Ilyayeve v City of New York
2016 NY Slip Op 31635(U)
August 25, 2016
Supreme Court, New York County
Docket Number: 805240/2012
Judge: Martin Shulman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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MARIA ILYAYEVE, Individually and as Administratrix of the Estate of VADIYE KHAIMOV, deceased,

Index No. 805240/2012

Plaintiff,

Decision & Order

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY FIRE DEPARTMENT (FDNY), NEW YORK PRESBYTERIAN HEALTHCARE SYSTEM, INC., NEW YORK PRESBYTERIAN HOSPITAL, NEW YORK PRESBYTERIAN EMERGENCY MEDICAL SERVICE, ANNEMARIE SOTILLEO and DANIEL BOZEK,

Defendants.

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Hon. Martin Shulman:

In this action, plaintiff Maria Ilyayeva (Ilyayeva or plaintiff), individually and as administratrix of her late husband's estate, alleges that the defendant City of New York's (City) Fire Department (Fire Department) sent the wrong type of ambulance and personnel to attend to her husband, Vadiye Khaimov (Khaimov). Ilyayeva further alleges that the ambulance personnel, Annemarie Sotilleo (Sotilleo) and Daniel Bozek (Bozek),[1] employees of The New York and Presbyterian Hospital (NYPH), s/h/a New York Presbyterian Hospital and New York Presbyterian Hospital Emergency Medical Service, improperly attended to Khaimov, thereby causing his conscious pain and suffering and death.

The City, on behalf of itself and its Fire Department, now moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. Movant's counsel adds a request in her moving affirmation's wherefore clause that "any and all cross-claims" be

[1] This action has been discontinued against Sotilleo, Bozek and the New York Presbyterian Healthcare System, Inc.

dismissed. Ilyayeva and NYPH oppose the motion, and NYPH cross-moves pursuant to CPLR 1007 for an order converting its alleged contribution cross claim into a third-party action against the City.

Background

Khaimov, a native of Tajikistan, worked in Manhattan's diamond district in a three-room suite which he shared with Artem Avakyan (Avakyan) and Aleksi "Alex" Nazaranko (Nazaranko), each of whom worked in his own separate jewelry-related business. *See* Avakyan ebt at 7-8. On the morning of July 11, 2011, Khaimov left home feeling well. At about 2:00 p.m., Nazaranko observed that Khaimov was not well, informed Avakyan, and said "let's call to the hospital." Avakyan ebt at 42.

Avakyan then went from the main/front room, where about three or four customers were present, to see Khaimov, who was in one of the two back rooms, and then accompanied him to room G, the other back room. Avakyan ebt at 41-44. According to Avakyan, Khaimov's skin had turned dark green, he was having trouble breathing, and he could not feel his left arm. *Id.* at 41. Avakyan spoke to Khaimov, who claimed that he was "okay," but Avakyan disagreed and told him that "we have to call to the hospital." *Id.* at 45. Khaimov insisted that he not call, but Avakyan did not listen. *Id.* Because Avakyan's English was poor and he believed that he could not convey necessary information, he asked "Arseniy," one of his customers (*id.* at 79-80), who was present and spoke Russian and English, to call 911. *Id.* at 40, 42, 45-46, 100. Mike Shimunov, who was there to do business with Khaimov, confirmed that he believed that Avakyan had asked another individual to call 911. Shimunov ebt. at 32.

At the time Arseniy made the 911 call, which was received at 2:24 p.m., Avakyan was in the front room with him about three feet away. Avakyan ebt at 80. Avakyan asserts that he explained Khaimov's symptoms to Arseniy in Russian, and that Arseniy conveyed them in English to the 911 operator. Avakyan ebt at 46-47, 80, 81-82, 84. Avakyan recalled that Arseniy asked him for Khaimov's age, and that he told Arseniy that Khaimov was 50. *Id.* at 85. Avakyan testified that during that call, Arseniy only asked him, and no one else, any questions about Khaimov. *Id.*

The 911 tape transcript reveals that Arseniy informed the 911 operator that a colleague was not feeling well, that he had turned greenish, and that he could walk, but was wobbling. After Arseniy advised the operator that they were on the 15th floor, Arseniy volunteered that "[h]e could go down." The operator replied, "[n]o . . . [h]e could stay where he is, they could come to him." At that point, shortly before 2:26 p.m., the operator informed Arseniy that he was going to be connected with Emergency Medical Services (EMS).

The call was transmitted to a Fire Department assignment receiving dispatcher (ARD), Darrlyn Hoover-Anderson (Hoover-Anderson). Arseniy informed her, seemingly unaided by anyone else in the room, that the ambulance was for a colleague, that he was not feeling well, was wobbling and turning an unspecified color, and that he said that his left hand was "like there's electric shock going through it." Manning affirmation, exhibit N. Many voices could be heard unintelligibly in the background since the call was made from the front room where there were customers and others. In response to the ARD's next question of Khaimov's age, Arseniy inquired "How old are you?" A foreign accented, unidentified voice on the 911 tape could be faintly heard in the

background answering in English, "50," after which Arseniy paused, and in the background someone could be heard saying something apparently in Russian, which Arseniy seemingly repeated to the ARD in English, when Arseniy next stated, "Heartburn in his left - - and his left hand feels like there's electricity going though it." *Id.* After Arseniy said that, someone in the background could be heard stating in accented English, "and heartburn."

Arseniy then verified the address and asked whether the ARD wanted Khaimov downstairs. Hoover-Anderson responded no, and told Arseniy that Khaimov should remain where he was, and that he did not need to be out in the heat. In response to Arseniy's inquiry of how long it would take for the ambulance to arrive, Hoover-Anderson answered, "as soon as possible . . . I don't have a time on here." 911 call transcript. The entire call lasted about one and a half minutes.

Avakyan testified that during the entire call, Khaimov was in room G, which was separated from the main room by a wall containing a window and a door, both between the two rooms. Avakyan ebt at 36, 46, 82, 84; *see also* Shimunov ebt at 29. According to Avakyan, during the phone call Arseniy had no conversation with Khaimov, and Avakyan believed that they did not talk. Avakyan ebt at 85. The only time during the incident that Khaimov came out of room G was, according to Avakyan, after the 911 call to state that he was going to lie down, and Avakyan helped him. *Id.* at 82-83, 88. Avakyan testified that he listened to the 911 tape of the call between Arseniy and the operator, but could not hear his own voice. *Id.* at 86. Following the 911 call, Khaimov did not indicate any displeasure over the fact of the call, and understood that the

ambulance was going to come; so, he changed his shirt from a working shirt to a regular one. *Id.* at 86-87.

Hoover-Anderson had trained to become, and was, a basic life support (BLS) ambulance emergency medical technician (EMT) for the Fire Department for about six years prior to training for eight weeks to become an ARD at some unspecified time in 2011. As an ARD she was trained to ask a series of universal questions, which she had memorized (Hoover-Anderson ebt at 20) from a Kardex algorithm system flip book and then, depending on the symptoms relayed, she would ask further questions if necessary (Hoover-Anderson ebt at 20, 29, 49) to decide how to categorize the call, which would determine the type of ambulance to be sent. Hoover-Anderson testified that because she heard Khaimov answer "50" when Arseniy asked him how old he was, she knew he was breathing and asserted that she was not required to ask about the quality of his breathing. Because she believed that she had all the information she needed to classify the call after speaking to Arseniy, Hoover-Anderson did not look at the Kardex flip book or ask any additional questions of the caller. Hoover-Anderson ebt at 29. Hoover-Anderson classified the call as a sick call, priority six, warranting a BLS ambulance rather than an advanced life support (ALS) ambulance.

In response to questioning at her deposition, Hoover-Anderson testified that pain radiating down one's arm can be an indication of a cardiac condition, but that she never heard it described as electric. *Id.* at 46. In addition, Hoover-Anderson took the position that a complaint of heartburn is not a complaint about one's heart, but instead is an abdominal complaint, and that she never learned otherwise during her training or from the Fire Department's Kardex system. *Id.* at 26-27. She further testified that she never

heard that a feeling of electricity in one's left hand or a change of skin color was a sign of a potential heart attack. Hoover-Anderson, after being shown the Kardex, conceded that the only colors that were mentioned in connection with a possibility of cardiac arrest and the need to ask followup questions, were blue, purple and white, but noted that, although she had never asked what color Khaimov was changing and was unaware of the color he was changing, the only color mentioned to the operator, prior to the call being transferred to her, was green, i.e., not a color that raised the possibility of a cardiac arrest or the need to send an ALS ambulance. Once Hoover-Anderson classified the call, she entered it into a computer which ultimately located an ambulance of the requisite type, and a radio dispatcher (dispatcher) dispatched a BLS ambulance.

Under the Kardex system, there are about 70 call types which have been assigned a priority level of one to eight. Calls which have a high priority, those categorized as levels one through three, are assigned ALS ambulances, staffed with a paramedic who, in addition to the tasks that BLS ambulance EMTs are able to provide, can intubate patients and administer intravenous fluids and controlled substances. Calls categorized as levels four through eight are assigned BLS ambulances, staffed by EMTs who are trained to give basic life support, including: administering CPR, defibrillation and oxygen; taking vital signs; assessing the patient; and administering certain medication, including albuterol, which opens a patient's airways. There are approximately twice the number of BLS as there are ALS ambulances.

After Hoover-Anderson determined that a BLS ambulance was required, one was not immediately available and, although there were several available ALS ambulances, the City's policy forbade their use on a BLS ambulance categorized call.

Thus, Khaimov had to wait until a BLS ambulance was available, which occurred at 2:32, about six and a half minutes after the 911 call ended. An ambulance belonging to NYPH was assigned to the job and arrived at the scene at 2:40 p.m., accompanied by NYPH's EMTs, Sotilleo and Bozek, who drove the vehicle.

According to Sotilleo, the first thing that Khaimov said to her upon arrival, before she even spoke to and was able to assess him, was that he did not need them and did not want to go to the hospital. Sotilleo ebt at 41-42; *see also* Bozek ebt at 59, 75. There were people there instructing him to go to the hospital. Sotilleo ebt at 66; *see also* Bozek ebt at 16. Sotilleo immediately assessed Khaimov, starting with his breathing, airways and circulation, and then obtained his history. Sotilleo ebt at 42-43, 125. He was alert, verbal, oriented, pale and flushed, perhaps at different times, and clammy, with a normal breathing rate, but his breathing had a shallow quality, i.e., he was breathing too fast and was hyperventilating. *Id.* at 44-45. Khaimov complained of feeling dizzy and of heartburn, as noted in the EMTs' chart. *Id.* at 131. Sotilleo took steps to slow down Khaimov's breathing and thereafter administered oxygen. *Id.* at 129-130. However, after he calmed down, and not long after an oxygen mask was placed, Khaimov pulled it off. *Id.* at 130-131. Sotilleo's notes reflect that Khaimov refused oxygen "and wants to RMA" (refuse medical attention). *Id.* at 131. Because Khaimov was refusing to go to the hospital, Sotilleo told him of the Fire Department's telemetry process and that he would have to speak to the Fire Department's doctor, but Khaimov refused. *Id.* at 64- 65.

Sotilleo testified that the EMTs were not informed of Khaimov's complaints as provided to the operator and the ARD, and that all such information was not always

provided to them. *Id.* at 167. She further testified that, in her line of work, she did not read printouts of the call and never saw one of Arseniy's call or heard the 911 tape prior to her deposition. *Id.* at 25-26, 170; *see also* Bozek ebt at 123. In addition, she testified that there were times when she arrived at BLS ambulance calls only to immediately find that an ALS ambulance was required. *Id.* at 119-120. In assessing patients on a BLS ambulance call, Sotilleo sometimes found that they required an ALS ambulance. *Id.* at 116-118.

Meanwhile, Avakyan, at some unspecified time after the 911 call was made, called Ilyayeva to let her know what was happening. Avakyan ebt at 58-59. Avakyan allegedly told her that Khaimov was not feeling well and asked her what they were supposed to do. *Id.* at 58. Ilyayeva, a cardiac nurse, asked to speak to her husband. *Id.* Avakyan gave the phone to Khaimov. *Id.* at 60. Khaimov told Ilyayeva that he had heartburn "radiating to [his] left arm" and that he had called 911. Ilyayeva ebt at 34-36. Ilyayeva allegedly advised him that it sounded like a heart attack, that their son was going to drive her from their Queens home toward Manhattan, and that he should call her to let her know the hospital to which he was being transported. Ilyayeva ebt at 35-36.

Thereafter, according to Avakyan, Ilyayeva called again and spoke to him, telling him that her husband did not want to listen to her, and asking Avakyan to give him an aspirin, at which time Avakyan suggested that she speak to the EMTs who came in. Avakyan ebt at 61. Ilyayeva and Sotilleo then spoke, and according to Sotilleo, Ilyayeva allegedly told her to take Khaimov to the hospital (Sotilleo ebt *Id.* at 65). According to Ilyayeva, Sotilleo thought Khaimov was merely having a panic attack, but

said that she was going to take him to the hospital for Ilyayeva's sake. Ilyayeva ebt at 28-30. Sotilleo testified that she remembered Khaimov saying that he would go to the hospital for his wife, because she wanted him to go. Sotilleo ebt at 132. The EMTs ultimately readied Khaimov for transport to the ambulance by placing him in their chair. Once in the chair Khaimov began to have seizures. Oxygen was administered, CPR was commenced and an ALS ambulance was requested, as confirmed by the dispatch records. While en route to the hospital, Khaimov, who had no prior history of cardiac disease, went into cardiac arrest. Although an ALS ambulance was available, it was canceled because the BLS ambulance was only a few minutes from the hospital, where Khaimov was brought and efforts to revive him failed.

The Pleadings

In August 2011, Ilyayeva served the City with a notice of claim alleging that, in light of Khaimov's complaints of numbness in his left hand, chest pressure and dizziness and the EMTs' findings, including his pallor, shortness of breath and seizures, the City was negligent because the EMTs failed to administer appropriate care to him and timely transport him to the hospital. The notice of claim further alleges, among other things, that the City was negligent in failing to hire, furnish, train and provide qualified, suitable and trained EMTs, and in hiring, furnishing and assigning EMTs who were known or should have been known to be unfit, unsuitable or improperly trained.

In August 2012, Ilyayeva commenced this action. The complaint asserts four causes of action. The first cause of action sounds in Khaimov's conscious pain and suffering based on the negligence of the City, its Fire Department, and its agents, servants and employees, including the ARD's failure to recognize Khaimov's heart

attack symptoms, and the need for an ALS ambulance's services and treatment. It is further claimed that all of the defendants represented that the EMTs would provide such equipment and care as needed, and that they were qualified to provide proper and timely service as would be required in accordance with accepted medical and ambulance practice. The complaint also alleges that the City, the Fire Department and NYPH had a special duty to provide Khaimov with emergency medical care. Further, the complaint alleges that Khaimov relied upon the representations that proper emergency medical services or proper personnel would be provided to him. The first cause of action also alleges that the EMTs failed to request an ALS ambulance, take timely and appropriate action in Khaimov's treatment, and appropriately diagnose him. The second cause of action, asserted against all the defendants, sets forth a conscious pain and suffering cause of action based on the alleged improper treatment rendered by the EMTs. The third cause of action asserts wrongful death claims against all of the defendants and the fourth cause of action alleges a lack of informed consent cause of action against all of the defendants.

NYPH's answer, which was served before this action was discontinued against three of the named codefendants, sets forth, without any heading, nine separately numbered paragraphs, before alleging, starting with paragraph "tenth," six separately captioned affirmative defenses, including a CPLR Article 16 defense. The ninth paragraph demands, on NYPH's behalf, "that the liability, if any, be apportioned."

The Motion and Cross Motion

The City and the Fire Department move for summary judgment dismissing the complaint on the ground that the notice of claim was inadequate to alert them that

plaintiff was claiming that they failed to recognize that Khaimov had heart attack signs and symptoms and required the services of an ALS ambulance. Additionally, movants maintain that they must be granted summary judgment because there is a lack of evidence demonstrating that the City or its Fire Department owed Ilyayeva and her husband a special duty arising out of its governmental function, because there was no contact between Ilyayeva or Khaimov and the ARD, nor under the circumstances presented did they rely upon anything said during that call.

Furthermore, the City contends that even were plaintiffs to establish a special duty, it is immune from liability because the use of the Kardex system's algorithm does not constitute a mandatory ministerial process, because it was developed to facilitate the accuracy and expediency of an interview and classification process involving the allocation of scarce resources, without wholly eliminating the ARD's exercise of judgment and discretion in performing a governmental function involving often imprecise and conflicting information communicated by distraught callers. Thus, the City claims that Hoover-Anderson's categorization of the 911 call was discretionary. The City also explains that while ambulances it dispatches through its 911 system can be operated and staffed by the City's Fire Department or by private hospitals, in the instant case the dispatched ambulance was staffed and operated by NYPH, rendering the City and its Fire Department free from liability for the EMTs' acts and omissions.

Movants rely on the affidavit of Eric Fay (Fay), a captain in the Fire Department's Emergency Medical Dispatch Unit (EMD) who is in charge of EMD training. Fay explains that ARDs process as many as 100 calls per hour and that they are trained to quickly get information from a caller as to the type of medical emergency and to select

the call type using the Kardex system, a flip book that the Fire Department developed to expeditiously assess calls. Fay further explains that the ARDs are trained to get the answers to three universal question sets, namely, whether the caller is the patient, next, how old is the patient, what is the patient's gender, and what is the reason for the call, i.e., why is medical assistance required, and lastly, is the patient breathing and awake. *See also* Manning affirmation, exhibit R, Kardex pages. After those questions are answered and the ARD believes he or she has sufficient information to categorize the call, the ARD enters it into the computer, which attempts to locate an ambulance of the required type. The call is then forwarded to a dispatcher, who assigns an ambulance to respond. Fay advises that BLS ambulance EMTs are trained to call for an ALS ambulance if the circumstances warrant it, and must do so in certain circumstances, such as if a patient starts to have seizures, as occurred here. Also, EMS's telemetry physician is always available to both types of ambulance personnel should they need assistance.

In addition to seeking summary judgment dismissing the complaint, the City and Fire Department request, without elaboration, in their counsel's moving affirmation's wherefore clause, that any and all cross-claims be dismissed.

Ilyayeva, who does not dispute that the City and its Fire Department lack liability for any of the EMTs' negligence/malpractice (*see generally Brown v Transcare N.Y., Inc.*, 27 AD3d 350, 351 [1st Dept 2006] [City not vicariously liable for hospital's contractor's ambulance and its staff which were not hired, compensated or trained by the City]), opposes the motion, and asserts that the notice of claim was adequate to apprise the City that it was inappropriate to send a BLS ambulance team, and that an

ALS ambulance team was required, as alleged in her complaint. Ilyayeva further urges that the City failed to demonstrate that it lacked a special duty to Khaimov. In this regard, Ilyayeva's counsel, claiming that Khaimov could be heard in the background during the 911 call giving his age to Arseniy, contends that Arseniy was acting as a conduit for Khaimov, who could not directly transmit the information himself to Hoover-Anderson, and therefore the City owed a special duty to Khaimov. Counsel further observes that the supplemental bill of particulars (Godosky affirmation, exhibit C at 3) alleges that the City assumed a duty to provide care to Khaimov, was aware that its inaction or negligence could lead to his harm, and "in promising to undertake care of [Khaimov], and knowing that [he] was relying upon such promises, [the City] breached this duty by failing to provide timely care, specifically, an ALS response team to treat cardiac arrest." Ilyayeva also relies on Arseniy's affidavit, in which, after setting forth his name and address, he provides a total of one more sentence, alleging that on July 11, 2011 he "placed a telephone call to 911 on behalf of" Khaimov, and that during that call he "relayed . . . the words and answers of [Khaimov] as he was unable to speak to the operator himself." *Id.*, exhibit E. Ilyayeva's counsel further contends that Khaimov relied on the ARD's advice that he remain in the office until the ambulance arrived.

Additionally, Ilyayeva asserts, in reliance on the affidavit of her expert EMT, Theodore Tully, and the deposition testimony of EMT Lisa Alvarez (Alvarez) of the Fire Department's Emergency Dispatch Unit,[2] that this case did not involve Hoover-Anderson's use of discretion, but instead involved her failure to adhere to a mandatory

[2] Alvarez detailed the questions she would have posed or that she claims should have been posed from the Kardex flip book (Alavarez ebt at 63-64) to the 911 caller under certain circumstances, including those present here.

protocol, i.e., the steps in the Kardex, which allegedly would have produced a compulsory result, namely, the sending of an ALS ambulance which allegedly would have prevented Khaimov's injuries and death. Thus, Ilyayeva claims that the ARD failed to properly execute a ministerial act.

NYPH also opposes the City's motion and claims that the notice of claim was sufficient. Relying on the affidavit of its expert, Jonathan Washko (Washko), NYPH concedes that an ARD can exercise discretion when classifying a call, but maintains that, because Hoover-Anderson never looked at the Kardex flip book to classify the call, she failed to exercise her discretion, thus depriving the City of any immunity and rendering her actions ministerial. In this regard, Washko notes that the introduction to the Kardex recites, under the assumptions underlying the Kardex algorithm, that it eliminates judgment areas whenever possible to render it less likely that the ARD will up-triage a call so that paramedics, a scarce resource, will be preserved for the instances where there is a high probability of need. Capece affirmation, exhibit B, Introduction to Kardex. Washko contends, based on Alvarez's testimony and the Kardex introduction, that the Fire Department required that the Kardex be used. Washko asserts that Hoover-Anderson's failure to follow the Fire Department's protocol of looking at and using the Kardex rendered her negligent in dispatching a BLS ambulance.

Additionally, because the City's dispatcher never informed the EMTs of all of Khaimov's signs and symptoms reported during the call, such failure, which did not involve the exercise of discretion, also constituted a ministerial act. Washko observes that both Sotilleo and Bozek testified that had they known that Khaimov had

complained of pain or shocks shooting down his left arm they would have called for an ALS ambulance, and opines that had the crew been informed of the complaints made to Hoover-Anderson, this too would have resulted in the crew requesting an ALS ambulance. Moreover, because the City's acts and omissions were ministerial, NYPH urges, largely for the reasons plaintiff asserts, that there is enough evidence to raise an issue as to whether the City assumed a special duty toward Khaimov. In this regard, NYPH adds that Khaimov's reliance on the City can be discerned from his changing from his work shirt to a regular shirt and his lying down to wait for the ambulance.

NYPH also opposes the City's request for summary judgment dismissing any and all cross claims, including NYPH's alleged cross claim for contribution as set forth at paragraph "ninth" of its answer. *See* Capece affirmation, ¶ 31. In the event that the complaint is dismissed, NYPH cross-moves for an order permitting it to convert its alleged contribution cross claim to a third-party action against the City on the ground that it owed NYPH a special duty based on the City's alleged special relationship with all participants in the 911 system. NYPH asserts that the City owed it a duty to protect it from the foreseeable harm of being unreasonably exposed to tort liability, urging that if the City had sent the correct type of ambulance it would not be facing tort liability. In addition, NYPH claims that the City's special duty to it arises from their mutual interest "that NYPH participate in the 911 system to increase [its] efficiency and responsiveness . . . and to provide quality care." Capece affirmation, ¶ 39. Because the City created the 911 system, NYPH claims that it relies on the duties that the City has voluntarily assumed under that system, and therefore the City owes NYPH a special duty. *Id.*, ¶ 41. In support of its cross motion, NYPH has provided a proposed third-party complaint

which sets forth two separately titled causes of action for contribution, one for contribution against the City and the Fire Department based on an alleged special duty owed to Khaimov, and the other against the City and the Fire Department based on the alleged special duty that the City owed to NYPH.

In response, the City asserts that NYPH's cross motion must be denied because NYPH fails to demonstrate that the City owed it a special duty. The City maintains that NYPH did not demonstrate any special duty arising from Hoover-Anderson's failure to look at the Kardex flip book or EMS's failure to convey to the EMTs Khaimov's signs and symptoms because there is no evidence that an affirmative representation was made to NYPH or to its EMTs upon which they relied.

In addition, the City asserts that plaintiff's reliance on *Garrett v Holiday Inns, Inc.* (58 NY2d 253, 261-263 [1983]) is misplaced because in that case, the Court of Appeals held that the municipality could be found to have owed a special duty to the owner and lessee/operator of a motel where plaintiffs were injured by a fire on the premises, and thus be held liable for contribution, where it was alleged that the municipality issued a certificate of occupancy verifying the premises as safe despite known, blatant, dangerous fire code violations, thereby inducing the defendants to justifiably rely on that certification in their dealings with the motel. The court further held that the municipality could not be held liable for simply failing to discover fire and safety violations while inspecting the motel premises. *Id.* at 262. In the instant case, the City contends that the ARD's alleged failure to ask further questions from the Kardex flip book and EMS's alleged failure to report certain signs and symptoms to the EMTs do not constitute an affirmative misrepresentation to NYPH.

The City contends that Sotilleo and Bozek were not relying on Hoover-Anderson's classification of the call as a sick call because once they arrived on the scene they were in the most favorable position to assess Khaimov and make a decision about his needs. Further, the City maintains that the EMTs' lack of such reliance is supported by their ability to call for an ALS ambulance when needed, as confirmed by Fay and by Sotilleo's testimony, including that EMTs are not always informed of all of the patient's complaints transmitted to 911, a patient's condition can change before and after the EMTs' arrival, and that she immediately assessed her patients upon arrival, including Khaimov. Therefore, the City asserts that no special duty is established. In reply, to demonstrate that the inadequacy of the information provided to the EMTs affected the care they rendered, NYPH's counsel points to Sotilleo and Bozek's testimony that, had they been advised that Khaimov had pain shooting down his arm, they would have called an ALS ambulance. *See* Sotilleo ebt at 167, 169-170; Bozek ebt at 76, 124-125.

Discussion

The movant on a summary judgment motion has the initial burden of establishing its prima facie entitlement to the requested relief by eliminating all material allegations raised by the pleadings. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The failure to do so mandates the denial of the application, "regardless of the sufficiency of the opposing papers." *Id.* Where the moving party makes its required showing, the burden shifts to the opponent to demonstrate the existence of a material fact. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986).

Initially, because it is undisputed that the City and its Fire Department are not liable for any acts or omissions of NYPH or its EMTs, all claims asserted against the City and the Fire Department in the second cause of action, which sounds in conscious pain and suffering arising out of the EMTs' care of Khaimov, and those portions of the first and third causes of action which seek to hold the City and the Fire Department liable for Khaimov's conscious pain and suffering and wrongful death based on NYPH and the EMTs' acts and omissions, are dismissed. For the same reasons, and because the City and the Fire Department did not render any medical care to Khaimov, the fourth cause of action sounding in lack of informed consent is dismissed as to the City and the Fire Department.

As to the balance of the first and third causes of action as to the City and its Fire Department, their position that the notice of claim is insufficient is without merit. A notice of claim serves to give the municipality sufficient information to investigate the plaintiff's claims and assess their merits. *O'Brien v City of Syracuse*, 54 NY2d 353, 358 (1981); *Teresta v City of New York*, 304 NY 440, 443 (1952); *Weiss v City of New York,* 136 AD3d 575 (1st Dept 2016). A plaintiff cannot add theories which were not directly or indirectly mentioned in the notice of claim. *Wanczowski v City of New York*, 186 AD2d 397 (1st Dept 1992). In the instant case, the allegations in the notice of claim that the City and its Fire Department were negligent in failing to furnish suitable EMTs and in providing EMTs defendants knew were unsuitable, were sufficient to apprise the City that Ilyayeva was indirectly claiming that sending a BLS ambulance was inappropriate, here where the notice of claim alleges that Khaimov's signs and symptoms included chest pressure, pallor, shortness of breath and dizziness. Furthermore, this theory of

liability, which was set forth in the complaint, did not substantially alter the theory of plaintiff's claims as set forth in her notice of claim. *See Demorcy v City of New York*, 137 AD2d 650, 650-651 (2d Dept 1988).

Turning to the substance of the instant applications, municipalities long ago gave up their common-law immunity for their employees' negligence. *Lauer v City of New York*, 95 NY2d 95, 99 (2000). Nevertheless, a distinction is drawn between governmental acts which are discretionary and those that are ministerial. *Id.* A discretionary, or quasi-judicial, act refers to conduct which involves "the exercise of reasoned judgment which could typically produce different acceptable results . . ." *Tango v Tulevech*, 61 NY2d 34, 41 (1983). When an official's act "involves the exercise of discretion, the officer [and municipality are] not liable for the injurious consequences of that action even if resulting from negligence or malice." *Id.* at 40; *see also Haddock v City of New York*, 75 NY2d 478, 484 (1990) ("when official action involves the exercise of discretion or expert judgment in policy matters, and is not exclusively ministerial," the municipality is ordinarily not liable for the injuries it causes as a result of its actions). That immunity reflects a belief that permitting governmental employees to freely exercise their discretion and judgment in their official duties, without "fear of second-guessing and . . . lawsuits," outweighs any benefit that would arise from imposing liability on those employees for injury to members of the public. *Id.* However, such immunity presupposes an exercise of discretion or judgment in compliance with the municipality's procedures, and is inapplicable where the employee violates the rules and procedures and exercises no discretion or judgment. *Id.* at 485.

A ministerial act refers to conduct which contemplates "direct adherence to a governing rule or standard with a compulsory result." *Tango v Tulevech*, 61 NY2d at 41. Ministerial acts can support municipal liability "only if they violate a special duty to the plaintiff, apart from any duty to the public in general." *McLean v City of New York*, 12 NY3d 194, 203 (2009). The existence of a special duty is fact dependent and the plaintiff bears a heavy burden in establishing its existence. Once that duty is demonstrated, the government is obligated to exercise reasonable care toward the plaintiff. *Pelaez v Seide*, 2 NY3d 186, 199, n 8 (2004); *see also Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426 (2013). A special duty can arise in the following three ways:

> (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation.

Pelaez v Seide, 2 NY3d at 199.

Municipal emergency systems, 911 call responses, and the services of publicly-employed first responders are all "within the sphere of governmental functions," rather than constituting proprietary functions. *Applewhite v Accuhealth, Inc.*, 21 NY3d at 427, 429. When it is claimed that a special duty exists because the municipality voluntarily assumed a duty that generated justifiable reliance by the person who benefits from that duty, four elements must be established, specifically: 1) the municipality must assume by promises or action "an affirmative duty to act on behalf of the party who was injured;" 2) the municipality's agents must be aware that their inaction could result in harm; 3) some form of direct contact between the municipality's agents and the injured person

must exist; and 4) there must be justifiable reliance by that person "on the municipality's affirmative undertaking." *Id.* at 430-431; *Laratro v City of New York*, 8 NY3d 79, 83 (2006).

Regardless of whether Hoover-Anderson exercised discretion in categorizing Arseniy's call or she failed to follow the Fire Department's protocol and procedures in categorizing that call, the City and the Fire Department's application to dismiss Ilyayeva's complaint must be granted because, even if Hoover-Anderson's actions were ministerial, this case is devoid of any special duty owed to Khaimov. *See e.g. Valdez v City of New York,* 18 NY3d 69, 80, 84 (2011) (issue whether governmental act was discretionary need not be reached where a special duty was lacking). In particular, there was no direct contact with Khaimov. Plaintiff fails to refute Avakyan's testimony he called 911 despite the fact that Khaimov did not want him to do so and insisted he was okay. Sotilleo's testimony that the first words Khaimov uttered on her arrival, that he did not want to go to the hospital and did not need them, buttresses Avakyan's assertions as to Khaimov's position on the matter, as do Sotilleo's testimony that Khaimov took off the oxygen mask, the EMTs' chart entry that Khaimov was RMA, and Sotilleo's testimony that Khaimov finally agreed to go to the hospital for his wife's sake.

Because Avakyan did not speak English well enough to convey the information needed, Avakyan asked his customer, Arseniy, who happened to be there and spoke English well, to make the call. Ilyayeva fails to provide any evidence refuting Avakyan's testimony in that regard, or to deny that Avakyan provided Arseniy with the relevant information. Arseniy's effectively one-sentence, bald and conclusory affidavit, which does not address Avakyan's deposition testimony, is unavailing to demonstrate any

direct contact. Nor does plaintiff indicate whether she could discern her husband's voice in the background of the recording and what, if anything, he said. Her counsel's assertion that the voice was Khaimov's is unsupported by any representations that counsel ever met Khaimov and knew his voice. Moreover, the ARD's 911 discussion does not reveal any questions directed by her or Arseniy toward Khaimov, other than Arseniy possibly asking Khaimov (*but see* Avakyan ebt at 85), "what is your age," after Hoover-Anderson asked that of Arseniy. Arseniy then related the answer to that question, possibly given by Khaimov, to Hoover-Anderson. Under the foregoing circumstances, including that the call was not initiated at Khaimov's request, and where Khaimov did not want the call made, and where Arseniy provided all answers to Hoover-Anderson, there was no direct contact between Hoover-Anderson and Khaimov. Under the foregoing circumstances, the mere happenstance that Arseniy asked Khaimov's age, and that someone, possibly Khaimov, provided that age to Arseniy, which Hoover-Anderson overheard, is insufficient to constitute direct contact. *See generally Cuffy v City of New York*, 69 NY2d 255, 261-262 (1987); *Brown v Transcare N.Y., Inc.*, 27 AD3d at 351; *Etienne v New York City Police Dept.*, 37 AD3d 647, 649 (2d Dept 2007); *Baez v City of New York*, 309 AD2d 679, 680 (1st Dept 2003); *Hancock v City of New York*, 230 AD2d 603, 603-604 (1st Dept 1996); *see also Laratro v City of New York*, 8 NY3d at 84 (that the person who called 911 was sitting physically near to the sick person when the call was made does not fulfill the direct contact requirement). Even assuming that Khaimov stated his age or his symptoms in the background, that would not constitute direct contact because, when many people call 911 on another's behalf, they obtain the signs and symptoms they convey to 911 from

the sick or injured person, unless that person is unconscious, or otherwise unable to speak.

Further, there is a lack of any evidence of reliance by Khaimov, since Hoover-Anderson did not inform Arseniy that the ambulance would arrive at any specific time, refused to give a particular arrival time, and did not advise Arseniy that a certain type of ambulance would come. Nor is there any evidence that Khaimov was aware that there were different types of ambulance teams that could be sent, what each type could bring, or what the different types of first responders could do. Plaintiff's counsel's assertion that Khaimov relied on the 911 call is without evidentiary weight. Neither is there any evidence that Khaimov was considering or gave up other means of transport, here where, until Khaimov spoke to his wife and acceded to her wishes, he had decided, even after the EMTs arrived, that he did not want medical help and did not want to go to the hospital; Avakyan testified that, while waiting for the ambulance to arrive, there were no discussions about his driving Khaimov to the hospital or about getting him there on Avakyan's own (Avakyan ebt at 93); and where Ilyayeva, driven by her son, could not quickly pick up her husband, since she was coming from Queens County, said she would meet him at the hospital, and arrived there after the ambulance arrived and her husband was being treated by hospital staff (*see* Ilyayeva ebt at 46-47). *See generally Holloway v City of New York*, 141 AD3d 688, 2016 NY Slip Op 05627, **2 (2d Dept 2016); *Baez v City of New York*, 309 AD2d at 680. The operator and the ARD's statements that Khaimov should wait upstairs and inside were not volunteered to induce reliance, but were solely in response to Arseniy's offer that Khaimov could come down and Arseniy's inquiry of whether the ARD wanted him brought downstairs.

Accordingly, the branch of the City and the Fire Department's motion which seeks summary judgment dismissing the complaint is granted, and the complaint is dismissed as to them.

The moving defendants' request, set forth only in the wherefore clause of their counsel's affirmation, that summary judgment also be granted dismissing any and all cross claims, while merely surplusage boilerplate, is granted, and NYPH's cross motion to convert its alleged cross claim to a third-party action against the City and the Fire Department is denied. NYPH's answer does not contain a cross claim, much less one pleading the City owed it a special duty, against the City, the Fire Department, or any other named codefendants still in the case at the time the answer was served. Even if NYPH's answer did contain a cross claim, there is no evidence that any of the three bases giving rise to a special duty to NYPH applies. Contrary to NYPH's counsel's assertion, paragraph "ninth" of its answer does not assert a cross claim against the City or the Fire Department. It merely demands an apportionment of any liability, a request that can simply be relevant to its Article 16 affirmative defense, i.e., that if its fault is 50% or less, it be liable to Ilyayeva only for its apportioned share of liability as to non-economic loss. *See* CPLR 1601(1). Paragraph "ninth" does not mention contribution or assert that anyone may be liable to NYPH for all or part of any claim asserted against NYPH in the action. *See generally* Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3019:15. Neither does NYPH's answer refer to any codefendant or contain a separately captioned cross claim against any codefendant.

Even if NYPH pled a contribution claim or if its cross motion were to be considered one to amend its answer to assert a contribution claim and then convert that amended answer into a third-party complaint, NYPH's proposed pleading, aside from falsely claiming that the 911 tape contains a complaint of shocks down Khaimov's left arm, rather than shocks limited to his left hand (third-party complaint, ¶16), is devoid of any claim, and there is a lack of any evidence, that the City owed a special duty to NYPH grounded in the City or the Fire Department's violation of a statutory duty, which was "enacted for the special benefit of [a] particular [class of] persons." *Garrett v Holiday Inns, Inc.*, 58 NY2d at 261. Nor is there any allegation in that proposed pleading or evidence of a special duty to NYPH arising from the City or the Fire Department having "assum[ed] positive direction and control under circumstances in which a known, blatant, and dangerous safety violation exists." *See e.g. id.* at 262; *see generally Matter of East 91st St. Crane Collapse Litig.*, 103 AD3d 503, 504 (1st Dept 2013). NYPH has also failed to allege, and there is no evidence demonstrating, that the City or the Fire Department "voluntarily assumed a duty, the proper exercise of which was justifiably relied upon by persons benefited thereby." *Garrett v Holiday Inns, Inc.*, 58 NY2d at 262; *see e.g. Florence v Goldberg*, 44 NY2d 189, 194 (1978); *Tara N.P. v Western Suffolk Bd. of Coop. Educ. Servs.*, 131 AD3d 517, 520 (2d Dept 2015).

While NYPH appears to be relying on this last category for establishing a special duty to it (*see* Capece affirmation, ¶ 38), its proposed pleading's allegation that the City owed it a special duty based upon its participation in the City's 911 system, does not meet all of the four aforementioned elements required to demonstrate that the City or its Fire Department voluntarily assumed a duty toward NYPH, including the City's

assumption, through promises or action, of an affirmative duty to act on behalf of NYPH, and that NYPH or the EMTs justifiably relied on an affirmative undertaking by the City. *Applewhite v Accuhealth, Inc.*, 21 NY3d at 430-431. The City does not voluntarily assume an affirmative duty unless it has agreed to do something that it was not already obligated to do by law, and here the proposed pleading does not allege and the record presented on these applications "is devoid of evidentiary facts suggesting that the City . . . voluntarily undertook any obligation beyond what [it was] already required to do . . ." *Abraham v City of New York*, 39 AD3d 21, 26-27 (2d Dept 2007).

Moreover, NYPH does not provide affidavits from Sotilleo and Bozek, and it is readily apparent from Sotilleo's testimony that she was well aware that not all of the information given to the ARD was always provided to the EMTs, that when she arrived on a BLS ambulance call she would often find that the person required an ALS ambulance, including because some of those persons were having cardiac issues, that a sick or injured person's condition could change at any time, including before Sotilleo arrived on the scene, and that she was trained to assess a patient, and as soon as she arrived at a call, including the one at issue, she would immediately begin her assessment. Further, the EMTs could call for an ALS ambulance whenever they believed one was necessary, and that in fact occurred when Khaimov started to have seizures. NYPH's counsel's reliance on Sotilleo and Bozek's testimony that had they been aware that Khaimov had complained of pain shooting down his arm, they would have called an ALS ambulance, is misplaced because no information about his arm was conveyed to the 911 operator or to Hoover-Anderson. Furthermore, Sotilleo was aware of Khaimov's color, his shallow breathing, and his heartburn. There is no

evidence of any significant reliance on what the dispatcher conveyed and, more importantly, no evidence of any affirmative undertaking the City voluntarily assumed, other than that which the City and Fire Department was already required to do, upon which NYPH or its EMTs justifiably relied.

NYPH's counsel's assertions that, as participants in the 911 system, it was in all of the defendants' mutual interests to provide quality care, and that as such, the defendants had duties to each other and necessarily relied upon each other (Capece affirmation, ¶ 39), when coupled with the proposed third-party complaint's bald and conclusory assertion of a special duty, do not comprise an undertaking, through promises or action, of an affirmative duty to act on behalf of NYPH or its EMTs. The cross-moving affirmation and the proposed pleading seem to imply that merely because the City and its Fire Department participated in the 911 system there arose an affirmative duty by the City never to be negligent in such endeavor, so that the City would be liable to any codefendant participant in such system for contribution. Clearly, the City never undertook such an affirmative duty to all possible codefendants who provided services through the 911 system, much less to all of the sick and injured persons who were the subjects of the calls. Absent an affirmative undertaking and, thus, a special relationship, any negligence by the City or its Fire Department is not actionable. *Garrett v Holiday Inns, Inc.*, 58 NY2d at 262. For the foregoing reasons, it is

ORDERED that the City of New York and the New York City Fire Department's motion for an order granting them summary judgment dismissing the plaintiff's complaint and any cross claims is granted, and the complaint and any cross claims asserted by the defendant The New York and Presbyterian Hospital (NYPH), s/h/a New

York Presbyterian Hospital and New York Presbyterian Hospital Emergency Medical Service, are dismissed with costs and disbursements to the City of New York and the New York City Fire Department as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

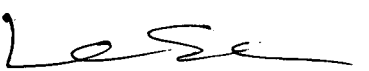
ORDERED that the action is severed and continued against the remaining defendant The New York and Presbyterian Hospital (NYPH), s/h/a New York Presbyterian Hospital and New York Presbyterian Hospital Emergency Medical Service; and it is further

ORDERED that defendant The New York and Presbyterian Hospital (NYPH), s/h/a New York Presbyterian Hospital and New York Presbyterian Hospital Emergency Medical Service's cross motion for an order converting their alleged contribution cross claim to a third-party action for contribution is denied.

Counsel for plaintiff and defendant The New York and Presbyterian Hospital (NYPH), s/h/a New York Presbyterian Hospital and New York Presbyterian Hospital Emergency Medical Service, are directed to appear for a pre-trial conference at Part 1 MMSP, 60 Centre St., Room 325, New York, New York on September 27, 2016 at 9:30 a.m. In the event that no settlement can be reached, counsel shall be prepared on that date to stipulate to a firm trial date in Part 40 TR.

The foregoing constitutes this court's decision and order.

Dated: New York, New York
August 25, 2016



HON. MARTIN SHULMAN, J.S.C.