

<b>Gubenko v City of New York</b>
2022 NY Slip Op 33451(U)
October 6, 2022
Supreme Court, Kings County
Docket Number: Index No. 512581/2020
Judge: Bernard J. Graham
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 KINGS

SVETLANA GUBENKO, As Administratrix of the  
Estate of GENNADIY RAKHLIN, and SVETLANA  
GUBENKO, Individually,

Plaintiff,

-against-

THE CITY OF NEW YORK, NYC HEALTH +  
HOSPITALS, THE FIRE DEPARTMENT OF  
NEW YORK CITY and THE NEW YORK  
COMMUNITY HOSPITAL OF BROOKLYN,  
INC., d/b/a NEW YORK COMMUNITY HOSPITAL,

Defendants

Index No.: 512581/2020

**DECISION/ORDER**

Hon. Bernard J. Graham  
Supreme Court Justice

**Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: dismiss plaintiff's fifth cause of action sounding in negligent hiring and supervision for failure to state a cause of action, pursuant to CPLR § 3211(a)(7).**

<b>Papers</b>	<b>Numbered</b>
Notice of Motion and Affidavits Annexed.....	1-2
Order to Show cause and Affidavits Annexed.....	<hr style="width: 100px; margin: 0 auto;"/>
Answering Affidavits.....	3
Replying Affidavits.....	4
Exhibits.....	<hr style="width: 100px; margin: 0 auto;"/>
Other: ..... (memo).....	5

**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

Defendant, New York Community Hospital, has moved (seq. 3) for an Order, pursuant to CPLR §3211(a)(7), to dismiss plaintiff's fifth cause of action sounding in negligent hiring and supervision, upon the grounds that plaintiff seeks recovery under two conflicting theories of law. Defendant contends that a claim for negligent hiring cannot be maintained when a malpractice claim has been brought against an employer under the doctrine of respondeat superior.

Counsel for plaintiff has opposed the relief sought in this motion upon the grounds that this motion is premature, as additional discovery regarding New York Community Hospital's employees is necessary to determine whether New York Community Hospital would be liable for their alleged malpractice under the doctrine of respondeat superior. In addition, plaintiff maintains that the claim for negligent hiring can be sustained because plaintiff alleged recklessness in their complaint.

Background:

On or about July 14, 2020, an action was commenced on behalf of the decedent by the filing of a summons and complaint with the Clerk's office of Kings County. Issue was joined on or about July 31, 2020. On or about September 30, 2020, counsel for the plaintiff provided a Verified Bill of Particulars in response to defendant's Demand.

Argument of this motion was heard on June 2, 2022 before the undersigned.

Facts:

This case, sounding in medical malpractice, involves allegations of negligence against defendant New York Community Hospital for the period of time between decedent's presentation to the Emergency Department on November 21, 2019 and her death on November 22, 2019. During this time period, it is alleged by plaintiff that New York Community Hospital failed to appropriately treat the decedent's respiratory issues and transfer the decedent from New York Community Hospital to another hospital where the proper care and treatment may have been rendered.

Contentions:

This Court is presented with the issue of whether the negligent hiring cause of action alleged by plaintiff against defendant New York Community Hospital should be dismissed as a matter of law.

In support of the motion to dismiss on behalf of New York Community Hospital, counsel argues that the plaintiff's cause of action for negligent hiring should be dismissed

because New York Community Hospital would be liable for the alleged negligence of their employees under the doctrine of respondeat superior, as the employees were acting within the scope of their employment in their treatment of the decedent.

Plaintiff, by their attorneys, opposes the relief sought in the motion, arguing that defendant's motion to dismiss the cause of action for negligent hiring is premature, as the defendant failed to identify the employees and specify the acts/omissions that were performed within the scope of their employment. In addition, plaintiff argues that their claim of recklessness<sup>1</sup> precludes the dismissal of the negligent hiring claim, since a finding of recklessness, which is an element of gross negligence, would entitle plaintiff to an award of punitive damages and allow recovery under both theories.

Discussion:

"Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training." Henry v Sunrise Manor Ctr. for Nursing and Rehabilitation, 147 AD3d 739, 741-42, 46 NYS3d 649 [2d Dept 2017].

This Court finds that the defendant New York Community Hospital has established that the cause of action for negligent hiring must be dismissed, as New York Community Hospital would be liable for the alleged actions and/or omissions of their employees under the doctrine of respondeat superior. Moreover, plaintiff did not specifically plead a claim of gross negligence in their complaint<sup>2</sup> and has not offered any evidence that New York Community Hospital intentionally, willfully, or recklessly disregarded the decedent's rights as a patient through conduct "showing heedlessness and an utter disregard for the rights and safety of others." Gruber v Craig, 208 AD2d 900; Rey v Park View Nursing Home, Inc., 262 AD2d 624, 627; Mortin v Brookhaven, 32

---

<sup>1</sup> See Plaintiff's complaint, NYSEF Doc #1, para. 56.

<sup>2</sup> See Plaintiff's complaint, NYSEF Doc #1, para. 56.

AD3d 381. While plaintiff's complaint does include the word "reckless" (paragraph 56)<sup>3</sup>, simply stating "reckless" is not sufficient to assert a claim of gross negligence. Although "an exception exists to the above general principle where the plaintiff seeks punitive damages from the employer 'based on alleged gross negligence in the hiring or retention of the employee'...here, that exception is inapplicable because the claimants did not seek punitive damages based upon an allegation that the defendant was grossly negligent in the hiring of its employees." Deker v State, 164 AD3d 50, 653-54, 83 NYS3d 533 [2d Dept 2018]. As the punitive damages exception does not apply, and if New York Community Hospital were liable for their employee's alleged medical malpractice it would be under the theory of respondeat superior, the plaintiff's claim for negligent hiring cannot be sustained.


Conclusion:

Accordingly, defendant's motion is granted and plaintiff's claim for negligent hiring, supervision or training as against New York Community Hospital is dismissed.

Dated: October 6, 2022

Brooklyn, NY

ENTER

  
Hon. Bernard J. Graham, Justice  
Supreme Court, Kings County

**HON. BERNARD J. GRAHAM**

<sup>3</sup> Paragraph 56 discusses specific allegations of medical malpractice as against the defendant New York Community Hospital: "...and in otherwise being careless, reckless and negligent in his care and treatment..."