

Polanco v Action Ambulette Inc.
2018 NY Slip Op 31295(U)
May 17, 2018
Supreme Court, Bronx County
Docket Number: 300741/13
Judge: Julia I. Rodriguez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

-----X **Index No. 300741/13**

Nilda Polanco,
Plaintiffs,

-against-

DECISION & ORDER

Action Ambulette Inc. and HHH Home Care, Inc.,

Defendants.

Present:

Hon. Julia I. Rodriguez
Supreme Court Justice

-----X
Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant Action Ambulette Inc.'s motion for summary judgment, dismissing the complaint.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
HHH Affirmation in Opposition & Exhibits	2
Pl. Affirmation in Opposition & Exhibits	3
Reply Affirmation	4

In the instant action, the 58-year-old plaintiff alleges she was injured as she was exiting a van owned by Action Ambulette Inc. ("Action"). At the time of the accident, plaintiff had been a passenger in the van, returning from an appointment with her doctor. She had used Action's van on numerous occasions beforehand and was familiar with the driver, Manuel.

Defendant Action now moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint, on the grounds that: (1) Action did not breach any duty owed to plaintiff, (2) Action is not the proximate cause of plaintiff's injuries, and (3) any potential negligence on Action's behalf was superseded by the independent act of plaintiff's home attendant, who shut the van's door on plaintiff's hand.

In support of summary judgment, Action submitted, *inter alia*, plaintiff's deposition testimony and the deposition testimony of Alida Lopez, Manuel Espaillat, and Carlos Martinez. At her deposition, plaintiff testified as follows: She took Action's vans to therapy, once or twice a week, which she would attend with her home attendant, Alida Lopez, employed by HHH Home Care, Inc. ("HHH"). Immediately prior to the accident, the van stopped to let her off. She was seated in the front passenger's side seat. Usually, the van driver would get out to help her

out of the van, but on the date of the accident, he did not. Instead, her home attendant exited the van and opened the door for her. As she exited the van, she put her right hand on the top of the van door. After her body exited the van, her hand remained on the top of the door. Before she removed her hand from the door, her home attendant attempted to shut the door, closing it on her hand.

At her deposition, Alida Lopez testified as follows: She had been plaintiff's home attendant for two years prior to the date of the accident. Plaintiff needed assistance because she "had lupus, high blood pressure, diabetes, a couple of things." Her job duties included making plaintiff's food, grocery shopping, cleaning, washing clothes, watching plaintiff while she bathed herself, and traveling to and from plaintiff's medical appointments. On the date of the accident, she had been assisting plaintiff as she exited Action's van after a medical appointment, she did not notice plaintiff's hand and closed plaintiff's hand in the door. Prior to the accident, plaintiff had opened the door to the vehicle and was in the process of getting out when she came to further assist plaintiff. She and plaintiff had opened their respective doors at the same time. The driver did not come out. About three months after the accident, she left plaintiff's employment because she "felt bad since [plaintiff's] hand was hurting." No one had ever advised her that it was the driver's responsibility to open the door for plaintiff but she assumed that it was his responsibility because it was an ambulette.

At his deposition, Manuel Espailat testified as follows: He had been a driver for Action for six years and received training from Action on assisting passengers who are in wheelchairs. If a non-wheelchair passenger did not have an attendant with them, he would help them get in and out of the vehicle. Action had no written policy requiring drivers to help the passengers in and out of Action's vehicles. The vehicle he was driving on the date of the accident had doors that "swing out" like a regular door. The doors did not slide. He did not assist plaintiff in getting into the vehicle on the date of the accident because she was with a home attendant. He always opens and closes the door for his passengers, but he doesn't touch them unless they ask for help or are in pain. He did not witness plaintiff's accident and became aware it had occurred

when he got out of the van and saw that “she had her hand very hurt.” Plaintiff told him that “her home attendant closed the door onto her hand.” At the time of plaintiff’s accident, he was “trying to get out [of] the van to open the door” for her. When he got out of the vehicle, he was “going to open the door for her but they opened the door first.” He offered to request medical assistance for plaintiff but she “didn’t want to.” He knew she was hurt because she was “complaining,” but he saw no blood.

At his deposition, Carlos Martinez testified as follows: He is an Operations Manager for Action. Action trains its drivers on helping passengers in wheelchairs and how to use the vehicles’ lift mechanism. Ninety-five percent of Action’s passengers are in wheelchairs, and the drivers assist them in and out of the vehicles. Passengers not in wheelchairs but with attendants receive assistance from the attendants, not the driver. Action is not required to assist every passenger entering or exiting the vehicle. Action has no policies concerning opening and closing vehicle doors for non-wheelchair bound passengers. Generally, drivers are permitted to use their own judgment as to whether to assist non-wheelchair bound passengers who do not have attendants.

In opposition to summary judgment, co-defendant HHH also submitted, *inter alia*, plaintiff’s deposition testimony and the deposition testimony of Alida Lopez, Manuel Espaillat, and Carlos Martinez. HHH points to the following deposition testimony: Martinez testified that Action drivers were trained that part of their job function was to help patients on and off the ambulette; there was no training on how to assist patients not in wheelchairs on and off the ambulette; Action drivers had the ability to make a determination whether or not to help all passengers on and off the ambulette; Action drivers were told that their primary responsibility was to ensure the safety of their passengers.

Espaillat testified that it was his custom and practice to help patients on and off the Action ambulette and he always opened and closed the doors for his passengers. He did that as a courtesy. In the roughly 12 times that he picked up plaintiff in 2011, he always opened and closed the door for her.

Plaintiff testified that in the one to two years that Action was picking her up “a lot of times the home attendant” would assist her into the vehicle and “a lot of times” the driver would assist her into the vehicle; if the driver did not fasten her seatbelt she fastened it; on the date of the accident, no one initially helped her into the vehicle but the driver opened the door for her when they arrived at her doctor’s office and when she returned to the vehicle after her appointment; she got herself into the passenger seat; when they arrived at her final destination, the driver removed her seatbelt; she waited for the driver to open the door and help her out but he received a phone call; and upon exiting the vehicle on her own, her home attendant closed the door on her hand.

In her opposition to the motion, plaintiff submitted her affidavit, an accident report and photos of the subject vehicle. In her affidavit, plaintiff states as follows: For about two years prior to the accident, ambulette drivers always assisted her in and out of the ambulette. On the date of the accident, she was picked up at her home by driver Manuel and he opened the door, assisted her into the front seat and closed the door. Her home attendant was seated in the rear of the ambulette. Upon arriving at her destination at 183rd Street Manuel stopped the ambulette away from the curb. At the same time, he got a phone call from his dispatcher and began to write an address. She waited for him to open the door. His inaction caused and/or allowed Alida to open the front door. As she was exiting, she placed her right hand on the edge of the door for support and Alida accidentally closed the door on her right hand. She couldn’t get her hand out of the door. As she “screamed in pain,” Manuel was coming around the front and opened the door releasing her hand.

* * * * *

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court; the party opposing a motion for

summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted, and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *See Aasaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). Summary judgment will be granted only if there are no material, triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957).

In order to prevail on a negligence claim, “a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom.” *See Solomon v. City of New York*, 66 N.Y.2d 1026, 1027, 499 N.Y.S.2d 392 (1985). In the absence of a duty, as a matter of law, there can be no liability. *See id.* at 1028; *Lauer v. City of New York*, 95 N.Y.2d 95, 100, 711 N.Y.S.2d 112 (2000). The definition and scope of an alleged tortfeasor’s duty owed to a plaintiff is a question of law. *See Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 585, 611 N.Y.S.2d 817 (1994). Courts “fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.” *See 532 Madison Ave. Gourmet Foods v. Finlandia Ctr.*, 96 N.Y.2d 280, 288, 727 N.Y.S.2d 49 (2001).

In *Morante v. Citywide Mobile Response Corp.*, 138 A.D.3d 544, 30 N.Y.S.3d 617 (1st Dept. 2016), the First Department held that an ambulette driver owed no duty to escort a passenger down the ambulette stairs when she took it upon herself to leave without requesting assistance from the driver. While in *Morante*, the plaintiff was accompanying her father in the ambulette and not the client/patient as the plaintiff herein, the Court notes that plaintiff was able to ambulate on her own and testified that sometimes the Action drivers provided assistance to her in entering and exiting their vehicles and sometimes they did not. Also, it appears that the Action driver was delayed in exiting the vehicle to open the door for the plaintiff but that he intended to do so as was his custom and practice. This delay provided the occasion for plaintiff to choose to exit the vehicle on her own, which she had done without incident in the past, and for

plaintiff's home attendant to assist her in exiting the vehicle, thereby causing injury to the plaintiff. Under these circumstances, where plaintiff chose to exit the vehicle on her own without requesting the driver's assistance, the Court finds that the driver had no duty to escort plaintiff out of the vehicle. In any event, even if such duty did exist, the intervening act of the home attendant in closing the door on plaintiff's hand was a superseding event which interrupted the link between any negligence on the driver's part and plaintiff's injury. *See Derdiarian v. Felix Constr. Corp.*, 51 N.Y.2d 308, 315-316, 434 N.Y.S.2d 166 (1980).

Based upon the foregoing, Action Ambulette Inc.'s motion for summary judgment is **granted**, and the complaint is dismissed as to this defendant only.

Dated: Bronx, New York
May 17, 2018



Hon. Julia I. Rodriguez, J.S.C.