Aklipi v American Med. Alert Corp
2021 NY Slip Op 30747(U)
January 26, 2021
Supreme Court, Kings County
Docket Number: 503960/2017
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Index Number 503960/2017
SEQ#002

Part 91

ZEV AKLIPI,

Plaintiff,

against

AMERICAN MEDICAL ALERT CORP. D/B/A TUNSTALL AMERICAS,

Defendant.

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed...	
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	
Other	

Upon review of the foregoing documents, defendant's motion for summary judgment (Mot. Seq. 002) is decided as follows:

Procedural History

Plaintiff originally brought this action against defendant because of defendant's employee's alleged threats and abuse of plaintiff, when that employee came to plaintiff's home to repair plaintiff's medical alert device on December 1, 2015. It his complaint, plaintiff appeared to assert claims for: (1) failure to exercise reasonable care in repairing plaintiff's medical alert device; (2) failure to supervise, train, direct, manage, maintain and control employees; and (3) intentional infliction of emotional distress ("IIED").

Defendant previously moved for summary judgment pursuant to CPLR 3212 to dismiss plaintiff's IIED claim as barred by the statute of limitations, and to dismiss pursuant to CPLR 3211 plaintiff's claims for negligence and for negligent supervision, training, management, maintenance and control over employees. By order, dated December 11, 2017, this court granted the motion to the extent of dismissing plaintiff's IIED claim as violative of the statute of

limitations. The court further dismissed plaintiff's claim for negligent supervision, etc., with leave to re-plead if appropriate.

Thereafter, plaintiff filed an amended complaint in which he asserts claims for negligence and negligent hiring, retention, supervision, or training.

Factual Background

Plaintiff testified at his deposition that, on December 1, 2015, one of defendant's technicians, Leopoldo Narvaez, came to plaintiff's home to repair a medical alert system (plaintiff's EBT at 9-11). Plaintiff's home health aide, Elianne Laine, who does not speak English well, was present at the time of Mr. Narvaez's visit (*id.* at 16-20). Plaintiff also claims the following: during the visit, Mr. Narvaez did not speak (*id.* at 24). Plaintiff spoke with him twice, to offer him an extension cord to plug in a portion of the medical alert system, and to request a new device (*id.* at 21, 29). As Mr. Narvaez was leaving, he said to plaintiff, "You'll be hanging on this wire" and Mr. Narvaez "pointed to the wire, extension wire" (*id.* at 20-21). Mr. Narvaez also made a gesture with his hand "[l]ike around the neck" (*id.* at 25-26).

Ms. Laine testified at her deposition that she was present when Mr. Narvaez visited plaintiff (Laine EBT at 23). Although she understands very little English, she recognized certain words that Mr. Narvaez used, such as "wire cable" (*id.* at 26, 30). While she was with plaintiff and Mr. Narvaez, the two of them were arguing (*id.* at 42). She testified that she also heard Mr. Narvaez say to plaintiff "I am going to turn it around on your neck, and I am going to hang you with it" (*id.* at 30). She claims that, while they were arguing, Mr. Narvaez "picked up the wire and . . . harass[ed]" plaintiff and made a gesture indicating he would hang plaintiff (*id.* at 55, 57).

Ms. Laine also signed an affidavit, sworn to June 26, 2018, in which she described the

incident at issue. She also states the following: she was with plaintiff when Mr. Narvaez visited plaintiff (Laine affidavit at ¶¶ 4-6). While Mr. Narvaez was working with the medical alert device, he became angry with plaintiff (*id.* at ¶¶ 8-12). Once Mr. Narvaez finished working and began to leave, he was still angry, and "pointed to the extension cord wire that he used for the medical alert device while making a motion around his head with his hand as if indicating a noose" (*id.* at ¶ 14). This made plaintiff distressed and caused him to "shake uncontrollably" (*id.*). Plaintiff's fear continued and he "was unable to go about his regular activities of daily living, . . . was scared to leave his home, [and] appeared to be very nervous and scared at all times throughout the day" (*id.* at ¶ 18).

The technician, Leopoldo Narvaez, testified at his deposition that, as an employee of defendant, his job was to "install, service, [and] remove emergency machines from the clients' homes" (Narvaez EBT at 10). When he was hired, he took a two-week training course, including shadowing another technician (*id.* at 12-13). Mr. Narvaez explained that, as part of his job, he showed clients how to put on and activate the alert device, which looks like a pendant on a necklace (*id.* at 47-48). Mr. Narvaez explained that many of the clients are hearing impaired, and so he shows them how to put on the pendant on over their head, like a necklace, and then shows them how to press the device (*id.*).

Mr. Narvaez did not recall his visit to plaintiff's home (*id.* at 24, 32-33). However, he denied threatening the plaintiff, and claimed he would never do such a thing (*id.* at 37-38). Mr. Narvaez explained that he was taught from a young age to respect elderly people (*id.* at 38). Defendant also trained him to treat clients like he would his grandparents (*id.* at 46-47). While he was employed by defendant, he was never suspended or censured (*id.* at 42).

The parties also submit evidence regarding plaintiff's medical condition. Plaintiff testified about treatment he received that he claims relates to Mr. Narvaez's visit. Defendant submits the report of Dr. Steven A. Fayer, who performed a psychiatric examination of plaintiff and opines about his mental condition. However, this damages information is ultimately not germane to the outcome of the instant motion.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Negligent Infliction of Emotional Distress

Although described as a plain negligence claim in the amended complaint, both parties analyze the claim in their motion papers as a claim for negligent infliction of emotional distress ("NIED"). Such a claim requires proof that defendant breached a duty of care resulting directly in emotional harm even though no physical injury occurred, that the mental injury is a direct, rather than consequential result of the breach, and that the claim possesses some guarantee of genuineness (*Ornstein v New York City Heath and Hospital Corp.*, 10 NY3d 1, 6 [2008]; *Taggart v Costabile*, 131 AD3d 243 [2d Dept 2015]).

Defendant argues that, according to plaintiff, Mr. Narvaez's alleged actions toward plaintiff were intentional, not negligent. Intentional conduct cannot serve as the basis for a claim of negligent infliction of emotional distress (*Trayvilla v Japan Airlines*, 178 AD3d 746, 747 [2d

Dept 2019], *appeal dismissed, lv to appeal denied*, 35 NY3d 1107 [2020]). During his deposition, plaintiff testified that Mr. Narvaez verbally threatened to hang him and made a threatening gesture (plaintiff's EBT at 20-21, 25-26). Likewise, Ms. Laine testified at her deposition and stated in her affidavit that Mr. Narvaez threatened to hang plaintiff and used a wire to show plaintiff how he would hang him (Laine EBT at 30, 55, 57; Laine Affidavit at ¶ 14). Because plaintiff and his home health aide assert that Mr. Narvaez's actions were intentional, plaintiff's NIED claim must be dismissed.

Negligent Hiring, Retention, Supervision, or Training Claim

A claim for negligent hiring, retention, supervision, or training must show, at least, that "the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Barton v City of New York*, 187 AD3d 976, 978 [2d Dept 2020], quoting *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 161 [2d Dept 1997]; *DeJesus v DeJesus*, 132 AD3d 721, 722 [2d Dept 2015]).

Defendant submits a copy of Mr. Narvaez's personnel file. Gina Sicker, a vice president with defendant, authenticates the file in her affidavit. There are more than seventy pages of documents in the file, including financial documents, employment agreements, and background check records. There is nothing in the file that describes any malfeasance of any kind by Mr. Narvaez. Ms. Sicker confirms in her affidavit that "Mr. Narvaez has never been reprimanded or censured by his supervisors. There is no indication in Mr. Narvaez's background check or personnel file that Mr. Narvaez has ever engaged in any threatening or other offensive conduct with clients, coworkers, or supervisors" (Sicker affidavit at ¶ 8). Additionally, Ms. Sicker submits emails from defendant's customer service representatives that provide evidence of calls

from customers complimenting Mr. Narvaez's work.

Plaintiff argues that defendant should have training about older Holocaust survivors because there are many in the NYC area. Even taking that to be true, plaintiff does not demonstrate that defendant either knew or should have known that Mr. Narvaez had any propensity to act as plaintiff described (*Barton*, 187 AD3d at 978).

Conclusion

For the foregoing reasons, defendant's motion for summary judgment is granted. Plaintiff's intentional infliction of emotional distress claim was previously dismissed. Therefore, the action is dismissed with prejudice.

January 26, 2021
DATE

DEVIN P. COHEN
Justice of the Supreme Court