Powell v Excel at Woodbury for Rehabilitation & Nursing, LLC
2023 NY Slip Op 34974(U)
February 2, 2023
Supreme Court, Queens County
Docket Number: Index No. 705041/2020
Judge: Maurice E. Muir

Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

IAS Part - 42

ZEPHANIAH POWELL,

Plaintiff,

Index No.: 705041/2020

Motion Date: 11/4/21

-against-

Motion Cal. No. 23

EXCEL AT WOODBURY FOR REHABILITATION AND NURSING, LLC AND ENERGY AMBULETTE SERVICES, INC.,

Motion Seq. No. 8

Defendants.

The following electronically filed ("EF") documents read on this motion by Energy Ambulette Services, Inc. ("Energy" or "movant") for an order pursuant to CPLR § 3212, dismissing plaintiff's Verified Complaint in its entirety against defendant Energy Ambulette Services, Inc. together with any and all cross claims, and for such other relief as the Court deems proper.

	Papers Numbered
Notice of Motion-Affirmation in Support-Exhibits….....	EF 17 - 48
Affirmation in Opposition-Exhibits-Service.....	EF 81
Affirmation in Reply……....	EF 78

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover damages for personal injuries Zephaniah Powell ("Ms. Powell" or "plaintiff") allegedly sustained while being transported by Energy Ambulette Services, Inc. ("Energy" or "movant") from Long Island Hyperbaric & Wound Care Medical Associates, P.L.L.C. ("LI Hyperbaric") to the Excel at Woodbury for Rehabilitation and Nursing LLC ("Excel"). In particular, the plaintiff alleges on April 10, 2015, she underwent a left trans-metatarsal amputation at Plainview Hospital. Thereafter, she started to receive post-surgery

treatment from LI Hyperbaric. As a result, Energy transported her to and from Excel to LI Hyperbari on a regular basis. However, on May 14, 2015, one of Energy's drivers, Timothy Frawley ("Mr. Frawley"), had an accident while transporting the plaintiff from LI Hyperbaric to Excel, wherein she struck her feet on the floor of the ambulette. As a result, on November 12, 2015, the plaintiff commenced the instant action; and on December 9, 2015, issue was joined, wherein Excel interposed an answer.

Now, Energy seeks to dismiss the complaint and all cross claims, pursuant to CPLR § 3212. In support of the instant motion, Energy provides Mr. Frawley's deposition testimony, *inter alia*, who testified that he first encountered the plaintiff on May 14, 2015, when he was picking her up from LI Hyperbaric. Mr. Frawley testified that the wheelchair she was in did not have leg supports; and he asked her whether the wheelchair had leg supports, to which she responded they did not. Mr. Frawley also testified that the plaintiff never made any complaints about not having leg supports on her wheelchair at any time during the drive. Moreover, he testified that he was not allowed to transfer plaintiff from the wheelchair she was in, to the wheelchair that Energy had in the ambulette: He further testified that it was Energy's policy not to transfer patients from the wheelchair they were into the wheelchair Energy had in the van. Furthermore, Mr. Frawley testified that once the plaintiff was in the ambulette, he ensured that she was properly secured therein. However, he testified that he never received an training as to footrests being needed. Moreover, Mr. Frawley testified that he was approximately 50 feet from the intersection of Jericho Turnpike and Woodbury Road when the traffic light turned yellow; and he proceeded to brake. He applied "medium pressure" on the brakes. However, he heard the plaintiff give out a little yell of pain, at which time he turned around and observed that the plaintiff's feet on the ground. As a result, he contacted EMT and filed an incident report.

In opposition, the plaintiff testified that on the day in question, the leg rests were missing from her wheelchair when she was placed in the ambulette. At some point after the ambulette had left LI Hyperbaric, the plaintiff testified that she first realized that there were no footrests on her wheelchair. As a result, she told Mr. Frawley that she did not have footrests, but he did not respond to her comment. Moreover, the plaintiff testified that the ride from LI Hyperbaric to Excel took approximately 30 minutes, and the incident occurred approximately halfway through the ride. Specifically, the plaintiff testified that there was a lot of traffic on the road during that drive; and Mr. Frawley stopped slightly, started to move again, and then came to stop once again.

The plaintiff testified that the lap belt was definitely on during the ride. Nonetheless, she "doubled over" and both of her feet struck the ground of the ambulette. (Upon hitting the ground of the ambulette, she felt searing pain and saw blood on her bandage.) The plaintiff testified that Mr. Frawley told her that he had been cut off by the driver in front of him.

To be entitled to the drastic remedy of summary judgment, the moving party 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 from the case. (*Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The failure to make such a *prima facie* showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC*, 101 AD3d 490 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]). When deciding a summary judgment motion the role of the court is to make a determination as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 NY3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exist, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. St. Claire's Hospital*, 82 NY2d 738 [1993]).

Here, the court finds that Energy failed to meet its initial burden of making a *prima facie* showing through the submission of evidence in admissible form. Furthermore, it is well settled that the failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers. (*see Xin Fang Xin v. Saft,* 177 AD3d 823 [2d Dept 2019]; *Rosenblum v. Schloss*, 175 AD3d 1339 [2d Dept 2019]; *Burns v. Stranger*, 31 AD3d 360 [2d Dept 2006]). Moreover, the court finds that there is conflicting testimony, which demonstrate the existence of triable issues of fact pertaining to the circumstances of the subject accident. (*Han v. Gladyshev*, 153 AD3d 762 [2d Dept 2017]; *Jones v. American Commerce Ins. Co.*, 92 AD3d 844 [2d Dept 2012]; *Gardner v. Cason, Inc.*, 82 AD3d 930 [2d Dept 2011]).

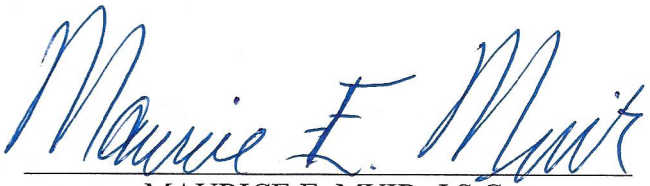
Accordingly, it is hereby,

ORDERED that Energy Ambulette Services, Inc., motion for summary judgment, pursuant to CPLR § 3212, is denied in its entirety; and it is further,

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon all parties on or before March 10, 2023.

The foregoing constitutes the Decision and Order of the court.

Dated: February 2, 2023
Long Island City, New York



MAURICE E. MUIR, J.S.C.