

**Nai Hua Li v Super 8 Worldwide,Inc.**

2012 NY Slip Op 32812(U)

November 20, 2012

Supreme Court, Richmond County

Docket Number: 0102434/2012

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No.:102434/12  
Motion No.: 001**

**NAI HUA LI,  
DONG ME LI, and  
RAN LI,**

*Plaintiffs*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

*against*

**SUPER 8 WORLDWIDE, INC.,  
WYNDHAM HOTEL GROUP, LLC, and  
GOLDEN OCEAN INTERNATIONAL, INC.,**

*Defendants*

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The following items were considered in the review of the following motion to dismiss.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants' move to dismiss the plaintiffs' complaint. The motion is granted to the extent that the fourth, fifth and sixth causes of action are dismissed.

**Facts**

This was commenced by the plaintiffs to seek compensation from the defendants due to the drowning death of their young family member Tony Li. The Estate of Tony Li commenced an action for wrongful death action and loss of services through the administrator of his estate, Nai Hua Li, his father, entitled *Nai Hua Li, as Administrator of the Estate of Tony Li v. Super 8 Worldwide, Inc., Wyndham Hotel Group, LLC and Golden Ocean International, Inc.* under Index Number 103605/2011. By motion dated March 30, 2012 the plaintiff in that action sought to add

additional plaintiffs: Nai Hua Li, decedent's father; Mei Li, decedent's mother; and Ran Li, decedent's sister; to assert their own individual claims of negligent infliction of emotional distress claims against the defendants. By decision and order dated June 7, 2012 this court denied the plaintiffs' motion to amend the complaint to add the aforementioned plaintiffs, and their cause of action for negligent infliction of emotional distress.

The plaintiffs commenced this action by filing a summons and complaint dated June 18, 2012 with the Richmond County Clerk on July 20, 2012. The plaintiffs first cause of action in this complaint alleges that:

61. At all times herein mentioned, it was the duty of the defendant Golden Ocean International Inc., defendant's servants, agents and/or employees to maintain said premises located at 7129 Route 9 North, in the County of Clinton, State of New York, in a reasonably safe and suitable condition and in good repair.

62. Solely as a result of the defendants' negligence, carelessness and recklessness, Nai Hua Li, Dong Me Li, and Ran Li were caused to suffer severe and serious personal injuries to mind and body, and further, that Tony Li was subjected to great physical pain and mental anguish.

63. The aforesaid occurrence was caused by the negligence of the defendants, without any culpable conduct on the part of Nai Hua Li, Dong Me Li, and Ran Li.

64. By reason of the foregoing, Nai Hua Li, Dong Me Li, and Ran Li were severely injured and damaged, rendered sick, sore, nervous, and disabled, sustained severe nervous shock and mental anguish, great physical pain and emotional upset; Nai Hua Li, Dong Me Li and Ran Li incurred hospital and/or medical expenses in an effort to be cured of said injuries; and Nai Hua Li, Dong Me Li, and Ran Li were unable to pursue their usual duties.

The plaintiffs' second cause of action in this complaint states:

70. Solely as a result of the negligence of the defendants and the injuries sustained by the decedent which ultimately led to death,

the decedent's estate incurred funeral and administrative expenses.

71. Due to defendants' negligence, plaintiff Nai Hua Li is entitled to damages.

The plaintiffs' third cause of action sets forth the following:

74. The decedent was survived by heirs at law and next of kin. The heirs at law and next of kin of the decedent sustained pecuniary loss as a result of the death of the decedent, including but not limited to, loss of society.

The plaintiffs fourth, fifth and sixth causes of action against the defendants are for negligent infliction of emotional distress. The plaintiffs complaint states as follows:

At all times herein mentioned, plaintiff's emotional distress was proximately caused by the observation of the serious injury and death of plaintiff's immediate family member, specifically [plaintiff's] minor [son/brother], Tony Li, an act which would not have occurred but for the negligence of defendants.

At all times herein mentioned, [plaintiffs] [were] within the zone of danger, as he was in and around the area in which [his/her] minor [son/brother] was seriously injured, resulting in his death.

Similarly, the language contained in the proposed amended complaint in the matter bearing Index No. 103605/2011 stated as follows:

At all times herein mentioned, plaintiff's emotional distress was proximately caused by the observation of the serious injury and death of plaintiff's immediate family member, specifically [his/her] minor son [brother], Tony Li, an action which would not have occurred but for the negligence of defendants.

At all times herein mentioned, plaintiff[s] . . . [were] within the zone of danger, as [he/she] was in and around the area in which his

minor [son/brother] was seriously injured, resulting in his death.

This court found the above quoted language insufficient to support the addition of a claim for negligent infliction of emotional distress finding that

. . . the plaintiff's reliance on the Court of Appeals decision in *Bovsun* allows a defined group of people within the zone of danger to recover if those in the zone of danger are threatened with bodily harm due to the defendant's negligence. Here, the plaintiff has failed to come forward with such allegations. Consequently, the plaintiff's motion to amend the complaint is denied.

The defendants move for an order: (1) dismissing the plaintiffs' second and third causes of action for pecuniary loss—pursuant to CPLR 3211(a)(4)—as there is another action pending between these same parties wherein plaintiffs seek this identical relief; and (2) dismissing the plaintiffs' first, fourth, fifth and sixth causes of action for the defendants' purported negligent infliction of emotional distress: (a) pursuant to CPLR 3211(a)(7), for failure to state a cause of action; and/or (b) pursuant to CPLR 3211(a)(5), upon the grounds of collateral estoppel, as this court has already rendered a legal determination that plaintiffs have insufficiently pled these causes of action.

### **Discussion**

#### *First, Fourth, Fifth and Sixth Causes of Action*

The defendants move to dismiss the plaintiffs' first, fourth, fifth and sixth causes of action pursuant to CPLR § 3211(a)(7) arguing that they fail to state a cause of action. In the context of a motion to dismiss for failure to state a cause of action, the court must afford the pleadings a liberal construction, interpret the allegations of the complaint as true and provide the plaintiff the benefit of every possible inference. Whether a plaintiff can ultimately establish its

allegations is not part of the calculus.<sup>1</sup>

Here, the defendants argue that the plaintiffs first cause of action is one sounding in negligent infliction of emotional distress stemming from the drowning death of their eight year old son and brother. In opposition, the plaintiffs' counsel argues that this cause of action is not one for negligent infliction of emotional distress, but rather one of premises liability. The plaintiffs' counsel argues that the “. . . first cause of action [plaintiffs] state that defendants owned said premises and therefore owed a duty to all visitors and patrons. Due to defendants' negligence, recklessness, and carelessness, the plaintiffs were caused to suffer severe and personal injuries to their mind and body.” Consequently, the requisite elements of that cause of action have been pled by the plaintiffs.<sup>2</sup>

In a decision and order of this court in the case entitled, *Nai Hua Li, as Administrator of the Estate of Tony Li v. Super 8 Worldwide, Inc., Wyndham Hotel Group, LLC and Golden Ocean International, Inc.* bearing Index Number 103605/2011 this court denied the plaintiff's motion to amend his complaint adding claims for negligent infliction of emotional distress on behalf of the plaintiffs in this action. In resolving that motion this court held that amendments to pleadings are freely given except in instances where the proposed amendment was palpably improper. This court then concluded that the Court of Appeals holding in *Bovsun v. Sanperi*<sup>3</sup> precluded the proposed plaintiffs from asserting their claims of negligent infliction of emotional distress. Therefore, the plaintiffs fourth, fifth and sixth causes of action must be dismissed pursuant to CPLR § 3211(a)(5) due to collateral estoppel.<sup>4</sup>

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<sup>1</sup> *EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11 [2005].

<sup>2</sup> *See, Moore v. Johnson*, 147 AD2d 621 [2d Dep't. 1989].

<sup>3</sup> 61 NY2d 219 [1984].

<sup>4</sup> *See generally, Dailey v. Tofel, Berelson, Saxl & Partners, P.C.*, 273 AD2d 341 [2d Dep't. 2000].

Notwithstanding the holding of this court that these causes of action should be dismissed pursuant to CPLR § 3211(a)(5) upon the grounds of collateral estoppel, this court will clarify its holding concerning the application of *Bovsun v. Sanperi* to the facts of this case. The Court of Appeals decision in *Bovsun v. Sanperi* held that:

. . . where a defendant negligently exposes a plaintiff to an unreasonable risk of bodily injury or death, the plaintiff may recover, as a proper element of his or her damages, damages for injuries suffered in consequence of the observation of the serious injury or death of a member of his or her immediate family — assuming, of course, that it is established that the defendant’s conduct was a substantial factor bringing about such injury or death.<sup>5</sup>

However, this holding has been interpreted to limit recovery to those immediate family members who are said to be within the zone of danger and limited to those causes of action seeking recovery for emotional harm “. . . premised upon a breach of duty owed directly to the plaintiff which either endangered the plaintiff’s physical safety or caused the plaintiff fear for his or her own physical safety.”<sup>6</sup> Here, the plaintiffs’ complaint states that each of them witnessed the drowning death of Tony Li, their son and brother. But the complaint does not state how the plaintiffs’ physical safety was “endangered,” or what, if anything, caused them to fear for their own physical safety. Consequently, the plaintiffs fourth, fifth and sixth causes of action are dismissed.

### *Second and Third Causes of Action*

The CPLR provides at § 3211(a)(4) that a party may move for a judgment dismissing one or more causes of action “where there is another action pending between the same parties for the same cause of action in a court of any state or the United States . . .” The Appellate Division,

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<sup>5</sup> *Bovsun v. Sanperi*, 61 NY2d 219, 230-231 [1984].

<sup>6</sup> *Jason v. Krey*, 60 AD3d 735, 736 [2d Dep’t. 2009](citing, *Creed v. United Hosp.*, 190 AD2d 489, 491[1993].)

Second Department has held that, “[w]hile complete identity of parties is not a necessity for dismissal under CPLR 3211(a)(4) . . . there must at least be a ‘substantial’ identity of parties ‘which generally is present when at least one plaintiff and one defendant is common in each action.’”<sup>7</sup> Here, the second and third causes of action cannot be dismissed pursuant to CPLR § 3211(a)(4). The action commenced under Index Number 103605/2011 was brought by the estate’s representative only. The next of kin and heirs at law are not named plaintiffs in that action. Consequently, the defendants motion to dismiss the second and third causes of action is denied because the plaintiffs differ between this action and the action brought under Index Number 103605/2011.

Accordingly, it is hereby:

ORDERED, that the defendants’ motion to dismiss is granted to the extent that the plaintiff’s fourth, fifth and sixth causes of action of the complaint are dismissed; and it is further

ORDERED, that the defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3<sup>rd</sup> Floor, on **Tuesday, January 29, 2013 at 9:30 a.m.** for a Preliminary Conference.

ENTER,

DATED: November 20, 2012

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Joseph J. Maltese  
Justice of the Supreme Court

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<sup>7</sup> *Proietto v. Donohue*, 189 AD2d 807 [2d Dep’t. 1993](internal citations omitted).