Earl v City of New York

2026 NY Slip Op 31342(U)

April 2, 2026

Supreme Court, New York County

Docket Number: Index No. 154652/2019

Judge: Hasa A. Kingo

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. HASA A. KINGO** **PART** **65M**

Justice

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NEFERTITI EARL, NEFERTITI EARL,

Plaintiff,

- v -

THE CITY OF NEW YORK, LITTLE TREASURES-PETITS TRESORS, SLP, PLLC,AISHA BROWNLEE

Defendant.

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INDEX NO. 154652/2019

MOTION DATE 03/13/2026

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 210, 211, 212, 213, 214, 215

were read on this motion for RENEWAL.

Defendant Little Treasures–Petits Trésors, SLP, PLLC ("Little Treasures") seeks an order, pursuant to CPLR §§ 2221(e) and 3212, (a) renewing its prior motion (Motion Seq. No. 006) for summary judgment, and (b) granting summary judgment in its favor, dismissing plaintiffs' complaint (and all cross-claims) in its entirety with prejudice. As grounds, Little Treasures asserts "new facts not offered on the prior motion" and an intervening change in the law arising from the January 13, 2026 decision of the Appellate Division, First Department, in *Earl v. City of New York*, 245 AD3d 465 (1st Dept 2026). Little Treasures also requests such other and further relief as the court deems just and proper.

BACKGROUND AND PROCEDURAL HISTORY

This negligence/wrongful death action arises from the death of infant Q.D. on March 20, 2018, following complications of a respiratory illness (human metapneumovirus, "hMPV"). Plaintiff Nefertiti Earl, as administratrix of Q.D.'s estate and individually, alleged that co-defendant Aisha Brownlee, an occupational therapist providing early-intervention services, exposed Q.D. to hMPV at Little Treasures, causing Q.D.'s fatal illness. Plaintiff's claims included wrongful death and personal injury, theory of Brownlee's negligence and her employer's (or apparent employer's) vicarious liability, negligent hiring and supervision, and related theories. The City of New York was named as a defendant solely on a vicarious-liability theory (as the public agency administering the early-intervention program).

Defendant Little Treasures operates an early-intervention clinic and retained Brownlee through a subcontract with Caring Hands Therapy Services. Little Treasures answered the complaint on August 6, 2019 (NYSCEF Doc. No. 96). After discovery, each defendant moved for summary judgment (Seq. Nos. 4–6). On October 22, 2024, the New York County Supreme Court (Kingo, J.) denied all three motions. With respect to Little Treasures, the court held that Little

Treasures had not met its prima facie burden. Indeed, as plaintiff argued, factual disputes existed whether Little Treasures held itself out as administering Q.D.'s care (raising an apparent-agency issue). The court cited *Weiszberger v. KCM Therapy*, 189 AD3d 1121 (2d Dept 2020), regarding the doctrine of apparent agency, but concluded that the record presented factual issues that must be resolved by the jury. Thus, all motions were denied on the pleadings (with leave reserved for trial), and a trial date was set.

The City of New York and Brownlee appealed. Little Treasures withdrew its appeal (letter dated July 10, 2025, First Dept Docket No. 2024-06915). On January 13, 2026, the Appellate Division, First Department, reversed the denial of summary judgment as to Brownlee and the City. The Appellate Division, First Department, held that Brownlee had shown prima facie entitlement to judgment: her infectious-disease expert (Dr. Hewlett) demonstrated she could not have transmitted hMPV to Q.D. in the relevant timeframe. In particular, even accepting plaintiff's testimony that Q.D.'s symptoms began the day before her last session with Brownlee, the virus's 5–7 day incubation meant Brownlee could not have caused it, and plaintiff offered no expert to contest that fact. Accordingly, the Appellate Division, First Department, found plaintiff "failed to raise an issue of fact in support of her theory that the infant's virus was caused by Brownlee." By the same reasoning, the court dismissed plaintiff's claim against the City – which could only be liable by virtue of Brownlee's conduct – because without Brownlee's causation the City had no liability. Summary judgment for Brownlee and for the City was therefore ordered (and judgment directed), and costs to them. No decision was issued on Little Treasures (because its appeal was withdrawn), leaving plaintiff's claims pending only against Little Treasures.

Little Treasures now moves in this court (on notice dated February 5, 2026) to renew its earlier summary-judgment motion, expressly relying on "new facts" and "changed law" in the Appellate Division, First Department's decision. Little Treasures argues that, in light of that decision, it is entitled to judgment as a matter of law.

ARGUMENTS

Defendant (Little Treasures). Little Treasures contends that renewal is proper under CPLR § 2221(e) because an intervening "change in the law" has occurred – namely, the Appellate Division, First Department's January 2026 decision – which "would change this [c]ourt's prior determination." The motion papers assert that plaintiff's sole theory of liability (that Brownlee's actions caused Q.D.'s death) has been foreclosed by binding appellate authority. Little Treasures notes that the Appellate Division, First Department, unanimously held that plaintiff "failed to raise an issue of fact" that Brownlee transmitted the virus, and therefore dismissed plaintiff's claims against Brownlee and the City. Little Treasures argues that these legal determinations necessarily entitle it to judgment: since Brownlee has been cleared as the cause of harm, Little Treasures cannot be held liable by respondeat superior or apparent-agency. In particular, Little Treasures emphasizes that a respondeat claim is derivative – if the underlying employee (Brownlee) committed no tort, the principal cannot be held responsible[1]. It cites *Escobar v. New York. Hosp.*, 111 AD2d 128, 129 (1st Dept 1985), and analogous authority, that an employer "cannot be held liable on a theory of *respondeat superior* based on [a] physician's alleged negligence where the malpractice action against the physician was discontinued." Similarly, any claim for negligent hiring or supervision fails if the underlying conduct did not cause the harm. Little Treasures points

out that plaintiff conceded there are no independent theories against it – its claims have always been vicarious/employer-liability theories – and plaintiff never identified any separate negligence by Little Treasures. Thus, Little Treasures concludes that the First Department's "change in law" compels dismissal of the entire case.

In support of renewal, Little Treasures invokes CPLR § 2221(e) and case law allowing renewal on intervening law. It cites *Roundabout Theatre Co. v. Tishman Realty & Constr. Co*., 302 AD2d 272, 272–73 (1st Dept 2003), where the Appellate Division, First Department, held that an "intervening clarification of the law" supports renewal. It also cites *Puello v. City of New York*, 118 AD3d 492, 492–93 (1st Dept. 2014) (altered on other grounds, 25 NY3d 993 [2015]), where renewal was granted based on a Court of Appeals decision clarifying the law. Little Treasures argues that the new Earl decision is precisely such a clarification of the law applicable here. Finally, Little Treasures submits that it has reasonable justification for not presenting the First Department's reasoning on the prior motion, since that decision was rendered only after the original motion was decided.

Plaintiff opposes renewal and summary judgment. Plaintiff argues that Little Treasures cannot satisfy CPLR § 2221(e), and asks that this motion be held in abeyance pending appeal to the Court of Appeals of the Appellate Division, First Department's January 13, 2026 decision and order.

In reply, Little Treasures contends that Plaintiff effectively concedes that Little Treasure's motion to renew should be granted and that summary judgment in its favor is warranted. Specifically, Little Treasures underscores that Plaintiff does not dispute that, in the absence of any viable claims against co-defendant Brownlee, the derivative negligence claims asserted against Little Treasures—premised upon her purported employment—cannot stand. Accordingly, Little Treasures maintains that the action must be dismissed in its entirety.

DISCUSSION

On a CPLR § 2221(e) renewal motion, the movant must identify the motion as one for renewal and show (1) new facts not offered on the prior motion that would change the prior determination, or (2) a change in the law that would change the prior determination, together with justification for not presenting such facts or law earlier. An intervening clarification of the law may suffice to satisfy CPLR § 2221(e)(2). Here, Little Treasures invokes an intervening change in the law – the Appellate Division, First Department's *Earl* decision – as grounds for renewal. The court agrees that the Appellate Division, First Department's, ruling represents a controlling change of law that warrants consideration. As in *Puello* and *Roundabout*, *supra*, the 2026 *Earl* decision clarified, after the first motion was decided, that plaintiff's theory of liability was unsupported by the evidence and law. This court is constrained to adhere to that determination, which constitutes binding precedent within the Appellate Division, First Department—the jurisdiction in which this court sits.. The renewal criterion of a change in law is therefore satisfied (Little Treasures had no way to present the Appellate Division, First Department's ruling before it was issued). There is no dispute that the motion was properly labeled as one for renewal and that counsel's delay is justified by the timing of the new appellate decision. Accordingly, the renewal motion is properly before the court.

The court next turns to the merits of summary judgment under CPLR § 3212. Summary judgment may be granted where the moving party shows that there is no triable issue of fact and that it is entitled to judgment as a matter of law. This requires the movant to make a prima facie showing of entitlement to judgment (*Alvarez v. Prospect Hosp*., 68 NY2d 320, 324 [1986]). Once the movant meets that burden, the burden shifts to the non-moving party to come forward with evidentiary proof sufficient to establish the existence of a material issue of fact (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). Mere conclusory allegations or speculation are insufficient to defeat summary judgment (*Alvord & Swift v. Muller Constr. Co*., 46 NY2d 276, 281–82 [1978]). Importantly, when a plaintiff's entire case depends on a particular causal link or theory, and that link is negated by undisputed facts, summary judgment is warranted.

Applying these standards, the court finds no triable issue and that Little Treasures is entitled to judgment. The Appellate Division, First Department, has now resolved the key causation issue against plaintiff. As the *Earl* opinion makes clear, Brownlee's own infectious-disease expert affidavit established that she could not have been the source of Q.D.'s fatal illness. Even assuming *arguendo* that Q.D.'s symptoms began on March 1, the day before Brownlee's last session, Dr. Hewlett's uncontradicted opinion – that the hMPV virus has a 5–7 day incubation – forecloses any causal connection. Plaintiff offered no contrary expert opinion. Thus, as of right, the Appellate Division, First Department, found that "plaintiff failed to raise an issue of fact in support of her theory that the infant's virus was caused by Brownlee." Because Brownlee is not deemed to have caused the injury, plaintiff's theory of recovery has no factual basis. The same decision dismissed the claim against the City, noting that without Brownlee's fault the City (as program administrator) has no liability.

Under New York law, a principal or employer may be held liable on a *respondeat superior* theory only if the employee committed a tort (i.e. only vicariously, not derivatively). Put another way, a cause of action founded on *respondeat superior* is derivative – "the plaintiff must show a tortious wrong on the part of the employee," since the claim against the employer is not independent (*Judith M. v. Sisters of Charity Hosp*., 93 NY2d 932 [1999] [employer cannot be held liable under respondeat superior if the employee is not liable]). Thus, if an employee is found non-negligent as a matter of law, the employer cannot be held liable for that employee's conduct. Here, the Appellate Division, First Department's ruling removes any tort by Brownlee from the case. Having "demonstrated prima facie entitlement to summary judgment" on the issue of Brownlee's negligence, and with plaintiff concededly unable to rebut that showing, Brownlee's conduct is no longer a viable basis for liability. It follows that Little Treasures cannot be held vicariously liable. Indeed, Little Treasures' counsel sensibly withdrew the appeal on just that premise: if Brownlee is cleared on appeal, plaintiff's whole cause of action must fail as a matter of law. This principle is well established (*see Escobar v. New York Hosp*., 111 A.D.2d 128, 129 [1st Dept. 1985][holding that the hospital's liability could not rest on doctors' negligence once the doctors' malpractice claims were withdrawn]). Under these authorities, there is no "gap" in the law – if the employee's wrongful act is a nullity, any claim of *respondeat* (or its equivalent under apparent-agency) likewise collapses.

Because Brownlee's conduct is legally irrelevant, the only remaining issues concern Little Treasures' own actions. But plaintiff has identified no independent negligence by Little Treasures;

her allegations were always premised on Brownlee's exposure. No evidence suggests Little Treasures itself caused Q.D.'s harm. The record before this court showed at most that Little Treasures supervised or billed for Brownlee's sessions – conduct that is not negligent *per se* and, even if it were, cannot satisfy proximate cause here. In short, Little Treasures met its initial burden by pointing to the Appellate Division First Department's dispositive findings and to its own undisputed evidence that it simply engaged Brownlee as an independent contractor. Plaintiff has failed to show any material issue.

Finally, on the CPLR § 3212 standard: Little Treasures (as movant) made a prima facie case by pointing to the uncontradicted *Earl* decision (equivalent to expert proof) that Brownlee could not have caused the death. Once that showing was made, the burden shifted to plaintiff to produce admissible evidence of a material fact (*Zuckerman*, 49 NY2d at 562). Plaintiff produced no such evidence. The court's October 2024 ruling relied on evidence that now is discredited by binding appellate law. Plaintiff has come forward with nothing new. In the absence of any evidence that Brownlee (or anyone affiliated with Little Treasures) exposed Q.D. to hMPV, summary judgment is mandated.

In sum, renewal is properly granted, and on the merits Little Treasures is entitled to judgment as a matter of law

Accordingly, the court finds as follows: (1) Little Treasures' motion is properly considered a motion for leave to renew, and renewal is warranted based on the intervening change in law effected by the Appellate Division, First Department's January 13, 2026 decision in *Earl*, *supra*. In light of that decision, no material fact remains with respect to causation or liability on Little Treasures' part, and Little Treasures meets its burden of showing it is entitled to judgment. Plaintiff has failed to raise any triable issue. Summary judgment dismissing the complaint against Little Treasures must therefore be granted.

Accordingly, it is hereby

ORDERED that the motion by defendant LITTLE TREASURES–PETITS TRESORS, SLP, PLLC, a/k/a LITTLE TREASURES–PETITS TRESORS, SLP & PSYCHOLOGY, PLLC, for leave to renew its prior motion for summary judgment pursuant to CPLR § 2221(e) is granted; and it is further

ORDERED that, upon renewal, the motion by said defendant for summary judgment pursuant to CPLR § 3212 dismissing the complaint and all cross-claims as asserted against it is granted, and the complaint and all cross-claims are hereby dismissed as against said defendant, with prejudice; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly in favor of defendant LITTLE TREASURES–PETITS TRESORS, SLP, PLLC, a/k/a LITTLE TREASURES–PETITS TRESORS, SLP & PSYCHOLOGY, PLLC, dismissing the complaint and all cross-claims as against it, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that counsel for the moving defendant shall, within twenty (20) days of entry, serve a copy of this decision and order with notice of entry upon all parties who have appeared in this action; and it is further

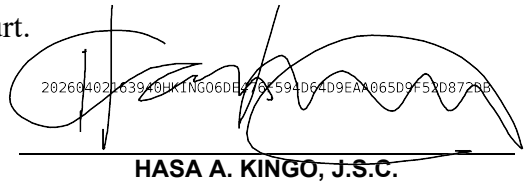
ORDERED that such service shall be made in accordance with the provisions of the CPLR and the Uniform Rules for the Supreme Court, and proof of such service shall be promptly filed with the Clerk of the Court; and it is further

ORDERED that upon service of a copy of this decision and order with notice of entry, the parties shall proceed in accordance with this determination and take all steps necessary to effectuate the dismissal of the action as against the moving defendant; and it is further

ORDERED that the Clerk of the Court shall mark the records of this court to reflect the dismissal of the complaint and all cross-claims as against defendant LITTLE TREASURES–PETITS TRESORS, SLP, PLLC, a/k/a LITTLE TREASURES–PETITS TRESORS, SLP & PSYCHOLOGY, PLLC; and it is further

ORDERED that any relief requested but not expressly addressed herein is hereby denied.

This constitutes the decision and order of the court.



4/2/2026
DATE

HASA A. KINGO, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**		**NON-FINAL DISPOSITION**			
	X	**GRANTED**	**DENIED**	**GRANTED IN PART**		**OTHER**	
APPLICATION:		**SETTLE ORDER**		**SUBMIT ORDER**			
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**		**FIDUCIARY APPOINTMENT**		**REFERENCE**	