SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JULIO RODRIGUEZ, III **PART** IAS MOTION 62EFM

Justice

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PETER B. EDDY, EXECUTOR OF THE ESTATE OF SUSAN S. EDDY, DECEASED,

Plaintiff,

- v -

ROBERT PERSAUD, CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT, NEW YORK CITY FIRE DEPARTMENT BUREAU OF EMERGENCY MEDICAL SERVICES

Defendant.

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INDEX NO. 152326/2016

MOTION DATE 09/05/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for DISMISSAL.

Defendants Robert Persaud (Persaud), City of New York (City), New York City Fire Department (FD) and New York City Fire Department Bureau of Emergency Medical Services (EMS), collectively "City", move for the dismissal of the first cause of action in the complaint, pursuant to CPLR §3211 (a) (7); for the dismissal of defendants FD and EMS from this complaint; and for the striking of certain "scandalous and irrelevant" allegations in the complaint.

This is a wrongful death action in which plaintiff alleges negligent and/or reckless conduct on the part of defendants. Plaintiff alleges as follows: on January 23, 2015, when decedent Susan S. Eddy walked out into West 35th Street, New York, New York, she was struck by an ambulance owned by FD which was en route to an emergency. The driver of the ambulance was Persaud, an employee of the FD. After being struck, Ms. Eddy was rushed to a hospital. She died within eight days from injuries sustained as a result of the accident.

Plaintiff is suing defendants for (1) negligent hiring, retention, training and supervision of Persaud; (2) negligent operation of the ambulance; (3) reckless operation of the ambulance; and (4) negligent maintenance of the ambulance. Plaintiff seeks damages for personal injuries and wrongful death.

Defendants all move for the dismissal of the first cause of action, the negligent hiring, retention, training and supervision of Persaud, on the ground that plaintiff is suing on the principle of respondeat superior, a principle that is not permitted in municipal liability matters in the First Department. Here, City admits that Persaud was its employee, acting within the scope of his

employment at the time of the accident. Defendants also contend that FD and EMS must be dismissed from the action because the New York City Charter does not subject city agencies such as these to such suits.

Defendants also seek the striking of certain allegations in the complaint, specifically those regarding Persaud. The complaint alleges that Persaud was convicted of driving while ability-impaired and that, notwithstanding said conviction, he was hired by the other defendants. Defendants argue that these allegations are not relevant because there is no proof that Persaud was intoxicated or impaired at the time of the accident, and because, given the proper dismissal of the first cause of action, defendants' knowledge or lack of knowledge of Persaud's prior conviction is not at issue. Therefore, defendants seek the striking of said allegations as inflammatory and irrelevant.

In partial opposition to this motion, plaintiff does not oppose the motion to dismiss the first cause of action or the motion to dismiss FD and EMS from this action. Plaintiff does take issue, however, with the motion to strike the allegations related to Persaud's prior conviction. Plaintiff argues that the statements pertaining to Persaud's prior conviction could be relevant with respect to proving his allegedly reckless conduct at the time of the accident. It is plaintiff's contention that Persaud's conduct was beyond negligence and would fall into the category of reckless disregard for the public safety and an awareness of foreseeable risks in the course of his work. Plaintiff contends that the information involving the conviction is sufficiently tied to the accident to be relevant. Plaintiff also contends that he need not, at this stage, submit every detail of Persaud's conduct, such as whether his senses were impaired at the time of the accident. According to plaintiff, defendants have failed to offer substantial proof for their motion to strike.

In reply, defendants argue that the subject conviction is not criminal in nature, neither a misdemeanor nor a felony, but a violation of section 1192 (1) of the New York Vehicle and Traffic Law (VTL). They also argue that the violation was almost 10 years old at the time of the accident, and that there is no proof of more recent violations. Defendants contend that there is no sufficient link to the subject conviction and this accident. Defendants refer to various case law which would dismiss this conviction on the ground of lack of relevance. Defendants argue that the motion to strike is appropriate here, where evidence of such a violation is likely to be used to impeach Persaud's credibility. They assert that the submission, speculative in nature, would be prejudicial to him.

CPLR §3204(b) authorizes motions to strike scandalous or prejudicial matter unnecessarily inserted in a pleading. The movant must show not only that said matter to be stricken is scandalous, but that it is not relevant to the cause of action (*see Soumayah v Minnelli,* 41 AD3d 390, 392 [1st Dept 2007]). On occasion, a scandalous allegation will not be stricken if deemed relevant (*see Irving v Four Seasons Nursing & Rehabilitation Ctr.,* 121 AD3d 1046, 1048 [2d Dept 2014]).

Here, defendants seek dismissal of allegations referring to a 2006 conviction against defendant Persaud for driving while impaired. As defendants argue, this conviction was pursuant to section 1192 (1) of the VTL, driving while impaired. This section makes distinctions between driving while impaired and driving while intoxicated. While the statute does not define "impaired," the courts have made it clear that the term is distinguishable from "intoxicated." Being

intoxicated requires a showing that one is incapable of employing physical and mental abilities which he or she is expected to possess in order to operate a vehicle as a reasonable and prudent driver. Being impaired, a lesser offense, requires only an impairment of one's senses to some extent (*see People v McNamara,* 269 AD2d 544, 545 [2d Dept 2000]). Section 1192 (1) classifies driving while impaired as an infraction, while under sections 1192 (2) and (3), driving while intoxicated is classified as a crime.

Since plaintiff is willing to dismiss the cause of action for negligent hiring and retention, which would have implicated defendants as liable in hiring Persaud in light of his conviction for driving while impaired, the application of this conviction would likely be used for impeachment purposes against Persaud in the event that this action goes to trial. The question is whether the probable use of the conviction would be relevant to the claims brought against him.

The court finds that, upon the dismissal of the first cause of action, the allegations related to Persaud's conviction of driving while impaired are too remote to be relevant to the general claims of negligent and reckless conduct in the complaint. Moreover, there is a lack of any allegations of other or more recent conduct which would indicate a continuation of impaired driving on Persaud's part. Therefore, this Court grants defendants' motion to strike the appropriate allegations. The parties have consented to the granting of the other branches of the motion.

Accordingly, it is

ORDERED that defendants' motion to dismiss the first cause of action in the complaint is granted on consent; and it is further

ORDERED that defendants' motion to dismiss defendants New York City Fire Department and New York City Fire Department Bureau of Emergency Medical Services from this action is granted on consent and the complaint is dismissed in its entirety as against said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that defendants' motion to strike certain prejudicial allegations in the complaint (paragraphs 14 to 23) is granted and plaintiff shall, within 10 days from service of a copy of this order with notice of entry, serve an amended complaint which shall not include the prejudicial matter set forth in the original complaint.

This constitutes the Decision and Order of this Court.

December 2, 2019

HON. JULIO RODRIGUEZ III, JSC

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