

Bartolo v City of New York
2023 NY Slip Op 35071(U)
November 1, 2023
Supreme Court, Richmond County
Docket Number: Index No. 151074/2014
Judge: Lizette Colon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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ANTHONY BARTOLO, as Guardian of MICHAEL
BARTOLO, An Incapacitated Person,

Plaintiff,

Present:

HON. LIZETTE COLON

-against-

DECISION AND ORDER

THE CITY OF NEW YORK, NEW YORK CITY
FIRE DEPARTMENT EMERGENCY MEDICAL
SERVICES and DENISE L. BELFIELD,

Defendants.

Index No. 151074/2014

Motion No. 005

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The Court marked the following e-filed documents associated with motion sequence 005 fully submitted on August 22, 2023.

	E-Filed Document #:
Plaintiff's Order To Show Cause dated July 12, 2023, Affirmation in Support dated July 11, 2023 and Exhibits.....	144-153
Defendant City of New York and New York City Fire Department Emergency Medical Service Affirmation in Opposition dated August 18, 2023 and Exhibit(s).....	154-158

Upon the forgoing papers, Plaintiff's motion (No.005) for an order pursuant to CPLR section 2221(e) seeking leave to renew is granted and upon renewal this Court's adheres to its order dated November 29, 2022 granting the Defendants', the CITY OF NEW YORK AND THE

NEW YORK CITY FIRE DEPARTMENT EMERGENCY MEDICAL SERVICES (collectively, "Municipality Defendants"), summary judgment dismissing Plaintiff's Complaint.

Plaintiff's action arises from a motor vehicle accident that occurred on September 6, 2013, at or near the intersection of Huguenot Avenue and Lombard Court, Staten Island, New York. At the time of the accident, Plaintiff, MICHAEL BARTOLO, was operating a motorcycle when he was involved in an accident with a motor vehicle operated by Co-Defendant, DENISE L. BELFIELD. As a result of the accident, Plaintiff was ejected from his motorcycle and came to rest in the street. After the accident, EMT (Basic Life Support) arrived, and thereafter Paramedics (Advanced Life Support), arrived at the scene and attended to the Plaintiff. It is alleged by Plaintiff's Counsel, as against the Municipal Defendants, that pre-hospital care and treatment rendered to the Plaintiff was, inter alia, improperly and/or negligently performed; "in intubating the plaintiff through his esophagus instead of his trachea; in failing to timely recognize that there was a traumatic intubation; in failing and neglecting to use reasonable care and diligence for the safeguarding and protection of said plaintiff measured by his capacity to provide for his own safety and well-being." It is claimed that as a result of the negligence and medical malpractice of Municipal Defendants, Plaintiff suffered, inter alia, severe traumatic brain damage.

Plaintiff commenced the within action by filing a Summons and Complaint on December 1, 2015. Municipal defendants interposed an answer dated December 22, 2014, which asserted an affirmative defense of governmental immunity. Co-Defendant, DENISE L. BELFIELD, interposed an Answer dated February 2, 2015. Upon completion of all discovery, the matter was certified for trial. After a Note of Issue was filed, all Defendants moved for summary judgment. Particularly, the Municipal Defendants moved to dismiss the Complaint pursuant to CPLR Section 3211, or alternatively, pursuant to CPLR Section 3212, contending said Defendants are immune from liability based upon performance of a governmental duty, and that Plaintiff failed to plead

and prove a “special relationship”. This Court heard oral arguments on said motions and by Order dated November 29, 2022, granted Municipal Defendants’ motion for summary judgment dismissing the Complaint and denied Co-Defendant’s motion for summary judgment. Plaintiff’s counsel has appealed said order.

Plaintiff now seeks leave to renew and upon renewal, vacatur of the Court’s prior determination. Pursuant to CPLR section 2221(e), a motion to renew must contain the following:

- 1. “shall be identified specifically as such;**
- 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination and**
- 3. shall contain a reasonable justification for the failure to present such facts on the prior motion.” (See CPLR section 2221(e)).**

A Court may exercise its discretion, in the interest of justice, to grant leave to renew where a party submits new facts not offered on the prior motion and offers a reasonable justification for its failure to present such facts on the prior motion. (See *Cando v. General Contracting Co., Inc.*, 200 AD3d 740 [2d Dept., 2021]). However, such application is not another opportunity “freely given to parties who have not exercised due diligence in making their first factual presentation.” (See *Cando, supra.*; *Marjam Supply Co., Inc. v. Warwick Props., Inc.*, 217 AD3d 853 [2d Dept., 2023]). Where a party submits additional facts known to them when the prior motion was made and fails to offer a reasonable justification for such failure, the Court cannot exercise its discretion to grant renewal. (See *Cando, supra.*).

Plaintiff's instant application alleges it is based upon new facts regarding post-accident information from Co-Defendant which were unknown at the time of the prior motion for summary judgment. Counsel for Plaintiff contends that such new facts were only recently discovered in preparation for trial. While this Court finds that Plaintiff's counsel has demonstrated a reasonable justification for its failure to present Co-Defendant's Affidavit in the prior motion, a review of the new fact(s) as submitted in the Affidavit of the Co-Defendant does not warrant this Court changing the determination made in its prior order.

It is well settled case law that where a municipality provides ambulance services in response to a 911 call for assistance, it is performing a governmental duty and cannot be liable unless a special duty is owed to the injured party. (See *Applewhite v. Accuhealth, Inc.*, 21 NY3d 420 [2013]; *Maldovan v. County of Erie*, 39 NY3d 166 [2022]; *Haberstam v. Port Authority of New York & New Jersey*, 175 AD3d 1264 [2d Dept., 2019]. One of the three ways to establish a special duty, applicable to the present matter, is to prove that Municipal Defendants voluntarily assumed a special relationship with the Plaintiff, beyond the duty it owes to the general public. Such a special relationship exists where the following four (4) factors are established:

- (1) An assumption by the municipality, through its promises or actions, of an affirmative duty to act on behalf of the injured party;**
- (2) Knowledge on part of the municipal'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) A party's justifiable reliance on the municipal affirmative undertaking. (See *Applewhite, supra.*; *Howell v. City of New York*, 39 NY3d 1006 [2022]; *Ferreira v. City of Binghamton*, 38 NY3d 298 [2022]; *Cranberg v. County of Nassau*, 214 AD3d 943 [2d Dept., 2023]; *Watts v. City of New York*, 186 AD3d 1577 [2d Dept. 2020].**

In addressing whether the Municipal Defendants owed a special duty to the Plaintiff, Plaintiff's Counsel limits its proof on this renewal application solely as to the fourth element of justifiable reliance. It is Counsel's contention that Plaintiff has proven the first three elements as outlined in his opposition to the underlying summary judgment motion.

The Court has had an opportunity to review the recently submitted Affidavit of Co-Defendant and finds that said Affidavit does not warrant this Court changing its prior determination. Specifically, the new fact as stated in paragraph 6 of Co-Defendant's Affidavit "...if I had known or thought that EMS was not going to arrive, I would have made every effort to take or have someone take Mr. Bartolo to the local hospital," does not establish that Plaintiff justifiably relied upon the affirmative actions, if any, of the Municipal Defendants in rendering pre-hospital care and treatment to him.

The Court of Appeals, as well as the Appellate Division of the Second Department, have consistently held that reliance cannot be "transferred" or imputed to the injured party from a third party who relied upon the alleged promises or actions of the municipal defendant, who is not a family member, acting on behalf of the injured. (See *Laratro v. City of New York*, 8 NY3d [2006]; *Koyko v. City of New York*, 189 AD3d 811[2d Dept., 2020]. Here, Co-Defendant was not and is not a family member who was acting on behalf of Plaintiff, therefore, there is no "transferred" reliance. Nor does Co-Defendant's Affidavit specifically state what promises were made or actions taken by Municipal Defendants, that induced reliance, and caused her to forego other avenues of transportation to the hospital or alternative immediate care for Plaintiff. In any event, as the caselaw exists today, there cannot be "transferred" reliance by a non-family member. Further, Co-Defendant's Affirmation contradicts her prior deposition testimony. As Municipal Defendants' Counsel submits, Co-Defendant testified at her deposition that an

ambulance arrived “quick”. Simply stated, this Affidavit does not establish that Plaintiff was induced by any promises or and/or actions of the Municipal Defendants to forego alternate means of transport and/or pre-hospital care and treatment by EMS or ALS.

Additionally, and contrary to Plaintiff’s Counsel’s contention, paragraph 5 of Co-Defendant's Affidavit stating “Prior to EMS arriving, I observed a neighborhood resident shaking Mr. Bartolo to try and keep him awake....I observed Mr. Bartolo’s eyes blinking,” does not provide new facts. These facts were known to Plaintiff’s Counsel at the time of the prior motion, as Counsel submitted those same facts in opposition to Defendants’ summary judgment motion by annexing, as an exhibit, relevant portions of Co-Defendant's deposition taken in 2019. Plaintiff’s counsel not only knew these facts but relied upon them at the time Counsel submitted opposition to the Municipal Defendants’ motion for summary judgment.

To prove and/or raise a genuine issue of fact regarding the fourth element of justifiable reliance, which is generally a question of fact, the pivotal questions are not only whether an injured party foregoes pursuing other means of protection in relying upon a municipal’s affirmative undertaking, or whether a competent family member acting on behalf of the injured party relies upon the promises or actions of the municipal defendants, but also, relevant to the facts of this case, whether reliance by the plaintiff through the promises and/or actions taken by the municipal defendants placed plaintiff in a worse position than he would have been if the specific action in question had not been performed by municipal defendants. [See *Koyko*, supra ; *Halberstam*, supra. *Dixon v. Village of Spring Valley*, 50 AD3d 943, [2d Dept., 2008]]. However, Co-Defendant’s Affidavit does not establish that Plaintiff’s reliance upon the promises and/or actions taken by Municipal Defendants placed him in a worse position than he would have been had no action been

taken by Municipal Defendants.¹ This Court is confined to the parameters of Plaintiff's motion to renew and cannot convert this motion as one to reargue since Plaintiff's time to move for re-argument has long expired. Nor is the purpose of a motion to renew an opportunity for a movant to reargue facts previously submitted to the Court.

No doubt the existing law on the special duty doctrine, particularly the element of justifiable reliance, is harsh and protects the Municipal Defendants from liability in an otherwise recognized breach of duty in negligence and/or medical malpractice claims. The Court of Appeals in *Maldovan*, supra., recognized this harshness and specifically stated "we do not address how or whether the special duty should apply in a different case where the injured party was a child or an adult with developmental disabilities incapable of pursuing other avenues of protection and did not have a competent adult family member advocating on their behalf." Perhaps, the Court may address this issue in the future and be inclined to expand the limited persons to whom, or circumstances under which, a municipality owes a special duty beyond that owed to the general public and include those individuals who are "vulnerable victims", incapable of pursuing other avenues of protection, do not have a competent adult family member advocating on their behalf, and are placed in worse position than had no action been taken by a municipality, much like the Plaintiff in the present matter and include those individuals similarly situated.

Accordingly, it is hereby:

ORDERED that Plaintiff's motion seeking renewal is granted and upon renewal, the Court adheres to its prior determination in granting Municipal Defendants', the CITY OF NEW YORK

¹ Counsel for Plaintiff submitted evidence in opposition to Municipal Defendants' underlying motion for summary judgement by way of, inter alia, testimony of both ALS paramedics and both EMS technicians as well an expert medical affidavit and has preserved this issue for appeal. It is not for this Court, on a motion to renew, to revisit the proof submitted and arguments made on the other three elements required to prove the existence or lack thereof, of a special relationship.

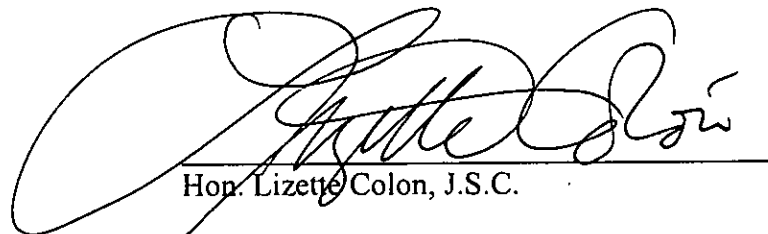
AND THE NEW YORK CITY FIRE DEPARTMENT EMERGENCY MEDICAL SERVICES

motion for summary judgment dismissing Plaintiff's Complaint against said Defendants.

The foregoing constitutes the decision and order of this court.

ENTER,

Dated: November 1, 2023



Hon. Lizette Colon, J.S.C.