidence must be “unambiguous, authentic, and undeniable,” such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable (*Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996 [2d Dept. 2010]; *Prott v. Lewin & Baglio, LLP*, 150 AD3d 908 [2d Dept 2017]). An affidavit is not documentary evidence because its contents can be controverted by other evidence, such as another affidavit (*Xu v Van Zqienen*, 212 A.D.3d 872 [2d Dept. 2023]; *Phillips v Taco Bell Corp.*, 152 A.D.3d 806 [2d Dept. 2017]; *Fontanetta v John Doe 1*, 73 A.D.3d 78 [2d Dept. 2010]). Where documentary evidence contradicts the allegations of the complaint, the court need not assume the truthfulness of the pleaded allegations (*West Branch Conservation Assn, Inc., v County of Rockland*, 227 A.D.2d 547 [2d Dept. 1996]; *Greene v Doral Conference Center Associates*, 18 A.D.3d 429 [2d Dept. 2005]); *Penato v. George*, 52 A.D.2d 939, 941 [2d Dept 1976]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137 [2017]; *Duncan v Emeral Expositions LLC*, 186 A.D.3d 1321 [2d Dept. 2020]; *Dinerman v Jewish Bd. of Family & Children’s Services Inc.*, 55 A.D.3d 530 [2d Dept. 2008]; *Nisari v. Ramjohn*, 85 A.D.3d 987, 989 [2d Dept 2011]). The defendant bears the burden of demonstrating that the proffered evidence “conclusively refutes plaintiff’s factual allegations (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *Kolchins v Evolution Mkts. Inc.*, 31 NY3d 100 [2018]; *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2D 314 [2002]).

It is well settled that a video recording may be authenticated by the testimony of a witness to the recorded event or of an operator or installer or maintainer of the equipment that the video accurately represents the subject matter depicted (*People v Patterson*, 93 NY2d 80 [1999]; *People v Byrnes*, 33 NY2d 435 [1974]; *Keene v Rosas*, 215 AD3d 938 [2d Dept. 2023]). Evidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering (*Patterson* at 84; cf., *People v Ely*, 68 NY2d 520 [1986]). Any deficiencies in the chain of custody affect only the weight of the evidence, not its admissibility (*People v Elwell*, 202 AD3d 817 [2d Dept. 2022]; *People v Costello*, 128 AD3d 848 [2d Dept.

2015]). Since the ultimate object of the authentication requirement is to insure the accuracy of the [video] sought to be admitted into evidence, any person having the requisite knowledge of the facts may verify it (*Byrnes* at 347). Mere identification by one familiar with the object, however, will be sufficient “when the object possesses unique characteristics or markings” and any material alteration would be readily apparent (*People v McGee*, 49NY2d 48 [1979]; see *People v Price*, 29 NY3d 472 [2017]). Ultimately, the availability of recognized means of authentication should ordinarily allow for and promote the general, fair and proper use of new technologies, which can be pertinent truth-yielding forms of evidence (*Price* at 477; *Patterson* at 84).

At the outset, the Court finds that the Defendants’ dash camera footage was properly authenticated by Piranti’s affidavit. In his affidavit, Piranti states the type of video equipment used to download and retrieve footage from the ambulances -- the Verizon Reveal application. Furthermore, Piranti states that within the normal course of business, he conducts searches for dash camera and video footage of alleged accidents, including Plaintiff’s, and that it is his duty to download the video footage from Verizon Reveal and archive it. Furthermore, Piranti states that he reviewed the footage and believed it to be a true, accurate, and authentic copy of the alleged accident, as required for authentication (see *Read v Ellenville Nat. Bank*, 20 AD3d 408 [2d Dept. 2005]). Contrary to Plaintiff’s contention, the lack of date and time on the video effect more so the weight of the evidence, not its admissibility (*McGee* at 59).

The proffered affidavits and police report are not considered documentary evidence within the intended scope of CPLR § 3211(a). Inasmuch as the submitted vehicle registration and dash camera footage are considered documentary evidence, neither utterly refutes the Plaintiff’s factual allegations that Defendants were negligent, conclusively establishing a defense as a matter of law. Here, the dash camera footage does not show the actual happening of the accident. Furthermore, while the vehicle registration states that the ambulance was owned by St. Luke’s, Plaintiff has sufficiently raised a question of fact by submitting correspondence from an adjuster, with a Notice of Denial, that identified HRA as the named insured.

Accordingly, that branch of Defendants’ motion to dismiss Plaintiff’s claims pursuant to CPLR § 3211(a)(1) is denied.

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a

cause of action (*Leon* at 88; *Skefalidis v China Pagoda NY, Inc.*, 210 A.D. 3d 925 [2d Dept. 2022]); *Oluwo v Sutton*, 206 A.D.3d 750 [2d Dept. 2022]; *Sokol v Leader*, 74 A.D.3d 1180 [2d Dept. 2010]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*Eskridge v Diocese of Brooklyn*, 210 A.D.3d 1056 [2d Dept. 2022]; *Zurich American Insurance Company v City of New York*, 176 A.D.3d 1145 [2d Dept. 2019]; *EBC I Inc. v Goldman, Sachs & Co.*, 5 NY3d [2005]).

On a motion made pursuant to CPLR 3211(a)(7) to dismiss a complaint, the burden never shifts to the non-moving party to rebut a defense asserted by the moving party (*Sokol* at 1181; *Rovello v Orofino Realty Co. Inc.*, 40 NY2d 970 [1976]). CPLR 3211 allows a plaintiff to submit affidavits, but it does not oblige him or her to do so on penalty of dismissal (*Id.*; *Sokol* at 1181). Affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint and such affidavits are not to be examined for the purpose of determining whether there is evidentiary support for the pleading (*Id.*; *Rovello* at 635; *Nonon* at 827). Thus, a plaintiff will not be penalized because he has not made an evidentiary showing in support of its complaint.

Unlike on a motion for summary judgment, where the court searches the record and assesses the sufficiency of evidence, on a motion to dismiss, the court merely examines the adequacy of the pleadings (*Davis v. Boenheim*, 24 NY3d 262, 268 [2014]). The appropriate test of the sufficiency of a pleading is whether such pleading gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments (*V. Groppa Pools, Inc. v. Massello*, 106 AD3d 722, 723 [2d Dept 2013]; *Moore v Johnson*, 147 AD2d 621 [2d Dept 1989]).

To plead a cause of action for negligence, a plaintiff must allege (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom (*Solomon by Solomon v City of New York*, 66 N.Y2d 1026 [1985]).

In his complaint, Plaintiff alleges that Kalogeropoulos the operator of the ambulance, was an employee, agent, servant of defendant HRA, that HRA was the owner, lessee of the ambulance involved, that HRA consented and gave permission, implied or express, to defendant KALOGEROPOULOS to operate the vehicle, that HRA negligently inspected, managed, controlled, repaired the ambulance, that HRA was negligent in training and entrusting the vehicle

to Kalogeropoulos causing serious injuries to Plaintiff. Thus, Plaintiff has adequately pleaded sufficient facts to state a claim against HRA sounding in negligence.

Accordingly, that branch of Defendants' motion to dismiss all claims asserted by Plaintiff against HRA pursuant to CPLR 3211(a)(7) is denied.

It is well established that "the proponent of a summary judgment motion must 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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v Nassau County*, 111 AD2d 212, [2d Dept 1985]; *Steven v Parker*, 99 AD2d 649, [2d Dept 1984]; *Galeta v New York News, Inc.*, 95 AD2d 325, [1st Dept 1983]). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]; *Rebecchi v Whitmore*, 172 AD2d 600 [2d Dept 1991]). To be entitled to summary judgment on the issue of liability, a plaintiff does not bear the burden of establishing the absence of his or her own comparative negligence (*Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Higashi v M & R Scarsdale Restaurant, LLC*, 176 AD3d 788 [2d Dept 2019]; *Webb v Scharf*, 191 AD3d 1353 [4th Dept 2021]). When a defendant's liability is established as a matter of law before trial, the jury must still determine whether the plaintiff was negligent and whether such negligence was a substantial factor in causing plaintiff's injuries -- if so, the comparative fault of each party is then apportioned by the jury (*Rodriguez* at 324).

Under Vehicle and Traffic Law § 1214, No person shall open the door of a motor vehicle on the side available to moving traffic unless and until it is reasonably safe to do so, and can be done without interfering with the movement of other traffic, nor shall any person leave a door open on the side of a vehicle available to moving traffic for a period of time longer than necessary to load or unload passengers.

Under Vehicle and Traffic Law § 1104, The driver of an authorized emergency vehicle, when involved in an emergency operation, may (1) Stop, stand or park irrespective of the provisions of this title; (2) Proceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation; (3) Exceed the maximum speed limits so long as he does not endanger life or property; (4) Disregard regulations governing directions of movement or turning in specified directions. the exemptions herein granted to an authorized emergency vehicle shall apply only when audible signals are sounded from any said vehicle while in motion by bell, horn, siren, electronic device or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted lamp so that from any direction, under normal atmospheric conditions from a distance of five hundred feet from such vehicle, at least one red light will be displayed and visible. The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

Here, the Court finds that the Defendants have not established entitlement to immunity from liability under Vehicle and Traffic Law § 1104. It is undisputed that Kalogeropoulos was operating an authorized emergency vehicle at the time of the accident pursuant to Vehicle and Traffic Law § 101. However, Plaintiff has sufficiently raised issues of material fact as to whether Kalogeropoulos was involved in an emergency operation at the time of the accident. In the submitted dash camera footage, Defendants' ambulance is shown driving a slow rate of speed in traffic. No emergency lights are displayed and there is no sound to indicate that the alarm was on. Furthermore, the ambulance stops initially at the red light and does not resume moving until the light turns green again, suggesting that the vehicle was not involved in an emergency operation at that time. Moreover, the injury-causing conduct here, does not fall within the privileged conduct listed in the statute. In the absence of an actual emergency, the ordinary negligence standard will be applied. Additionally, Plaintiff has sufficiently raised a question of fact by submitting correspondence from an adjuster, with a Notice of Denial, that identified HRA as the named insured of the subject ambulance. To the extent that Defendants argue that Plaintiff was a proximate cause of his own accident, the comparative fault of each party is a question for a jury. Defendants have raised sufficient issues of fact regarding Plaintiff's potential comparative negligence.

Accordingly, it is hereby,

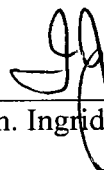
ORDERED, that Defendants' motion to dismiss Plaintiff's claims pursuant to CPLR § 3211(a)(1) is denied, and it is further,

ORDERED, that Defendants' motion to dismiss all claims asserted by Plaintiff against HRA pursuant to CPLR 3211(a)(7) is denied, and it is further,

ORDERED, that Defendants' motion for summary judgment pursuant to CPLR § 3212 is denied, and it is further,

ORDERED, that the issue of Plaintiff's comparative negligence is to be determined at trial.

This constitutes the decision and order of the court.



Hon. Ingrid Joseph, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**