

**Burnett v City of New York**

2025 NY Slip Op 35046(U)

December 31, 2025

Supreme Court, New York County

Docket Number: Index No. 160676/2023

Judge: Paul A. Goetz

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.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ PART 47

*Justice*

-----X

PERRY BURNETT,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY  
DEPARTMENT OF HOMELESS SERVICES, THE  
DEPARTMENT OF SOCIAL SERVICES, NEW YORK CITY  
DEPARTMENT OF PARKS & RECREATION, CLARK  
THOMAS, MEN'S SHELTER

Defendants.

-----X

INDEX NO. 160676/2023

MOTION DATE 09/12/2025

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

In this action, plaintiff Perry Burnett, a resident at the Clark Thomas Men’s Shelter alleges that he was denied access to his insulin medication by staff at the shelter resulting in him losing consciousness and falling into a diabetic seizure which required hospitalization. Plaintiff asserts a cause of action for negligence as against all defendants. Defendants move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint.

**DISCUSSION**

*Summary Judgment Standard*

It is well settled 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’” (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make

such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-54 [1st Dept 2010]).

“The court’s function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility” (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-11 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

#### *Defendants Duty*

“The elements of negligence are (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom” (*Abbott v Johnson*, 152 AD3d 730, 732 [2d Dept 2017]). “The existence and scope of a duty of care is a question of law for the courts entailing the consideration of relevant policy factors” (*id.*). Defendants argue that they owed no duty to plaintiff because non-party, Help USA, an independent contractor, was responsible for all medical services provided by the shelter. Further, they argue that as a municipality, providing governmental services they can only be held liable if a special

relationship existed between them and plaintiff, which did not exist here. Plaintiff argues that the defendants owed him a non-delegable duty to ensure that medical services were provided with reasonable care.

While plaintiff cites *Brunero v City of New York Dept. of Parks and Recreation*, to support its argument that a municipality remains liable for the acts of a contractor who performed its duties negligently (121 AD3d 624 [1st Dept 2014]), that case concerned the non-delegable duty of a property owner to maintain its property in a reasonably safe condition (*see Daly v 9 E. 36th LLC*, 153 AD3d 1145 [1st Dept 2017]). In contrast, here plaintiff does not allege that the property itself was not maintained safely, but rather that an employee of non-party, independent contractor Help USA, negligently withheld his medication. Plaintiff fails to cite any support that the provision of medical services is a non-delegable duty which would hold defendants liable for the negligence of their independent contractor. Furthermore, while plaintiff cites a case titled *Backus v. City of Rochester*, (148 AD3d 1697 [4th Dept 2017]) to support his argument that a municipality can be held liable for a contractor who negligently performs medical services, the court is unable to locate this case in any legal databases.

Additionally, defendants argue that they cannot be held liable because “a municipality cannot be held liable for negligence in performing a governmental function unless a special relationship exists between the municipality and the injured party” (*Santoro v City of New York*, 17 AD3d 563, 564 [2d Dept 2005]). Here it is well settled that the operation of a homeless shelter implicates a governmental function, and “liability for the performance of which is barred absent the breach of a special duty owed to the injured party” (*Clark v City of New York*, 130 AD3d 964, 964 [2d Dept 2015]; *see also Maldonado v Young and Booby Realty Corp.*, 223

AD3d 435 [1st Dept 2024] [“the provision of temporary housing for homeless families is a governmental function mandated by the state constitution for the benefit of the general public”]).

In order to establish the existence of this special duty, plaintiff must show:

“(1) an assumption by the [governmental entity], through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the [entity]'s agents that inaction could lead to harm; (3) some form of direct contact between the [entity]'s agents and the injured party; and (4) that party's justifiable reliance on the [entity]'s affirmative undertaking (*Feeney v County of Delaware*, 150 AD3d 1355, 1357 [3d Dept 2017]).

Plaintiff argues that defendants assumed a special duty, by the non-party contractor allegedly failing to provide plaintiff with his insulin medication prior to his medical incidents. However, as stated above, defendants did not assume this duty as medical services were provided solely by the non-party Help USA. Plaintiff has failed to provide any evidence of the assumption of a duty by defendants, that the defendants were aware of his condition, nor that there was any contact between defendants' agents and plaintiff. Therefore, defendants cannot be held liable for plaintiff's injuries and the complaint will be dismissed.


Accordingly it is,

ORDERED that the motion to dismiss is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendants and as against plaintiff, with costs and disbursements to defendants; and it is further

ORDERED that the counsel for plaintiff is directed to show cause on January 22, 2026 at

2:15 p.m. why he should not be sanctioned for citing a nonexistent case.

  
20251231161253PG0ETZ22474E05915E41F78373E90821F1F3FE

12/31/2025  
DATE

\_\_\_\_\_  
PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE