

Pioli v New York City Fire Dept.

Supreme Court of New York, Kings County

April 13, 2020, Decided

Index No. 520629/2017

Reporter

2020 N.Y. Misc. LEXIS 1873 *; 2020 NY Slip Op 31229(U) **

[**1] ANTHONY L. PIOLI, AS ADMINISTRATOR OF THE GOODS, CHATTELS, & CREDITS WHICH WERE OF ANNA PIOLI, DECEASED, Plaintiff, -against- NEW YORK CITY FIRE DEPARTMENT, NEW YORK CITY EMERGENCY MEDICAL SERVICES, & CITY OF NEW YORK, Defendant(s). Index No. 520629/2017

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Judges: [*1] Hon. Rosemarie Montalbano, J. S. C.

Opinion by: Rosemarie Montalbano

Opinion

DECISION & ORDER

Hon. Rosemarie Montalbano

Upon the foregoing papers, and after oral argument, the Court finds as follows:

Introduction

In this wrongful death action by plaintiff Anthony L. Pioli,

as administrator of the goods, chattels and credits which were of Anna Pioli, deceased against defendants New York City Fire Department, New York City Emergency Services, and the City of New York (collectively "the City"), defendants move for an order pursuant to CPLR 3212, granting summary judgment and dismissing plaintiff's complaint in its entirety. Plaintiff opposes.

Factual Background & Procedural History

On October 5, 2016, at approximately 7:17 pm plaintiff called emergency services reporting that his mother, Anna Pioli, suffered from a blood disorder, was shivering, her legs were leaking water and hurting. Emergency Medical Services responded by dispatching a Basic Life [**2] Support ("BLS") ambulance to his mother's residence at 1650 80th Street, in Brooklyn. The Prehospital Care Report Summary states the basis for the dispatch was recorded as "sick" and chief complaint as "not feeling well". The ambulance with Emergency Medical Technicians Timur [*2] Chernichkin ("EMT Chernichkin") & Joseph Deuel ("EMT Deuel") arrived approximately six (6) minutes later at Anna Pioli's residence at 7:23 pm.

Upon their arrival plaintiff engaged the EMTs regarding his mother's physical ailments. The EMT's then began assessing and examining the patient. They evaluated her mental competency, tended to the discharging fluid and pain in her leg, and inquired about current medication. It was determined that Anna Pioli was alert, oriented but had leg pains, swelling, chills and nausea. She had no fever and "vitals were stable". The EMT's concluded their patient was suffering from "edema", "not in a dire condition", and bandaged the leg that was discharging fluid.

The EMTs further stated that Anna Pioli "should see her primary care physician" the next morning. They stated to her that it would be better that she to wait until the morning and see her primary care physician because "there are more emergencies out there, and emergency rooms are overcrowded" Anna Pioli then signed a

Refusal of Medical Assistance and both technicians left. The EMT's remained outside the residence in their ambulance in the case circumstances change and after some time left.

The next [*3] morning plaintiff received a call from his father that Anna Pioli was again not well. "She was out of it." Upon arriving at the residence, plaintiff called emergency services and mother-pioli was then transported to NYU Lutheran Medical Center and admitted. on October 11, 2016, five days later, after suffering two cardiac arrests at the hospital Anna Pioli died.

On October 25, 2017, plaintiff brought the present suit against the City for wrongful death, careless and negligence in the medical care and treatment rendered to the decedent, and failure to obtain informed consent of the decedent. The notice of claim was served on November 9, 2016. Plaintiff's summons and complaint was served on October 31, 2017. The City answered on November 30, 2017. After which discovery was exchanged. On May 10, 2019, the note of issue and certificate of readiness was filed. Then on September 9, 2019, defendants brought the present motion.

Discussion

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of [*3] law (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]; *Zuckerman v. City of New York*, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Thus, a defendant seeking summary judgment must establish prima[*4] facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v. DiStefano*, 16 AD3d 637, 638, 792 N.Y.S.2d 177 [2d Dept 2005]; *Peskin v. New York City Transit Authority*, 304 AD2d 634, 634, 757 N.Y.S.2d 594 [2d Dept 2003]).

Once movant meets the initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Perez v City of New York*, 43 Misc 3d 1217[A], 992 N.Y.S.2d 160, 2014 NY Slip Op 50688[U] [Sup Ct 2014], *affd sub nom Epperson v City of New York*, 133 AD3d 522, 21 N.Y.S.3d 23 [1st Dept 2015];

citing Zuckerman at 562). "the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown" (*Brill v City of New York*, 2 NY3d 648, 651, 814 N.E.2d 431, 781 N.Y.S.2d 261 [2004]).

Special Duty

In addressing the motion, where a municipality exercises a governmental function, the threshold inquiry focuses on the extent to which the municipality owed a "special duty" to the injured party (*Applewhite v. Accuhealth, Inc.*, 21 NY3d 420, 426, 995 N.E.2d 131, 972 N.Y.S.2d 169 [2013]; *Valdez v. City of New York*, 18 NY3d 69, 80, 960 N.E.2d 356, 936 N.Y.S.2d 587 [2011]). Assistance rendered by FDNY EMTs is viewed as "a classic governmental" function, which requires the existence of a special duty (*Valdez*, 18 NY3d at 75; see also *Applewhite*, 21 NY3d at 430; *DiMeo v. Rotterdam Emergency Med. Servs., Inc.*, 110 AD3d 1423, 1424, 974 N.Y.S.2d 178 [3d Dept 2013]). "Without a [special] duty running directly to the injured [*5] person there can be no liability in damages, however careless the conduct or foreseeable the harm" (*Lauer v. City of New York*, 95 NY2d 95, 100, 733 N.E.2d 184, 711 N.Y.S.2d 112 [2000]). "The core principle underlying this special duty requirement is that to sustain liability against a municipality, the duty breached must be more than that owed the public generally" (*Applewhite*, 21 NY3d at 426, quoting *Valdez*, 18 NY3d at 75, quoting *Lauer*, 95 NY2d at 100).

The Court of Appeals has recognized that "a special duty can arise in three situations: (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) [*4] the municipality took positive control of a known and dangerous safety condition" (*Applewhite*, 21 NY3d at 426; see also *Metz v. State of New York*, 20 NY3d 175, 180, 982 N.E.2d 76, 958 N.Y.S.2d 314 [2012]). It is the plaintiff's obligation to prove that the government defendant owed a special duty of care to the injured party because duty is an essential element of the negligence claim itself (*Lauer*, 95 N.Y.2d at 100; *Valdez*, 18 NY3d at 75). "In situations where the plaintiff fails to meet this burden, the analysis ends and liability may not be imputed to the municipality

that acted in a governmental capacity" (*Applewhite*, 21 NY3d at 426).

Plaintiff relies on the second of these situations, arguing that the City voluntarily assumed a special relationship with the decedent beyond [*6] the duty that is owed to the general public.

Four elements must exist to establish that relationship, including: "(1) an assumption by the municipality, 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 municipality'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) that party's justifiable reliance on the municipality's affirmative undertaking" (*Laratro v City of New York*, 8 NY3d 79, 861 N.E.2d 95, 828 N.Y.S.2d 280 [2006]).

A plaintiff must satisfy each of these factors in order to establish a special relationship. Here, the parties here dispute the second and fourth elements.

i. Second Element

Regarding the second element, defendant argues that plaintiff cannot claim the EMTs had knowledge that their inaction or failure to bring the deceased to the hospital on evening of October 5th would have caused her harm. The City points out that the EMTs stated that Anna Pioli should have followed up the next day with her primary care physician. And, the examination before trial testimony of plaintiff, plaintiff's father, and plaintiff's sister evidence that they were told the deceased should follow up [*7] with her primary care doctor the next day.

Plaintiff argues, through the affidavit of a proposed expert, that the EMTs should have been aware or recognized that the deceased had an infection.

Plaintiff claims that the EMTs should have been aware Anna Pioli had an infection is unavailing. The EMT testimony shows they recommended to her that she see her primary care physician the following morning. There is nothing presented that demonstrates the EMTs had knowledge that Anna Pioli's condition would have led to her passing within the next six days.

ii. Fourth Element

[**5] Regarding the fourth element, the City argues that the deceased did not justifiably rely to her detriment on any municipal promise. Specifically, they point to the testimony of Ms. Vaughn, plaintiff's sister and the

deceased daughter, in which she stated that the hospital was unaware of what was causing the deceased's condition or how to address it. Defendant's also point that the testimony shows the deceased had ceased taking her medication including oral antibiotics prescribed for her leg infection. Defendant's also call attention to the RMA. The decedent signed the RMA expressly stating that she did not want to be transported [*8] to the hospital.

Plaintiff points to his testimony in which he states that his mother asked to go to the hospital; however, the EMTs told the her to wait until the morning to see her primary physician.

Plaintiff has not shown the nexus between decedent's alleged reliance on the EMT's recommendations to wait till the next morning to see her primary care physician and her demise approximately five to six days later. Notably, plaintiff's sister testified that after decedent was admitted to the hospital the next morning she went undiagnosed, by physicians, for the following two to three days. Nothing was proffered that a different outcome would have resulted had Anna Pioli been transported to the hospital approximately ten (10) to twelve (12) hours earlier than she had originally done.

Accordingly, summary judgment is GRANTED in favor of the City. The case is DISMISSED. The Clerk is ordered to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: April 13, 2020

Brooklyn, NY

/s/ Rosemarie Montalbano

Hon. Rosemarie Montalbano

J. S. C.

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