SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 506038/2020
Motion Date: 6-14-21
Mot. Seq. No.: 2

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LUIS RAMOS, as Administrator of the Goods, Chattels and Credits that were of MICHAEL RAMOS, Deceased,

Plaintiff,

-against-

DECISION/ORDER

PRATT INSTITUTE and SAFE ENVIRONMENT BUSINESS SOLUTIONS, INC.,

Defendants.

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Upon the following e-filed documents, listed by NYSCEF as item numbers 10-32, the motion is decided as follows:

The defendant, SAFE ENVIRONMENT BUSINESS SOLUTIONS, INC. (hereinafter "S.E.B."), moves for an order pursuant to CPLR Rules 3211(a)(1) and 3211(a)(7) dismissing plaintiff's amended complaint insofar as asserted against it.

In the amended complaint, the plaintiff alleges that on October 26, 2018, plaintiff's decedent, MICHAEL RAMOS, while a student at Pratt Institute, collapsed and died after giving a presentation in class. Plaintiff further alleges that S.E.B, "by its agents, servants and/or employees, did render emergency medical services, care and/or treatment to this plaintiff's decedent" prior to this death and that "said medical services, care, and/or treatment were performed in such a manner and fashion and way so as to be unsuccessful, without value and were performed in a negligent, careless and reckless manner." Specifically, the plaintiff alleged that S.E.B. was negligent and reckless conduct "in causing, permitting, or suffering the response to plaintiff's decedent's medical emergency to be delayed and untimely", "in failing to prevent the response to plaintiff's decedent's medical emergency from being delayed and untimely", "in causing, permitting, or suffering the response to plaintiff's decedent's medical emergency to be ineffective and unsuccessful", "in failing to prevent the response to plaintiff's decedent's medical emergency from being unsuccessful and ineffective"; and "in performing various

services in connection with the care and treatment of this plaintiff's decedent without proper and/or adequate personnel, supervision and assistance…."

In support of the motion, S.E.B. submitted the affidavit of Paul DiNozzi, S.E.B's General Manager, who stated that S.E.B. was hired by Pratt Institute to provide security services at Pratt's campus pursuant to a written contract. S.E.B. also submitted a copy of the contract which reflects that S.E.B. did not undertake a contractual duty to render emergency medical services to students.

Mr. DiNozzi also stated in his affidavit that S.E.B. employees received no medical training from Pratt, and that "It is my belief that no S.E.B. personnel provided medical services or aid or life-saving resuscitation to the Decedent at any time."

The gist of S.E.B.'s argument in favor of dismissal is that since its contract demonstrates that S.E.B did not owe a duty to the students at Pratt Institute to provide emergency medical care, there is no basis to hold them liable in this case. S.E.B. also contends that even if employees of S.E.B. did in fact provide medical assistance to plaintiff's decedent on the date of the incident, under NY PBH section 3000-a, New York's Good Samaritan statute, S.E.B. can only be held liable under a gross negligence standard. NY PBH section 3000-a provides

> …any person who voluntarily and without expectation of monetary compensation renders first aid or emergency treatment at the scene of an accident . . . to a person who is unconscious, ill, or injured, shall not be liable for damages for injuries alleged to have been sustained by such person or for damages for the death of such person alleged to have occurred by reason of an act or omission in the rendering of such emergency treatment unless it is established that such injuries were or such death was caused by gross negligence on the part of such person."

S.E.B. contends that there are no allegations of gross negligence complaint.

On a motion to dismiss pursuant to CPLR 3211(a), the court " 'must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs

the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.*, 20 N.Y.3d 59, 63, 956 N.Y.S.2d 439, 980 N.E.2d 487, quoting *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414, 729 N.Y.S.2d 425, 754 N.E.2d 184; *see Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511). To prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), a defendant must demonstrate that the proffered documentary evidence "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190). In order for evidence submitted in support of a CPLR 3211(a)(1) motion to qualify as "documentary evidence," it must be "unambiguous and of undisputed authenticity" (*Fontanetta v. John Doe 1*, 73 A.D.3d 78, 86, 898 N.Y.S.2d 569; *see Attias v. Costiera*, 120 A.D.3d 1281, 1282, 993 N.Y.S.2d 59). Affidavits are not considered "documentary evidence" within the intendment of CPLR 3211(a)(1) (*see Suchmacher v. Manana Grocery*, 73 A.D.3d 1017, 900 N.Y.S.2d 686; *Fontanetta v. John Doe 1*, 73 A.D.3d at 85–87, 898 N.Y.S.2d 569).

Here, the only documentary evidence submitted by S.E.B. in support of the motion is its contract with Pratt Institute to provide security services. Mr. DiNozzi's affidavit was not considered in connection with S.E.B.'S motion under CPLR 3211(a)(1) for any purpose other than to lay a foundation for the contract since it did not constitute documentary evidence.

Even though the contract does not require S.E.B. to provide emergency medical services to the students at Pratt Institute, S.E.B. admits that it may be held liable under a theory of gross negligence if it did in fact provide such services to plaintiff's decedent. Certainly, S.E.B. failed to submit any documentary evidence demonstrating that its employees did not provide emergency medical services to plaintiff's decedent on the day in question. Thus, the pivotal issue is whether the amended complaint states a course of action against S.E.B. sounding in gross negligence.

As stated in *Dolphin Holdings, Ltd. v. Gander & White Shipping, Inc.*:

> Gross negligence "differs in kind, not only degree, from claims of ordinary negligence" (*Colnaghi, U.S.A. v. Jewelers Protection Servs.*, 81 N.Y.2d 821, 823, 595 N.Y.S.2d 381, 611 N.E.2d 282; *see Goldstein v. Carnell Assoc., Inc.*, 74 A.D.3d 745, 746, 906 N.Y.S.2d 905). "To constitute gross negligence, a party's conduct must smack of intentional wrongdoing or evince a reckless indifference to the rights of others" (*Ryan v. IM Kapco, Inc.*, 88 A.D.3d 682, 683, 930 N.Y.S.2d 627 [internal quotation marks and brackets omitted]). "Stated differently, a party is grossly negligent when it fails to exercise even slight care or slight diligence" (*id.* at 683, 930 N.Y.S.2d 627 [internal quotation marks omitted]; *see Goldstein v. Carnell Assoc., Inc.*, 74 A.D.3d at 747, 906 N.Y.S.2d 905). Ordinarily, the question of gross negligence is a matter to be determined by the trier of fact (*see Food Pageant v. Consolidated Edison Co.*, 54 N.Y.2d 167, 172–173, 445 N.Y.S.2d 60, 429 N.E.2d 738).

(*Dolphin Holdings, Ltd. v. Gander & White Shipping, Inc.*, 122 A.D.3d 901, 902, 998 N.Y.S.2d 107, 109).

Here, as in *Dolphin Holdings, Ltd.*, the amended complaint does not set forth the exact details which led to the death of plaintiff's decedent. It does not allege exactly what S.E.B. did or did not do but clearly alleges that S.E.B. acted recklessly. Construing the amended complaint in a light most favorable to the plaintiff, the Court finds that it alleges conduct by S.E.B. that that evinced a reckless disregard for the rights of plaintiff's decedents (*Colnaghi, U.S.A. v. Jewelers Protection Servs.*, 81 N.Y.2d 821, 823–824, 595 N.Y.S.2d 381, 611 N.E.2d 282). Thus, "taking into account that the defendant is in a better position to know the details and that the motion was made pre-answer" the pleading sufficiently stated a cause of action for gross negligence (*Dolphin Holdings, Ltd.*, 122 A.D.3d at 903, 998 N.Y.S.2d at 109; citing CPLR 3013; *Grcic v. Peninsula Hosp. Ctr.*, 110 A.D.2d 625, 626, 487 N.Y.S.2d 113).

Finally, Mr. DiNozzi's statement in his affidavit that: "It is my belief that no S.E.B. personnel provided medical services or aid or life-saving resuscitation to the Decedent at any time" was insufficient to demonstrate that the facts alleged in the complaint were undisputedly not facts at all (*Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d at 683, 941 N.Y.S.2d 675; *see Guggenheimer v. Ginzburg*, 43 N.Y.2d at 275, 401 N.Y.S.2d 182, 372 N.E.2d 17).

Accordingly, it is hereby

ORDRED that the motion is **DENIED.**

This constitutes the decision and order of the Court.

Dated: November 9, 2021

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020