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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART 52

Index Number : 156503/2012
THOMAS, DEC'D, KATHLEEN
vs
CITY OF NEW YORK
Sequence Number : 001
DISMISS ACTION

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

The following papers, numbered 1 to 3, were read on this motion + cross motion to/~~for~~ dismiss.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1
Answering Affidavits — Exhibits + cross motion | No(s). 2
Replying Affidavits | No(s). 3

Upon the foregoing papers, it is ordered that this ~~motion is~~

motion and cross-motion are decided in accordance with accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

Dated: 8·26·13

______, J.S.C.
HON. MARGARET A. CHAN

1. CHECK ONE: .... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

PRESENT: Hon. Margaret A. Chan
Justice

PART 52
INDEX 156503/2012

KATHLEEN THOMAS, Deceased, by her sister and Administratrix SANDRA S. PASCAL and SANDRA S. PASCAL Individually,
Plaintiffs,

- vs. -

THE CITY OF NEW YORK, ET AL.,
Defendants.

DECISION and ORDER

Defendants jointly (hereafter collectively referred to as "the City"[1]) moved to dismiss the instant action pursuant to CPLR § 3211(a)(1) and (7). Defendants argued that plaintiff failed to state a cause of action for which relief may be granted and that documentary evidence proved that plaintiff does not have a viable action. Plaintiff cross-moved pursuant to CPLR § 3025(b) to amend her complaint and submitted opposition to the motion to dismiss. The decision of the motion and cross-motion is as follows:

Plaintiff's complaint alleged that on December 27, 2010, Kathleen Thomas died while waiting for an ambulance to come her aid. Ms. Thomas suffered cardiac arrest after slipping on ice and snow that rapidly accumulated during a blizzard. Ms. Thomas' boyfriend, Alan Taylor, made a 911 phone call twenty (20) minutes after her fall and an ambulance arrived approximately two (2) hours later – around 4:30 am. Plaintiff claimed, in essence, that the City was negligent in failing to properly evaluate and respond to the blizzard and did not timely clear the roadways of ice and snow, thus, delaying emergency medical aid.

The duty of providing emergency ambulance service is a general duty owed by the municipality to the general public (*see Laratro v City of New York*, 8 NY3d 79, 83 [2006]). In order to challenge the performance of a municipal duty a plaintiff must fall into a "narrow exception to the general rule of nonliability where the injured person had a 'special relationship' with representatives of the municipality" (*id* at 82 [2006]). Defendants argued that plaintiff did not plead a special relationship and, thus, her claim must fail. Plaintiff did not argue that such a special relationship must be pleaded, rather plaintiff asserted additional facts in her proposed amended complaint that attempted to fit into the narrow special relationship requirements.

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[1] The Corporation Counsel of the City of New York is defending all named defendants except individually named defendants Stephen Goldsmith, a former Deputy Mayor of the City of New York, and Adrian Benepe, the former Commissioner of Department of Parks and Recreation, both who were not employed by the City at the time this action was commenced. The City claimed service on those defendants was not proper. The City also noted that arguments it made in defense of the represented defendants would similarly apply to defendants Goldsmith and Benepe.

The Court of Appeals in *Cuffy v City of New York*, 69 NY2d 255, 260 (1987), held that the special relationship elements are: "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking."

Here, plaintiff cannot satisfy either the third or fourth *Cuffy* element because plaintiff was allegedly unconscious at the time the 911 phone call was made on her behalf; she could not have had any direct contact with the 911 operator. In the plaintiff's proposed amended complaint, plaintiff seeks to impute direct contact and reliance through the actions of Mr. Taylor, the decedent's boyfriend (*see* Pltf's Cross-Mot, Exh A, para 48). However, the only circumstance where another party's direct contact and reliance may be imputed to the injured person is in the case of an immediate family member (*see Laratro v City of New York*, *supra* at 84, *citing Sorichetti v City of New York*, 65 NY2d 461 [1985]). Plaintiff's proposed amended complaint stated that the 911 operator told "the family member" that help would arrive immediately (*see* Pltf's Cross-Mot, Exh A, para 48). This is belied by the record. Mr. Taylor is not a family member; he was the decedent's longtime boyfriend. The only other family member mentioned by plaintiff is herself, she is the decedent's sister. Plaintiff was not informed of Ms. Thomas' fatal fall until approximately 4:45 am (*see* Deft's Mot, Exh D, pp 36-37), which would have been after the ambulance finally arrived. Therefore, plaintiff cannot satisfy the *Cuffy* elements of a special relationship and plaintiff's claim against the municipality and its employees must fail.

It should also be noted that plaintiff's proposed amended complaint was neither verified nor signed by an attorney (*see* NY Ct Rules § 130.1.1a). However, this court sought to afford plaintiff the benefit of every possible favorable inference and, thus, reviewed the defective proposed amended complaint in any event (*see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]).

Accordingly, defendants' motion to dismiss is granted pursuant to CPLR § 3211(a)(7) for failure to state a cause of action[2]. Plaintiff's motion to amend its complaint is denied as the amendments would still not provide a valid claim. Additionally, while individual defendants Goldsmith and Benepe have failed to answer, the foregoing reasoning to dismiss this action would similarly apply to them. Thus, this court *sua sponte* dismisses the action against all defendants, including defendants Goldsmith and Benepe.

This constitutes the decision and order of the court.

Dated: August 26, 2013

Margaret A. Chan , *J.S.C.*

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[2] Even though defendants also moved pursuant to CPLR 3211(a)(1) – that their defense is founded on documentary evidence – this court does not dismiss on that basis and that branch of defendants' motion is moot.